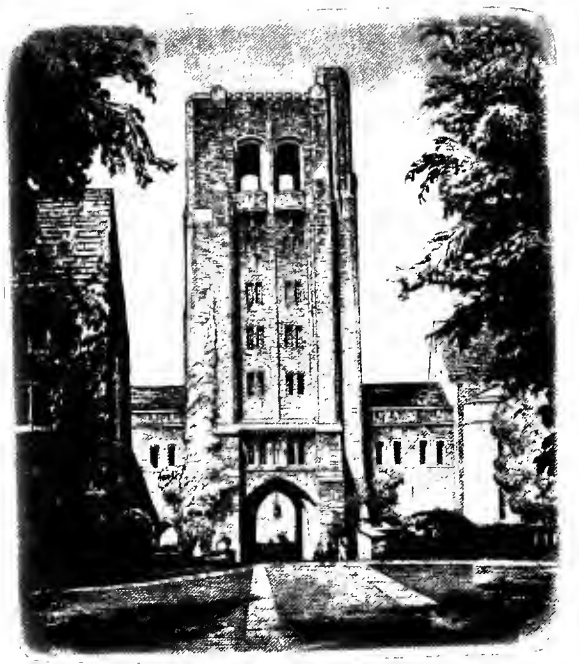

A DIGEST OF CASES

DECIDED BY THE

SUPREME COURT OF CANADA

FROM THE ORGANIZATION OF THE COURT, IN 1875, TO THE 1ST DAY OF MAY, 1886.

COMPRISING BOTH REPORTED AND UNREPORTED CASES, AND MANY POINTS OF PRACTICE DETERMINED BY THE COURT AND BY THE JUDGES IN CHAMBERS.

BY

ROBERT CASSELS Q. C.

REGISTRAR OF THE COURT.

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CHIEF JUSTICES AND JUDGES

OF THE

SUPREME AND EXCHEQUER COURTS OF CANADA.

CHIEF JUSTICES.

Hon. Sir William Buell Richards, Knt., appointed 8th October, 1875.
Hon. Sir William Johnstone Ritchie, Knt., appointed 11th January, 1879.

JUDGES.

Hon. Sir William Johnstone Ritchie, Knt., appointed 8th October, 1875.
Hon. Samuel Henry Strong, appointed 8th October, 1875.
Hon. Jean Thomas Taschereau, appointed 8th October, 1875.
Hon. Télésphore Fournier, appointed 8th October, 1875.
Hon. William Alexander Henry, appointed 8th October, 1875.
Hon. Henri Elzéar Taschereau, appointed 7th October, 1878.
Hon. John Wellington Gwynne, appointed 14th January, 1879.

OFFICERS OF THE COURTS.

REGISTRAR.

Robert Cassels Q. C., appointed 8th October, 1875.

REPORTER AND SECRETARY OF THE JUDGES.

George Duval, Advocate, appointed 20th January, 1876.

ASSISTANT REPORTERS.

Charles H. Masters, Barrister-at-Law, appointed temporarily 17th September, 1885.

Archibald Sandwith Campbell, Solicitor, appointed 3rd March, 1886.

MINISTERS OF JUSTICE AND ATTORNEYS-GENERAL OF THE DOMINION OF CANADA SINCE THE ORGANIZATION OF THE COURT.

Hon. Edward Blake, appointed 19 May, 1875.
Hon. Rodolphe Laflamme, appointed 8th June, 1877.
Hon. James McDonald, appointed 17th October, 1878.
Hon. Sir Alexander Campbell, K.C.M.G., appointed 20th May, 1881.
Hon. John S. D. Thompson, appointed 25th September, 1885.

ABBREVIATIONS.

A. J. A. Ont., *Administration of Justice Act, Ontario.*.
All. N. B., *Allen's New Brunswick Reports.*
B. C., *British Columbia.*
B. N. A. Act., *British North America Act*, 1867.
C. C. or C. C. P. Q. or C. C. L. C. } *Civil Code of the Province of Quebec.*
Can. S. C. R., *Supreme Court of Canada Reports.*
C. L. J., *Canada Law Journal.*
C. L. T., *Canada Law Times.*
C. C. P. or C. C. P. P. Q. or C. C. P. L. C. } *Code of Civil Procedure of the Province of Quebec.*
C. L. P. Act, *Common Law Procedure Act.*
C. S. N. B., *Consolidated Statutes of New Brunswick.*
C. S. C., *Consolidated Statutes of Canada.*
C. S. L. C., *Consolidated Statutes of Lower Canada.*
C. S. U. C., *Consolidated Statutes of Upper Canada.*
D., *Dominion of Canada.*
Dor. Q. B. R., *Dorion's Queen's Bench Reports, Lower Canada.*
Gr., *Grant's Chancery Reports.*
L. C., *Lower Canada.*
L. C. Jur., *Lower Canada Jurist.*
L. C. R., *Lower Canada Reports.*
M., *Manitoba.*
M. C. P. Q., *Municipal Code of the Province of Quebec.*
M. L. R., Q. B., *Montreal Law Reports, Queen's Bench.*
M. L. R., S. C., *Montreal Law Reports, Superior Court.*
N. B., *New Brunswick.*
N. B. R., *New Brunswick Reports.*
N. S., *Nova Scotia.*
O. or Ont., *Ontario.*
Ont. R., *Ontario Reports.*
Ont. App. R., *Ontario Appeal Reports.*
Ont. Jud. Act, *Ontario Judicature Act.*
P. E. I., *Prince Edward Island.*
P. & B. or Pugs. & Bur., *Pugsley and Burbidge, New Brunswick Reports.*
P. Q., *Province of Quebec.*
Q., *Quebec.*
Q. B. L. C., *Queen's Bench of Lower Canada.*
Q. L. R., *Quebec Law Reports.*
R. S. N. S., *Revised Statutes of Nova Scotia.*
R. S. O., *Revised Statutes of Ontario.*
Russ. & Geld., *Russell and Geldert, Nova Scotia Reports.*
S. C., *Supreme Court.*
S. C. A. or S. & E. C. A. } *Supreme and Exchequer Courts Act.*
S. C. A. A., *Supreme Court Amendment Act.*
U. C. C. P., *Upper Canada Common Pleas Reports.*
U. C. Q. B., *Upper Canada Queen's Bench Reports.*
U. C. O. S., *Old Series of Upper Canada Reports.*

DIGEST OF CASES

DECIDED BY THE

SUPREME COURT OF CANADA.

Abandonment.

See INSURANCE, MARINE 2, 5, 6, 9, 15.

Absent and Absconding Debtor.

See CORPORATIONS 5.

Acceptance—Evidence of.

See SALE OF GOODS 6.

Accident.

See RAILWAYS AND RAILWAY COMPANIES 2, 7, 23, 26.
" INSURANCE, LIFE 7.

Accord and Satisfaction.

See CONTRACT 2.

Account—Decree for—Imputation of payments—Appropriation by debtor—Statute of Limitations.

See PAYMENT 5.

2. Action of—Proceeds of Sale of Timber.

See TIMBER 5.

Accretion—**Accrues to owner of adjacent land—Right of Way—Implied Extinction by Statute—Cobourg Harbour Works—22 Vic. c. 72.**

By 10 Geo. iv. c. 11, the Cobourg Harbour Company were authorized to construct a harbour at Cobourg, and also to build and erect all such needful moles, piers, wharves, buildings and erections whatsoever, as should be useful and proper for the protection of the harbour, and to alter and amend, repair and enlarge the same as might be found expedient. The Harbour Company commenced their work in 1820 by running a wharf, southerly from the road allowance between lots 16 and 17 of the Township of Hamilton, which now forms Division Street in the town of Cobourg. By means of the mud and earth raised by dredging and gradual accretions, which were prevented from being washed away by being confined by crib-work, the original wharf was widened to the full width of Division Street, and in addition they constructed a store house and placed a fence dividing it from the land which

Accretion—Continued.

appellant (whose lot fronted on Division Street, and extended to the water's edge,) had gained by accretion since the original wharf was made. Thereupon the appellant filed a bill complaining that his access to this alluvial land was obstructed by the store house and fence which the respondents caused to be placed on the addition to the wharf, and praying that the respondents, other than the Attorney-General, be decreed to remove them.

Held, 1. That land gained by alluvial deposits arising from natural or artificial causes, or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible, accrues to the owner of the adjacent land. 2. That the store house and fence complained of in this case, were not constructed on any part of Division Street, but on an artificial structure constructed under the authority of a statute, on the line of Division Street for harbour purposes, and therefore appellant was not entitled to be indemnified because he is denied access to his alluvial land through the premises of the respondents. 3. That the public right of way from the end of Division Street to the waters of Lake Ontario, was extinguished by statute by necessary implication. *Corporation of Yarmouth* v. *Simmons* (L. R. 10 Ch. D. 518) followed.

Standly v. Perry.—iii, 356.

2. Of Marsh Lands.

See TRESPASS 10.

Acknowledgment of Debt—What sufficient.

See LOAN.

" SALE OF LANDS 9.

Acquiescence—A knowledge of the facts necessary to constitute.

See MORTGAGE 16.

Action—In rem, by Mother of deceased Child.

See MARITIME COURT OF ONTARIO 3.

2. Petitory—To recover church property.

See PETITORY ACTION.

Adjoining Land Owners—Liabilities and rights of.

See EASEMENTS.

" DAMAGES 20.

Adjudication—By Sheriff to joint purchasers—Security required by art. 688 C.C.P.—Rights of joint adjudicataires.

See SHERIFF 7.

Administrators—Action against—Evidence of plaintiff as to dealings with deceased not admissible—R. S. N. S. 4th Series ch. 96 sec. 41.

See EVIDENCE 4.

2. With will annexed—Purchase of land by, when personal assets

Agent—Continued.

11. Sale of lands—Authority to deliver deed and receive purchase money—Agent exceeding authority—Memo. to agent—New agreement.

One W. sold land under power of sale in a mortgage, and F. became the purchaser, and paid ten per cent. of the purchase money, it being agreed that the balance was to be paid in notes. Shortly after the plaintiff A. brought a deed to F. and demanded the notes. F. wished to show the deed to his attorney, and it was left with him on his delivering to A. a writing as follows:—"Received from E. A. a deed given by W. for a certain piece of land bought at auction, Saturday the thirtieth day of September, 1876, at Midgic. The above mentioned deed I receive only to be examined, and if lawfully and properly executed to be kept, if not lawfully and properly executed to be returned to Edward Anderson. When the said deed is lawfully and properly executed to the satisfaction of my attorney, I, the said Charles Fawcett, will pay the amount of balance due on said deed, five hundred and seventy-two dollars, provided I am given a good warrantee deed, and the mortgage, which is on record, is properly cancelled if required." The deed was not returned to A. and an action was brought by him to recover the said sum of $572, named in the above memorandum.

The action was twice tried, and on the last trial a verdict was given for the defendant, under the direction of the judge, and leave was reserved to the plaintiff, to move for a verdict in his favor for nominal damages, the purchase money having in the meantime been paid to W. On plaintiff moving for such leave a majority of the Supreme Court of New Brunswick set aside the verdict of the jury, and entered a verdict for the plaintiff (19 N. B. R. 22).

On appeal to the Supreme Court of Canada, **Held**, (reversing the judgment of the court below), Strong J. dissenting, that the said memorandum did not constitute a new contract between the plaintiff and defendant to pay the purchase money to the plaintiff, who was merely the agent of W., and therefore the verdict for the defendant should stand.

Per Strong J.—That the said writing did constitute a new agreement between the parties, but that if A. was merely an agent of W. in the transaction, he could still sue, as his principal had not interfered.

Appeal allowed with costs.

Fawcett v. Anderson.—22nd June, 1885.

Agreement—Construction of—Sale of Timber—Consideration—Right to recover back money paid.

C., after having examined a lot, entered into an agreement with W., the owner, whereby the latter sold all the pine timber standing on the lot to C., "such as will make good merchantable waney-edged timber, suitable for his purpose, at the rate of $13 per hundred cubic feet," and C. paid to

Agreement—Continued.

W. $1,000, "the balance to be paid for before the timber is removed from the lot." C. cut $651.17 worth of first-class timber, suitable for the Quebec market, which was all of that class to be found on the lot, and sued W. to recover back the balance of the $1,000, namely $348.83.

Held, that the true construction of the contract was that W. sold and granted to C. permission to enter upon his lot, and cut all the "good merchantable timber there growing, suitable for his purpose," and not merely "first-class timber;" that there was more than sufficient "good merchantable timber" still remaining on the lot to cover the balance of the $1,000, and that there was no evidence to show that the contract had been rescinded.

Per Taschereau and Gwynne JJ.—That the payment of the $1,000 was an absolute payment, the plaintiff believing and representing to defendant that there was sufficient timber to cover that amount, if not more, on the faith of which representation defendant entered into the contract, which he otherwise would not have done, and that if the plaintiff made an error, he, and not the defendant, must suffer the consequences of this error.

Clarke v. White.—III. 309.

2. **Special Agreement, non-fulfilment of—Indebitatus counts.**

L. sued N. *et al.* to recover from them, under specially endorsed writ, the balance of account due under and in pursuance of an agreement under seal providing that "L. was to run according to his best art and skill a tunnel of 200 feet for the sum of four dollars per running foot; that $150 should be advanced on account of the contract, the balance to be paid on the satisfactory completion of the work." L. made five tunnels, none of which were 200 feet, but claimed he had done in all 204 feet. In addition to the count on the agreement the plaintiff inserted in his declaration the common counts for work and labor.

Held, that there was not a sufficient fulfilment of the agreement, and inasmuch as L. had given no particulars, nor any evidence under the indebitatus counts, the rule absolute of the court below, ordering judgment to be entered for the defendants, should be affirmed and the appeal dismissed with costs.

Lakin v. Nuttall.—III. 685.

3. Additional parol term in.

See RAILWAYS AND RAILWAY COMPANIES 6.

4. **Construction of—Property in timber—Ownership and control of timber until payment of draft given for stumpage under the agreement.**

The respondents, owners of timber lands in New Brunswick, granted C. & S. a license to cut on twenty-five square miles. By the license it was agreed *inter alia:* "Said stumpage to be paid in the following manner: Said

Agreement—Continued.

company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by them as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, be secured by good endorsed notes, or other sufficient security, to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid. And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the afore-mentioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at private or public sale, for cash; and after deducting reasonable expenses, commissions, and all sums which may then be due or may become due from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages." For securing the stumpage payable to respondents under this license C. & S. gave to the respondents a draft upon J. & Co., which was accepted by J. & Co., and approved of by the respondents, but which was not paid at maturity. After giving the draft C. & S. sold the lumber to J. & Co., who knew the lumber was cut on the plaintiff's land under the said agreement. J. & Co. failed, and appellant, their assignee, took possession of the lumber and sold it.

Held, Per Strong, Taschereau and Gwynne JJ. (affirming the judgment of the court below) Ritchie C.J. and Fournier and Henry JJ. dissenting, that upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to C. & S. immediately upon the receipt by the company of the accepted draft of C. & S. on J. & Co., and that appellant was liable for the actual payment of the stumpage.

McLeod v. The New Brunswick Railway Co.—v, 281.

5. Conditional agreement to take stock.

See CORPORATIONS 8.

Agreement—Continued.

6. Construction of—Evidence—Question for the Jury—Contract not under seal.

To an action on the common counts brought by T. & W. M. against the C. C. R. Co., to recover money claimed to be due for fencing along the line of C. C. railway, the C. C. R. Co. pleaded never indebted and payment. The agreement under which the fencing was made is as follows:—"Memo. of fencing between Muskrat river, east, to Renfrew. T. & W. M. to construct same next spring for C. C. R. Co., to equal to 5 boards 6 inches wide, and posts 7 and 8 feet apart, for $1.25 per rod, company to furnish cars for lumber." Signed "T. & W. M.," and "A. B. F."

F. controlled nine-tenths of the stock, and publicly appeared to be and was understood to be, and acted as, managing director or manager of the company, although he was at one time contractor for the building of the whole road. T. & W. M. built the fence and the C. C. R. Co. have had the benefit thereof ever since. The case was tried before Patterson J. and a jury, and on the evidence, in answer to certain questions submitted by the judge, the jury found that T. & W. M., when they contracted, considered they were contracting with the company through F., and that there was no evidence that the company repudiated the contract till the action was brought, and that the payments made were as money which the company owed, not money which they were paying to be charged to F., and a general verdict was found for T. & W. M. for $12,218.51.

On appeal to the Supreme Court of Canada, **Held**, (affirming the judgment of the court below) that it was properly left to the jury to decide whether the work performed, of which the C. C. R. Co. received the benefit, was contracted for by the company through the instrumentality of F., or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence; (Ritchie C.J. and Taschereau J. dissenting, on the ground that there was no evidence that F. had any authority to bind the company, T. and W. M. being only sub-contractors, nor evidence of ratification.) 2. That although the contract entered into by F. for the company was not under seal, the action was maintainable.

Canada Central Railway Company v. Murray—viii, 313.

7. To pledge moneys by a debtor, Validity of—Articles 1966, 1969, 1970, C. C.

G., in 1878, being unable, on account of depression in business, to meet his liabilities, applied to his creditors for an extension of time for the payment of their claims, showing a surplus of $6,000, after deduction of his bad debts. The creditors consented to grant his request, and agreed to accept G.'s notes at 4, 8, 12 and 16 months, on condition that the last of them should be endorsed to their satisfaction. N. (the respondent) agreed to

Agreement—Continued.

endorse the last notes on condition that G. should deposit in a bank in his (N.'s) name $75 per week to secure him for such endorsation, and G. signed an agreement to that effect. Thereupon N. endorsed G.'s notes to an amount of over $4,000, and they were given to G.'s creditors. On 31st July, 1879, G., after having deposited $2,007.87 in N.'s name, in the Ville Marie Bank, failed, and N. paid the notes he had endorsed, partly with the $2,007.87. B., as assignee of G., brought an action against N., claiming that the payments made to N. by G. were fraudulent, and praying that the money so deposited might be reimbursed by N. to B., for the benefit of all G.'s creditors.

Held, (affirming the judgment of the Court of Queen's Bench, Ritchie C.J. and Fournier J. dissenting), that the arrangement between G. and N., by which the moneys deposited in the bank by G. became pledged to N., was not void either under the Insolvent Act or the Civil Code; there was no fraud on the creditors, nor such an abstraction of assets from creditors as the law forbids, but a proper and legitimate appropriation of a portion of G.'s assets in furtherance and not in contravention of the rights of the creditors, giving at the most to the surety a preferential security which could not be said to have been in contemplation of insolvency or an unjust preference.

Beausoleil v. Normand—Ix, 711.

8. With Government of Canada for continuous possession of railroad—Construction of.

See PETITION OF RIGHT 15.

9. For advances to get out timber.

See LIEN 2.

10. **Agreement to insure Ship to amount of advances—37 Vic ch. 15 Q—Continuance of cause under, so as to suspend prescription.**

Appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing a judgment rendered by the Superior Court, at Quebec, on the 19th of May, 1883, condemning the respondents, as representatives of the late firm of George Burns Symes & Co., to pay the appellant a sum of $20,491.74, with interest from the 13th of July, 1876, and costs. The claim arose out of an alleged breach of contract by Symes & Co., in not insuring according to agreement to the full extent of their advances thereon the ship "Empress Eugenie," belonging to the appellant, the loss of which entailed upon him heavy damages. The facts of the case may briefly be stated as follows:—For several years previous to 1857, the firm of Symes & Co. had large dealings with the appellant, consisting principally in advances, which they made to the appellant on the security of ships, which the latter, a ship builder, constructed and disposed of through them. During the

Agreement—Continued.

course of such transactions, on the 18th of August, 1854, the appellant assigned to Symes & Co. the ship "Empress Eugenie," together with the freights and earnings of the vessel, for £18,500, in trust, to sell her at such time and place as they might judge best; to receive the price and earnings thereof; and out of the moneys arising from such sale, freight, earnings or hire, or otherwise coming into their hands on account of the appellant, to retain so much thereof to pay the said sum of £18,500, and all other sums then due to them by the appellant, or which they might thereafter pay, lay out or advance for him, and all other moneys due for charges, expenses, interest and commission, as specified in the deed. It was also stipulated in the deed that the said vessel and her freights should at all times be kept insured by the said George Burns Symes & Co. to at least the full amount of the advances made by them in respect thereof, and to such further reasonable amount as the appellant might see fit, the premiums of such insurances to be deducted from the moneys arising out of the premises.

The "Empress Eugenie" left the port of Quebec for Liverpool with a full cargo, but owing to the depressed state of the market she could not be sold, and it was agreed that she should be classed and coppered, in order that she might be run with freight until a more favorable opportunity occurred to dispose of her. While the vessel was at Liverpool expenses were incurred by Symes & Co., with the assent of the appellant, to the amount of $41,003.67 for classing and coppering the vessel, as well as for discharging and loading her. In the meantime Symes & Co. received $22,001.29 for freight earned by the "Empress Eugenie" on her voyage to Liverpool, and sums derived from other sources, amounting in all to $43,382.36, which, according to the deed of the 18th of August, 1854, they were entitled to place to the credit of their advances on the "Empress Eugenie." The vessel, after being classed and coppered, was insured for $68,000, and left Liverpool in destination for the port of Quebec with a cargo, the freight of which was valued at $7,600, and insured for that sum. She was lost on her voyage. Symes & Co. credited the amount received to the appellant, and in 1857 they brought an action against him for a balance of £2,929 4s. 9d. on their general account.

The appellant contested the account, and pleaded that Symes & Co. had neglected to insure the "Empress Eugenie" to the full extent of their advances, and that he had thereby lost a large sum of money, exceeding the amount which they claimed from him and which was thereby compensated, and he prayed that the action be dismissed. The appellant made no incidental demand.

In 1873, while the case was still pending, the record was destroyed by the burning of the Quebec court house. More than two years after, the appellant

Agreement —Continued.

petitioned under the Quebec Statute 37 Vict. ch. 15, for leave to recommence the proceedings, which was granted to him, and he instituted the present action against the respondent as representing George Burns Symes and David Douglas Young, who had composed the late firm of Symes & Co., and were then deceased.

The majority of the Court of Queen's Bench for Lower Canada were of opinion that the demand of the appellant, not having been made in the first case, could not be deemed to be a recommencing of the cause or proceeding of which the record was burned within the meaning of 37 Vic. ch. 15 Q., and was not a continuance of said cause or proceeding so as to suspend prescription within the meaning of sections 7 and 21 of that Act. But the court did not consider it necessary to enter into the consideration of the question of prescription, preferring to rest their judgment on the broader ground that the respondents were only bound to insure for the amount of their claim.

On appeal to the Supreme Court of Canada, **Held**, Per Ritchie C.J. and Strong and Gwynne JJ., affirming the judgment of the Court of Queen's Bench, Fournier and Henry JJ. dissenting, that the amount for which Symes & Co. were bound to insure the ship under the agreement was the amount of any balances which at any time might be due to them by appellant for moneys paid or laid out and expended by them on account of appellant with reference to the ship, viz., for the amount of moneys for which the ship was liable to them under the deed, and not for the cost of said ship, or the aggregate amount of all advances which they might have made, irrespective of the sums received by them to be applied on account of such advances. Appeal dismissed with costs.

Gingras v. Symes.—12th January, 1885.

11. **Construction of—Estoppel—Misrepresentation.**

G. M., a man of education, well acquainted with commercial business, executed a bond to pay certain sums of money, in certain events, to the Merchant's Bank of Canada. By an agreement, bearing even date with the bond, it was recited *inter alia* that, in consideration of a mortgage granted to the bank by M. Bros. & Co., the bank had agreed to make further advances to M. Bros. & Co., joint obligors with G. M., and parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in said mortgage, and to secure the bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness, then the bond and agreement should become wholly void. In a suit brought upon the said agreement against G. M., alleging a deficiency in the assets of the firm and indebtedness to

Agreement—Continued.

the bank, G. M. pleaded that the agreement had been executed by him on representation made to him by one of his co-obligors that it was to secure the bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over-valuation of the property embraced in the mortgage, and not otherwise. The bank, the plaintiffs, made no representations whatever to the defendants.

Held, (affirming the judgment of the Chancery Division of the High Court of Justice of Ontario, Gwynne J. dissenting) that G. M. was bound by the execution of the documents, and was liable upon them according to their tenor and effect.

Moffatt v. Merchants Bank of Canada.--xi, 46.

12. Between agent of vendor and purchaser—Delivery of deed—Agent exceeding authority.

See AGENT 11.

13. **Agreement with municipality—Construction of tramway—Traction engine—Agreement to withdraw and discontinue use—Includes steam engine.**

An agreement was entered into under the authority of an Act of the Legislature of Ontario, between the municipality of York and the Toronto Gravel Road Co., for a right to construct a tramway from their gravel pits to the city of Toronto. One of the clauses of the agreement was as follows: "So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highway of the said county, and shall discontinue the use and employment of the said traction engine, or of any other traction engine, upon or along such public highways." The company claimed the right to put steam engines upon the road, over such public highway, notwithstanding the above clause in their agreement.

Held, (affirming the judgment of the Court of Appeal, 11 Ont. App. R. 765), that the use of steam engines was an infraction of the said clause. Appeal dismissed with costs.

Toronto Gravel Road Co. v. County of York. 16th Nov. 1885.---22 C. L. J. 18.

Amendment—Right to order, under Administration of Justice Act Ont. sec. 50.

See MORTGAGE 9.

2. Power of Supreme Court as to.

See CONTRACT 14.

3. Of pleadings—Motion for, rejected by Superior Court L. C.—Insufficiency of affidavit—Procedure—Refusal of Supreme Court to interfere.

See JURISDICTION 35.

4. Of pleadings, by Supreme Court, to make them conform to Evidence.

See LICENSE 7.

Annuities—Sale of *corpus* to pay.

See WILL 5.

Appeal—Jurisdiction of Supreme Court of Canada in.

See JURISDICTION.

2. Court of, Right of to entertain question not raised at the trial.

See WILL 2.

3. Objection not raised by pleadings—Not open on appeal.

See BENEFIT SOCIETY.

4. **On questions of fact—Conflicting evidence—Duty of Appellate Court.**

Held, Where a disputed fact, involving nautical questions, is raised by an appeal from the judgment of the Maritime Court of Ontario, as in the case of a collision, the Supreme Court will not reverse the decree of the judge of the court below, merely upon a balance of testimony.

The Picton.—iv, 648.

5. **Held,** A court of appeal should not reverse the finding upon matters of fact of the judge who tried the cause and had the opportunity of observing the demeanor of the witnesses, unless the evidence be of such a character as to convey to the mind of the judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. Per Gwynne J.

Ryan v. Ryan.—v, 406.

6. **Held,** where there is a direct conflict of testimony, the finding of the Judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanor while under examination. Per Strong J.

Grassett v. Carter.—x, 107.

7. **Held,** A Court of Appeal ought not to differ from court below on a matter of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. Per Ritchie C.J.

Jones v. Tuck.—23rd June, 1884.

8. **Held,** where questions to be decided by court of first instance were purely of fact, its judgment should be affirmed.

See RAILWAYS AND RAILWAY COMPANIES 23.
" ELECTION 12, 19, 20.
" WILL 7.

9. Where Verdict affirmed by two Courts on the weight of evidence.

See EVIDENCE 21.
" SALE OF GOODS 14.

10. Additional objection to Award cannot be taken on Appeal.

See ARBITRATION AND AWARD 3.

Appeal—Continued.

11. Documents not proved or produced at trial—Inadmissible on appeal.

Held, that a document which has not been proved nor produced at the trial cannot be relied on or made part of the case in appeal.

Lionais v. Molson's Bank.—x, 527.

12. Per saltem, when allowed.

See PRACTICE.

13. In Criminal cases.

See CRIMINAL APPEAL.

14. In Controverted Elections.

See ELECTION.

15. From Maritime Court of Ontario.

See MARITIME COURT OF ONTARIO.

Appropriation—Of dividend.

See CONTRACT 5.

2. By debtor.

See PAYMENT 5.

Arbitration and Award—Award, remitting back—The Land Purchase Act of 1875 P. E. I. sec. 45.

Held, that by the statute passed by the island legislature, which they had a right to pass, the award of the commissioners could not be quashed and set aside, or declared invalid and void, on an application made to the Supreme Court; but it could have been remitted back to the commissioners in the manner prescribed by the 45th section of the Act. The application for the rule in the court below not having been made within the proper time, nor according to the provisions of that section, the decision of that court is against the express words of the statute, and cannot be allowed to stand.

Kelly v. Sulivan.—i, 1.

2. Award—Finality of—Finding specifically on each of the matters in difference.

Plaintiffs brought ejectment to recover possession of certain lands in the parish of P. After cause was at issue, under a rule of reference, all matters in difference were referred to arbitration, and the arbitrators were to have power to make an award concerning the glebe and church lands at P., and to make a separate award concerning the school lands at P. The powers of the arbitrators were to extend to all accounts and differences between the said parish and the late Rector, and the defendant as executrix of said Rector, as also between the said defendant individually and the parish. The arbitrators made two awards. First, as to the school lands, they awarded that the defendant was indebted to the plaintiffs, as such

Arbitration and Award – Continued.

executrix, on the school moneys in the sum of $1,400; that the defendant should pay that sum to the plaintiffs; and that judgment should be entered for the plaintiffs for that amount. Secondly, as to the glebe and church lands, they awarded that the plaintiffs were entitled to recover the lands claimed on the writ of ejectment, and ordered judgment in ejectment to be entered for the plaintiffs with costs of suit; and, after reciting that all the accounts respecting the receipt and disbursements of all moneys received from the interest, rent and sale of these lands by the late Rector, or his agents, or by the defendant as his executrix, were also referred to them, as well as all accounts and differences between the said parish and the defendant individually, they further awarded that the defendant should "pay to the plaintiffs the sum of $1 in full of the same," saving and excepting the matters in controversy respecting the school lands, on which they had made a separate award; and that judgment should be entered for the plaintiffs for the said sum of $1. They also awarded that the defendant should pay all costs of the reference and award.

Held, that the awards sufficiently specified the claims submitted, and the various capacities in which such claims arose. That the first award, being against the defendant in her representative capacity, could not be considered against her personally, and negatived any claim of that kind, and also was an adjudication against the defendant that she had assets; and that the finding in the second award, that the defendant should pay $1, could be considered a finding as against her in her individual capacity for that sum, and, as to the claims of the plaintiffs against her for moneys received by her husband, or by her as his executrix, as a finding against the plaintiffs on their claim. That the part of the second award, directing payment of the costs of the reference and award was bad, but might be abandoned.

St. George's Parish v. King.—ii.—143.

3. **Award—Power of attorneys to enlarge time for making—Appeal, additional ground on.**

In an action on contract, the matters in difference were, by rule of court, by and with the consent of the parties, submitted to arbitration. By the rule of reference the award was directed to be made on or before the 1st May, 1877, or such further or ulterior day as the arbitrators might endorse from time to time on the order. The time for making the award was extended by the arbitrators till the 1st of September, 1877. On the 31st August, 1877, the attorneys for plaintiff and defendants, by consent in writing, endorsed on the rule of reference, extended the time for making the award till the 8th September. On the 7th September the arbitrators made their award in favor of the plaintiff for the sum of $5,001.42, in full settlement of all matters in difference in the cause.

Arbitration and Award—Continued.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that where the parties, through their respective attorneys in the action, consent to extend the time for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time under the rule and a continuation to the extended period of the authority of the arbitrators, and therefore an award madewithin the extended period is an award made under the rule of reference, and is valid and binding on the parties. 2. That the fact of one of the parties being a municipal corporation makes no difference. 3. That in Nova Scotia, where the rule *nisi* to set aside an award specifies certain grounds of objecton, and no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal.

Oakes v. The City of Halifax.—iv. 640.

4. Award—Effect of on Insurance claim.

See INSURANCE, MARINE 3.

5. **Award, dealing only with equity of redemption—No notice to third arbitrator—Liberty to amend answer setting this up—No costs of appeal when objections taken for first time in Appellate Court.**

Bills filed to enforce awards and to recover moneys to be paid thereunder for lands taken by the Canada Southern Ry Co. The facts connected with the making of the awards and the subsequent litigation will be found in 41 U.C. Q.B. 195, 28 U.C. C.P. 309, 5 Ont. App. R. 13, and 9 Ont. App. R. 310. The Canada Southern Ry. Co. appealed to the Supreme Court of Canada from the judgments of the courts below maintaining the awards. Before the Supreme Court, counsel for the appellants for the first time contended that, in the Norvell case the award was bad because the arbitrators had dealt only with the equity of redemption of the land owner, and that in the other cases the awards were bad on their face as being signed by only two of the three arbitrators without showing a notice to the third arbitrator.

Held, in the Norvell case, that the Canada Southern Ry. Co. should be allowed to amend their answer in the cause in the Court of Chancery as they might be advised, in order to show that the award was in respect only of the equity of redemption and not the fee simple, and upon such amendment being made the award should be declared null and void.

Held, in the other cases, that the Canada Southern Ry. Co. should be at liberty to amend their answer in order to show that the awards were made by two of the arbitrators in the absence of, and without notice of the meeting of the said two arbitrators to, the third arbitrator, with liberty to the plaintiffs to file with the Registrar of the Supreme Court their signification of their desire for new trials, when such new trials should be granted without costs; in default of such signification in any casethe award was declared null and void.

Arbitration and Award—Continued.

Appeals allowed, but without costs, the objections having been taken for the first time on appeal.

Canada Southern Ry. Co. v. Norvell.—21st June, 1880.
" " **v. Cunningham.**
" " **v. Duff.**
" " **v. Gatfield.**

6. Award—Motion to set aside, too late—9 & 10 Wm. 3 ch. 15.

An appeal from the judgment of the Court of Appeal for Ontario, by the appellant Bickford, who became plaintiff by order of revivor in a suit originally brought in the Court of Chancery for Ontario by one Ario Pardee against one Henry Crompton Lloyd, for dissolution of partnership and an account and winding up of the partnership dealings. A decree was made at the hearing of the cause, ordering, by consent of the parties, a reference to three arbitrators of the matters in difference in the cause. There was also a deed of submission, in the same terms as the decree, subsequently executed by the parties. An award was made and published by the arbitrators on the 13th August, 1878. The respondent Lloyd's solicitor served, on the second day of September, 1878, a notice of appeal from the said award. The appellant's solicitor, on the eighth day of October, 1878, served a notice on the respondent's solicitor, consenting to an order being made setting aside the award. No action being taken thereon by the respondent, the appellant, on the 2nd day of December, 1878, served a notice of motion for an order to set aside the award for the reasons therein set forth. That motion was enlarged from time to time by and at the request of the respondent; and after argument, an order was made by Vice-Chancellor Proudfoot, on the 26th March, 1879, setting aside the award with costs. (See 26 Grant 375). The respondent appealed from that order to the Court of Appeal for Ontario, which court reversed the order of the Court of Chancery, and dismissed with costs the motion to set aside the award, on the ground that it was made too late. (See 5 Ont. App. R. 1).

On appeal to the Supreme Court of Canada, **Held**, that the motion was not made within the time allowed by the ststute (9 & 10 Wm. 3 ch. 15), and as no good reason was given for the delay the judgment of the Court of Appeal should be affirmed. Appeal dismissed with costs.

Bickford v. Lloyd—21st June, 1880.

7. Arbitration by order of Court at Nisi Prius—To be entered as a verdict—Motion to set aside—Judge's order—Special paper Sup. Court, N. B.—Affidavits in reply—New matter—Discretion of Court below—Con. Stats. N.B. ch. 37 sec. 173.

The cause was referred by the Supreme Court of New Brunswick at Nisi Prius to arbitration, the award to be entered on the *postea* as a verdict

Arbitration and Award—Continued.

of a jury. After the award the appellants obtained a judge's order for a stay of proceedings, and for the cause to be entered on the motion paper of the court below, to enable the appellants to move to set aside the award and obtain a new trial, on the ground that the arbitrators had improperly taken evidence after the case before them was closed. Before the term in which the motion was to be heard, appellants abandoned that portion of the order directing the cause to be placed on the motion paper, and gave the usual notice of motion to set aside the award and *postea*, and for a new trial, which motion, by the practice of the court, would be entered on the special paper. Defendant, in opposing such motion, took the preliminary objection that the judge's order should be rescinded before plaintiffs could proceed on their notice, and presented affidavits on the merits, and plaintiffs requested leave to read affidavits in reply, claiming that defendant's affidavits disclosed new matter. This the court refused, and dismissed the motion, the majority of the judges holding that plaintiffs were bound by the order of the judge, and could not proceed on the special paper until that order was rescinded, the remainder of the court refusing the application on the merits. (23 N. B. R. 447.)

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, that the cause was rightly on the special paper, and should have been heard on the merits, and the court should have exercised its discretion as to the reception or rejection of affidavits in reply; Strong J. dissenting, on the ground that such an appeal should not be heard.

Per Ritchie C J.—A Court of Appeal ought not to differ from a court below on a matter of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. Con. Stats. N.B. ch. 37, sec. 173, applies as well to motions for new trials, where the grounds upon which the motion is based are supported by affidavits, as in other cases. It makes no distinction, but applies to all "motions founded on affidavits."

Appeal allowed with costs.

Jones v. Tuck.—23rd June, 1884.

8. **Railway Company—Arbitration under 44 Vic. ch. 43 Q.—Notary Public not disqualified as arbitrator.**

This case arises from an award made by a majority of arbitrators on the 1st of September, 1883, establishing at the amount of $4,474 the indemnity to be paid to the respondents for a piece of land belonging to them and of which they were dispossessed by appellants in virtue of the statute of Quebec, 45 Vic. ch. 23. Action was taken for the above sum and costs of arbitration and law costs, amounting altogether to $4,658.20. Judgment was rendered by the Superior Court against the appellants for said amount, with interest and costs, which judgment was unanimously confirmed by the

Arbitration and Award—Continued.

Court of Queen's Bench. The principal ground for defence was that Mr. Charlebois, being the agent of the respondents, was disqualified from acting as their arbitrator.

On appeal to the Supreme Court of Canada, **Held**, that the evidence showing that Mr. Charlebois was not in the continuous employ of respondents, but acted for them from time to time only, in his professional capacity as a notary public, and not in any other capacity, he was not disqualified from acting as arbitrator. Appeal dismissed with costs.

The North Shore R. Co. v. The Rev. Ursuline Ladies of Quebec—5th Mar. '85.

9. **Official Arbitrators—Appeal from—Intercolonial Ry. Extension—Damages—Submission—Petition of Right—Demurrer—42 Vic. ch. 8.**

The plaintiffs proceeded against the Government by petition of right for damages caused by the I. C. Ry. extension destroying their road and compelling them to sell their plant, &c. at a loss. The Crown demurred to the petition, and, the demurrer being argued before Sir W. B. Richards CJ., judgment was given allowing the demurrer on the ground that the only remedy for the company was by reference to the official arbitrators.

It was then agreed that the reference to the official arbitrators should be had, and the following special terms were agreed to: "Whereas, The Halifax Street Railway Company have made a claim upon the Government of Canada for compensation for damages alleged to have been sustained by that company by reason of the construction of the Intercolonial Railway, and as the government and the company have failed to agree as to such compensation, the company has requested that such claim should be referred to the official arbitrators under the statutes in that behalf; and whereas the government is willing to refer the claim to such arbitrators on the following conditions, to which the company has agreed, namely: 1. That the company shall, before the matter is entered upon before the arbitrators furnish to the government a statement of the various claims which they make in the premises, classifying separately each kind of claim. 2. That the government admit their liability to make compensation to the extent only to which they are by law bound to make such compensation. 3. That the arbitrators shall deal with each separate kind of claim separately, reporting their findings with respect to the facts connected therewith, and as to the amount of compensation (if any) which should be made therefor to the company. 4. That either party shall be at liberty to make this submission a rule of the Exchequer Court pursuant to chapter 8 of the Act 42nd Victoria (1879), Canada, and to proceed under the provision of the said Act before that court with respect to the award, or any part thereof, as may be thought best. 5. That any judgment, order, rule or decision of the Exchequer Court in the premises may be appealed from to the Supreme Court pursuant to the 9th

Arbitration and Award—Continued.

section of the Act last mentioned. Therefore the Government of Canada and the said company hereby refer the said claims to the full board of arbitrators upon the terms and conditions above mentioned. And whereas, The Halifax City Railroad Company, in pursuance of the terms of the above-cited order in council, has lodged with the Government of Canada a claim, of which the following is a copy, viz.: In compliance with section 1 of the reference in this matter the Halifax City Railroad Company hereby furnish the following statement of their respective claims for compensation:—1. The total loss of the railroad as a chartered property possessing exclusive privileges within the city, with all its plant and real and personal properties, the estimated value of which was at the date of the government taking possession of the track the sum of $260,000. 2. The company claims also damage for the dividing of their road into two portions rendering each valueless, and thus, in other words, destroying the whole value $260,000. 3. The company claims also for damages actually done to the crossing for loss in having to sacrifice horses, plant and properties which were sacrificed in consequence of the act of the government, and for general depreciation in value of their real property, and for loss of their charter and the privileges and rights guaranteed under it by the Provincial Legislature, $260,000. 4. The company claims interest at six per cent. per annum on the amount to be allowed for damages from the time of breaking up the track, say 17th May, 1876, up to the time of payment in full to the company. Therefore the Government of Canada and the said company hereby refer the said claims to the full board of arbitrators upon the terms and conditions above mentioned."

The matter was heard on the above submission before the official arbitrators, and on the 27th August, 1880, the following award was made. After reciting the submission and the facts:—1. We find, with regard to the first item of the claim, that the company are not entitled to recover for the loss of their railroad and its plant and real and personal properties, because that railroad was neither totally nor partially lost by any actual interference of the government with the company's property. 2. We find, with regard to the second item of the claim, that the company are not entitled to be paid any compensation, because the government have not "divided their (the company's) railroad into two portions, rendering each valueless," or destroyed the value of the railroad. 3. We find, with regard to the third item of the claim, that the company is not entitled to any compensation, because the government did no actual damage to the crossing, and because the company were not obliged to sacrifice horses, plant, or properties, in consequence of any act of the government, and did not suffer any depreciation in the value of their real estate within the meaning of the Public Works Act, 31 Vic. ch. 12, and did not lose their charter and the privileges and rights guaran-

Arbitration and Award—Continued.

teed under it by any act of the government. 4. We find, with regard to the fourth item of the claim, that nothing is due to the company for interest.

The plaintiffs appealed from this award, and Mr. Justice Henry, in the Exchequer Court, gave judgment in their favor for $8,000. From this judgment both parties appealed.

Held, Henry J. dissenting, that the appeal of the Halifax Street Railway Company should be dismissed with costs, and the appeal of the Crown allowed with costs.

Halifax Street Railway Company v. The Queen.—12th May, 1885.

10. **Misconduct of Arbitrators—Bill to rectify award—Prayer for general relief—Jurisdiction of Court—Practice—Factum.**

The bill in this case was filed to rectify an award made under a submission to arbitration between the parties, because the arbitrators had considered matters not included in the submission, and had divided the sums received by the defendant from the plaintiffs, on the ground that defendant's brother and partner was a party to such receipt, although the partnership affairs of the defendant and his brother were excluded from the submission. The bill prayed that the award might be amended, and the defendant decreed to pay the amount due the plaintiffs on the award being rectified, and that, in other respects, the award should stand and be binding on the parties. There was also a prayer for general relief.

Held, affirming the judgment of the Supreme Court of New Brunswick, that to grant the decree prayed for would be to make a new award, which the court had no jurisdiction to do but, **Held**, also, reversing the decision of the court below, that under the prayer for general relief the plaintiff was entitled to have the award set aside. (23 N. B. R. 392.) The plaintiff's factum containing reflections on the conduct of the judges of the Court below, was ordered to be taken off the files as scandalous and impertinent. Appeal allowed with costs.

Vernon v. Oliver—13th May, 1885.

Arrest, False—Notice of action against Magistrate.

See NOTICE 8.

2. Wrongful—Action for—Justification—Canada Temperance Act, 1878.

See CANADA TEMPERANCE ACT 1878, 6.

3. Of commercial traveller for selling without license—By-law of city of Quebec—29 & 30 Vic. ch. 57, secs. 20, 21 Q.

See LICENSE 7.

Assessment and Taxes—**Assessment—Notice of—Alteration without notice by Court of Review—Liability.**

The plaintiffs, being persons liable to assessment, were served by the assessors of a municipality with a notice in the form prescribed by 32 Vic.

Assessment and Taxes—Continued.

ch. 36, sec. 48, O., and on that notice the amount of their personal property, other than income, was put down at $2,500, but on the column of the assessment roll, as finally revised by the Court of Revision, the amount was put down at $25,000, thereby changing, without giving any further notice to plaintiffs, the total value of real and personal property and taxable income from $20,900 to $43,400.

Held, that the plaintiffs were not liable for the rate calculated on this last named sum, and that a notice, to be given by the assessor in accordance with the Act, is essential to the validity of the tax. [Since this decision the statute has been altered.]

Nicholls v. Cumming.—1. 395.

2. Assessment roll—Amendment of—Triennial assessment roll—Arts. 716 and 746 (a) M. C. P.Q.

See PROHIBITION.

3. **Assessment—Improper—False Imprisonment—Arrest—41 Vic. ch. 9 N.B.—Execution issued by Receiver of taxes for City of St John—"Respondeat superior."**

The 41 Vic. ch. 9, intituled "An Act to widen and extend certain public streets in the City of St. John," authorized commissioners appointed by the Governor in Council to assess the owners of the land who would be benefited by the widening of the streets, and in their report on the extension of Canterbury street, the commissioners so appointed assessed the benefit to a certain lot at $419.46, and put in their report the name of the appellant (McS.) as the owner. The amount so assessed was to be paid to the corporation of the city, and, if not, it was the duty of the receiver of taxes, appointed by the city corporation, to issue execution and levy the same. McS., although assessed, was not the owner of the lot. S., the receiver of taxes, in default, issued an execution, and for want of goods McS. was arrested and imprisoned until he paid the amount at the chamberlain's office in the City of St. John. The action was for arrest and false imprisonment, and for money had and received. The jury found a verdict for McS. on the first count against both defendants.

Held, reversing the judgment of the Supreme Court of New Brunswick, that S., who issued the warrant founded upon a void assessment and caused the arrest to be made, was guilty of a trespass, and being at the time a servant of the corporation, under their control and specially appointed by them to collect and levy the amount so assessed, the maxim of *respondeat superior* applied, and therefore the verdict in favor of McS. for $635.39 against both respondents on the first count should stand. (Ritchie C.J. and Taschereau J. dissenting.)

Assessment and Taxes—Continued.

Per Gwynne J.—That the corporation had adopted the act of their officer as their own by receiving and retaining the money paid and authorizing McS.'s discharge from custody only after such payment.

McSorley v. The Mayor, &c., of the City of St. John.—vi. 531.

4. **35 Vic. P.Q. ch. 51, sec. 192—Assessment for footpaths—Validity of—Proof of error—Onus probandi—Voluntary payment—Notice, want of.**

On the 31st May, 1875, under the authority of 37 Vic. ch. 51 sec. 192 (P.Q.), the City Council of the city of Montreal by a resolution adopted a report from their road committee prepared on the 30th April previous, as amended by a report of their finance committee of May 27, 1875, recommending the construction of permanent sidewalks in the following streets (*inter alia*), Dorchester and St. Catherine. On the adoption of these reports, with which an estimate indicating the quantity of flag stone required for each street, and the approximate cost of the work to be made in each street, had been submitted, the city surveyor caused the sidewalks in said streets to be made, and assessed the cost of the sidewalks according to the front of the real estate owned by the proprietors on each side of the same, and prepared a statement of the same, which he deposited with the treasurer for collection. D. A. B. possessed real estate on Dorchester and St. Catharine streets, and did not object to the construction of the new sidewalk. On the 3rd December, 1877, a few days after receiving a notice from the city treasurer to pay within fifteen days certain sums, in default whereof execution would issue, D. A. B. paid, without protest, $946.25; and on the 29th October, 1878, paid a further sum of $438.90, and on the 14th November, 1878, without having received any notice, paid $700 on account of 1877 assessment.

In an action instituted by D. A. B. against the city of Montreal, to recover the said sums of money which she alleged to have paid in error, believing the assessment valid, **Held**, affirming the judgment of the court below, Henry and Gwynne JJ. dissenting, that D. A. B. had failed, both in allegation and proof, to make out a case for the recovery of the assessment paid by her, either as a voluntary payment made in ignorance of its illegality, or as a constrained payment of an illegal tax, and that mere irregularities in the mode of proceeding to the assessment, although they might, in a proper proceeding, have entitled the ratepayers to have had the assessment quashed, did not now entitle her to recover the amount back as a payment of a void assessment illegally extorted. 2. That the City Council, in laying pavements in parts of the city only, the cost of which was to be paid by assessment according to the frontage of the respective properties, and not in proportion to the cost of the part laid opposite each property, were

Assessment and Taxes—Continued.

acting within the scope of the power conferred upon them by 37 Vic. ch. 51 sec. 192. 3. That the objection founded on the invalidity of the assessment for want of notice, not having been alleged nor relied on at the trial of the case, was irrelevant on this appeal.

Bain v. City of Montreal.—viii. 252.

5. Assessment of ship—Owned by resident of Halifax, but not registered there—Not liable to city assessment.

See SHIPS AND SHIPPING 3.

6. **Foreign corporation—Branch Bank—"Income," as distinguished from "Net Profits"—31 Vic. ch. 3 sec. 4, N.B.**

L., manager of the bank of B. N. A., a foreign banking corporation, having a branch in the city of St. John, derived from such business during the fiscal year of 1875 an income of $46,000, but, during the same period, sustained losses in its business beyond that amount. The bank, having made no gain from said business, disputed the corporation's authority to assess them under 22 Vic. c. 37, 31 Vic. c. 36, and 34 Vic. c. 18, on an income of $46,000.

Held, that under the Acts of Assembly relating to the assessing of rates and taxes in the city of St. John, foreign banking corporations doing business in St. John are liable to be taxed on the gross income received by them during the fiscal year; and that L. had been properly assessed. (Henry J. dissenting). [On appeal to the Privy Council the judgment of the Supreme Court of Canada was reversed. See 6 App. cases 373.]

Lawless v. Sullivan.—iii, 117.

7. **Taxes—Sale of land for—32 Vic. ch. 76 sec. 155, O.—Proof of taxes in arrear.**

In a suit commenced by a bill in the Court of Chancery asking for an account of damages sustained by certain trespasses alleged to have been committed by the appellant (defendant), for an injunction and for possession, the principal question raised was whether a sale of the land for taxes, which took place on the 1st March, 1856, through and under which the respondent (plaintiff) claimed title was valid.

Held, that there was no evidence to show the land sold had been properly assessed, and therefore the sale of the land in question was invalid. (Strong and Gwynne JJ. dissenting).

Per Fournier, Henry and Gwynne JJ.—Where it appears that no portion of the taxes have been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid, and the defect is not cured by section 155 of 32 Vic. ch. 36 O. (Strong J. dissenting, holding that sec. 155 applied to a case where any taxes were in arrear at the date of the sale.)

McKay v. Crysler.—iii, 436.

Assessment and Taxes—Continued

8. **Taxes—Sale of lands for—Indian Lands—Liability to taxation—Lists of lands attached to warrant—32 Vic. ch. 36, sec. 128, O., and sec. 156, ch. 180, R. S. O.**

In September, 1857, a lot in the township of Keppel, in the county of Grey, forming part of a tract of land surrendered to the Crown by theIndians, was sold, and in 1869, the Dominion Government, who retained the management of the Indian lands, issued a patent therefor to the plaintiff. In 1870, the lot in question, less two acres, was sold for taxes assessed and accrued due for the years 1864 to 1869, to one D. K., who sold to defendant; and as to the said two acres, the defendant became purchaser thereof at a sale for taxes in 1873. The warrants for the sale of the lands were signed by the warden, had the seal of the county, and authorized the treasurer "to levy upon the various parcels of land hereinafter mentioned for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands claimed by plaintiff. The lists and the warrant were attached together by being pasted the whole length of the top, but the lists were not authenticated by the signature of the warden and the seal of the county. By sec. 128 of the Assessment Act, 32 Vic. ch. 36 O., the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c.

Held, affirming the judgment of the court below, that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands, and upon being granted became liable to assessment. 2. That the list and warrant may be regarded as one entire instrument, and as the substantial requirements of the statute had been complied with, any irregularities had been cured by the 156th section, c. 180 R. S. O. (Fournier and Henry JJ. dissenting.)

Church v. Fenton.—v, 239.

9. **Inhabitant of the city of St. John—Taxation—Wife's separate property.**

Plaintiff was a resident of the city of St. John up to June, 1877, when he went with his family to Nova Scotia. In 1878, he returned to the Province of New Brunswick with his wife and family, and after leaving them in the town of Portland, went to Boston in search of employment. He remained in Boston until the spring of 1880, having been employed in business, and paid taxes there. Whilst plaintiff was absent, his wife's father assigned to her a lot of leasehold property in the city of St. John. In the fall of 1878 she and family moved into the city and resided on her property until the spring of 1880, when the plaintiff returned from Boston and lived with his wife. For the taxes for 1879, assessed against him in respect of his wife's property, and

Assessment and Taxes—Continued.

for an income tax against himself, both being included in one assessment, he was afterwards arrested and taken to jail, where he remained two days, when he paid the amount under protest, and was released. He brought an action for false imprisonment, and obtained a verdict for $150.

The full court of N. B. set aside the verdict, and granted a new trial, a majority being of the opinion that the plaintiff was constructively an inhabitant of the city of St. John, and as such was liable to be assessed, and that there ought to be a new trial, as it did not very distinctly appear that objections were taken at the trial, or upon what the motion for a nonsuit was to depend.

On appeal, the Supreme Court of Canada **Held**, that the plaintiff was not liable to assessment, and that the verdict should stand. Appeal allowed with costs.

Edwards v. The Mayor &c. of St. John—1st May, 1883.

10. Sale of taxes—33 Vic. ch. 23 (O.)

See POSSESSION 5.

11. **St. John City Assessment Act 1882, 45 Vic. ch 59 N. B.—Chartered Bank—Assessment on capital stock of—Par value—Real and personal property of bank—Payment of taxes under protest.**

By section 25 of the St. John City Assessment Act of 1882, it is provided that all rates and taxes levied and imposed upon the city of St. John shall be raised by an equal rate upon the value of the real estate situate in the city, and part of the city to be taxed, and upon the personal estate of the inhabitants, and of persons deemed and declared to be inhabitants and residents of the said city, and upon the capital stock, income, or other thing, of joint stock companies, corporations, or persons associated in business, and after providing for the levying of a poll tax such section goes on to say, "that the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income, and joint stock, according to the true and real value and amount of the same as nearly as can be ascertained, provided that joint stock shall not be rated above the par value thereof." See 28 of the same act provides that, "all joint stock companies and corporations shall be assessed, under this act, in like manner as individuals; and for the purposes of such assessment, the president, or any agent, or manager, of such joint stock companies shall be deemed and taken to be the owner of the real and personal estate, capital stock and assets of such company or corporation, and shall be dealt with, and may be proceeded against accordingly. J. D. L., the president of the Bank of New Brunswick, was assessed, under the provisions of the above act, on real and personal property of the bank, valued in the aggregate at $1,100,000. The capital stock of the bank at the time of such assessment was only $1,000,000, and he

Assessment and Taxes—Continued.

offered to pay the taxes on that amount, which was refused. It was not disputed that the bank was possessed of real and personal property of the value assessed.

On appeal from the Supreme Court of New Brunswick, refusing a certiorari to quash the said assessment, (23 N. B. R. 591,) **Held,** Fournier J. dissenting, that the real and personal property of the bank are part of its capital stock, and that the assessment could not exceed the par value of such stock, namely, $1,000,000. Appeal allowed with costs.

Exparte J. D. Lewin—22nd June, 1885.

12. **Property occupied under lease by Militia Department—Not liable to Municipal taxation—Prerogative of the Crown—10-11 Vic. ch. 17—23 Vic. ch. 61 sec. 58—C. S. L. C. ch. 4 sec. 2—37 Vic. ch. 51 sec. 237 Q.—Mun. Code L. C. art. 712—36 Vic. ch. 21 sec. 18 Q.**

In 1878 the City of Montreal brought an action against the reverend ladies of the Montreal General Hospital for the recovery of $1,984.46, being the amount of municipal taxes for the years 1874, 1875 and 1876, levied on real estate belonging to them and situate in St. Ann's Ward. The Attorney General, in the name of her Majesty the Queen, intervened by means of a petition praying that he might be allowed to take up the *fait et cause* of the defendants and to contest the plaintiff's demand. The intervenant alleged that by lease, bearing date on the 7th of April, 1874, the reverend ladies had leased the above-mentioned premises to her Majesty's government for one year, to be computed from the 1st day of May then following, with the condition that said government should pay all taxes and assessments which might be levied and become due on the said premises during the term of the said lease; that the said lease was continued from year to year, on the same conditions, and during all that period the government was in possession of said premises as tenant; that, notwithstanding the said condition, Her Majesty was never bound to pay the taxes and assessment, one of the privileges inherent to the Crown being an immunity from all imposts, taxes, assessments and other charges generally; that such privilege attaches equally to every property, personal or real, possessed or occupied by the Crown; that the city was aware that during the whole of the period for which taxes were claimed the Crown was in the sole and exclusive possession of the premises, and that therefore the action ought to be dismissed. It was admitted that Her Majesty, by the government of the Dominion of Canada, occupied the property in virtue of the lease for the use of the Militia Department, and that the taxes claimed were in accordance with the assessment roll.

The Superior Court for Lower Canada (Chagnon J.) rendered judgment on the 8th of November, 1880, dismissing the intervention of the Crown,

Assessment and Taxes—Continued.

and condemned the defendants, and condemned the Crown to pay the defendants.

The appellant sought in the Court of Queen's Bench (appeal side) the revision of the judgment pronounced against him, for two reasons:—1. Because the judgment, in so far as it condemned him to pay the defendants, was *ultra petita;* 2. Because it was contrary to law in not granting the exemption from taxation.

The Court of Queen's Bench for Lower Canada (appeal side) admitted appellant's first ground, and reformed the judgment to that extent; but nevertheless confirmed the judgment of the Superior Court in other respects. (See 3 Dorion's Q. B. R. 341.)

On appeal to the Supreme Court of Canada, **Held,** reversing the judgment of the courts below, that the property in question was exempt from taxation. (Strong J. dissenting.)

Per Ritchie C.J.—It cannot be disputed that the property of the Crown, or property held by her Majesty, or her servants for her Majesty, is exempt from taxation; and this exemption can only be taken away by express legislative enactment. The law on the subject is laid down in *The Mersey Docks* v. *Cameron*, 11 H. L. 443, and in this case there are no statutes depriving the Crown of this exemption, but statutes of the Province of Quebec distinctly recognizing it and relieving the property of the Crown and property occupied by officers of the Crown for the public service from taxation, even if such statutes were, in view of the royal prerogative, requisite or necessary (10, 11 Vic. ch. 17, 23 Vic. ch. 61 sec. 58, C.S.L.C. ch. 4 sec. 2, 37 Vic. ch. 51 sec. 237). The case of *The Corporation of Quebec* v. *Leaycraft*, 7 Q.L.R. 56, distinguished.

Per Strong, J. (dissenting)—The taxes were not imposed upon property "belonging to or held in trust" for the Crown so as to bring it within the terms of C.S.L.C. ch. 4 sec. 2. The Crown cannot be affected by a statute giving powers of local taxation to a municipal body, unless it is expressly named and express powers to tax its property are conferred, which is not the case in the Montreal Act of Incorporation; but there has been no attempt to impose a tax upon the Crown. The Montreal Incorporation Act authorizes the city to tax proprietors in respect of their immoveable property, and the powers conferred by it have been followed by the city, for the Grey Nuns, the principal defendants, are the owners of the full property in the lands upon which the taxes were imposed.

Per Taschereau J.—The property was held in trust by theMinister of Militia for the use of Her Majesty under the very terms of ch. 4 sec. 2 C.S.L.C. A tax upon a property held and occupied as this must fall upon the Crown

Assessment and Taxes—Continued.

and be paid out of the revenues of the Dominion. In the very terms of the B.N.A. Act the city of Montreal is not authorized to levy the funds necessary for the administration of its municipal government upon the inhabitants of the rest of the Dominion. It would have been granting powers refused to other municipalities of the Province, for under Art. 712 of the M.C., as amended by 36 Vic. ch. 21 sec. 18, properties occupied as this one are specially exempted from taxation.

Appeal allowed with costs.

Attorney General of Canada v. The City of Montreal.—22nd June, 1885.

13. **Educational institution—Cons. Stats. L.C. ch. 15, and 41 Vic. ch. 6 sec. 26 P.Q.—Art. 712 Mun. Code, P.Q.—Construction of.**

Action by the city of Montreal to recover the sum of $408, for assessment or taxes for the years 1878, 1879 and 1880 on property in said city occupied by the defendant. The property set out in the plaintiff's declaration was during the time mentioned therein occupied and used as a private boarding and day school for girls, kept and maintained by the defendant, who employed divers teachers, and during that time had therein, on an average, for their education, as pupils, eighty-five girls per annum. The said institution never received any grant from the plaintiff.

Held, Gwynne J. dissenting, that the said institution is an educational establishment within the meaning of 41 Vic. ch. 6 sec. 26 (P.Q.), and exempt from municipal taxation. Appeal allowed with costs.

Wylie v. The Corporation of the City of Montreal.—8th March, 1886.

14. **Educational Institution—Farm owned by—Revenue from—Not Property held for the purposes for which institution established—Not exempt from school taxes—32 Vic. ch. 16 sec. 13 Q.—C. S. L. C. ch. 15 sec. 77.**

The action was brought to recover the sum of $808.50 for three years school taxes, (1878, 1879, 1880,) imposed by the Appellants upon certain immoveable property owned by the respondents within the limits of the village of St. Gabriel. The respondents alleged by their defence, that they are an educational institution and that the lands mentioned in the appellants' declaration as being their property are exempt from the payment of municipal and school taxes, inasmuch as the said parcels of land are held by the respondents for the objects for which they were established. By their answer the appellants denied that the property taxed was held by the respondents for educational objects, but contended that the latter work the same for the purposes of deriving income therefrom. The facts of the case are few. The respondents admitted the truth of the declaration, and relied solely upon the exemption pleaded by them. Only one witness was examined on behalf of the respondents, sister Ste. Justine. She explained the nature of the respondent's occupation and the use to which the immoveables in question

Assessment and Taxes—Continued.

were put. They consist of a farm managed by two or three of the ladies of the congregation. She stated that all the products of this farm are consumed at the mother house, Villa Maria, situated in another municipality, with the exception of a portion sold to cover the expenses of working and cultivating the farm. Occasionally some of the nuns who were ill or indisposed, would pass a few days there, but the establishment was not kept as a sanitarium or place of repose for the respondents. The respondents have no school or house of education at the establishment in question, nor even within the municipality of St. Gabriel. Under such circumstances the question to be decided was whether or not the respondents could invoke in their favor the exemption established by section 13 of chapter 16 of 32 Victoria, (Que.) The portion of the above mentioned section bearing upon this question reads as follows: Section 13—"No religious, charitable, or educational institutions, or corporations, shall be taxed for school purposes on the property occupied by them for the objects for which they were instituted, but on all property held by them or any of them, for the purposes of deriving any income therefrom, they shall be taxed by the school commissioners."

The Superior Court for Lower Canada (Papineau J.) held that the property in question was occupied for the objects for which the defendants' institution was established and was therefore exempt.

The Court of Queen's Bench for Lower Canada (appeal side) composed of Monk, Ramsay, Tessier, Cross and Baby JJ., affirmed this judgment, Tessier J. dissenting.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgments of the courts below, that the property in question, was not property occupied by the defendants for the purposes for which they were instituted, but was held for the purpose of deriving a revenue therefrom, and was therefore liable to taxation for school purposes.

Per Ritchie C.J.—The property assessed was held solely to make a profit for the funds of the institution, and for the purpose of a revenue, whether received in produce, or the produce sold and received in money. He entirely agreed with the judgment delivered by Chief Justice Dorion, in the case of *La Corporation du Village de Verdun* v. *Les Sœurs de la Congregation de Notre-Dame*, as reported in 1 Q. B. R. L. C. 164, and had nothing to add to what was there said.

Per Fournier and Taschereau JJ.—Sec. 13 of 32 Vic. ch. 16, is not an amendment of sec. 77 of ch. 15 of the C.S.L.C. On comparison of the two sections, it is difficult to find such difference as to lead to the conclusion, that it was the intention to amend the latter section. According to both acts, the exemption is of property held for the purposes of education, and is

Assessment and Taxes—Continued.

not wider in the one case than in the other. The judgment of C. J. Dorion and of Cross J. in *La Corporation, &c., de Verdun* v. *Les Sœurs, &c*—approved. There is no doubt the products of the farm constitute a revenue.

Appeal allowed with costs.

La Corporation &c., du Village de St. Gabriel v. Les Sœurs de la Congregation de Notre-Dame de Montreal—March 8th, 1886.

Assignment—Under foreign bankruptcy.

See INSOLVENCY 2.

2. In Trust.

See INSURANCE 4.

3. **For benefit of creditors—Power to sell on credit—Fraudulent preference—R. S. ch. 118 sec. 2.**

In a deed of assignment for the benefit of creditors, the following clause was inserted: "And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, &c., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shown.

Held, affirming the judgment of the court below, that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O. ch. 118 sec. 2.

Slater v. Badenach.—x, 296.

4. Of a Government Contract without prior consent of Government—Effect of.

See PETITION OF RIGHT 14.

5. Order for delivery of Bonds of Railway Company.

See RAILWAYS AND RAILWAY COMPANIES 19.

6. **Right of Assignee to sue under voluntary assignment—Arts. 13 and 19 C. C. P. (L. C.)—Assignee represents only Assignor.**

Held, in the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment to him could have enforced; therefore the defendant could not by a plea in his own name ask to have a conveyance, made by the debtor to the plaintiff, prior to the assignment under which defendant claimed, rescinded or set aside as fraudulent against creditors.

Assignment—Continued.

The nullity of a deed should not be pronounced without putting all the parties to it *en cause en déclaration de jugement commun.*

Semble—The plaintiff, being a second purchaser in good faith and for value, acquired a valid title to the property in question, which he could set up even against an action brought directly by the creditors.

Burland v. Moffatt.—xi, 76.

7. Of interest in Tender for Contract—Provision against Assignment of interest in Contract.

See CONTRACT 24.

8. For benefit of creditors—Accidental omission of claim from schedule of debts—R. S. Ont. ch. 118 sec. 2.

See FRAUDULENT PREFERENCE 3.

9. Condition not to assign in Policy of insurance—Chattel Mortgage not breach of.

See INSURANCE, FIRE 16.

Attachment—Under absent and absconding debtors Act of Nova Scotia, ch. 97 R.S. N.S.

See CORPORATIONS 5.

Attorney—Appearance by without authority.

See OPPOSITION 2.

Attorney General—Delegation of Authority by.

See CRIMINAL APPEAL 1.

2. Of Province—Proper person to bring a suit for administration of charitable trust.

See CHARITABLE TRUST.

Auctioneer—Liability of, to assignees of Bill of Lading.

See BILL OF LADING.

Bailee—Right to hold goods for unpaid purchase money.

See SALE OF GOODS 5.

Ballots.

See ELECTION 12, 16.

Banks and Banking—**The Banking Act, 34 Vic. ch. 5 sec. 40—Advances on Real Estate.**

B., on the 19th January, 1876, transferred to the Bank of T. (appellants) by notarial deed an hypothec on certain real estate in Montreal, made by one C. to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at B.'s credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of C. to set aside a prior hypothec given by C. and to establish their priority.

Banks and Banking—Continued.

Held, affirming the judgment of the Court of Queen's Bench, that the transfer of B. to the Bank of T. was not given to secure a past debt, but to cover a contemporaneous loan, and was therefore null and void, as being a contravention of the Banking Act, 34 Vic. ch. 5 sec. 40.

Bank of Toronto v. Perkins.—viii. 603.

2. Right to transfer shares under Banking Act.

See CORPORATIONS 10.

3. Liability for money deposited for benefit of creditors.

See AGREEMENT 7.

4. **Creditor and Debtor—Relation of—Agency—Payment—C. C. art. 1143—Parties.**

S. G. acquired during the life of his first wife, M. A. B., certain immoveable property which formed part of the *communauté de biens* existing between them. At his death, after his marriage with H. S., his second wife, he was greatly involved. His widow, H. S., having accepted *sous benefice d'inventaire* the universal usufructuary legacy made in her favor by S. G., continued in possession of her estate as well as that of M. A. B., the first wife, and administered them both, employing one G. to collect, pay debts, etc. Shortly afterwards, at a meeting of the creditors of S. G., of whom the respondents were the chief, a resolution was adopted authorizing H. S. to sell and licitate the properties belonging to the estate of S. G. with the advice of an advocate and the cashier of the respondents, and promising to ratify anything done on their advice, and the creditors resolved that the money derived from the sale or licitation of the properties should be deposited with the respondents, to be apportioned among S. G.'s creditors *pro rata*. G. continued to collect the fruits and revenues and rents, and acted generally for H. S. and under the advice aforesaid, and deposited both the moneys derived from the estate of S. G. and those derived from the estate of M. A. B., the first wife, with the respondents, under an account headed "Succession S. G." A balance remained after some cheques thereupon had been paid, for which this action was now brought by the heirs and representatives of dame M. A. B.

Held, per Strong, Taschereau and Gwynne JJ. (Ritchie C.J. and Fournier and Henry JJ. contra)—That, as between the heirs B. and the bank there was no relation, of creditor and debtor, nor any fiduciary relation, nor any privity whatever; and as the moneys collected by G. belonging to the heirs of B. were so collected by him as the agent of H. S. and not as the agent of the bank, and received by the bank in good faith, as applicable to the debts of the estate of S. G., and as the representatives of H. S. were not parties to the action, the appellants could not recover the moneys sued for.

Giraldi v. La Banque Jacques Cartier.—ix. 597.

Banks and Banking—Continued.

5. Deposit for special purpose.

See NEW TRIAL 4.

6. Winding up under the Imperial Companies Act, 1862—Calls upon past member—Right of action.

See CORPORATIONS 15.

7. **Bank, Insolvent—Winding up—Contributories—Shareholders—Double liability—45 Vic. ch. 23 D.**

In the year 1855, the bank of Prince Edward Island was incorporated by Provincial statute 18 Vic. ch. 10. Its capital stock was thereby fixed at £30,000 P. E. I. Cy., or $97,333.33 Dominion Cy., divided into shares of £10, or $32.44. Power to increase this capital by the issue of additional shares, of same value, was given by sections 39, 40, 41 & 42 of the act, and these sections prescribed the manner of effecting this increase, and the sale of the new stock by auction, and it was provided by sec. 43 that "the said additional shares should be subject to all the rules, regulations and provisions to which the original stock is subject, or may hereafter be subject, by any law of this Island." The 19 section of the act was repealed, and re-enacted by the 3 section of 19 Vic. ch. 11., as follows:—

"The holders of the stock of the said bank shall be chargeable in their private and individual capacity, and shall be holden for the payment and redemption of all bills which may have been issued by the said corporation, and also for the payment of all debts at any time due from the said corporation, in proportion to the stock they respectively hold, provided however, that in no case shall any one stockholder be liable to pay a sum exceeding twice the amount of stock actually then held by him, over and above, and in addition to the amount of stock actually by him paid into the bank, provided nevertheless, that nothing is this act, or in the said hereinbefore recited act contained, shall be construed to exempt the Joint Stock of the said corporation from being also liable for, and chargeable with, the debts and engagements of the same."

No increase to the capital stock was ever made under the provisions of this act. In 1872, the bank having a balance of net profits on hand of $27,286.41, pursuant to a resolution passed at the general annual meeting of the shareholders, application was made to the legislature, and the statute 35 & 36 Vic. ch. 23 was passed, which enacted as follows:

1. "It shall and may be lawful for the board of directors of the Bank of Prince Edward Island at any time, and from time to time, to enlarge the capital stock of the said bank by applying to each individual share of the capital a portion of the rest or surplus profits, lying at the time at the credit of the said bank." 2. "Such mode of enlarging the capital stock of the said

Banks and Banking—Continued.

bank shall not prevent the enlargement of the same by the mode pointed out in the 39th, 40th, 41st, 42nd and 43rd sections of the Act of Incorporation of the said bank."

In 1872, the sum of $10,666.67 was taken out of the profits and added to the capital stock, raising the value of each share by the sum of $3.55 and a fraction, or to a total par value of $56.

In 1875, a further sum of $12,000 out of profits was carried to the credit of capital stock. This addition made the capital $120,000, and the par value of each share $40.

On the 19th day of June, 1882, an order was made by Mr. Justice Peters for winding up the said bank, which had become insolvent within the meaning of the Act 45 Vic. ch. 23, intituled "An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations," and the respondents were appointed liquidators of the said bank. Subsequently an order *nisi* was granted by Mr. Justice Peters calling upon all shareholders to show cause why they should not pay calls upon their shares to the amount of $80 for each share, which order he made absolute after having counsel for the appellants, contributories. On appeal to the full Supreme Court of P.E.I. this order absolute was formally confirmed, two of the Judges thinking themselves disqualified from hearing the appeal in any other than a merely formal manner.

On the 10th Feby., 1883, Henry J. of the Sup. Ct. of Canada made an order under 45 Vic. ch. 23, granting leave to appeal to that court, which **Held,** reversing the decision of Peters J., that the shareholders were not liable to pay more than $64.89 per share, or twice the amount of their original stock. The Act of 1872, which authorized the alleged increase, had no provision creating any double liability, as was imposed on the original stock, and any new stock which might have been created under 18 Vic. ch. 10, and the fair inference from the omission of any express enactment with reference to the increased stock was that the legislature did not intend to clothe it with a double liability. Gwynne J. dissenting. Appeal allowed with costs.

Morris v The Liquidators of the Bank of P.E. Island.—19th June, 1883.

8. Shareholder or contributory of Bank—Action against—Right of set off—Demurrer—45 Vic. ch. 23 sec. 76 (Winding up Act)—Construction of.

An action was brought by the bank of P. E. I. against the appellant on a promissory note, to which he pleaded set off of a draft made by the plaintiffs and endorsed to him. To this there was a replication that the defendant was a contributory on the stock book of the bank, and knew that the bank was insolvent when the draft was purchased. The defendant

Banks and Banking—Continued.

demurred on the ground that the replication did not aver that the debt for which the action was brought was due from the defendant in his capacity as shareholder or contributory.

Held, reversing the judgment of the Supreme Court of P. E. I., that the replication was bad in law. 45 Vic. ch. 23 sec. 76.

J. I., the appellant, gave to one O. his note for $6,000, which was endorsed to the bank of P. E. I. The Union Bank of P. E. I. at the time held a check or draft, made by the bank of P. E. I. for nearly the same amount, and this draft the appellant purchased for something more than $200 less than its face value. Being sued on the note he set off the amount of such check or draft and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off set to the claim on his note, which he had made non-negotiable and he also admitted that, if he could succeed in his set off, and another party could succeed in a similar transaction, the Union Bank would get their claim against the bank of P. E. I., which had become insolvent, paid in full. The judge on the trial charged that if the draft was endorsed to the defendant to enable him to use it as a set off, he could not do so, because he was a contributory within the meaning of the 76th section of the Winding Up Act, and that the Act which came into force on the 12th May, 1882, was retrospective as regards the endorsements before it was passed, but within thirty days before the commencement of the proceedings to wind up the affairs of the bank. The jury under the direction of the judge found a general verdict for the plaintiff for the amount of the note and interest which the Supreme Court refused to disturb.

On appeal to the Supreme Court of Canada, **Held,** reversing the judgment of the court below, that the appellant having purchased the draft in question for value and in good faith prior to the 26th May, 1882, the Canada Winding Up Act, 45 Vic. ch. 23, was not applicable, and therefore the appellant was entitled to the benefit of his set off. That the Winding Up Act was not retrospective as to this endorsement.

By sections 75 and 76 of 45 Vic. ch. 23 it is provided that if a debt due or owing by the company has been transferred within thirty days next before the commencement of the winding up under that Act, or at any time afterwards to a contributory who knows, or has probable cause for believing, the company to be unable to meet its engagements, or in contemplation of insolvency under the Act, for the purpose of enabling such contributory to set up by way of compensation or set off the claim so transferred, such debt cannot be set up by way of compensation or set off against the claim upon such contributory.

Banks and Banking—Continued.

Held, that the sections in question only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory. Appeal allowed with costs.

Ings v. The Bank of P. E. Island.—22nd June, 1885.

9. Assessment of Bank under St. John City Assessment Act, 45 Vic. ch. 59 N.B.

See ASSESSMENT AND TAXES 11.

10. Transfer to Bank of shares held in trust—Notice—Obligation to account.

See TRUSTS AND TRUSTEES 9.

11. Insolvent Bank—Winding up—Priority of Crown over simple contract creditors.

See CROWN 15.

12. **Advances, security taken for in the name of a third person—Right of bank to lien on shares—Claim in insolvency—Liability for mal-administration—Interest—Commencement of proof in writing.**

In 1875 the plaintiff, Lamoureux, became insolvent and made an assignment of his estate to one Auger, an official assignee. The claims filed against his estate amounted in all to the sum of $93,105.78 of unprivileged debts, and $895.92 of privileged debts. Among other claims was one by the Bank of St. John, party defendant, sworn to by Mr. L'Ecuyer, their then cashier, on the 5th of February, 1876. This claim was for $41,431.41, and it was stated that the bank held no security except certain shares owned by the plaintiff of the stock of said bank, valued at $18,000. It appears that the claim was based entirely upon promissory notes, eighteen of which, amounting to $11,788.71, had not then matured, the remainder being overdue. A large number of these notes, amounting in all to $24,500, were endorsed by the said cashier, who, it appears, held a hypothec on the property of the plaintiff to the extent of $30,000 to secure him against his said endorsements.

The plaintiff compounded with his creditors for the sum of twenty-five cents in the dollar, and the defendants, the Bank of St. John, were placed on his dividend sheet for the amount of their alleged unsecured debt, viz., $23,431, the composition on which would be $5,857.86. The plaintiff, not having the amount required to pay the composition to his creditors, in all a sum of $24,173.63, entered into negotiations with the defendant Molleur for the purpose of procuring it. The extent and nature of the negotiations form the subject of the present contention. They resulted in the execution of a deed dated the 16th May, 1876, made between the plaintiff, his assignee, and the defendant Molleur, whereby it was recited that the plaintiff had received from the defendant Molleur the sum of $25,251.55 for the purpose of paying

the composition to his creditors and for securing repayment of this sum, together with a bonus of $4,000, as one of the considerations for said advance. The plaintiff requested the assignee to, and the assignee thereby did, assign and transfer to the defendant Molleur all the property belonging to the plaintiff. The defendant Molleur was also to be paid the costs and expenses connected with the administration of the property. Molleur continued to deal with the property of the plaintiff until 1879, when the plaintiff brought this action, alleging the facts herein before set forth, and alleging further that at the time of the execution of the deed of the 16th May, 1876, Molleur was acting as the *prete nom* or *locum tenens* of the other defendants, the Bank of St. John; that the bank and not Molleur had advanced the sum of $25,251.55 mentioned in the deed; that although it had been agreed between the plaintiff and the defendant Molleur that only the said sum of $25,251.55, together with a bonus of $4,000, should be paid to the bank, and upon such payment being made Molleur should re-transfer to the plaintiff the property remaining in his possession, the defendant Molleur had wrongfully paid to the bank the claim against his estate in full, and had also so improperly managed the estate as to cause the plaintiff considerable loss. The plaintiff asked that the defendant Molleur should render an account of his administration, that the bank might be declared to be equally responsible with the defendant Molleur, who should be held to be merely the *locum tenens* of the bank, that the defendants jointly should be obliged to repay to him the balance of monies which they had received, after paying the amounts which were authorized by the said deed of the 16th May, 1876, and that Molleur should also be obliged to re-assign to the plaintiff the balance of the plaintiff's property then unsold.

In the course of the proceedings Molleur by his pleas denied that the properties belonging to the plaintiff were assigned to him to pay only the sums mentioned by the plaintiff; he denied that he was the *locum tenens* of the bank; and he alleged that at the time of the execution of said deed it was agreed between the plaintiff and himself, that besides the said sums the defendants should pay to the bank in full the balance remaining due to said bank on the claim filed against the plaintiff beyond the amount of the composition, such balance, amounting to $35,573.56, having necessarily to be paid to discharge the hypothecs held by the endorsers of the plaintiff's notes.

The total amount which by the defendant Molleur's contention would thus have to be paid out of the proceeds of the plaintiff's property would be the sum of $64,825.11, together with the expenses of management, and the defendant also claimed that the plaintiff agreed to pay interest on the various sums at the rate of 9 per cent. per annum. He stated that up to that time he had paid to the bank, and on hypothecary claims on the property and for

Banks and Banking—Continued.

expenses of management, the sum of $62,977.85; he admitted having received from the revenues and sale of portions of the property a sum of $49,633.09, and having sold another portion of said property for $1,000 which he not yet received. The defendant went into particulars with respect to his dealings with certain portions of the property. The result would have been that a considerable balance would still have appeared owing to the bank of St. John, if the contention of the defendant Molleur was correct. The defendant filed with his pleas certain statements of account. To these the plaintiff objected as not having been sworn to, as required by law, and he reiterated his contentions with respect to the agreement between him and the defendant Molleur.

On the 20th May, 1882, the Superior Court of the district of Iberville, Chagnon J. presiding, by an interlocutory judgment, **Held**, that the defendant Molleur was the *locum tenens* of the bank, and that the said defendant should render a proper sworn account. This the defendant Molleur did, not only of his dealings with the property up to the time of the institution of the action, but also up to the date of rendering said accounts the 15th August, 1882, and he claimed that a balance was still due to him of $3,814.18.

On the 29th January, 1883, Mr. Justice Chagnon delivered judgment in which he re-affirmed his previous finding, that the defendant Molleur was the *prête nom* or *locum tenens* of the bank. He held, also, that the defendant Molleur was justified in paying to the bank the amount of the notes for which they held the endorsement of L'Ecuyer, there being no evidence that the hypothec held by L'Ecuyer was not a *bonâ fide* security of which the bank had a right to the benefit; that the bank was justified in retaining the shares of the plaintiff to be applied on the balance of its claim; that the bank was entitled also to the sum of $25,251.56, together with the amount of the bonus of $4,000, and to interest on all the amounts it was thus declared entitled to at the rate of 6 per cent. per annum, with the exception of the said bonus, upon which the judge considered no interest should be paid; that, as regards the amount alleged to have been improperly paid the assignee, the plaintiff must be left to his recourse against the assignee, or his estate, he being then dead; that, as regards any questions of mal-administration, the recourse of the plaintiff, if any, should be reserved to him; and the court directed the accounts to be submitted to an auditor to ascertain the balance on the principles laid down in the judgment, and also directed that if a balance should be payable by the defendants the defendant Molleur should re-assign to the plaintiff the balance of property remaining unsold.

The auditor found a balance in favour of the plaintiff of $3,200.60.

Neither party being satisfied with this judgment, appeals were instituted to the Court of Queen's Bench, which court reversed the finding of Mr.

Banks and Banking—Continued.

Justice Chagnon on the question of the relation between the bank and Molleur, holding that Molleur was not the *locum tenens* of the bank, and reversed his finding with respect to the rate of interest. In other respects it practically affirmed the judgment of the Superior Court, and sent the case back to that court to have the account rectified in accordance with suggestions in their judgment.

Held, by the Supreme Court of Canada, that the judgment of Mr. Justice Chagnon should be affirmed with the exception hereafter mentioned. The evidence was ample to lead to the conclusion beyond any reasonable doubt, that the defendant Molleur was acting as the *prête nom* or *locum tenens* of the bank. The only difficulty with regard to this point was created by the fact that there was no writing to connect the bank with the deed of the 16th May, 1876, no *commencement de preuve par écrit.* But this difficulty was not insuperable :—1st. Because, if held as a bar to considering the bank as the real party liable, the bank would be enabled to commit a fraud upon the plaintiff and to receive and retain monies to which it was not entitled. And secondly, because the bank by its actions and conduct throughout had shown ample ratification of the acts of the defendant Molleur, and an acceptance of the deed of the 16th May, 1876, and of every thing done under it. Whether as the principal party concerned, acting through its *locum tenens*, or by reason of its having received monies by collusion with the defendant Molleur to which it was not entitled, the bank should be held equally responsible with the defendant Molleur.

With reference to the L'Ecuyer notes, the bank did not, these notes being over-due, treat the hypothec taken by L'Ecuyer as any security to it when filing its said claim, nor did it appear that the plaintiff ever contended at the meeting of his creditors, or in any of the insolvency proceedings, that this hypothec given to Mr. L'Ecuyer was in reality held for the bank. Nor was there any evidence to the effect that the plaintiff subsequent to the insolvency proceedings, and up to the time of the institution of this action, ever contended that this hypothec was held by the bank, or held otherwise than as a *bonâ fide* security by Mr. L'Ecuyer himself, and a security, therefore, which the defendant Molleur was bound to pay off to release the properties. On the other hand there was considerable evidence that the plaintiff acknowledged his liability on this hypothec, and wished the defendant Molleur to pay off the indebtedness for which it was given. The judge of the Superior Court was justified in holding that the defendant had properly paid the amount of the promissory notes endorsed by L'Ecuyer in order to obtain the discharge of his hypothec.

Further, the bank in filing its claim was justified in alleging that it held as security only the shares of the plaintiff, and that it was further

Banks and Banking—Continued.

justified in applying the proceeds of these shares to any balance remaining due on the notes of the plaintiff after payment of the L'Ecuyer notes.

The Court of Queen's Bench should not have raised the rate of interest to eight per cent., no rate having been mentioned in the deed of the 16th May, 1876.

There was one point, however, in the judgment of the learned judge of the Superior Court from which the Court was obliged to dissent. At the time the deed of the 16th of May, 1876, was executed there were, as already stated, certain claims being contested before the assignee. The amount of these claims should not have been paid to the assignee before the result of the contestations was declared, or, if paid, the defendants should have taken proceedings in the interest of the plaintiff to recover back this amount from the assignee. This amount the plaintiff was entitled to, in addition to the sum found by the auditor on the basis of the judgment of the Superior Court.

In all other respects the judgment of the Superior Court should be affirmed and the appeal of the plaintiff allowed with costs, and the cross appeals dismissed with costs, the plaintiff to receive his costs on the appeal and cross appeals in the Court of Queen's Bench.

Lamoureux v. Molleur—8th March, 1886.

Benefit Society—Expulsion of member—Prior notice not necessary under by-laws—Mandamus.

L. was expelled from membership in L'U. St. J., an incorporated benefit society, for being in default to pay six months' contributions. Art. 20 of the society's by-laws, sec. 5, provides that "When a member shall have neglected during six months to pay his contributions, or the entire amount of his entrance fee, the society may erase his name from the list of members, and he shall then no longer form part of the society; for that purpose, at every general and regular meeting, it is the duty of the collector-treasurers to make known the names of those who are indebted in six months' contributions, or in a balance of their entrance fee, and then any one may move that such members be struck off from the list of members of the society." L. brought a suit under the shape of a petition, praying that a writ of *mandamus* should issue, enjoining the company to reinstate him in his rights and privileges as a member of the society. 1. On the ground that he had not been put *en demeure* in any way; and that no statement or notice had been given him of the amount of his indebtedness. 2. On the ground that many other members of the society were in arrear for similar periods, and that it was not competent for the society to make any distinction amongst those in arrear. 3. On the ground that no motion was made at any regular meeting.

Benefit Society—Continued.

The Court of Queen's Bench for L.C. (appeal side) held that L. should have had "prior notice" of the proceedings to be taken with a view to his expulsion.

Held, on appeal, that as L. did not raise by his pleadings the want of "prior notice," or make it a part of his case in the court below, he could not do so in appeal.

Per Taschereau and Gwynne JJ.—A member of that society, who admits that he is in arrear for six months' contributions, is not entitled to "prior notice" before he can be expelled for non-payment of dues.

L'Union St Joseph de Montreal v. Laplerre—1v. 164.

Bill of Lading—Rights of Assignee of—Right to instruct Agent to hold until payment of Bill of Exchange drawn for goods mentioned in Bill of Lading—Whether instructions admissible in action against a third party—Consignee obtaining goods without Bill of Lading and without paying for goods—Liability of Auctioneers to Assignees of Bill of Lading for selling the goods on Consignees account—Trover—Interest.

The plaintiffs, a banking company doing business at Charleston S.C., were assignees of a bill of lading for 100 casks of spirits of turpentine and 501 barrels of rosin, for which they had discounted the shipper's draft on R., of Saint John N.B., the consignee. They forwarded the draft to their agents with instructions to deliver the bill of lading to R. when the draft was paid. The draft was dated August 2, 1875, and was payable 20 days after date. R. accepted the draft, but did not pay the same, and the bill of lading was retained by plaintiffs' agents. The invoice was sent from Charleston to R., to whom the captain of the vessel by which the goods were shipped delivered the goods without the production of the bill of lading. Subsequently R. delivered 90 barrels of the turpentine to the defendants, who were auctioneers, for the purpose of being sold by the defendants on account of R., upon which they advanced R. $1,000. The defendants, after advertising the sale sold the turpentine at public auction and paid the balance of the net proceeds to R. on September 24, 1875. The turpentine had been taken out of the vessel and landed and warehoused several days before the delivery to defendants, and defendants did not know that R. had not possession of the bill of lading until October 21, 1875, when the plaintiffs by notice in writing, demanded the turpentine of them.

The Supreme Court of New Brunswick held, that the plaintiffs were entitled in an action of trover to recover from defendants the value of the turpentine, and gave interest on the amount to the plaintiffs from the day the demand was made. The court held also that the instructions from plaintiffs to their agents to deliver the bill of lading upon payment of the draft, was admissible evidence in an action by plaintiffs against the defendants. (See 3 Pugs. & Bur. 268.)

Bills of Lading—Continued.

On appeal to the Supreme Court of Canada, **Held,** that the judgment of the court below should be affirmed. Appeal dismissed with costs.

Stewart v. The People's National Bank of Charleston.—10th June, 1880.

2. Sale with privilege of taking bill of lading or reweighing at seller's expense.

See SALE OF GOODS 12.

Bills of Exchange and Promissory Notes—Misdirection of jury as to interest on note.

See EVIDENCE 5.

2. **Unstamped bill of exchange—42 Vic. ch. 17 sec. 13—Knowledge—Question for judge.**

The action was brought by T. *et al.* against C. to recover the amount of a bill of exchange. It appeared that the draft when made and when received by T. *et al.* had no stamps; that they knew then that bills and promissory notes required to be stamped, but never gave it a thought, and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection on the 26th February, 1880, and they immediately put on double stamps. The bill was received in evidence, leave being reserved to the defendant to move for a non-suit; the learned judge stating his opinion that though as a fact the plaintiffs knew the bill was not stamped when they received it, and knew that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission in February, 1880.

Held, 1. That the question as to whether the holder of a bill or draft has affixed double stamps upon an unstamped bill or draft so soon as the state of the bill was brought to his knowledge within the terms of 42 Vic. ch. 12 sec. 13, is a question for the judge at the trial and not for the jury. (Gwynne J. dissenting.) 2. That the "knowledge" referred to in the Act is actual knowledge and not imputed or presumed knowledge, and that the evidence in this case showed that T. acquired this knowledge for the first time on the day he affixed stamps for the amount of the double duty, 26th February, 1880. 3. That the want of proper stamping in due time is not a defence which need be pleaded. (Gwynne J. dissenting.)

Chapman v. Tufts.—viii. 543.

3. **Promissory note—Death of endorser—Notice of dishonor—33 Vic. ch. 47 sec. 1 (D).**

The appellants discounted a note made by P. and endorsed by S. in the Bank of Commerce. S. died, leaving the respondent his executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment, and the bank, being unaware of the death of S., addressed notice of protest to S. at Toronto, where the

Bills of Exchange and Promissory Notes—Continued.

note was dated, under 37 Vic. ch. 47 sec. 1 (D). The appellants, who knew of S.'s death before maturity of the note, subsequently took up the note from the bank, and, relying upon the notice of dishonor given by the bank, sued the defendant.

Held, reversing the judgment of the Court of Appeal for Ontario, that the holders of the note sued upon when it matured, not knowing of S.'s death, and having sent him a notice in pursuance of sec. 1, ch. 47, 37 Vic., gave a good and sufficient notice to bind the defendant, and that the notice so given enured to the benefit of the appellants.

Cosgrave v. Boyle.—vi. 165.

4. Bill of exchange for goods in bill of lading.

See BILL OF LADING.

5. **Promissory note overdue in hands of payee—Garnishee clauses C. L. P. Act—Payment into court.**

Held, an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor under the C.L.P. Act, and payment by the garnishee of the amount to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge.

Roblee v. Rankin.—23rd June, 1884.

6. **Bill of exchange—Not stamped by drawer—Affixed by drawee before being discounted—Double duty affixed at trial—Knowledge of law relating to stamps—42 Vic. ch. 17—Plea that defendant did not make draft—Con. Stats. N.B. ch. 37 sec. 83 sub-secs. 4 & 5—Evidence of want of stamp under—Special plea.**

R. remitted by mail to V. a draft on Bay of Fundy Quarrying Co., Boston, Mass., in payment of an account of the company of which R. was superintendent. The draft when received by V. was unstamped, and V. affixed stamps required by the amount of the draft, and initialed them as of the date the draft was drawn, which was at least two days prior to the date on which they were actually affixed. The draft was not paid, and an action was brought against R., who pleaded "that he did not make the draft," according to provisions of Con. Stats. New Brunswick, ch. 37 sec. 83 sub-sec. 4. On the trial the draft was offered in evidence and objected to on the ground that it was not sufficiently stamped, the plaintiff having previously testified as to the manner in which the stamps were put on, and having also sworn that he knew the law relating to stamps at the time. The draft was admitted, subject to leave reserved to defendant to move for a non-suit, and at a later stage of the trial it was again offered with the double duty affixed. The trial resulted in counsel agreeing that a nonsuit should be entered, with leave reserved to plaintiffs to move for verdict, court to have power to draw inferences of fact.

Bills of Exchange and Promissory Notes—Continued.

On motion pursuant to such leave reserved, the Supreme Court of New Brunswick set aside the nonsuit and ordered a verdict to be entered for the plaintiffs on the ground that the defect in the draft of want of stamp should have been specially pleaded. (See 23 N. B. R. 343.)

On appeal to the Supreme Court of Canada—**Held**, 1. Reversing the judgment of the court below, Strong and Gwynne JJ. dissenting, that double duty should have been placed on the note as soon as it came into the hands of the drawee unstamped, and that it was too late at the trial to affix such double duty, the plaintiff having sworn that he knew the law relating to stamps, which precluded the possibility of holding that it was a mere error or mistake.

2. That under the plea that defendant did not make the draft, he was entitled to take advantage of the defect for want of stamps.

Per Strong J.—That the note was sufficiently stamped and plaintiffs were entitled to recover.

Per Gwynne J.—That if the note was not sufficiently stamped the defence should have been specially pleaded.

Appeal allowed with costs.

Roberts v. Vaughan.—23rd June, 1884.

Bills of Sale.

See CHATTEL MORTGAGE.

Bond—Goods in.

See STOPPAGE IN TRANSITU.

2. Action on.

See MORTGAGE 10.

3. Alleged misrepresentation by co-obligor as to effect and purpose of.

See AGREEMENT 11.

Bonds—Collateral security—Revendication.

B., as trustee for H. C. & Co., deposited with D. twelve bonds of the M. C. & S. Ry. Co., as collateral security, to be availed of only subsequent to the failure of the government to pay $10,000 subsidy previously transferred to D., and obtained a receipt from D. that on the subsidy being paid D. would return these bonds to B. The subsidy was paid and B. sued D. to recover back the twelve bonds. H. C. & Co. did not intervene.

Held, that B., being a party personally liable on the bills held by D., which the government subsidy of $10,000 transferred was intended to pay, and having complied with all the conditions mentioned in the receipt entitling him to recover possession of the bonds, was, as against D., the legal owner of the bonds.

Drummond v. Baylis.—11, 61.

Bonds—Continued.

2. Validity of.

See RAILWAYS AND RAILWAY COMPANIES 9.

3. Of Railway Company—Agreement to deliver in payment of construction.

See RAILWAYS AND RAILWAY COMPANIES 19.

Boundary—**Equitable estoppel—Description of land by reference to plan—Construction of deed—Extrinsic evidence of boundaries.**

T. was the owner of lot 9, and C. was the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. T., being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked C. where he claimed his northern boundary was. C. pointed out an old fence, running part of the way across the land between the lots and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out his line, C. not objecting. A few days afterwards T., with his architect and builder, went on the ground, and, in the presence of C., the builder again marked out the boundary by means of a line connecting the surveyor's marks, C. not objecting. Excavating was commenced according to that line immediately, and T.'s house was built according to the line on the extreme verge of T.'s land. The first time that C. raised any objection to the boundary so marked was when the walls of T.'s house were up and ready for the roof and considerable money had been expended in building.

Held, that C. was estopped from disputing that the line run by the surveyor was the true line.

Per Strong J.—When lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description.

In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents, which do not agree with those in the deed.

In 1861, W. D. P., who owned a piece of land bounded on the south by Queen street, on the east by William street, on the west by Dummer street, and running north some distance, laid out the southerly portion into lots depicted upon a plan, which plan showed the boundary line between the plaintiff's and defendant's lots to be exactly 600 feet from Queen street.

Boundary—Continued.

There were no stakes or other marks on the ground to indicate the boundaries of the lots or the extent of the land so laid out. Many years afterwards the remaining land to the north of the parcel so laid out, was laid out into lots so depicted on another plan, and a street was shown between the northerly limit of the first plan and the southerly limit of the second plan. The actual distance, however, of this street from Queen street was greater than the first plan on its face showed it to be, and the parties owning lots on the first plan appeared to have taken up their lots as if Queen street and the street on the north of the first plan were actual limits of the plan.

Per Strong J.—1. The true boundary line between the plaintiff's and defendant's lots was a line commencing at a point 600 feet from Dummer street, as measured on the ground at the time when the plan was made; but in the absence of evidence showing a measurement on the levelled street, that point could not be accepted as the true point of commencement of the boundary in question. 2. Inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots so conveyed.

Grasett v. Carter.—x, 105.

2. **Boundaries—Agreement as to—Whether executed or executory—Plan, signed by adjoining proprietors—Statute of Frauds—Purchaser for value without notice—Discretionary jurisdiction of Court of Equity.**

The plaintiff, by his bill, alleged that in March, 1844, the Crown granted in fee to William Stewart the east part and the S. W. part of lot letter F., and that he went into and remained in possession thereof until his death; that one Kealey was then in possession of the part of lot letter G., immediately adjacent on the south to the land granted to Stewart; that disputes having arisen respecting the true boundary, it was agreed to have it surveyed and defined on the ground by Anthony Swalwell, P. L. S., whose survey was to be the settled and permanent boundary, and who accordingly in September, 1854, made a survey, and prepared a map and plan showing the boundary line; that thereupon, on or about the 20th October, 1854, the said boundary line having been so defined, it was mutually agreed to between the said William Stewart and the said Martin Kealey, and the following memorandum was then written upon the said map or plan, and was signed by them respectively: "We, the undersigned, interested in this survey, agree to it as shown by this plan, as witness our hands;" that thereupon the said parties shifted their occupation, so as to accord with the said line so surveyed by the said Swalwell and so agreed to as aforesaid, and that Kealey afterwards applied for the patent of lot G., which was issued to one Horace Pinhey as trustee for him. The bill went on to state that the survey commenced from the west side of G. at a point then mutually

Boundary—Continued.

agreed upon between Stewart and Kealey and the other persons interested, as the north-west angle of the lot; that Stewart and Kealey then removed to and thence continued in possession of their respective lands as aforesaid, as so separated and defined; that Stewart died in 1856; that the plaintiff, to whom he devised lot F., did not attain his majority until 1870; that in 1862, the defendant obtained possession of a strip of the land in possession of the plaintiff and his father under the agreement, being about 70 feet in width, to the north of the boundary, which had been agreed upon, and refused to restore possession, or to recognize the agreement; that the plaintiff was unable to recover possession at law, inasmuch as the legal title of the plaintiff under the patent would be determined by the mode of survey which prevailed according to the general law; that the defendant had notice of the agreement and the settlement of the boundary; that the true boundary line was difficult to ascertain in 1854, and that the agreement was a compromise and settlement of disputed and doubtful rights. The prayer was that the agreement might be specifically enforced, and the boundary established accordingly, and that the defendant might execute a deed to confirm the strip of land to the plaintiff, and might be ordered to deliver up possession.

The defendant denied that Stewart ever had actual possession of the disputed strip, which he alleged was in a state of nature at the time of his purchase from Kealey; he alleged that he had had the line run by one Sparks, a P. L. S., and had erected an expensive fence along the line and a dwelling house, the whole or greater part of which being on the land claimed by plaintiff; that he had made other valuable improvements; that Kealey was an illiterate man, and if his name was procured to the agreement it was through fraud. He also set up the registry laws, the statute of frauds, laches, that he was a *bonâ fide* purchaser for value without notice, and that the agreement was not one which the court in its discretion would enforce against him.

Spragge C. made a decree in accordance with the plaintiff's contentions. The judgment of the Chancellor is not reported except on a point which arose with reference to the proof of the will of plaintiff's father. (24 Grant 433.)

The Court of Appeal reversed the decree, the judgment of the court being delivered by Moss C.J. He was of opinion, from a review of the whole tenor and scope of the pleading, that the plaintiff was appealing to the discretionary jurisdiction of the court and that the ordinary principles upon which it was administered were applicable. That he had seen no case in which a mere verbal agreement, unattended by acts, had been sufficient

Boundary—Continued.

under the statute of frauds, although it had been held in a number of cases in the courts of the U.S. that where two adjoining proprietors employ a surveyor to define their boundary line, and posession is taken and held in accordance therewith, the objection of the want of a writing shall not be allowed to prevail. That the plaintiff had failed to show anything done on the faith of the agreement, or a change of position in reliance upon the boundary line settled. That the proof of the agreement was not of that clear and unambiguous kind the court requires when asked to exercise its discretionary jurisdiction. That there was no sufficient evidence to countervail the defendant's oath denying that he had actual notice of the alleged agreement, and that it was a case in which specific performance would inflict a grievous hardship upon the defendant without any benefit to the plaintiff which he had a right to expect, and without the plaintiff having any equity which the court was bound to respect.

On appeal to the Supreme Court of Canada, **Held,** that the plaintiff had failed to establish the agreement alleged in his bill, of which he sought specific performance, and upon which he rested his application for the interference in his favor of the equitable jurisdiction which he evoked. That if the plaintiff contended that the evidence established that William Stewart and Kealey agreed upon and adopted as the boundary line between them the line which Swalwell had surveyed, and that for this purpose and to give effect to this agreement they signed the map, and that in pursuance of such agreement and in adoption of this line as the boundary line between them they moved their fences to conform to the agreement and occupied up to such fences until after the death of Stewart when the defendant entered upon the possession then held by the devisee, then the case made, assuming the completion of the agreement and presenting a purely legal claim, and the bill having been filed before the Administration of Justice Act, the Court of Chancery would have no jurisdiction.

Appeal dismissed with costs.

Stewart v. Lees.—10th April, 1880.

Bribery.

See ELECTION.

Bridge—Liability of municipal corporation for defect in.

See CORPORATIONS 19.

2. Powers of bridge company—Impeding navigation.

See NAVIGATION 3.

British North America Act, 1867.

See FISHERIES.

" HARBOR.

British North America Act, 1867—Continued.

See LEGISLATURE.

" PARLIAMENT OF CANADA.

" PETITION OF RIGHT.

Building Society.

See CORPORATIONS 17.

By-Law—Imposing license tax on merchants, traders, &c.

See LICENSE 1.

2. Of city of St. John—Building erected in violation of.

See CONTRACT 4, 20.

3. Municipal, validity of—Grant of bonus to railway company by—Remedy—Action at law—Mandamus—34 Vic. ch. 48 (O.), construction of.

By 18 Vic. ch. 33, the Grand Junction Railway Co. was amalgamated with the Grand Trunk Railway Co. of Canada. The former railway not having been built within the time directed, its charter expired. In May, 1870, an Act was passed by the Dominion Parliament to revive the charter of the Grand Junction Railway Co., but gave it a slightly different name, and made some changes in the charter. After this, in 1870, a by-law to aid the company by $75,000 was introduced into the county council of Peterborough. This by-law was read twice only, and, although in the by-law it was set out and declared that the ratepayers should vote on said proposed by-law on the 16th November, it was on the 23rd November that the ratepayers voted on a by-law to grant a bonus to the appellant company, construction of the road to be commenced before the 1st May, 1872. At the time when the voting took place on the by-law, there was no power in the municipality to grant a bonus. On the 15th February, 1871, the Act 34 Vic. ch. 48 (O.) was passed, which declared the by-law as valid as if it had been read a third time, and that it should be legal and binding on all persons as if it had been passed after the Act. On the same day of the same year ch. 30 was passed, giving power to municipalities to aid railways by granting bonuses. In 1874 the 37 Vic. ch. 43 (O.) was passed, amending and consolidating the Acts relating to the company. In 1871 the company notified the council to send the debentures to the trustees who had been appointed under 34 Vic. ch. 48 (O). In 1872 the council served formal notice on the company, repudiating all liability under the alleged by-law. Work had been commenced in 1872, and time for completion was extended by 39 Vic. ch. 71 (O). No sum for interest or sinking fund had been collected by the corporation of the county of Peterborough, and no demand was made for the debentures until 1879, when the company applied for a mandamus to issue and deliver them to the trustees.

Held, affirming the decision of the court below, that the effect of the statute 34 Vic. ch. 48 (O.), apart from any effect it might have of recognizing

By-law--Continued.

the existence of the railway company, was not to legalize the by-law in favor of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company, and, there being certain other defects in the said by-law not cured by the said statute, the appellants could not recover the bonus from the defendants.

Per Gwynne J., Fournier and Taschereau JJ. concurring.—As the undertaking entered into by the municipal corporation contained in by-law for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in Ontario in which delivery to trustees on behalf of the company can be enforced, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is by an action under the provisions of the statutes in force then regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of *mandamus* which the writ of the *mandamus* obtainable on motion without action still is.

Per Henry J.—That if appellants had made out a right to file a bill to enforce the performance of a contract ratified by the Legislature, they would not have the right to ask for the present writ of *mandamus*.

The Grand Junction Railway Co. v. The Corporation of Peterborough—viii. 76.

4. Municipal—Guaranteeing cost of expropriation—Invalid.
   See RAILWAYS AND RAILWAY COMPANIES 18.

5. Of Synod, altering disposition of commutation fund.
   See COMMUTATION FUND.

6. Of city of Quebec—Imposing license fee on transient traders.
   See LICENSE 7.

Calls—Action for.
See CORPORATIONS 9.

Canada—Culling Timber under license from old Province of—Dispute with New Brunswick—Order in Council of Dominion Government—Petition of Right by Licensee.
See PETITION OF RIGHT 20.

Canada Temperance Act, 1878—Constitutionality of.
See PARLIAMENT OF CANADA 5.

2. Conviction by J. P.—For Selling contrary to provisions of—Removal by *certiorari* into Q. B. Man.—No appeal.
   See JURISDICTION 33.

Canada Temperance Act, 1878—Continued.

3. Case referred by Governor in Council—Notice required by sec. 6—Deposit of in Office of Registrar.

Sec. 6 of the Canada Temperance Act, 1878, provides that the notice required by section 5, to be sent to the Secretary of State of the desire of the signers that the votes of the electors be taken for or against the adoption of the petition must be deposited in the office of the sheriff or registrar of deeds of or in the county for public examination, and evidence of such deposit sent to the Secretary of State, with notice prescribed in section 5. In the case of the county of Perth, the notice was deposited with the registrar of the north riding only. Thereupon a petition was sent to the Government praying that under these circumstances no proclamation under section 7 should be issued by the Governor General in Council. The Governor General in Council thereupon referred the following case to the Supreme Court:—

There are two registrars of deeds for the county of Perth, in the province of Ontario—one for the north riding, with an office at Stratford, and one for the south riding, with an office at St. Mary's. With a notice and petition for bringing the second part of "The Canada Temperance Act, 1878," into force in the said county, there was laid before the Secretary of State evidence that such notice and petition was deposited, for the purpose and time required, in the office of the Registrar of deeds for the North Riding of the said county.

Is that a compliance, in that respect, with the requirements of the sixth section of the said Act?

Ritchie C.J. in giving judgment said, that in such an important matter, involving the right of a certain class of persons, it was important that every provision of the law should be strictly complied with. This, he held, had not been done. The petition might have been deposited either in the sheriff's office or in both the registry offices. He held that the filing in the one registry office was insufficient.

Strong J. said there could be only one construction of the Act, and no argument could be advanced to sustain the validity of the filing. He was only surprised that it had been found necessary to resort to this Court to obtain a decision upon such a question.

The other Judges concurred.

In re Can. Temperance Act, '78, and Co. Perth (20 C.L.J. 375)—28th Oct. '84.

4. Case referred by Governor General in Council—Petition for bringing second part of Act into force—Signatories—Withdrawal of names by.

A certain number of electors of the county of Kent, in the province of Ontario, having signed a notice and petition under the provisions of "The Canada Temperance Act, 1878," bringing into force in the said county of

Canada Temperance Act, 1878—Continued.

the second part of the said Act, and the said notice and petition having been laid before the Secretary of State with evidence of compliance by the petitioners with the formalities prescribed by the Act, but before being submitted to the Governor General in council in the view to the issuing of a proclamation under the 7th sec. of the Act, some of the signatories have laid before the Secretry of State, a petition asking to withdraw their names from the said petition. Have they a right to so withdraw their names?

OPINION—The said signatories to the said petition, signed under the provisions of the said Act for bringing into force in the said county the second part of the said Act, have not, under the circumstances set forth in the said question, the right to withdraw their acknowledged and deliberate signatures, or to have the same withdrawn from the said petition.

In re Canada Temperance Act, 1878, and The County of Kent—12th Nov. 1884.

5. **Canada Temperance Act, sec. 107—Appropriation of penalties for contravention of—31 Vic. ch. 1 sec. 7 sub-sec. 22 (Interpretation Act)—Applicable to Statutes relating to P. E. I.**

Held,—31 Vic. ch. 1 sec. 7 sub sec. 22 (Interpretation Act), does not apply to penalties imposed under the Canada Temperance Act. The second part of such sub-section refers only to appropriation of penalties imposed under the provisions of the first part, relating to the mode of recovering penalties where no such mode is given in the Act contravened, and as section 107 of the Canada Temperance Act provides for the prosecution of offences in the manner directed by the Act relating to the duties of justices of the peace out of session, and for such purposes incorporates the necessary parts of the latter Act in itself, thus providing a mode for the recovery of penalties under the Canada Temperance Act, the sub-section 22 aforesaid has no application.

The penalties imposed by virtue of the provisions of the Canada Temperance Act should therefore go to the Crown, as in cases under the said Act relating to the duties of justices of the peace out of session, which makes no specific appropriation of penalties imposed under it. (Ritchie C. J. dubitante.)

The Interpretation Act, 31 Vic. ch. 1, applies to statutes of the Dominion relating to Prince Edward Island, whether such statutes were passed before or after the admission of the island into the Dominion.

Appeal allowed with costs.

Fitzgerald V. McKinlay—22nd June, 1885.

6. **Justices of the Peace—Conviction—Canada Temperance Act, 1878, sec. 105—Absence—Wrongful arrest—Justification.**

A. and B., justices of the peace for King's county, were sued for issuing a warrant of commitment under which B. (appellant) was imprisoned.

Canada Temperance Act, 1878—Continued.

The facts, as proved at the trial, were as follows: A prosecution under the Canada Temperance Act, 1878, was commenced by two justices, A. and B., and a summons issued. On the return of the summons, on the application of the defendant, A. and B. were served with a subpœna, to give evidence for the defendant on the hearing; whereupon two other justices (the respondents) at the request of A. and B. under the provisions of sec. 105 of the Act, heard the case and convicted the appellant. A. and B., though present in the court room as witnesses, took no part in the proceedings.

The Supreme Court of New Brunswick ordered a non-suit to be entered.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, Henry and Taschereau JJ. dissenting, that, as the conviction was good on its face, until set aside it was a justification for respondents for anything done under it. **Held**, also, that upon the facts disclosed A. and B. were "absent," within the meaning of sec. 105 of the Canada Temperance Act, 1878.

Appeal dismissed with costs.

Byrne v. Arnold.—22nd June, 1885.

7. Scrutiny—Powers of County Judge.

Held, that a judge of the County Court, on holding a scrutiny of votes under the provisions of the Canada Temperance Act, can only determine which side has a majority of the votes polled, by inspection of the ballots, and has no power to enquire into corrupt acts, such as bribery, etc., which might avoid the election (Henry J. dubitante).

Appeal allowed with costs.

Chapman v. Rand (22 C. L. J. 13.)—16th November, 1885.

Candidate.

See ELECTION.

Capias—Affidavit—Art. 798 C. C. P.—Want of reasonable and probable cause—Damages.

S., a debtor resident in Ontario, being on the eve of departure for a trip to Europe, passed through the city of Montreal, and while there refused to make a settlement of an overdue debt with his creditors, McK. *et al.*, who had instituted legal proceedings in Ontario to recover their debt, which proceedings were still pending. McK. *et al.* thereupon caused him to be arrested, and S. paid the debt. Subsequently S. claimed damages from McK. *et al.* for the malicious issue and execution of the writ of *capias*. McK. *et al.*, the respondents, on appeal, relied on a plea of justification, alleging that when they arrested the appellant they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent McK., one of the defendants, for his belief that the appellant was about to leave the Province of Canada were as follows:—"That Mr. P., the deponent's partner,

Capias—Continued.

was informed last night in Toronto by one H., a broker, that the said W. J. S. was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and defendant was himself informed, this day, by J. R., broker, of the said W. J. S.'s departure for Europe and other places." The appellant S. was carrying on business as wholesale grocer at Toronto, and was leaving with his son for the Paris Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew that he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud. There was also evidence given by McK., that after the issue of the *capias*, but before its execution, the deponent asked plaintiff for the payment of what was due him, and that plaintiff answered him "that S. would not pay him, that he might get his money the best way he could."

Held, that the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving with intent to defraud his creditors; and that the evidence showed the respondent had no reasonable and probable cause for issuing the writ of *capias* in question.

Shaw v. McKenzie.--vi, 181.

Carriers—Liability of railway company as.

See RAILWAYS AND RAILWAY COMPANIES 6.

2. Crown not liable as a common carrier.

See PETITION OF RIGHT 10, 11.

Certiorari—Writ of.

See PRACTICE.

" HABEAS CORPUS 3.

Certificate of Engineer—When necessary as condition precedent to recovery for extra work.

See PETITION OF RIGHT 1, 2, 8.

2. Condition precedent to issue of bonds.

See RAILWAYS AND RAILWAY COMPANIES 9.

3. Whether a progress or final estimate.

See CONTRACT 9.

Cestui Que Trust.

See SALE OF LANDS 5.

Chancery, Court of.

See COURT OF CHANCERY.

Charter Party.

See SHIPS AND SHIPPING 4, 8.

Charitable Trust—Grant to Township of Land for School—Charitable Trust—Acceptance of by Trustees—Discretion of Trustees—Doctrine of Cy pres.

By the patent or grant of the township of Cornwallis, in King's county N. S., made in 1761, four hundred acres of land were declared to be "for the school." By a subsequent grant from the Crown in 1790, the said four hundred acres were declared to be vested in the rector and wardens by name of the church of St. John in the said township, and the rector and wardens of the said church for the time being, in special trust, to and for the use of one or more school or schools, as may be deemed necessary by the said trustees, for the conveniency and benefit of all the inhabitants of the said township of Cornwallis, and in trust that all schools in said township furnished or supplied with masters qualified, agreeable to the laws of this province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof, shall receive and instruct free of expense, such poor children as may be sent them by the said trustees. There were no words in the last mentioned grant which would make the estate thereby conveyed an estate of inheritance. The grantees took possession of the land mentioned in said grant, and they and their successors in office have ever since remained in possession of it; and until the year 1873, the rents and profits arising from such land, were distributed among the schools of said township, and poor children sent by the trustees to, and educated in said schools according to the terms of the trust.

In 1873, however, the then trustees discontinued such distribution, and allowed the funds realized from said lands to accumulate, the reason alleged therefor being, that the schools of the township had become so numerous that the sum apportioned to each would be too small to be of use, and also that under the free school system all the poor children of the township were educated free of expense, and the object for which such funds had previously been supplied no longer existed.

The present defendants were invested with the said trust in 1879, when the revenue of the said lands had accumulated until they amounted to over $1,200. Shortly after they became such trustees it was determined to build a school house in a certain district in the said township with the money. A meeting of the vestry of the church was held, and a resolution passed authorizing such schoolhouse to be built on land leased from the church. The school was to be non-sectarian, but after school hours any of the children that wished could receive instruction in the doctrines of the church of England.

Charitable Trust—Continued.

On a suit to restrain the defendants from using the trust funds to build such schoolhouse, and praying for an account, **Held**, reversing the judgment of the Supreme Court of Nova Scotia, and restoring that of the court of first instance, that the trustees had no discretion as to the application of the trust funds, but were bound to distribute them among all the schools of the township, which would be entitled to participate under the terms of the trust, however wanting in utility such a disposition of said funds might be.

Held, also, that notwithstanding the absence of words of inheritance in the grant, it was sufficient for the purpose of this suit that the defendants had acted as trustees.

Held, also, that the attorney general of the province was the proper person to bring this suit.

Per Strong J.—Under the doctrine of cy pres, a reference might be made to the master, to report a scheme for the future administration of the charity.

Appeal allowed with costs.

Attorney General v. Axford—12th May, 1885.

Chattel Mortgage—**Passing after acquired property—Partus sequitur ventrem—Novus actus interveniens—Trover against sheriff.**

The plaintiffs were the grantees and one Hackett the grantor in a bill of sale, by way of mortgage, which conveyed among other property a certain mare. In the mortgage there was a proviso that until default Hackett might remain in possession of all the property mortgaged, but with full power to the plaintiffs, in default of payment, to take possession and dispose of the property as they should see fit. After default in payment of principal and interest the mare dropped a foal. This foal, together with a horse, also in possession of Hackett, were seized by defendant (sheriff) under an execution against Hackett.

On appeal from the Supreme Court of New Brunswick (see 4 Pugs. & Bur. 246) **Held**, that the foal, having been dropped while plaintiffs were owners and entitled to possession of the mare, was their property—*partus sequitur ventrem.*

Appeal dismissed with costs.

Temple v. Nicholson.—3rd March, 1881.

2. Rights of the Crown as against mortgagee for slidage dues.

See PETITION OF RIGHT 18.

3. **Security for after acquired property—Agreement not to register—Assignment in trust by mortgagor—Legal title of trustee in goods mortgaged—Equitable title of mortgagee—Priority.**

In May, 1880, the defendant Davidson, being indebted to the plaintiffs in the sum of $8,000, gave them a chattel mortgage on all his stock in trade,

Chattel Mortgage—Continued.

chattels and effects then being in the store of the said defendant, Davidson, on Granville street, in the city of Halifax; and by the said mortgage the said defendant further agreed to convey to the plaintiffs all stock which during the continuance of the said indebtedness he might purchase for the purpose of substituting in place of stock then owned by him in connection with his said business. These goods were never so conveyed to the plaintiffs. By the terms of the mortgage the debt due to the plaintiffs was to be paid in three years, in twelve equal instalments at specified times, and if any instalment should be unpaid for fifteen days after becoming due, the whole amount then due the plaintiffs would become immediately payable, and they could take possession of and sell the said mortgaged goods. It was further agreed between the said defendant and the plaintiffs that to save the business credit of Davidson the said mortgage was not to be filed and was to be kept secret; and it was not filed until Dec. 12th, 1881. On the 13th Dec., 1881, Davidson made an assignment of all his property, real and personal, to the defendant Forsyth in trust for the benefit of his (Davidson's) creditors, and such trust deed was executed by Davidson, Forsyth, and one of Davidson's creditors, and subsequently by a number of other creditors. At the time of the execution of this deed Forsyth had no notice of the mortgage to the plaintiffs. Forsyth took possession of the goods in the store on Granville street and refused to deliver them to the plaintiffs, who demanded them on December 14th, default having been made in the payments under the mortgage, and the plaintiffs brought this suit for the recovery of the goods and an account. Previous to the suit being commenced the defendant Forsyth delivered to the plaintiffs a small portion of the goods in the store, which, as he alleged, were all that remained from the stock on the premises in May, 1880.

Held, affirming the judgment of the Supreme Court of Nova Scotia, Strong J. dissenting, that the legal title to the property vested in the defendant must prevail, the plaintiffs' title being merely equitable and the equities between the parties being equal.

Per Ritchie C.J.—While the arrangement not to register the deed and keeping the same secret, thereby enabling Davidson to obtain credit as the ostensible owner of the stock in the ordinary course of business, and with the stipulation that he should convey all goods subsequently purchased on the strength of such credit to the plaintiffs, was a transaction, to say the least of it, of a most questionable character, it cannot be disputed under the evidence that the deed of the 13th December was a *bonâ fide* transaction on the part of Forsyth, Fordham, and the other creditors of Davidson, without notice of the existence of the mortgage, or any notice whatever of any claim on the part of the plaintiffs thereunder.

Chattel Mortgage—Continued.

The question raised is not between plaintiffs and Davidson, but between plaintiffs and Forsyth as trustee, and Fordham and the other creditors of Davidson, and, in fact, a simple question as to which shall have priority, the creditors under the mortgage, or the creditors under the assignment to Forsyth. By the mere agreement of the deed of the 8th May, 1880, to convey all stock Davidson might purchase, no property or title in any such goods passed to plaintiff. But by the deed of the 13th December, 1881, the title and the property in these goods, then in the possession of Davidson, vested absolutely in Forsyth, and Fordham, a creditor, being a party to the deed, the relation of trustee and *cestui que trust* was established between Forsyth and Fordham and the other creditors of Davidson, whereby Fordham and the other creditors obtained a beneficial interest under it. As soon as Fordham signed the deed, Forsyth ceased to be a mere mandatory of Davidson, but an onerous trust was imposed on him creating a duty to the creditors which he could not cast off. This relation being established, it was a consideration for the deed, which was no longer voluntary. (*Harland* v. *Binks*, 15 Q. B. 718.) Therefore the plaintiff, having only an equitable title and the defendant a legal title without notice, the legal title must prevail. The case is governed in principle by *Joseph* v. *Lyons*, 33 W. R. 146. See also *Hallas* v. *Robinson*, 32 W. R. 426.

Per Henry J.—There would be no difficulty in arriving at the conclusion that McAllister ought not to profit by an arrangement intended obviously for his own benefit, to enable Davidson by false pretences to obtain further credit from parties outside. The second bill of sale was one which the statute of Nova Scotia was intended to prevent. But the law in relation to the transaction was properly laid down by the Chief Justice and sustained by the case he referred to.

Appeal dismissed with costs.

McAllister v. Forsyth.—12th May, 1885.

4. **Insufficient description of goods—Cons. Stats. Man. ch. 49 sec. 5.**

One Louisa Black was indebted to the plaintiff in the sum of $4,000, or thereabouts, and to secure the debt gave the plaintiffs a chattel mortgage on her stock in trade. In such mortgage the goods were described as "all and singular the goods, chattels, furniture, and household stuff hereinafter particularly mentioned and described, and particularly mentioned and described in the schedule hereupto annexed marked A, all of which goods and chattels are now situate and lying on the premises situate in a building on the east side of Main street in the city of Winnipeg on the Grace Church property, and now being occupied by the said Louisa Black as a millinery store and dwelling, which said building may be more particularly known as number two hundred and ninety-one (291) Main street, in the said city of Winnipeg."

Chattel Mortgage—Continued.

The schedule was merely a list of the various articles, as so many yards of ribbon, or cloth, with the price opposite each item. In many instances articles were mentioned with figures before them and figures after them, so that only a person acquainted with the character of the goods could tell any thing about the quantities. The defendants were also creditors of the said Louisa Black and having obtained judgment on their respective debts, issued executions under which the sheriff seized the goods on the said premises, No. 291, Main street. The plaintiffs claimed that the goods seized belonged to them under the said chattel mortgage and the title to them was tried before the Chief Justice of the Court of Queen's Bench of Manitoba, in chambers, when judgment was given for the defendants, the Chief Justice holding the chattel mortgage void, both under the statute of Eliz., and under ch. 49 of the Consolidated Statutes of Manitoba. The Court of Queen's Bench refused to set this judgment aside.

On appeal to the Supreme Court of Canada it was **Held**, affirming the judgment of the court below, Strong and Henry JJ. dissenting, that the description of the goods was not such that they might be readily and easily distinguished, and the mortgage was therefore void against the execution creditors.

Per Ritchie C.J.—The learned Chief Justice who heard this matter in the first instance, and the full Court on motion to set aside the decision of the Chief Justice, concurred in the holding that the description of the goods, with the exception of a very few insignificant items, does not contain the sufficient and full description of the goods that they may be easily and readily distinguished, and on that account is void. If it were necessary to distinguish the items which comply with that section, they would be found few in number and insignificant in value, and therefore they held the chattel mortgage void. By the 49 Con. Stats. Man. 1880, sec. 5, "All the instruments "mentioned in this Act, whether for the sale or mortgage of goods and "chattels, shall contain such sufficient and full description thereof that the "same may be thereby readily and easily known and distinguished."

If from the description given the articles cannot be readily and easily known and distinguished, it is clear the statute has not been complied with. I do not think the Legislature intended to confine this description to the parties by whom it was prepared as between themselves alone, but the description was to enable the property to be identified as against third parties, creditors or others, claiming an interest in the property; this need not be such a description as that with the deed in hand without other enquiry the property could be identified, but there must, in my opinion, be such material on the face of the mortgage as would indicate how the pro-

Chattel Mortgage—Continued.

perty may be identified if proper inquiries are instituted; as, for instance, "all the property now in a certain shop, etc."

Is the property then, in this case, described with sufficient certainty to enable it to be distinguished and identified?

It may have been the intention to convey all the goods in the store, but the mortgage does not say so, nor is there any evidence to show the goods named in the schedule were the only goods of that description in the store, or what were the exact goods in the store.

If we take the largest items in the schedule I can discover nothing in the description to guide any one in knowing or distinguishing them.

When we come to examine the evidence in the case the insufficiency of the description would seem to be made very apparent.

Dorritt, the agent for the claimants, who obtained the mortgage says: "Item one (of chattel mortgage) means 22 doz. Spanish net, means 22 doz. yards Spanish net; the price shows it is per dozen yards; the next item, 20 Spanish net, 40 $8; this means 20 yards Spanish net; I know by the price this means yards, and not dozen yards; it would require a knowledge of business to understand the quantities and qualities of the articles; item 3 is 37 Spanish net, 65 (in the column of price), means 37 yards of Spanish net at 65c. per yard; the schedule is such as would be sufficient to a business man having a knowledge of that description of goods; it would be difficult to a person not having that knowledge; the mortgagor would show it and the mortgagees would show it; I think Mr. White would understand it; but one not understanding that line, it might be difficult for such a person to understand it; it was prepared by my going to the place and taking notes of the stock; I got some of the prices from Mrs. Black; the annexed list is in my writing; Mrs. Black assisted me as to prices, the prices in wholesale; I got that list without her concurrence, and the prices she gave me on my asking for them."

And again on cross examination: "I made the lists from mem. I had taken in Mrs. Black's store from time to time; I did not measure any of the pieces in the store, and no one else did for the purposes of this schedule; the lengths I got from looking at the ends; they generally run from 9 to 18 yards to the end; I counted the ends by my eye; I ran my eye over the lot in my mind; ribbons not all taken at one time; I may have counted in some twice or may have left out some pieces; the quantities are estimates not measurements, and number of yards also and quantity may be more or less; I did'nt think I was a great deal out in my estimate; the prices were put down when I was in the store; I put them down in the warehouse, the retail prices in figures, and the cost

Chattel Mortgage—Continued.

in characters, and the reverse sometimes; I don't know how the ribbons were marked. The first item on page three—22 Spanish net, means 22 yards, not 22 dozen yards."

Mr. White referred to by this witness is called and he says: H. D. White, wholesale milliner for eleven years.

"Looks at description of the gooda in chattel mortgage; it does not contain such sufficient and full description of the goods that the same may be thereby readily known and distinguished. He looks at the mortgage—first item, 250 yards ribbon, 10c. $25; cannot tell what color or quantity, or quality; the quality and width affect the price, color does not; the price per yard, would not show the width, quality or quantity (or color): ribbons have their individual number, a number which indicates its width, and by its color is plain; this is the general character of all the items on page one; only two lines in writing the articles, of which there are 30, must be ascertained by evidence outside the bill of sale; first item on page three, this might mean 22 yards or 22 dozen yards; there are some Spanish nets at the price of $2.75 per yard, and also $2.75 per dozen yards, owing to width and quality; 7 on page two; I know what tissue is; I could not pick out the tissue in the store from the description given; on page two, the last item, this might be yards, it is a matter of jndgment from prices, the quantity would be too large for pieces; it is set down at 50, and may be yards or pieces, I should think yards from the nature of her business; the articles should be numbered; this applies to all the articles described in the schedules excepting some on the last page; the last few items are not in my line, being show case, mirror, fixtures and carpet, shop fixtures and stands; the schednle generally is wanting in information; that the description does not give such description by which they can be easily known, they could not be picked out in a store."

Cross examined—"I understand the blank lines on the first page to indicate goods of the same character in the written words above them; this does not show what kind, quality or colour, and the first six lines on the second page, and four lines on the third page, under the word "crimp," that means crimp crape; the item on the third page 8 (blank) under "braided dresses." I don't think that means "eight black braided dresses," for the reason that Mrs. Black's business would not enable her to keep those 8 and 2 (10) on hand; also from my knowledge of her stock; I saw coloured braided dresses there, I think the schedule means them; the dresses are not braided, it is the trimmings; three blank lines more underlines; I can tell whether coloured black or white; I don't know the quantity in that store on fourth page, and on all the other places three blank lines generally, they would

Chattel Mortgage—Continued.

indicate similar articles to the one named above. On page two, 85 plush and satin, I would knowing the business know it meant yards, but a stranger would not; the place where yards is written is of assistance to me in interpreting its meaning. On page three, item of cream silk, wht. snow flake and spt. nets, $300—too indefinite to distinguish them. 120 yards gossamer silk of no other than I did tell it, but not of more than 120 yards would put to eight or ten pieces; birds ornaments, twenty birds, $225, that may mean birds from 20c. to $10 each; each stand bore its own box, is numbered, and each has its own number, $225."

This is all the evidence that bears on the description of the goods, and I cannot under this evidence say the judges in the court below were wrong in holding that there had not been a compliance with sec. 5 ch. 49 of the Cons. Stats. Manitoba. As between the parties, difficulty may not be likely to arise, but the statute is to protect creditors and subsequent purchasers from uncertainty in regard to identity. If, so, how can it be said that the description in this schedule, if, as to many of the articles, a description it can be called, was sufficient and full, that the articles proposed to be conveyed could thereby be readily and easily distinguished. The statute is a wise one and should be so construed as to make it effectual.

Fournier, Taschereau and Gwynne JJ. concurred. Strong and Henry JJ. dissented.

Appeal dismissed with costs.

McCall v. Wolff.—12th May, 1885.

5. Mortgage given by Insolvent Company—Preference.

See FRAUDULENT PREFERENCE 4.

6. Condition against Assignment in Policy of Insurance—Chattel Mortgage not a breach of.

See INSURANCE, FIRE 16.

Church—St. Andrews Church, Montreal.

See PEWHOLDER 1.

2. Defendant sued as Trustee of Property belonging to—Denial of quality.

See PETITORY ACTION.

3. Church rates—Action for, P. Q.—Amount under $2,000—Not appealable.

See JURISDICTION 40.

Circuit Court, P.Q.——When case has originated in, no appeal lies to Supreme Court.

See JURISDICTION 26.

Code of Procedure, Lower Canada—Continued.

See JURISDICTION 35. (Art. 1120.)
" LEASE. (Art. 19.)
" NOTICE 8. (Gen. provns. 1st pt., sec. 22.)
" OPPOSITION. (Art. 632.)
" " 2. (Arts. 483, 484, 505.)
" PETITION OF RIGHT 3. (Arts. 116, 473.)
" SHERIFF. (Art. 638)—(Art. 581.)
" " 7. (Arts. 688, 691, 694, 760.)
" SUBSTITUTION 3. (Art. 154.)

Collision.

See RAILWAYS AND RAILWAY COMPANIES 2.

2. With anchor of vessel—Damages.

See MARITIME COURT OF ONTARIO 2.

3. Between tug towing raft and tug at anchor in Detroit River.

See MARITIME COURT OF ONTARIO 4.

Colorable Employment.

See ELECTION.

Combination.

See PATENT OF INVENTION 1.

Commission—Contract to sell on.

See CONTRACT 10.

2. To examine witnesses.

See INTERROGATORIES 2.

3. Of real estate agents selling lands.

See SALE OF LANDS 12.

Commissioner—Of sewers—Under R.S.N.S. ch. 40.

See TRESPASS 10.

Common Carrier—Crown not a.

See PETITION OF RIGHT 10, 11.

Community—**Assets of first and second community—Transfer of arrears of life-rent by wife to the grandson of her second husband, validity of—Edit de secondes noces, 1560—Arts. 279, 282 and 283, Custom of Paris, and Arts. 1760, 1265 and 774 C. C. (P. Q.)—Costs—Error of date in deed of transfer.**

On the 17th February, 1841, C. and wife acknowledged by deed that they were indebted to one S. N., widow of one P., in a sum of $140, due to her late husband. On the same day C. and wife, the son-in-law and daughter of S. N. and P., also acknowledged to be indebted to S. N. in an annual life-rent, in consideration of certain real estate given to them previously by the late P. and S. N., by deed of gift, 16th February, 1830. On 19th February, 1841, the

Community—Continued.

widow, S. N., married one J. B. L. On the 21st January, 1870, J. B. L. and his wife, S. N., transferred to P. L., the grandson of J. B. L., all the arrears of life-rent due them by C. and his wife as well as the sum of $140, being the amount of the obligation.

In an action brought by P. L. against C. and his wife, to recover £1,325 for 26 years of said life-rent, and £35 for the amount of the obligation of the 17th February, 1841;

Held,—1. Affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), that the arrears of the life-rent which accrued during the second marriage of S. N. belonged to the community which existed between her and her second husband, J. B. L., and that the husband as head of the community could legally dispose of his share in the community, viz., one half of said arrears, in favor of his grandson, P. L., but the transfer as to the other half belonging to his wife, S. N., was null, as by law S. N. could not tranfer to any of her husband's descendants, who, in such a case, are by law considered as persons interposed to secure directly to the husband a benefit which cannot be conferred upon him directly.—Art. 774, C. C. (P. Q.)

2. Reversing the judgment of the court *a quo*, that although the sum of $140 formed part of the movables belonging to the first community, yet the half of said sum belonging to S. N. at the time of her second marriage formed part of the second community, and her husband, J. B. L., could legally dispose of his share in said sum, viz., $35 in favor of his grandson, the transfer of the balance, viz. $105, being null and void.

In this case both parties appealed to the Supreme Court, the respondent, A. M. *et ux.* having succeeded in getting the judgment of the court *a quo* reversed on the second point and confirmed on the first point, were allowed costs of a cross appeal.

In plaintiff's declaration it was alleged that the arrears of rent transferred to him and which he claimed from defendants, were due in virtue of a life-rent constituted by a deed of cession, dated 16th February, 1828, and in the Superior Court, after argument, a motion was made by plaintiff to discharge the *délibéré* inasmuch as it was discovered at the argument that a clerical error of a serious nature to the interests of the present plaintiff had inadvertently crept into one of the authentic documents invoked by the plaintiff in support of his action, such error being as to the date of a certain donation upon which the action is mainly based; and inasmuch as such clerical error could most easily be remedied by referring to the minute of the notary who passed the deed or otherwise, this motion was granted, and a second motion was made by the plaintiff *en reprise d'instance*, praying to be allowed to amend the declaration by adding under count No. 10 in the declaration the following, to wit: "That the date of the constitution of the rent

Community—Continued.

above mentioned was erroneously mentioned in the deed of transfer above related as being made by and in virtue of the contract of marriage of the said A. C., dated the 7th February, 1828.

"That the said constituted rent is made by a deed of the 16th February, 1830, as it appears from an authentic copy of said deed forming part of exhibit number one of the plaintiff in this cause, and that the intention of the parties to the said deed of transfer at the time of the execution thereof was to transfer the arrears of rent constituted by the said defendant on the 16th February, 1830. The said rent being the only one due by the said A. C. to the said S. N."

Held, affirming the judgment of the courts below, that the error in the transfer, as to the date of the deed under which the life-rent was due, was a mere clerical error. There was no other life-rent to which the transfer could apply but the one in question. The claim was sufficiently identified by the description of the deeds and the date of their registration, under the special allegations of the plaintiff and the evidence which he has adduced.

Pilon v. Brunet—V, 318.

Commutation Fund—**Member of Synod—Trust, construction of—Vested rights—Commutation fund—By-Law.**

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society of the Diocese of Huron, upon trust to pay to the commuting clergy their stipends for life, and when such payment should cease then "for the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time be declared by any by-law or by-laws of the Synod to be from time to time passed for that purpose." In 1860, a by-law was passed providing that out of the surplus of the commutation fund clergymen of eight years and upwards active service should receive each $200, with a provision for increase in certain events. In 1873, the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors of the Church Society) repealed all previous by-laws respecting the fund, and made a different appropriation of it.

Held, affirming the judgment of the Court of Appeal for Ontario, Fournier and Henry JJ. dissenting, that under the terms of the trust there was no contract between the plaintiff and defendants; the trustees had power, from time to time, to pass by-laws regulating the fund in question and msking a different appropriation of it, for the support and maintenance of the clergy of the diocese, and the plaintiff must be assumed to have accepted his stipend with that knowledge and on that condition. (See case as reported in 29 Grant 348 and 9 Ont. App. R. 411).

Wright v. Incorporated Synod of the Diocese of Huron—xi. 95.

Companies' Act, 1862 (Imp.)—Order making calls against past member—Action—Declaration, form of—Demurrer.

See CORPORATIONS 15.

Company.

See BENEFIT SOCIETY.

" CORPORATIONS.

" RAILWAY AND RAILWAY COMPANIES.

Compromise—Deed of—Action to set aside for fraud and coercion.

See PARTITION.

Condition Precedent.

See CONTRACT 8.

" INSURANCE, MARINE 3.

" PETITION OF RIGHT 1, 2, 8, 16.

" RAILWAYS AND RAILWAY COMPANIES 9.

" SALE OF LANDS 2.

Consignment—Of Goods—Payment—Property.

See SALE OF GOODS 7.

Conspiracy—Between Deputy Returning Officer and Candidate's agent to interfere with franchise by marking ballots.

See ELECTION 21.

Contempt—Power of Provincial Legislature to punish for.

See LEGISLATURE 9.

Contract—**Terms of delivery—Reasonable time—Damages—Arts. 1067, 1073, 1544, C. C. L. C.**

On the 7th May, 1874, the appellant sold to the respondent five hundred tons of hay. The writing, which was signed by the appellant alone, is in following terms: "Sold to G. A. C. five hundred tons of timothy hay of best quality, at the price of $21 per ton f. o. b. propellers in canal, Montreal, at such times and in such quantities as the said G. A. C. shall order. The said hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot by order or draft on self, at Bank of Montreal, the same to be consigned to order of Dominion Bank, Toronto."

In execution of this contract, the appellant delivered one hundred and forty-seven tons and thirty-three pounds of hay, after which the respondent refused to receive any more. The appellant having several times notified the respondent, both verbally and in writing, by formal protest on the 28th July, 1874, requested him to take delivery of the remaining354 tons of hay.

On the 11th November following, the appellant brought an action of damages for breach of contract, by which he claimed $3,417.77, to wit, $2,471

Contract—Continued.

difference between the actual value of the hay at the date of the protest and the contract price, and $943.77 for extra expenses which the appellant incurred, owing to the refusal of the respondent to fulfil his contract.

Held, that such a contract was to be executed within a reasonable time, and that, from the evidence of the usages of trade, the delivery, under the circumstances, was to be made before the new crop of hay, and that the respondent, being in default to receive the hay when required, was bound to pay the damages which the appellant had sustained, to wit, the difference at the place of delivery between the value when the acceptance was refused and the contract, and other necessary expenses, the amount of which, being a matter of evidence, is properly within the province of the court below to determine.

Chapman v. Larin.—iv, 349.

2. **Construction of—Accord and satisfaction.**

Appellant, part owner of a vessel, brought an action against respondents, merchants and ship-brokers in England, alleging in his declaration that while he had entire charge of said vessel as ship's husband, they, being his agents, refused to obey and follow his directions in regard to said vessel, and committed a breach of an agreement by which they undertook not to charter nor send the vessel on any voyage, except as ordered by appellant, or with his consent.

On the trial it appeared that E. V., a brother of respondents, had obtained from appellant a fourth share in the vessel, the purchase being effected by one of the respondents; and it was also shown that the agreement between the parties was as alleged in the declaration. On the arrival of the vessel at Liverpool, respondents went to a large expense in coppering her, contrary to directions, and sent her on a voyage to Liverpool, of which appellant disapproved. Appellant wrote to rospondents, complaining of their conduct and protesting against the expense incurred. They replied, that appellant could have no cause of complaint against them in their management of the vessel, and alleged they would not have purchased a fourth interest in the vessel, if they had not understood that they were to have the management and control of the vessel when on the other side of the Atlantic. A correspondence ensued, and finally, on the 17th November, 1869, appellant wrote to them, referring to the fact that respondents complained of the "eternal bickerings," and that it was not their fault. He then reasserted his right to control the vessel, stated, in detail, his grounds of complaint against them, and closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for $4,200 in cash." This amount was about the same price for the share as appellant had sold it

Contract—Continued.

for some years before. Respondents accepted the offer, and the transfer was made to appellant.

Held, on appeal, reversing the judgment of the Supreme Court of New Brunswick, that the expression "to end the matter" should be construed as applying to the bickerings referred to, and there had not been an accord and satisfaction.

The contract having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name.

Weldon v. Vaughan, v.—35.

3. To take shares.

See CORPORATIONS 9.

4. **Negligence of contractor—41 Vic. chs. 6 and 7 (N.B.)—By-law of city of St. John, Building erected in violation of—Negligence of Contractor—Liability of Employer—Several defendants appearing by same attorney—Separate counsel at trial—Cross-appeal—Rent, loss of—Damages.**

On the 26th September, 1877, S. contracted to erect a proper and legal building for W. on his (W.'s) land, in the city of St. John. Two days after, a by-law of the city of St. John, under the Act of the Legislature, 41 Vic. ch. 6, "The St. John Building Act, 1877," was passed, prohibiting the erection of buildings such as the one contracted for, and declaring them to be nuisances. By his contract, W. reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail or execution of the work without avoiding the contract, &c., &c. By the contract it was also declared that W. had engaged B. as superintendent of the erection—his duty being to enforce the conditions of the contract, furnish drawings, &c., make estimates of the amount due, and issue certificate. While W.'s building was in course of erection, the centre wall, having been built on an insufficient foundation, fell, carrying with it the party wall common to W. and McM., his neighbour.

On an action by McM. against W. and S. to recover damages for the injury thus sustained, the jury found a verdict for the plaintiff for general damages, $3,952, and $1,375 for loss of rent. This latter amount was found separately, in order that the court might reduce it, if not recoverable.

On motion to the Supreme Court of New Brunswick for a non-suit or new trial, the verdict was allowed to stand for $3,952, the amount of the general damages found by the jury.

On appeal to the Supreme Court and cross-appeal by respondents to have verdict stand for the full amount awarded by the jury, **Held**, Gwynne J. dissenting, that at the time of the injury complained of, the contract for the erection of W.'s building being in contravention of the provisions of a

Contract—Continued.

valid by-law of the city of St. John, the defendant W., his contractors and his agent (S.) were all equally responsible for the consequences of the improper building of the illegal wall which caused the injury to McM. charged in the declaration. That the jury, in the absence of any evidence to the contrary, could adopt the actual loss of rent as a fair criterion by which to establish the actual amount of the damage sustained, and therefore the verdict should stand for the full amount claimed and awarded.

Per Gwynne J. dissenting.—That W. was not, by the terms of the contract, liable for the injury, and, even if the by-law did make the building a nuisance, the plaintiff could not, under the pleadings in the case, have the benefit of it.

The defendants appeared by the same attorney, pleaded jointly by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of plaintiff's witness, both counsel claimed the right to cross-examine the witness.

Held, affirming the ruling of the judge at the trial, that the judge was right in allowing only one counsel to cross-examine the witness.

Walker v. McMillan.—vi. 241.

5. **Sale of goods—Payment—Appropriation—Non-suit.**

The Albert Mining Company (respondent) brought this action to recover for coal sold and delivered to appellants during the years 1866, 1867 and 1868. S. and M. and McG. were partners carrying on business under the name of the Albertine Oil Company, the defendant S. furnishing the capital. The contract for the coal was made by S. who was a large stockholder in the plaintiff company and entitled to yearly dividends on his stock. The agreement, as proved by plaintiffs, was that S. purchased the coal for the Albertine Oil Company, the members of which he named, that the president of the plaintiff company told S. they would look to him for payment, as the other partners were poor; that the terms of sale were cash on delivery on board the vessels; and that S. agreed that the dividends payable to him on his stock should be applied in payment for the coal; that in consequence of this arrangement the plaintiffs credited the Albertine Oil Company with the amount of S.'s dividends as they were declared from time to time down to August, 1860, leaving a balance of $912 due to S. It also appeared that the coal delivered was charged in the plaintiffs' books to the Albertine Oil Company, and that the bills of lading on the shipments of the coal were also made out in their name, and that some time afterwards a notice signed by S. and M. was given to the plaintiffs, complaining of the inferior quality of the coal, and claiming damages in consequence. In the latter part of the year 1868, S. repudiated the agreement to appropriate his dividends to the pay-

Contract—Continued.

ment of coal, and refused to sign the receipts therefor in the plaintiffs' books. He had signed the receipt for the dividend of 1866.

The present action was then brought (in 1873) against S. and M., the surviving partners of the Albertine Oil Company, McG. having died, to recover the value of the coal. S. shortly afterwards brought an action against the plaintiffs for the dividends; the claim was referred to arbitration and an award was made in favor of S. for upwards of $15,000, which the plaintiffs paid in July, 1874. The receipt given for the payment stated that it was in full satisfaction of the judgment in the suit of S. against the Albert Mining Company, and it appeared (though evidence of this was objected to in the present action) that it included the dividends for the years 1867 and 1868.

The learned judge before whom the action was tried non-suited the plaintiffs, but the Supreme Court of Nova Scotia set aside the non-suit.

Held, reversing the judgment of the court below, Strong J. dissenting, that there being clear evidence of the appropriation of S.'s dividends in pursuance of agreement made with him, and therefore of the plaintiffs having been paid for the coal in the manner and on the terms agreed on, the plaintiffs were properly non-suited.

Spurr v. The Albert Mining Co.—ix. 35.

6. **Contract—Breach of—Master and owner—Damages, measure of.**

This action was brought by G. against A. F. S. S. Co. to recover damages for an alleged breach of contract. The plaintiff was master of the ss. "George Shattuck," trading between Halifax and St. Pierre and other ports in the Dominion. She was owned by defendant company, the plaintiff being one of the largest shareholders of the company. Plaintiff's contract was that he was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for $900 a month, afterwards increased to $950. The ship had been originally accustomed to remain at St. Pierre forty-eight hours, but the time was afterwards lengthened to sixty hours by the company, yet the plaintiff insisted on remaining only forty-eight hours, against the express directions of the company's agents at St Pierre, and was otherwise disobedient to the agents, in consequence of which he was, on the 22nd May, without prior notice, dismissed from the service of the company. The case was tried before Sir William Young C.J., without a jury, who, considering that the plaintiff was not a master in the ordinary sense, held that he had been wrongfully dismissed and found a verdict in his favor for $2,000. A rule *nisi* was made absolute by the full court for a new trial.

On appeal to the Supreme Court of Canada it was **Held**, 1st. That even if the dismissal had been wrongful, the damages were excessive, and the case should go back for a new trial on this ground. 2nd. Per Ritchie C.J. and Fournier and Gwynne JJ., that the fact of the master being a shareholder

Contract—Continued.

in the corporation owning the vessel, had no bearing on the case, and that it was proper to grant a new trial to have the question as to whether the plaintiff so acted as to justify his dismissal by the owners submitted to a jury, or a judge, if case be tried without a jury.

Guilford v. Anglo-French SS. Company.—ix. 303.

7. Of towage.

See SHIPS AND SHIPPING 5.

8. **Condition precedent—Direction to jury—Implied promise, when part performance.**

In April, 1872, the defendant, Morrow, gave the plaintiffs, Waterous, *et al.* an order by letter for certain mill machinery, which the plaintiffs were to put in complete operation to the defendant's satisfaction in a building to be provided by the defendant. All the machinery, with the exception of a slab saw, was supplied, and the mill was put in operation in the summer of 1872. The defendant found fault with the machinery, and after alterations and repairs made by the plaintiffs in 1873, the defendant put additional machinery into the mill and worked it until 1875, when it was destroyed by fire. The defendant had insured the whole machinery, including that supplied by the plaintiffs, for $7,700, the additional machinery put in by himself being valued at $2,500. The defendant received the benefit of the insurance to the full amount of the loss. The contract price was $4,250, together with freight and expenses, making in all $4,790. Some payments were made, but the defendant refusing to pay a balance of $1,900, the plaintiffs brought an action of assumpsit, adding the common counts.

At the close of the plaintiffs' case a non-suit was moved for on the ground that it was a condition precedent to the defendant's liability accruing that the work should be done to his satisfaction, and it was contended that the plaintiff's own evidence showed that the defendant never was satisfied, but that he was complaining all along. This point being over-ruled, the defendant undertook to show that the machinery was not what was represented, but defective and in many parts had to be repaired, and that he had already paid as much as it was worth. Much evidence was given on this issue, and the plaintiffs endeavored to show that any defect in the working of the mill was attributable to the shifting of the foundation erected by the defendant himself, and to the want of skill of the men employed by him. The learned judge left it to the jury to say whether the machinery was reasonably fit and proper for the purpose for which it was intended, and if not, directed them that the defendant was only bound to pay as much as it was worth. The jury returned a verdict for the plaintiffs for $1,850, having deducted $200 for the defects and $80 for that part of the machinery not supplied.

Contract—Continued.

A rule *nisi* to set aside the verdict and grant a new trial was made absolute by the Supreme Court of New Brunswick (2 Pugs. & Bur. 11) on the ground that the learned judge should have directed the jury that "the length of time that the defendant used the machinery, the complaints he made about it from time to time, and all the circumstances connected with it, should have been left to the jury, with a direction for them to consider whether from the defendant's dealings with it they could infer a new implied contract on his part to keep the machinery and pay what it was worth, though less than the contract price."

On appeal to the Supreme Court of Canada, **Held**, That in suing upon this contract it was not necessary for the plaintiffs to have averred, as a condition precedent to their right to recover, that the work, besides having been skilfully, properly, sufficiently and in a workmanlike manner executed, was completed to the satisfaction of the defendant.

In cases in which something has been done under a special contract, but not in strict accordance with the terms of the contract, although the party cannot recover the remuneration stipulated for in the contract because he has not done that which was to be the consideration for it, still, if the other party has derived any benefit from the work done, as it would be unjust to allow him to retain that without paying for it, the law implies a promise upon his part to pay such a remuneration as the benefit conferred upon him is reasonably worth. The jury in this case having decided upon the evidence that the defendant had derived a greater benefit from the work done than was compensated by the amount he had already paid, the plaintiffs were entitled to retain the benefit of the verdict, and the rule granting a new trial should be discharged with costs.

Appeal allowed with costs.

Waterous v. Morrow—12th Decr. 1879.

9. **Contract—Certificate of Engineer, whether a progress Estimate or final Estimate.**

Boomer & Son were contractors to build for McGreevy the superstructure of the bridges on the North Shore Railway between Quebec and Three Rivers. By the agreement the defendant McGreevy reserved the right to himself to substitute iron for the wooden superstructures of any of the bridges, and by notice to the plaintiffs to terminate the contract at any time in regard thereto, he to pay the plaintiffs for the work done and materials provided up to the time of giving such notice, "on production of the certificate of the engineer of the said" defendant "establishing amount due." The defendant acted on this provision of the contract with respect to three of the bridges, by notice dated 2nd October, 1875, and Charles Odell, the defendant's engineer, reported and certified under date of the same day

Contract—Continued,

$14,872.13 to be due, including $4,100 for iron work for two turn-tables purchased by plaintiffs for the work, and deducting a payment on account by a note for $8,000. The engineer made another estimate, apparently in amendment of his previous one, dated the same day, establishing the amount at $22,131.93, without reference to the amount of the note for $8,000.

The defendant contended that the estimates of the engineer did not establish correctly either the amount of work done or value of materials, but were merely progress estimates to enable work to progress generally under the contract, until a final examination and acceptance of the works, and that, as a matter of fact, the plaintiffs had been fully paid all they were entitled to.

The Superior Court for Lower Canada, Caron J., awarded Boomer & Son $15,042.44, deducting the turn-tables. This judgment the Court of Queen's Bench affirmed with the exception of a further deduction of $2,006.03 for which there appeared to have been no estimate given.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, that the proper conclusion from the evidence was that the certificate in question was delivered to the plaintiffs as a final estimate, intending to represent as correct the debt of the defendant to the plaintiffs for amount due on materials prepared for the bridges, upon which work was stopped by defendant.

Appeal dismissed with costs.

McGreevy v. Boomer—10th June, 1880.

10. **Contract to sell on commission, breach of—Damages—Evidence from defendant's own books—Supplemental demand—Settlement of accounts, not final—Prescription, interruption of—C. C. P. Art. 345, 346—Technical objection not taken in court below—Rule of Privy Council.**

By written contract of the 23rd January, 1868, the plaintiff contracted with the defendants to sell their goods in the Maritime Provinces, the engagement to continue for a period of five years, subject to co-partnership or business changes. By the contract he was to have 5 per cent. commission on all goods of defendants' manufacture and 2½ per cent. on all other goods. This commission was to be paid to him on all sales, no matter whether such sales had been effected by him or had been made direct to purchasers by defendants without his knowledge or intervention. The plaintiff was opening up an entirely new market for defendants' goods.

The plaintiff entered upon his duties under the contract, and in two years succeeded in establishing a trade for defendants. On the 5th December, 1780, the defendants terminated the engagement, alleging that they did so in consequence of the interruption to their business by the late fire and some changes they expected to make in their business firm the ensuing year.

Contract—Continued.

The plaintiff objected to his agency being terminated, and at the expiration of the five years brought this action to recover a balance of $1,000 for unpaid commissions due and $10,000 damages for breach of contract.

On going to proof plaintiff examined defendant Ames, who produced from defendants' ledgers a full statement of sales effected by defendants in Maritime Provinces up to the 5th December, 1870. Thereupon plaintiff made a supplemental demand, claiming $1,289.50 additional for unpaid commissions.

The Superior Court for Lower Canada by its judgment rejected plaintiff's claim for damages on the ground that co-partnership and business changes took place in December, 1870, in defendant's firm, and that this by the terms of the contract entitled them to terminate it as they did. As to the plaintiff's claim for unpaid commissions for the period up to the 5th December, 1870, the court held the same to be a good open existing demand, and referred the accounts to an accountant, who found $1,705.78 due to plaintiff for commissions. This report the same court by its final judgment adopted, and condemned defendants in the above sum of $1,705.78 and interest from service of process and costs.

The Court of Queen's Bench reversed the judgment of the Superior Court and dismissed appellant's action, on the ground that it was proved that after each trip made by plaintiff accounts were settled for commission due to satisfaction of plaintiff, and that there was a settlement on the 29th December, 1869, when engagement terminated, and that the evidence produced by defendants showed that plaintiff was fully paid for all commissions earned.

On appeal to the Supreme Court of Canada, **Held**, that nothing had occurred at the settlement of commission, from time to time paid by the defendants to the plaintiff upon the sales as the defendants themselves, who alone had a perfect knowledge of them, represented them to be, which would disentitle the plaintiff to have an account taken of all the sales upon which he was by his contract entitled to commission at least up to 5th December, 1870. The plaintiff was not aware of the large sales which had been made by defendants, and there could be no binding acquiescence when the plaintiff was not aware of his rights. That the result of the account taken by the accountant appointed by the Superior Court could not be objected to, and therefore the judgment of the Superior Court should be affirmed.

Per Taschereau J.—The prescription, if any, was interrupted by a letter written by defendants to plaintiff before it accrued, and *Walker* v. *Sweet* (21 L. C. Jur. 21) must be followed as long as it stands unreversed. The objection, that the report was not duly received in evidence in the case,

Contract—Continued.

according to articles 345 and 346 C. C. P., had not been taken in the court below, and the rule in the Privy Council, that a purely techical objection not made in the court below cannot be entertained in appeal, must be followed.

Appeal allowed with costs.

Fuller v. Ames—10th June, 1880.

11. Under Statute of Frauds—As to whether mem. in writing contained terms of—Question for Jury.

See SALE OF GOODS 10.

12. **Contract sous seing privé—Interrogatories on articulated facts—Evasive answers taken as affirmative—C. C. P. arts. 228, 229.**

The plaintiff alleged that he made for defendant, for the use of the Quebec, Montreal, Ottawa & Occidental Railway, 50,980 railway ties, according to the stipulations of a contract *sous seing privé* (by private writing) entered into between defendant, acting by Robert McGreevy, his brother, agent and mandatary on one part, and one Joseph Lavallée and one Frs. L. Duhaime on the other part, the said Lavallée & Duhaime having, shortly after, made over to said plaintiff all their rights, claims and interests in the said contract, together with one horse, for fifty dollars. That of the above stated quantity of railway ties, 33,900 were delivered by plaintiff to defendant on the line of the said railway, and 17,080 were delivered on launching places on river banks (*jetées*) and that the said ties were of the price and value stipulated in the said contract. Plaintiff further alleged that he made for defendant, and delivered to him 2,822 cull ties, for which the defendant promised to pay him eight dollars per hundred and which were worth that price. Lastly he alleged having paid for defendant, for the rent of a piece of ground, forty dollars, making in all, according to the price stipulated in the said contract and the value of the said ties, $6,855.89. He gave credit to defendant for $3,765, leaving due him a balance of $3,090.89, which he claimed. Plaintiff claimed a further sum of $1,000 for damages.

Defendant met the whole claim by a general denial, and alleged that the said contract was never entered into by himself, but was entered into by the said Robert McGreevy, his brother, in his personal name and capacity, that said plaintiff did not fulfil his said contract nor make the said ties as stipulated in the said contract, and that the amount which he received was sufficient to pay for the ties so made.

To interrogatories on articulated facts put to the defendant he answered, with one or two exceptions: "I do not know." The Superior Court at Three Rivers held that these answers were evasive and insufficient, and must therefore be declared to be true and proved, and on these and on the evidence

Contract—Continued.

adduced gave judgment and condemned the defendant to pay to the plaintiff $3,090.89 for the balance due on the price and value of said ties, dismissing the plaintiff's claim for damages.

On appeal to the Court of Queen's Bench this judgment was unanimously confirmed.

On appeal to the Supreme Court of Canada, **Held**, that the defendant did not answer the interrogatories put to him, which referred to the matters in issue, in a categorical, explicit and precise manner as he was bound to do by law (C. C. P. arts. 228, 229). If he had no personal knowledge he should have obtained the information from his general agent, clerks and others acting for him in executing the contract. These interrogatories, therefore, were properly taken as affirmatively answered and proved the plaintiff's case. Appeal dismissed with costs.

McGreevy v. Paillé.—12th February, 1881.

See CONTRACT 17.

13. Sale of goods not specified—Intention to pass property—Appropriation.

See SALE OF GOODS 11.

14. Contract to cut lumber—Vesting of property—Writ of replevin—Sheriff's possession under—Trespass—Pleading—Jus tertii—Justification by Sheriff under writ—Amendment, power of by Supreme Court of Canada.

In November, 1874, one Arbo entered into a written agreement with one Muirhead to get logs off land under Muirhead's control, the logs to be Muirhead's property as cut. In December following one Marooney agreed with Arbo to cut and haul logs for him from land specified in the agreement between Arbo and Muirhead, which logs were to be Arbo's property at the landing, Arbo agreeing to furnish Marooney with supplies to get the logs. Marooney cut logs under this agreement and hauled them to the landing. In November, 1875, the logs not having been driven and Arbo not having furnished sufficient supplies, he and Marooney rescinded their agreement, Marooney giving his note to Arbo for the supplies delivered. The logs remained on the landing, and in February, 1876, they were seized as the property of Arbo, who had become insolvent, under a writ of attachment, issued under the Insolvent Act of 1875. In May, 1876, Marooney sold the logs to the plaintiff, who drove them to the boom of the S. W. Miramichi, where they were replevied by the assignee of Arbo's estate. The plaintiff put in a claim of property in them, and the sheriff returned the writ of replevin, with such claim, to the attorney who issued the writ. No writ *de prop. prob.* having been issued, the sheriff kept possession of the logs, and the plaintiff brought trespass against him for taking them.

Contract—Continued.

The plaintiff pleaded: 1. Not guilty; 2. Goods not the plaintiff's; 3. Goods the goods of the assignee of Arbo, and defendant did acts complained of by license of such assignee; 4. Goods the goods of Muirhead, and defendant did acts complained of by license of Muirhead; 5. Goods property of defendant.

A verdict was entered for plaintiff by consent for $1,554, the value of all the logs, subject to be reduced to $420.47, the value of logs not cut by Marooney, if the court should be of opinion that plaintiff not entitled to Marooney logs.

The Supreme Court of New Brunswick reduced the verdict to the said sum of $420.47. *See* 4 Pugs. & Bur. 25.

On appeal to the Supreme Court of Canada, **Held,**

Per Ritchie C.J.—That the judgment appealed from should be affirmed on the following ground: It having been proved on the trial, without objection, and made part of the case, that the logs in question were seized by the defendant, as sheriff, under a writ of replevin issued out of the Supreme Court of New Brunswick, directing him to take the logs in question, the sheriff was justified in taking the logs thereunder, and that as against the plaintiff it was no wrongful taking or conversion. That this defence could be given in evidence under the pleadings in the cause, or, if it could not be so given, this being a strictly technical objection, and this defence having been put forward on the trial without objection, and no such technical point reserved on the trial, if necessary the record should be amended.

Per Strong and Gwynne JJ.—The parties at the trial having rested their rights upon the question of title, viz.: were the logs the property of the plaintiff, or were they the property of Ellis, as assignee of Arbo, or of Muirhead, and the plaintiff claiming title through Marooney, it was necessary for him to show title in Marooney, which he had failed to do, and therefore he could not recover for the Marooney logs.

Per Fournier and Henry JJ.—The logs when taken were the property of the plaintiff, and he was therefore entitled to judgment on all the issues raised.

Per Fournier J.—The defendant might have justified under the writ, and the court might grant leave to add such a plea, but in that event the costs should be paid by defendant.

Per Henry J.—No effort having been made in the court below to add such a plea it was too late and contrary to precedent and justice now to admit it.

Per Gwynne J.—When the plaintiff fails to show in evidence that he was in actual possession at the time of the taking, and is therefore driven to

Contract—Continued.

rest on the goodness of his title to the property, a defendant may, in rebuttal of the evidence of such title, set up a bare *jus tertii* without showing he had any authority from the third person having such title. So a sheriff sued for taking the goods of the plaintiff may show, under this issue, that the goods belonged to a third party against whom he took them in execution. The several matters therefore alleged in the 3rd, 4th and 5th pleas were matters which could have been given in evidence under the issue joined upon the 2nd plea. As to the 5th plea, in view of the evidence it was quite inappropriate to such evidence, for the writ of replevin placed in the hands of the defendant as sheriff to be executed did not vest in the defendant any property in the goods, the taking of which was complained of, so as to enable him to justify the taking as his own property as is done in the 5th plea.

Appeal dismissed with costs.

Swim v. Sheriff—10th June, 1881.

15. Partnership between Contractors—Nature of contract.

See PARTNERSHIP 3.

16. For carriage of Steel Rails—Representation by Agent of Crown.

See PETITION OF RIGHT 17.

17. **Contract for extra work—Decision of Engineer as to price binding—Interrogatories on faits et articles, when to be take pro confessis—Art. 229 C. C. P.—Motion for, necessary.**

An action for $37,000 which the respondents claimed were due them for balance on a sum of $103,213.96, amount of work performed under contract between appellant and respondents, and extra work agreed to between respondents and appellant.

On appeal to the Supreme Court of Canada from the Court of Queen's Bench for Lower Canada, **Held**, Taschereau J. delivering the judgment of the court, 1. The contention on the part of the respondents that the *faits et articles* submitted to the appellant should be taken *pro confessis*, because the answers thereto were not direct, categorical and precise (art. 229 C. C. P.) was not open to the respondents, as they had failed to make a motion to that effect in the court of first instance. The case of *McGreevy* v. *Paillé* (5 Leg. News 95,) confirmed by Supreme Court, was not in point as a motion had been regularly made and granted in the Superior Court. Nor has *Douglas* v. *Ritchie*, 18 L. C. Jur. 274, any application. There the defendant made default and had not answered the *faits et articles* at all. Here the defendant had answered, and if plaintiffs desired to have the answers set aside, it must be by motion.

2. The appellant was entitled to reversal of the judgment of the Queen's Bench as to an item of $1,882.15, which appeared to have been allowed by oversight.

Contract—Continued.

3. The sum of $3,765.20 added by the Court of Queen's Bench to amount granted by the Superior Court should also be deducted from the judgment, the difference between 20 and 24 cts. per yard for earth work done in 1878, there being sufficient evidence to establish that the engineer, who, by a clause of the contract, was to fix the prices of all extra work and whose decision the parties were bound to submit to, had fixed the price of such work at 20 cts.

Appeal allowed with costs and judgment of the court below varied.

McGreevy v. McCarron.—18th June, 1883.

See CONTRACT 12.

18. Not complete or binding.

See SALE OF GOODS 13.

19. Rescission of, on ground of fraud and false representations.

See SALE OF LANDS 8.

20. Building Contract—Enforcement of—Violation of city by-law—Liability of owner—Effect of by-law passed after contract made.

S. & Co., contractors for the erection of a building for the respondent in the city of St. John, N.B., brought an action claiming to have been prevented by respondent from carrying out their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of the by-law of the city passed (under authority of an Act of the General Assembly of New Brunswick, 41 Vic. ch. 7) two days after the contract was signed.

On the trial of the action the plaintiffs were non-suited, and an application to the Supreme Court of New Brunswick to set such non-suit aside was refused.

On appeal to the supreme Court of Canada, **Held**, Henry J. dissenting, that the by-law of the said city of St. John made the said contract illegal, and therefore the plaintiffs could not recover. *Walker* v. *McMillan* (6 Can. S. C. R. 241. *See* contract 4) followed.

Per Henry J.—That the erection of the building would not, so far as the evidence showed, be a violation of the by-law, and therefore the non-suit should be set aside and a new trial ordered.

Appeal dismissed with costs.

Spears v. Walker.—23rd June, 1885.

21. Action for breach of contract to supply meat—Steward's decision binding on the parties—Forfeiture of deposit—Damages.

Action of damages for breach of the following contract :

"26th April, 1880."

"Tender for supplying the Windsor Hotel, Montreal, with meat, &c. from 1st May to 1st November, 1880.

Contract—Continued.

"We the undersigned do hereby agree to supply the Windsor Hotel, "Montreal, with joints, &c., of meat, at the prices quoted, viz: (here follows "a description of the articles to be supplied and the prices.)

"The quantity and quality of the foregoing supplies to be satisfactory to "the steward of the hotel, and two hundred dollars ($200) are now handed "the Windsor Hotel Syndicate as security for the due fulfilment of the con- "tract, to be forfeited in case of non-performance, and if at any time the "hotel steward is obliged to procure supplies elsewhere through any cause "or negligence of ours, any excess of cost then paid over the prices of this "contract shall be chargeable against the deposit of two hundred dollars. "The said deposit shall not bear interest.

"This contract may be cancelled by the Windsor Hotel Syndicate at "any time should they lease or sell the hotel, or should the hotel from any "cause be closed before 1st November next.

"Should this contract be satisfactorily fulfilled the deposit of two hun- "dred dollars, or any balance of the same remaining in accordance with fore- "going terms, shall be returnable on demand to us.

"All accounts to be paid weekly.

(Signed) "BROWN BROS.

"The foregoing tender and contract accepted.

(Signed) "WINDSOR HOTEL SYNDICATE,
"by GEORGE ILES,
"Secretary House Managing Committee.

"Montreal, April 30th, 1880."

Plaintiff supplied meat until the 30th of June. The steward of the hotel was dissatisfied and repeatedly notified the plaintiff of his dissatisfaction, but did not immediately stop receiving meat. The supplies continuing unsatisfactory to the steward, and in his opinion not according to the contract, he so decided and reported his decision, and the contract was cancelled whereby the deposit became forfeited. The defendants had been obliged to expend $168 more than the deposit in obtaining meat elsewhere.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Queen's Bench for Lower Canada, that the parties having agreed to make the steward the sole judge and to abide by his decision, the plaintiff was bound by it. Further, the evidence showed that the steward's dissatisfaction was justified by the inferiority of the meat supplied, and that there was no *mala fides* on his part, but that he had acted *bonâ fide* under a reasonable sense of dissatisfaction.

Appeal dismissed with costs (Fournier and Henry JJ. dissenting).

Brown v. Allan—23rd June, 1884.

Contract—Continued.

22. Completed by letters—Statute of frauds.

See SALE OF LANDS 10.

23. **Contract to saw lumber—Recission of—Finding of Jury Right to recover on common counts for work done.**

The plaintiff was employed by the defendant under a written agreement, not under seal, to saw lumber in the defendant's mill, of which, under the agreement, plaintiff had possession and charge.

It was contended on behalf of the plaintiff at the trial that this agreement was rescinded, and that the plaintiff was entitled to recover on the common counts, for the work actually done up to the time of the alleged recission.

The jury found in favour of the plaintiff upon the facts bearing upon the alleged recission, and the Supreme Court of Nova Scotia refused a rule *nisi* for a new trial, Rigby J. delivering the judgment of the court. (See 5 Russell & Geldert 381).

It was contended on behalf of the plaintiff that the judgment appealed from was correct, because there was sufficient evidence to warrant the jury in finding that the agreement in question had been rescinded, and that the defendant agreed to pay the plaintiff for the work done by the latter up to the time of the said recission.

On appeal to the Supreme Court of Canada, **Held,** that for the reasons given by Rigby J. in the court below the judgment should be affirmed. (Ritchie C. J. and Strong J. dissenting).

Appeal dismissed with costs.

Young v. Tracey.—17th Feby. 1885.

24. **Tender for contract by firm—Assignment of interest in tender to third person—Alteration of—Specification after tender and before acceptance—Provision inserted against assignment—Incomple contract—No locus standi in individual member of firm to bring action.**

On the 1st of February, 1880, the corporation of the village of St. Gabriel published a notice calling for tenders for certain waterworks required for the village, according to plan and specification.

C. St. James & Co. tendered "to do the several works of supplying and laying water pipes in this village according to plan and specification," for the sum of $37,600.99.

The specification did not contain any prohibition against transferring or or making over, in whole or in part, the contract for said works.

The tender of C. St. James & Co., when the tenders were opened, which was on the 2nd March, 1880, was found to be the lowest but one, that of E. Dubuc & Co. By a memo. of agreement, made on the 5th of March, 1880, between C. St. James and Alexander Chisholm, doing business together under

Contract—Continued.

the name of C. St. James & Co., of the first part, and one Charles E. Torrance, of the second part, the parties of the first part transferred all their interest in or to and by virtue of the tender to the party of the second part, for $500, a further sum of $500 to be paid by the party of the second part when contract should be awarded by by-law duly passed.

Dubuc & Co. having availed themselves of certain irregularities to withdraw their tender, the St. Gabriel council decided to make some changes in the plans and specifications, and at a meeting held on the 12th July, 1880, resolved that the specification as made by the engineer of the corporation, with the corrections as amended by the council, be accepted and adopted, and that Mr. Casimir St. James should be allowed two days to consider the specification, and if he should accept that he should attend on the 15th at 3 p.m. to sign the contract.

The new specification to which reference was made in the resolutions, contained among other clauses the following: "The contractor will not be permitted to sub-let any portion of the work, except for the delivery of materials, without the consent of the Municipal Council."

In the afternoon of the 15th July, Casimir St. James and Alexander Chisholm went to the office of the respondent's notary for the purpose of signing the contract referred to in the resolutions. At the same time Mr. Torrance presented himself, and claimed the right to sign the contract in question, as being the transferee of the two individuals above referred to, producing and communicating to the Mayor, who was present, the document hereinbefore referred to, by which C. St. James & Co. had transferred to him all their interest in the contract in question.

The Mayor thereupon requested delay until the evening to consult the council, which was to meet in accordance with the terms of the adjournment on the 12th July.

At the council meeting which was held the same evening, the Mayor made a report of the respective pretentions of St. James and Chisholm and Mr. Torrance. St. James was called upon by the members of the council to state whether Mr. Torrance's pretentions were founded, and whether it was true that that gentleman was the transferee of C. St. James & Co.'s interest under the tender which they had submitted. The result was that the council determined not to give the contract to C. St. James & Co., but sent for the next lowest tenderers, to whom they made an offer on the terms and conditions proposed to St. James & Co. at the meeting of the 12th July, and this offer having been accepted it was resolved to give such next lowest tenderers the contract, and the contract with them was signed the next day.

St. James, in his own name, and pretending to be the only person interested in the tender of C. St. James & Co., then instituted an action in

Contract—Continued.

damages for breach of the contract which he pretended was entered into between himself and respondent under the resolutions of 12th July, 1880.

The Superior Court for Lower Canada (Chagnon J.) dismissed the plaintiff's action, holding that the evidence showed no individual tender by St. James, but one by St. James and Chisholm, as constituting the firm of C. St. James & Co., that therefore the plaintiff had no *locus standi* to maintain the action in his own name; that, besides, under the circumstances there never had been any completed contract between the parties; the provision against assigning the contract was a material stipulation which had been violated by the assignment to Mr. Torrance, and that the council had been justified in refusing to accept the tender.

This judgment was reversed by the Court of Review at Montreal, but was restored by the judgment of the Court of Queen's Bench for Lower Canada (appeal side).

On appeal to the Supreme Court of Canada, **Held,** Henry J. dissenting, that the judgments of the Superior Court and the Court of Queen's Bench should be affirmed.

Appeal dismissed with costs.

St. James v. The Corporation of St. Gabriel.—12th May, 1885.

25. Suit for recission of—Fraud—Evidence.

See SALE OF LANDS 14.

26. Hiring and service—Clerk—Money paid out—Prescription.

R. brought action against Y. and others, the heirs of D. D. Y., for services done as clerk to the executor of D. D. Y.'s will, in administering the estate and for money paid and laid out for estate.

Pleas: That all demands for salary were prescribed, by two years under C. C. of L. C. Art. 2261, and all sums advanced to estate and paid for and on account of it by five years under C. C. Art. 2260 § 6. 2. That the executor, who received $400 p. a under the will had no right to employ a clerk at expense of estate to do the work thereof, and R.'s work was done for executor, against whom alone he had a claim.

Held, by Superior Court for Lower Canada, that the only prescription for yearly salary was that of 5 years, under Art. 2260 § 6, while that of 30 years alone was applicable to claim for moneys laid out for estate. That the general powers of an executor include the engagement of clerks to keep the books of the estate and to carry on its affairs (C. C. 914); and $1,754 was awarded to R.

In appeal the holdings of the Superior Court upon the several questions of law were affirmed, but the action was dismissed (Tessier and Cross JJ. dissenting) on the ground that there was evidence that R. had agreed to accept $400 p. a. and had been paid that sum.

Contract – Continued.

On appeal to the Supreme Court, **Held**, that the judgment of the Court of Queen's Bench for L. C. should be reversed, and that of the Superior Court varied by increasing the amount awarded R. to $5,607.

Rattray v. Young.—16th November, 1885.

See AGREEMENT.
" PETITION OF RIGHT 16.

Contributory—Right of action against in winding up proceedings under The Imperial Companies' Act, 1862.

See CORPORATIONS 15.

2. Of Bank of P.E.I.—Liability of, under 18th Vic. ch. 10, and 19th Vic. ch. 11, P.E.I.

See BANKS AND BANKING 7.

3. Right of set off by, in action against.

See BANKS AND BANKING 8.

Conversion by sheriff.

See CORPORATIONS 5.
" TROVER.

Corporations—**Public Company under 27 and 28 Vic. ch. 23—Shareholders Liabilities.**

Certain shares in a company incorporated by letters patent, issued under 27 and 28 Vic. ch. 23, were allotted, by a resolution passed at a special general meeting of the shareholders, to themselves, in proportion to the number of shares held by them at that time, at 40 per cent. discount, deducted from their nominal value, and scrip issued for them as fully paid up. G., under this arrangement, was allotted nine shares, which were subsequently assigned to the appellant for value as fully paid up. Appellant enquired of the secretary of the company, who also informed him that they were fully paid-up shares, and he accepted them in good faith as such, and about a year afterwards became a director in the company. The shares appeared as fully paid up on the certificates of transfer, whilst on each counterfoil in the share-book the amount mentioned was "Shares, two, at $300—$600."

Held, reversing the judgment of the Court of Appeal for Ontario, that a person purchasing shares in good faith, without notice, from an original shareholder under 27 and 28 Vic. ch. 23, as shares fully paid up, is not liable to an execution creditor of the company whose execution has been returned *nulla bona*, for the amount unpaid upon the shares. (Richards C.J. and Ritchie J. dissenting.)

McCraken v. McIntyre.—i, 479.

Corporations—Continued.

2. Railway Company—Mortgage by, of road.

See RAILWAYS AND RAILWAY COMPANIES 1.

3. Railway Company—Liability of for Fraudulent Shipping Note issued by Agent.

See RAILWAYS AND RAILWAY COMPANIES 5.

4. Want of Seal.

See INSURANCE, LIFE 2.

5. **Sale by Corporation—Attachment—Absent and Absconding Debtors' Act of Nova Scotia, ch. 97, Rev. Stats. of N. S.—Demurrer—Conversion by Sheriff—Justification under Order of Court—Seal.**

One H. instituted proceedings against L. C. M. Company, the officers of which resided in the United States, but which did business in Nova Scotia, and, on the 25th May, 1872, caused a writ of attachment to be issued out of the Supreme Court at Amherst, under the Absent and Absconding Debtors' Act of Nova Scotia, directed to the appellant, the High Sheriff of the County of Cumberland. Under this writ, the appellant seized certain chattels as being the chattels of the said company. On the 12th November, 1872, an order was issued out of the said court, directing the appellant to sell, and the appellant did sell said chattels as being of a perishable nature. On the 11th December, 1874, a discontinuance was filed in the said cause by H. On the 30th May, 1876, the respondent commenced an action against appellant for the conversion of the chattels in question, contending that the company, having failed in its operations and being desirous of winding up its affairs, and being indebted to him, had sold and conveyed to him the said chattels by a certain memorandum of sale, dated 5th July, 1867, "signed on behalf of the company," by one "Hawley, agent." To this memorandum a seal was affixed which did not purport to be the seal of the company. The appellant pleaded to the declaration, that he did not convert; goods not plaintiff's; not possessed; and also a special plea of justification, setting forth the proceedings by H., and that he had seized and sold the goods as the goods of the company, in obedience to the attachment and order issued in said proceedings. The respondent replied, setting up the discontinuance. The appellant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale. He also demurred, on the ground that, being bound to obey the order of the court, he could not be affected by the discontinuance.

At the trial a verdict of $500 damages was rendered for respondent. The appellant obtained a rule *nisi* to set aside verdict, and the rule and demurrer were argued together. The court below refused to set aside the verdict and gave judgment for plaintiff on the demurrer.

Corporations—Continued.

Held, that the appeal should be allowed; that the plea of justification showed a sufficient answer to the declaration; that the replication was bad, and that the verdict must be set aside and judgment be for the defendant on the demurrer.

Per Ritchie J. dissenting—The seizing under the attachment, and not the sale, constituted the conversion; there was sufficient evidence to show that the chattels in question had been transferred by the company to respondent, and under sec. 15 ch. 53 of the Revised Statutes of Nova Scotia, the sale of the chattels did not require to be under the corporate seal of the company.

Per Strong J.—The sale, and not the seizure, was the conversion complained of, and to this the order of the court was a sufficient answer. *Semble,* a mere taking of the goods of a third person under a *mesne* attachment against a defendant to keep them *in medio* until the termination of the action is not a conversion.

Per Henry J.—The order for the sale would not have been a justification for the original levy on the goods, as well as for the sale, if they had been the property of the respondent, but the evidence failed to show a sale by the company to the respondent. Such a sale would require to be under the corporate seal of the company, and did not come within the meaning of sec. 15 ch. 53 of the Revised Statutes of Nova Scotia.

McLean v. Bradley.—ii, 535.

6. **Shareholder in public company—Action against by creditors of company—Registration of certificate—Con. Stat. C. ch. 63, secs. 33, 35.**

In an action brought by McK. under the provisions of Con. Stats. Can. ch. 63, against K. *et al.* as stockholders of a joint stock company incorporated under said Act, to recover the amount of an unpaid judgment they had obtained against the company, the defendants K. *et al.* pleaded, *inter alia,* that they had paid up their full shares and thereafter and before suit had obtained and registered a certificate to that effect.

Held, affirming the judgment of the Court of Common Pleas, that under secs. 33, 34 and 35 ch. 63 Con. Stats. Can., as soon as a shareholder has paid up his full shares and has registered, although not until after the 30 days mentioned in sec. 35, a certificate to that effect, his liability to pay any debts of the company then existing or thereafter contracted ceases, excepting always debts to employees, as specially mentioned in sec. 36. (Ritchie C.J. and Fournier J. dissenting.)

McKenzie v. Kittridge.—iv, 368.

7. **Trespass by individual Corporators—Plea—Corporation may sue its members—Rev. Stats. N. S. (4th series) ch. 23 sec. 30.**

J. C. and J. A. C., while trustees of school section No. 16, south district of Pictou county, and N. C. as their servant, entered upon the school plot be-

Corporations--Continued.

longing to their section, removed the school house from its foundation and destroyed a portion of the stone wall. Subsequently, the trustees of said school section brought an action of trespass *quare clausum fregit* and *de bonis asportatis* against the said J. C., J. A. C. and N. C., for injury done to the school house, the property of the section. The defendants pleaded *inter alia* justification of the acts complained of, asserting that the acts were legally performed by them in their capacity of trustees. Sub-sec. 4 of sec. 30, cap. 23, Rev. Stats. N. S. (4th series), declares that the sites for school houses shall be defined by the trustees, subject to the sanction of the three nearest commissioners residing out of the section. In this case the sanction of the three nearest commissioners was not obtained.

Held, on appeal, that under cap. 23, Rev. Stats. N. S. (4th series) J. C., J. A. C. and N. C. were not authorized to remove the school house from its site in the manner mentioned. That defendants having subsequently abused their right to enter upon the lands of the corporation by an overt act of spoliation, the plaintiffs, who are a corporate body and are identical with the corporation which existed at the time of the trespass, can maintain trespass against the defendants for the injury done to the corporate property. That when an action is brought in the name of a corporation without due authority, it is not sufficient for the defendants to plead that the plaintiffs did not legally constitute the corporation, but in such a case defendants ought to apply to the summary jurisdiction of the court to stay proceedings.

Pictou School Trustees v. Cameron.—ii. 690.

8. **Allotment of stock—Notice of—R.W. Co.—Action by creditor against a shareholder—Conditional agreement.**

The appellant, a judgment creditor of the T. G. & B. Railway Co., sued the respondent as a shareholder therein, for unpaid stock. From the evidence it appeared that the respondent signed the stock book, which was headed by an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares" they covenanted to pay ten per cent. of the amount of the said shares and all future calls. The company, on the 1st July, passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the amount of shares held by him. The secretary prepared them, including one for the respondent, and handed them to the company's broker to deliver to the shareholders. The brokers published a notice, signed by the secretary, in a daily paper, notifying subscribers to the capital stock of the T. G. & B. Railway Co., that the first call of ten per cent. on the stock was required to be paid immediately to them. The respondent never called for or received his

Corporations—Continued.

certificate of allotment, and never paid the ten per cent., and swore that he had never had any notice of the allotment having been made to him. The case was tried twice, and the learned judge, at the second trial, although he found that the respondent had subscribed for fifty shares and had been allotted said fifty shares, was unable to say whether respondent had received actual notice of allotment.

Held, affirming the judgment of the Court of Appeal, that the document signed by the respondent was only an application for shares, and that it was necessary for the appellant to have shown notice within a reasonable time of the allotment of shares to respondent, and that no notice whatever of such allotment had been proved. (Ritchie C.J. and Gwynne J. dissenting).

Nasmith v. Manning.—v. 417.

9. **Company—Action for calls—Misrepresentation—Contract—Repudiation—Acquiescence by receipt of dividend.**

The Stadacona Insurance Company, incorporated in 1874, employed local agents to obtain subscriptions for stock in the district of Quebec, such local agents to receive a commission on shares subscribed. At the solicitation of one of these local agents, F. X. C., intending to subscribe for five paid-up shares, paid $500 and signed his name to the subscription book, the columns for the amount of the subscription and the number of shares being at the time left in blank. These columns were afterwards, in the presence of appellant, filled in with the number of shares (50 shares) by the agent of the company, without F. X. C.'s consent. Having discovered his position, one of appellant's brothers, who had also subscribed in the same way, went next day to Quebec and endeavored, but ineffectually, to induce the company to relieve them from the larger liability. At the end of the year 1875 the company declared a dividend of 10 per cent. on the paid-up capital (*montant versé*) and the plaintiff received a check for $50, for which he gave a receipt. In the following year the company suffered heavy losses, and, notwithstanding F. X. C.'s repeated endeavors to be relieved from the larger liability, brought an action against him to recover the 3rd, 4th, 5th and 6th calls of five per cent. on 50 shares of $100 each, alleged to have been subscribed by F. X. C. in the capital stock of the company.

Held, Ritchie C.J. *dubitante*, reversing the judgment of the court below, that the evidence showed the appellant never entered into a contract to take 50 shares; that the receipt given for a dividend of 10 per cent. on the amount actually paid (*montant versé*) was not an admission of his liability for the larger amount, and he therefore was not estopped from showing that he was never, in fact, holder of 50 shares in the capital stock of the company.

Coté v. Stadacona Ins. Co.—vi, 193.

Corporations—Continued.

10. Shareholders—Rights of—The Banking Act, 34 Vic. ch. 5 secs. 19 and 58—Resolutions by directors and shareholders not binding on absent shareholders—Equitable plea.

Bank of L. brought an action against S., the appellant (defendant), as shareholder, to recover a call of 10 per cent. on twenty-five shares held by him in that bank. By the 7th plea, and for defence on equitable grounds, defendant said, "that before the said call or notice thereof to the defendant, the defendant made, in good faith and for valid consideration in that behalf, a transfer and assignment of all the shares and stock which he had held in the bank of L. to a person authorized and qualified to receive the same, and the defendant and the transferees of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock; but the said plaintiffs, without legal excuse and without reason, refused to record such transfer, or to register the same in the books of the bank, or to recognize the said transfer. And the defendant prays that the said bank of L. shall be compelled and decreed to make and complete the said transfer, and to do all things required on its part to be done to make the said transfer valid and effectual, and the said bank of L. be enjoined from further prosecution of this suit."

The plaintiffs filed no replication to this plea, but at the trial of the action, which took place before James J., without a jury, they attempted to justify the refusal to permit the transfer of the shares upon the ground that at a special general meeting of the shareholders of the bank of L., held on the 26th June, 1873, it was resolved "that, in the opinion of the meeting, the bank of L. should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect."

The defendant was not present at the meeting when this resolution was passed, and it appeared from the evidence that the bank of L. effected a loan of $80,000 from the bank of S. upon the security of one B., who, to secure himself, took bonds for lesser amounts from other shareholders, including the defendant, whose bond was released by B. when the defendant sold his shares. This he did in 1877 to certain persons then in good standing, and powers of attorney, executed by defendant and the purchasers respectively, were sent to the manager of the bank of L., in whose favor they were drawn, to enable him to complete the transfer. The directors of the bank of L. refused to permit the transfer, but the defendant was not notified of their refusal, nor did they make any claim against him for any indebted-

Corporations—Continued.

ness on his part to the bank; and it appeared also from the evidence that subsequently to the resolution of the 26th of June, 1873, and prior to the sale by defendant of his shares, a large number of other shares had been transferred in the books of the bank. In October, 1879, the bank of L. became insolvent, and the bank of S., the respondents, obtained leave to intervene and carry on the action.

At the trial a verdict was found by the judge in favor of the appellant; but the Supreme Court of Nova Scotia, James J. dissenting, made absolute a rule *nisi* to set aside the verdict.

On appeal to the Supreme Court of Canada, it was **Held**, reversing the judgment of the Supreme Court of Nova Scotia, that the resolution of the 26th June, 1873, could not bind shareholders not present at that meeting, even if it had been acted upon, and under the facts disclosed in evidence the defendant could not be deprived of his legal right under the Banking Act to transfer his shares, and to have the transfer recorded in the books of the bank; and the 7th plea was therefore a good equitable defence to the action.

Per Strong and Gwynne JJ.—It is doubtful whether the strict rules applied in England to equitable defences pleaded under the C. L. Procedure Act, should be adopted with reference to such pleas in Nova Scotia, where both legal and equitable remedies are administered by the same court and in the same form of procedure.

Smith v. Bank of Nova Scotia—viii, 558.

11. **Liability of Public Company—Shareholder—27 & 28 Vic. ch. 23—Estoppel—Mortgage of shares.**

The Ontario Wood Pavement Company, incorporated under 27 & 28 Vic. ch. 23, with power to increase by by-law the capital stock of the company "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from $130,000 to $250,000 before the original capital stock had been paid in. P. *et al.*, execution creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by way of *sci. fa.* against A. as holder of shares not fully paid up in said company. It appeared from an examination of the books that the shares alleged to be held by A. were shares of the increased capital and not of that originally authorized.

Held, affirming the judgment of the Court of Appeal, that as there was evidence that the original nominal capital of $130,000 was never paid in, the directors had no power to increase the stock of the company, and as the stock held by A. consisted wholly of new unauthorized stock, P. *et al.* were not entitled to recover.

Corporations—Continued.

Per Gwynne J. dissenting—The objection not having been taken by the defendant, or tried, the court, under sec. 22 ch. 38 R S. O., should put the questions of fact upon which the validity and sufficiency of the objections suggested by the court rested, into a course for trial in due form of law.

Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock.

Per Strong and Henry JJ. (Gwynne J. *contra*)—That although A., a mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of the shares was by way of mortgage. 27 & 28 Vic. ch. 23 sec. 5 sub-sec. 19.

Page v. Austin.—x, 132.

12. **45 Vic. ch. 23 (D.)—Construction of—Foreign Company—Winding-up.**

The Steel Company of Canada (limited), incorporated in England under the Imperial Joint Stock Companies Acts, 1862-1867, and carrying on business in Nova Scotia, and having its principal place of business at Londonderry, Nova Scotia, was, by order of a judge, on the application of the respondents and with the consent of the company, ordered to be wound-up under 45 Vic. ch. 23 (D). The appellants, creditors of the Steel Company, intervened, and objected to the granting of the winding-up order on the ground that 45 Vic. ch. 23, was not applicable to the company.

Held, reversing the judgment of the Supreme Court of Nova Scotia, Fournier J. dissenting, that 45 Vic. ch. 23 was not applicable to such company.

The Merchants Bank of Halifax v. Gillespie.—x, 312.

13. Liability of for Libel.

See LIBEL.

14. Benefit Society—Expulsion of Member from.

See BENEFIT SOCIETY.

15. **The (Imperial) Companies' Act, 1862—Order making calls against past member—Right of action thereon—Declaration—Demurrer.**

The defendant was a holder at one time of 100 shares in Barned's Banking Company (limited) but had ceased to be a member of the company before the commencement of the winding up. An order for the winding up of the said company having been made by the High Court of Chancery in England, and the defendant having been placed upon the list of contributories, pursuant to the provisions of the Winding Up Act, the said court, by an order made on 2nd January, 1870, made a call on the defendant for a

Corporations—Continued.

certain sum in respect of his shares in the said company, and directed him to pay it to one of the official liquidators.

Subsequently to this order, the plaintiffs commenced this action in the Court of Queen's Bench for Upper Canada, and their declaration being demurred to by the defendant, the matter was argued in Hilary Term, 1875, and the demurrer disallowed. The case is reported in 36 U. C. Q. B. 256.

Afterwards the plaintiffs amended their declaration as suggested in the judgment then given, by charging the defendant distinctly as a past member, and, the amended declaration being again demurred to, the matter was argued before the Court of Queen's Bench, on 4th October, 1877, and the demurrer was allowed, Wilson J. dissenting. The decision is reported in 40 U. C. Q. B. 435.

From this decision the respondents appealed to the Court of Appeal for Ontario, and on 23rd December, 1878 that court delivered judgment reversing the decision of the Court of Queen's Bench, and allowing the appeal. Reported 3 Ont. App. R. 371.

The defendant appealed to the Supreme Court of Canada from that judgment, which decided that the liability of the defendant to pay the calls was a debt which originated at the time he became a holder of the shares, and that the plaintiffs were entitled to sue him here for the recovery thereof.

The declaration set out sections 6, 7, 38, and sub-secs. 1, 2, 3, & 4 of sec. 38; sections 74, 75, 79 sub-secs. 4 & 5; sec. 80 sub-sec. 4; sections 81, 83, 92, 98, 102 and 106 of the Imperial Companies' Act of 1862, 25 & 26 Vic. ch. 89. The declaration then set out that the plaintiffs were a company duly incorporated and registered in England under the said Act, and limited by shares, and the defendant was the holder of one hundred shares in the capital stock of the said company, and was, in respect of the said shares, a member of the said company, and had not ceased to be a member for the period of a year or upwards prior to the commencement of the winding up thereinafter mentioned, and was liable, in respect of the said shares, to contribute as a past member to its assets in the event of its being wound up, and the said company became unable to pay its debts, and thereupon such proceedings were had in the High Court of Chancery in England, before the Master of the Rolls, one of the judges of that court, that it was proved to the satisfaction of the said court that the said company was unable to pay its debts, and the said court was of opinion that it was just and equitable that the said company should be wound up, and an order was duly made by the said court for the winding up of the said company by the said court, and all things happened and were done necessary to make the said order valid under the said Act, and by other orders of the said court Harwood

Corporations—Continued.

Walcot Banner and John Young were duly appointed official liquidators of the said company, and by another order of the said court, made as soon as might be after the making of the said order for winding up the said company, the said court duly settled the list of contributories to the assets of the said company, and thereby declared the defendant to be, and settled him on the said list as a contributory in respect of the said one hundred shares as a member or contributory in his own right, and as included in the list of contributories, on the sixth day of December, A.D. 1867, and afterwards by an order duly made on the second day of January, 1870, by the said court, the said court made a call upon the defendant of thirty-three pounds sterling per share in respect of fifty of the said shares for which the defendant had been so settled in the list of contributories, and a call of thirty-nine pounds ten shillings sterling per share in respect of the other fifty of the said shares, and ordered that the defendant should, on or before the ninth day of September, 1870, or within twenty-four days after the service of the said order, pay the said sum of three thousand six hundred and twenty-five pounds to the said Harwood Walcot Banner, of 26 North John street, Liverpool, in the county of Lancaster, one of the said official liquidators, such sum being by the said order declared to be the amount due from the defendant in respect of the said calls of thirty-three pounds per share, and of thirty-nine pounds ten shillings per share. And the said order was, before the said ninth day of September, duly served upon the defendant, and the said Act of Parliament or law, during all the time aforesaid, was and is still in full force, and was and is the law of England; and all things happened and were done, and all times elapsed necessary to render the defendant liable to pay the said sum of money, and to entitle the plaintiffs to maintain this action for the non-payment thereof, and the said sum of money is equal to the sum of seventeen thousand six and forty-two dollars of lawful money of Canada, yet the defendant had not paid the same, and the plaintiffs claimed thirty thousand dollars.

To this declaration the defendant demurred on the following grounds:—

That the declaration did not show any facts or circumstances which, under the laws in force in this province, give the plaintiffs any right of action against the defendant: That said declaration did not show that under the alleged Act of Parliament, or under the law of England the plaintiffs had any right of action against the defendant: That it appeared by said declaration, that the said company of the plaintiffs was being wound up by the High Court of Chancery in England, and under the authority of the alleged Act of Parliament in the declaration mentioned, and the plaintiffs were not shown to have the power under said Act to sue or bring actions for any

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call made by said court: That it was not shown that any calls were made on the alleged shares before said order for winding-up was made, or that the defendant was the holder of the said shares, or any of them, at the time of making any such calls or that he ever became indebted to the plaintiffs upon or in respect of the said shares, or any of them: That it appeared by said declaration that defendant had ceased to be the holder of any of the said shares before the commencement of the winding-up of the said company, and that the defendant was at most only a past member: That under the law of this country the defendant would not be liable for any call made after he ceased to be a holder of said shares, and the declaration did not show any provision of English law that made him liable to the plaintiffs for any such call: That it appeared by the English law as set out in said declaration that a past member like the defendant was not subject to the same liability as a present member, and said declaration did not show that any debts or liabilities of the said company existed to or in respect of which defendant was liable to contribute or in respect of which he could be placed on the list of contributories, or that he was liable to contribute anything: That as the plaintiffs were now suing on a law not in force in this country, and were claiming a liability which did not exist under the laws of this country, they were bound to show that the liability they claimed clearly existed under the English law, which they had not done: That it appeared by said declaration that after an order had been made for winding up a company all power in regard to collecting or getting in the assets of the said company was invested in the said Court of Chancery, which was a specially appointed tribunal for that purpose and had special and extraordinary powers which could not be enforced in this country: That it appeared that any proceedings had were not final, and that said court had power to rectify the list of contributories and could at any time remove the defendant's name from such list: Also, that said court had the power to restore to the defendant all or any part of the moneys which he might pay under the said order making said calls, and that the English law as presented by said declaration showed that the proceedings had were not final in their character like a judgment, and the rights of plaintiffs, if any, could be enforced only by said special tribunal, and not by suit at law in this country.

On appeal to the Supreme Court of Canada, **Held**, Per Ritchie C.J. and Fournier and Henry JJ. (Strong and Gwynne JJ. dissenting), that assuming an action at law will lie for a call, such as was claimed to be due in this case, as plaintiffs could not avail themselves of sec. 109 of The Companies' Act, 1862, to declare generally, nor of sec. 106 of said Act, making the order conclusive evidence that the money ordered to be paid was due, for the reason that

Corporations—Continued.

neither of those sections applies to actions brought in this country; and as defendant's liability, if any, was not on the order as a final judgment, but was a purely statutory liability of a limited character, it was necessary to allege in the declaration everything required by the statute to fix the limited liability of a past member on the defendant, and which allegation, if traversed, the plaintiff would be bound to prove, and as the declaration on its face contained no such allegations as show any such liability of defendant as a past member, it was therefore bad.

2. Per Henry and Taschereau JJ.—That the declaration did not show any right under the Act in the plaintiffs to sue in their own name.

Appeal allowed with costs.

Reynolds v. Barned's Banking Company.—3rd Feby 1880.

16. **Saint John City—Power of Mayor, &c., to raise the level of the streets—Raising a street in part and erecting fence on part so raised by which access to the street is cut off—Non-suit—Charter of city—Municipal Councils, powers of.**

By the charter of the city of Saint John the corporation was given power to alter, amend and repair streets theretofore laid out, or thereafter to be laid out. The charter is confirmed by 26 Geo. 3 ch. 46, and the right to alter the levels of streets is recognized by 9 Geo. 4 ch. 4. Church street was not one of the streets originally designated on the plan of the city. It was made a public street in 1811, on petition of the owners of the land through which it passes, who gave the land for the street. In 1874 the corporation raised Church street below Canterbury street, filling it in to within four or five feet of the plaintiff's house and shop. On the embankment so made in front of the plaintiff's house and shop the corporation erected a fence. By reason of this the plaintiff had no access from the street to his house and shop, but reached them by the narrow passage left next the house and shop running easterly towards Canterbury street and westerly toward Prince William street.

An action having been brought against the Mayor, &c., of the city for the damage sustained by the plaintiff by reason of so filling in the street and erecting the fence, the plaintiff was non-suited by Duff J., on the ground that the charter and Acts of Assembly gave the defendants full authority to raise the level of the street, and that in them was vested the sole discretion as to the time and manner of doing it, and that having exercised a *bonâ fide* discretion in the matter and raised it the damage sustained by the plaintiff was not the subject of an action; that as to the erection of the fence on the wall it was necessary for the protection of the public, and that it was the duty of the defendants to put it there for that purpose.

Corporations—Continued.

This non-suit was set aside by the Supreme Court of New Brunswick, it being there held by Weldon, Fisher and Wetmore JJ., Allen C.J. and Duff J. dissenting, that the corporation had no right to fill in the street in the manner in which they did it, and to erect the fence on the embankment in front of the plaintiff's house and shop, and that the manner in which the corporation had filled in the street and erected the fence, was of itself evidence that they had acted carelessly and without reasonable skill and care and that the consideration of this should not have been withdrawn from the jury. (See 2 Pugs. & Bur. 636.)

On appeal to the Supreme Court of Canada, **Held,** that the non-suit should not have been set aside. Fournier and Henry JJ. dissenting.

Per Gwynne J., Taschereau J. concurring.—That the defendants have, under the several Acts of Parliament which confirm and amend their charter, complete legislative power to raise or lower the level of the streets to any extent that the irregularities of the ground may seem to the corporation and its council, as representing the public, to require for the benefit and convenience of the public, cannot be doubted; the councils of these municipal corporations are themselves a deliberative law-making assembly, chosen by the people to do whatever, within their jurisdiction, may in their judgment be necessary for the public benefit, and the powers conferred upon them must therefore have a liberal construction in view of the public rather than of private interests. The power of altering, amending, repairing and improving the streets, which is a power vested in the corporation for the benefit of the public, whose representatives the council of the corporation are, is restricted by no condition save only the implied condition that what shall be done in the name of the public, and ostensibly for their benefit and convenience, shall not be done in such a manner as in reality to constitute a public nuisance.

The plaintiff has never rested his right to maintain this action upon the ground that the act complained of is a public nuisance from which he sustained peculiar injury, and as he could not succeed without establishing the act of which he complains to be such public nuisance, the non-suit was right and should be affirmed.

Appeal allowed with costs.

The Mayor, &c., of St. John v. Pattison—23rd February, 1880.

17. **Building society—By-law—Ch. 69 C.S.L.C.—Purchase of land—Ultra vires.**

La Cie de V., a building society incorporated under ch. 69 Con. Stats. L. C., by its by-laws, on the 21st August, 1874, declared that the principal object of the society was to purchase building lots, and to build on such lots cottages costing about $1,000 each for every one of its members. In order

Corporations—Continued.

to attain its object, the company, through its directors, obeying the instructions of the shareholders, on the 7th October, 1874, purchased the particular lots described in the by-laws, and contracted for the building of twenty-four cottages at $1,250 each, the amount that each of the shareholders had agreed to pay. A year elapsed during which the cottages were built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages, being shareholders in the Dominion Building Society, borrowed money from the latter society, and transferred to the same, as collateral security, the moneys due them by the appellants in virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some monies on account, and finally a deed of settlement *acte de reglement de comte* was executed between the two companies, upon which was based the suit against the appellants, brought by H. the respondent, as assignee of the Dominion Mortgage Loan Company, which name was substituted for that of "The Dominion Building Society," by 40 Vic. ch. 80 (D.)

Held, affirming the judgment of the court below, Strong and Gwynne JJ. dissenting, that the transaction in question was within the objects and purposes for which the society was incorporated, and was therefore not *ultra vires.* See 3 Dorion's R. 175.

La Compagnie de Villas du Cap Gibraltar v. Hughes, 23 June, 1884.

18. **Public streets—Duty of Corporation as to repairs.**

W. was the proprietor of an omnibus line running through some of the principal streets of Halifax under license from the corporation. Owing to the want of repair on some of the streets, and the accumulation of snow and ice, the conveyances could not be run according to time table, and there was a falling off in the number of passengers; moreover, some of the horses were injured and vehicles broken or damaged by the rough state of the streets.

Held, 1. Ritchie C.J. dissenting, that it was the duty of the corporation to keep the streets in good repair; and 2. Gwynne J. dissenting, that the plaintiff was entitled to retain his verdict, having proved special injury, and the damages awarded not being too remote nor excessive.

Judgment of the Supreme Court of Nova Scotia affirmed and appeal dismissed with costs.

The City of Halifax v. Walker.—16th February, 1885.

19. **Negligence—Defective state of public bridge—Liability of municipality for—Damages—New trial—Misdirection.**

An action was brought against the municipality of Colchester for damages on account of injury to the plaintiff from falling over a bridge at Acadia Mines, such bridge being at the time very much out of repair, about twenty

Corporations—Continued.

feet of the railing on one side having fallen away. At the trial, it was proved that one of the standing committees of the municipal Council was a committee on roads and bridges, whose duty it was, among other things, to report to the regular meetings of the council the state of the roads and bridges in the county. There was no evidence as to whether the bridge was much used as a thoroughfare or otherwise.

The only question submitted to the jury, was as to the amount of damages. The judge who tried the cause charged "that the accident which had occurred to the plaintiff was a most disastrous one, resulting from the undoubted negligence of those on whom the duty lay of keeping the bridge in a safe condition, and that the liability of the defendants was a matter of law which he would reserve for the full court."

The jury found a verdict for the plaintiff for $3,000, and the defendants obtained a rule *nisi* for a new trial, but the grounds on which such rule was obtained did not include misdirection of the judge at the trial.

The Supreme Court of Nova Scotia were equally divided on the argument of the rule *nisi*, two of the learned judges, Rigby and Weatherbe JJ., being of opinion that the defendants' counsel had agreed in the view propounded by the learned judge at the trial, and had requested the court to determine the question of law first, as if the issue of negligence had been found against defendant, upon sufficient evidence and under a proper charge. They considered the case disposed of by *Walker* v. *The City of Halifax* (See *Corporations* 18) and *McQuarry* v. *The Municipality of St. Mary's* (not reported).

McDonald C.J. and Tompson J. were of opinion, that the reservation at the trial was a reservation for the opinion of the court of a mixed question of law and fact, and they not only doubted their power to draw inferences of fact at all, but were unable to draw the inference of negligence, the evidence being silent on material points, such as whether the bridge was much or little travelled, and whether the alleged defect ever came to the knowledge of the county officers.

On appeal to the Supreme Court of Canada, **Held**, Strong J. dissenting, that the plaintiff was entitled to retain his verdict.

Per Strong J. dissenting, that there was not sufficient evidence of negligence to warrant the verdict, and the case reserved for the court being on questions of fact as well as of law, a new trial might have been ordered, notwithstanding the objection was not taken either at the trial or in the rule *nisi*.

Appeal dismissed with costs.

Colchester v. Watson.—16th March, 1885.

20. Powers of Bridge Company—Impeding navigation—43 Vic. ch. 61 and 44 Vic. ch. 51 (D).

See NAVIGATION 3.

Corporations—Continued.

21. North Shore Railway Company—Authority to use streets—Damages—Non-liability of Corporation—16 Vic. ch 100—39 Vic. ch. 2 sec. 2.

By 16 Vic. ch. 100 (Q.) the North Shore Railway Company was authorized to construct a railway to connect the cities of Quebec and Montreal, with the restriction that the railway was not to be brought within the limits of the city without the permission of the corporation of the city expressed by a by-law.

In July, 1872, the City Council, by resolution, had given to the North Shore Railway Company the liberty to choose one of the streets to the north of St. Francis street in exchange for St. Joseph street, which had been at one time chosen for that purpose. In 1874 the City Council were informed by the company that the line of railway had been located in Prince Edward street, and the company asked the council to take the necessary steps to legalize the line, but the corporation did not take any further action in the matter. In 1875, the company being unable to carry on its enterprise, the railway was transferred to the Province of Quebec by a notarial deed, and the transfer was ratified by 39 Vic. ch. 2 (D.) By that Act the name of the railway was changed and the Legislature authorized the construction of the road to deep water in the port of Quebec. It moreover declared that the railway should be a public work and should be made in such places and in such manner as the Lieutenant Governor in Council should determine and appoint as best adapted to the general interests of the province. After the passing of this Act the Provincial Government caused the road to be completed, and it crossed part of the city of Quebec from its western boundary by passing through Prince Edward street along its entire length.

The road was completed in 1876. In 1878, L. (the appellant) owner of several houses bordering on Prince Edward street, sued the corporation of the city of Quebec for damages suffered on account of the construction and working of the railway.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the respondent had no right of action against the corporation for the damages which he may have suffered by the construction and working of the railway in question. If the corporation gave the authorization required by 16 Vic. ch. 100 sec. 3, there was a complete justification of the Acts complained of. The imposing of terms was discretionary with the corporation. But the corporation never acted on the demand to legalize, and never authorized, the building of the railway through Prince Edward street. If the corporation could have prevented the government from constructing the railway in the streets of the city, in the face of the provisions of 39 Vic. ch. 2, the respondent could also have prevented it. His recourse,

Corporations—Continued.

if any, was not against the corporation but against the Provincial Government, the owners of the railway.

Appeal dismissed with cots.

Lefebvre v. The Corporation of the City of Quebec.—22nd June, 1885.

22. Agreement between Municipality and Road Company to discontinue use of Engine—Construction of.

See AGREEMENT 13.

23. Negligence—Liability of Corporation for—Defective sidewalk—Lawful use of street—Contributory negligence—Damages.

In an action against the town of Portland, N.B., for damages arising from an injury caused by a defective sidewalk, the evidence of the plaintiff showed that the accident whereby she was injured happened while she was engaged in washing the windows of her dwelling from the outside of the house, and that in taking a step backward, her foot went into a hole in the sidewalk and she was thrown down and hurt; she also swore that she knew the hole was there. There was no evidence as to the nature or extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation.

No motion for non-suit was made, and the jury were directed that if the plaintiff knew the hole was there, it was contributory negligence; but if she believed it was firm ground there was no contributory negligence.

The jury awarded the plaintiff $300 damages, and a rule *nisi* for a new trial was discharged.

Held, Ritchie C.J. and Fournier J. dissenting, that there should be a new trial.

Per Henry J.—That the plaintiff was lawfully using the street, and there was evidence of negligence on the part of the corporation, but as the question of contributory negligence had not been left to the jury as it should have been there must be a new trial.

Per Gwynne and Taschereau JJ.—That there was no evidence of negligence to justify the verdict, and a non-suit should have been granted if moved for.

Per Ritchie C.J. and Fournier J. dissenting.—That the plaintiff was neither walking nor passing over, travelling upon, nor lawfully using the said street as alleged in the declaration, and she was therefore not entitled to recover.

Appeal allowed and new trial ordered.

The Town of Portland v. Griffiths.—16th November, 1885.

Corporations—Continued.

24. Promoters of company—Action against company and promoters for fraudulent misrepresentation—Action ex delicto for deceit—Fraudulent concealment—Prospectus, alleged misstatements in.

A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on a lumber business as partners and had become embarrassed; that they then concocted the scheme of forming a joint stock company; that the sole object of the proposed joint stock company was to relieve the members of the firm from personal liability for debts incurred in the said business and induce the public to advance money to carry on the business; that application was made to the Government of Ontario for a charter, and at the same time a prospectus was issued which was set out in full in the bill; that such prospectus contained the following paragraphs among others, which the plaintiffs alleged to be false: 1. The timber limits of the company, inclusive of the recent purchase, consist of 222½ square miles, or 142,400 acres, and are estimated to yield 200 million feet of lumber. 2. The interest of the proprietors of the old company in its assets, estimated at about $140,000 over liabilities, has been transferred to the new company at $105,000, all taken in paid up stock, and the whole of the proceeds of the preferential stock will be used for the purposes of the new company. 3. Preference stock not to exceed $75,000 will be issued by the company to guarantee 8 per cent. yearly thereon to the year 1880, and over that amount the net profits will be divided amongst all the shareholders *pro rata*. 4. Should the holders of preference stock so desire the company binds itself to take that stock back during the year 1880 at par, with 8 per cent. per annum, on receiving six months notice in writing. 5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary, as well as on the preference, stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased.

The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus: that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus; that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor was the fact of a mortgage on the assets of the old company having been given to the Ontario Bank, after the prospectus was issued, but before the stock certificates were granted; that the assets of the old company were not worth $140,000, or any sum, over liabilities, but were worthless; and prayed for a recission of the contract for taking stock, for re-pay-

Corporations—Continued.

ment of the amount of such stock, and for damages against the directors and promoters for misrepresentation.

There was evidence to show that the promoters had reason to believe the prospects of the new company to be good, and that they had honestly valued their assets.

On the argument three grounds of relief were put forward:—1. Recission of the contract to subscribe for preference stock; 2. Specific performance of the contract to take back the preference stock during the year 1880 at par; 3. Damages against the directors and promoters for misrepresentation. The company having become insolvent, the plaintiffs put their case principally on the third ground.

Held, affirming the judgment of the court below, (11 Ont. App. R. 336,) that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders and affirmed their contract as owners of shares after becoming aware of the grounds of misrepresentation.

Held, also, as to the action against the defendants other than the company for deceit, that the evidence failed to establish such a case of fraudulent misrepresentation as to entitle plaintiffs to succeed as for deceit.

Held, also, as to the alleged concealment of the mortgage to the Ontario Bank, it having been given after the prospectus was issued it could not have been in the prospectus, and moreover that the shareholders were in no way damnified thereby, as the new company would have been equally liable for the debt if the mortgage had not been given; and as to the concealment of the embarrassed condition of the old company, the evidence showed that the old firm did not believe themselves to be insolvent; and in neither case were they liable in an action of this kind.

Appeal dismissed with costs.

Petrie v. The Guelph Lumber Company.—8th March, 1886.

25. Municipal corporation—Agreement by to take stock in Railway Company and to pay for in debentures—Breach of agreement—Right of Railway Company to sue for special damages.

See DAMAGES 40.

26. **Sale by Director to Company—Ratification of by-law by Shareholders—Vote of owner of property.**

A director of a joint stock company personally owned a vessel which he wished to sell to the company; he was possessed of a majority of the shares of the company, some of which he assigned to other persons in such numbers as qualified them for the position of directors, which position they accordingly filled. Upon a proposed sale and purchase by the

Corporations—Continued.

company of the said vessel, the board of directors, including the owner of the vessel, passed a by-law approving of such purchase by the company, and subsequently at a general meeting of the shareholders, at which the said owner and those to whom he had transferred the portions of his stock were present and voted, a resolution was passed confirming the said by-law, which resolution was opposed by a number of the shareholders representing nearly one half of the total stock of the company.

Held, reversing the decision of the Court of Appeal, (11 Ont. App. R. 205,) that the board of directors had no power to pass the said by-law, and under the circumstances the resolution of the shareholders confirming the by-law was invalid.

Appeal allowed with costs.

Beaty v. The North Western Transportation Company.—9th April, 1886.

Costs—Charged against administrator personally—Where misconduct.

See EXECUTORS 7.

2. In appeal.

See PRACTICE.

3. **Railway company—Lands taken for railway purposes—Arbitration—Award—Matters considered by arbitrators.**

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same which offer was not accepted and the matter was referred to arbitration under the Cons. Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the said land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer.

Held, affirming the judgment of the Court of Appeal, and the judgment of the Divisional Court, 5 O. R. 674, Gwynne J. dissenting, that under the circumstances neither party was entitled to costs.

Appeal dismissed with costs.

Ontario and Quebec Railway Co. v. Philbrick—9th April, 1886.

Counsel—Right to recover fees—Agreement for.

See PETITION OF RIGHT 5.

At hearing.

Right to begin.

Counsel—Continued.

When appellant in person.

Fees in appeal.

See PRACTICE.

Counts—Misjoinder of, in an indictment.

See CRIMINAL APPEAL 2.

County Court—Of Halifax—Prohibition to restrain trial of cause by.

See PROHIBITION 4.

County Court—Judge of—No power on a scrutiny under Canada Temperance Act to enquire into corrupt acts.

See CANADA TEMPERANCE ACT, 1878, 7.

Court of Chancery, Ont.—Transfer of action to, under Adm. Just. Act.

See MORTGAGE 10.

2. Powers of in Ejectment—R. S. Ont. ch. 40 sec. 87.

See POSSESSION 5.

Court of Review, P.Q.

See REVIEW, COURT OF.

Covenant—In mortgage deed.

See MORTGAGE 2.

Criminal Appeal—**Indictment—Delegation of authority by Attorney General—32 and 33 Vic. ch. 29 sec. 28—Obtaining money under false pretences.**

On an indictment, containing four counts for obtaining money by false pretences, was endorsed: "I direct that this indictment be laid before the grand jury.

MONTREAL, 6th October, 1880.

"L. O. Loranger, Attorney-General; by J. A. Mousseau, Q.C.; C. P. Davidson, Q.C."

Messrs. Mousseau and Davidson were the two counsel authorized to represent the Crown in all the criminal proceedings during the term.

A motion supported by affidavit was made to quash the indictment on the ground *inter alia*, that the preliminary formalities required by sec. 28 of 32 and 33 Vic. ch. 29, had not been obesrved. The Chief Justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted.

Held, on appeal, reversing the judgment of the Court of Queens Bench, that under 32 and 33 Vic. ch. 29 sec. 28, the Attorney General could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand

Criminal Appeal—Continued.

jury; and it being admitted that the Attorney General gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside,

Abrahams v. The Queen.—vi, 10.

2. **Indictment—Misjoinder of counts—Manslaughter—Evidence.**

An indictment contained two counts, one charging the prisoner with murdering M. J. T. on the 10th November, 1881; the other with manslaughter of the said M. J. T. on the same day. The Grand Jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the indictment was sufficient.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death (17th October preceding), the prisoner had knocked his wife down with a bottle; she fell against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side.

The following questions were reserved, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th November or the 17th October, 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment?

Held, affirming the judgment of the Supreme Court of New Brunswick, that the evidence was properly received, and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner.

Theal v. The Queen.—vii, 397.

3. **Larceny—Unstamped promissory note—Valuable security—32 & 33 Vic. ch. 21 (D).**

S. was indicted, tried and convicted for stealing a note for the payment and value of $258.33, the property of A. McC. and another. The evidence showed that the promissory note in question was drawn by A. McC. and C. R., and made payable to S.'s order. The said note was given by mistake to S., it being supposed that the sum of $258.33 was due to him by the drawers, instead of a less sum of $175.00. The mistake being immediately discovered, S. gave back the note to the drawers, unstamped and unindorsed, in exchange

Criminal Appeal—Continued.

for another note of $175.00. An opportunity occurring, S. afterwards, on the same day, stole the note; he caused it to be stamped, indorsed it, and tried to collect it.

Held, on appeal, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that S. was not guilty of larceny of "a note" or of "a valuable security" within the meaning of the statute, and that the offence of which he was guilty was not correctly described in the indictment.

Scott v. The Queen.—ii, 349.

4. **Witness—Contradiction of—New trial.**

The prosecutrix, in an indictment for rape, was asked in cross-examination, after she had declared she had previously had connection with a man, other than the prisoner, whether she remembered having been in the milk-house of G. with two persons named M., one after the other.

Held, that the witness might have objected, or the judge might, in his discretion, have told the witness she was or she was not bound to answer the question; but the court ought not to have refused to allow the question to be put because the counsel for the prosecution objected to the question.

Held, also, that since the passing of 32 and 33 Vic. ch. 20 sec. 80, repealing so much of ch. 77 of Cons. Stat. L. C., as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case; and of 32 and 33 Vic. ch. 36, repealing sect. 63 of ch. 77 Cons. Stat. L. C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial.

Laliberté v. The Queen.—i, 117.

5. No right of appeal when Conviction unanimous.

See JURISDICTION 8.

6. **Forgery—Uttering forged order for payment of money—Trying for an offence other than the one for which prisoner extradited.**

The prisoner Cunningham was indicted and tried at the October Term, 1884, of the Supreme Court of Nova Scotia at Halifax, Macdonald C.J. presiding. There were three counts in the indictment, charging—

1. That the said James Cunningham did feloniously offer, utter, dispose of and put off, knowing the same to be forged, a certain check or order for the payment of money, which said forged order is as follows, that is to say—

No. E. 43460. Halifax, N.S., February 13th, 1884.

Merchants' Bank of Halifax:

Pay William McFatridge, or order, two hundred and twenty-four dollars and seventeen cents ($224.17.)

(Sgd.) LONGARD BROS.

And endorsed as follows: "W. McFatridge."

With intent to defraud.

Criminal Appeal—Continued.

2. That the said James Cunningham afterwards, to wit, on the day and year aforesaid, having in his custody and possession a certain other order for the payment of money, which said last-mentioned order is as follows, that is to say—

No. E. 43460. Halifax, N.S., February 13th, 1884.

Merchants' Bank of Halifax:

Pay William McFatridge, or order, two hundred and twenty-four dollars and seventeen cents ($224.17.)

(Sgd.) LONGARD BROS.

He, the said James Cunningham, afterwards, to wit, on the day and year last aforesaid, at Halifax aforesaid, feloniously did forge on the back of said last-mentioned order a certain indorsement of said order for the payment of money, which said forged indorsement is as follows, that is to say, "W. McFatridge," with intent to defraud.

3. That the said James Cunningham afterward, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off, a certain other forged order for the payment of money, which forged order is as follows, that is to say—

No. E. 43460. Halifax, N.S., February 13th, 1884.

Merchants' Bank of Halifax:

Pay William McFatridge, or order, two hundred and twenty-four dollars and seventeen cents ($224.17.)

(Sgd.) LONGARD BROS.

And indorsed "W. McFatridge."

With intent thereby then to defraud.

Counsel for the prisoner, before the jury were sworn, pleaded to the jurisdiction of the court on the ground that the indictment charged an offence or offences different from that for which the prisoner was extradited, to which plea the attorney general demurred. Judgment was pronounced sustaining the demurrer and the trial proceeded. The prisoner was convicted on the first and third counts of the indictment, and acquitted on the second.

At the close of the trial counsel for the prisoner renewed his application, and the C. J. agreed to reserve for the opinion of the judges and submitted:—

(1) Whether the prisoner was indicted and tried for another and different offence, or other and different offences, than that for which he was extradited at the instance of the Government of Canada; and if so, whether the court had jurisdiction to try and convict the prisoner of such offence or offences.

Criminal Appeal—Continued.

(2) Whether the evidence on the part of the Crown, as reported herewith, is sufficient to sustain a conviction on the first and third counts of the indictment or on either of those counts. The papers put in evidence on the trial to be considered and read as part of the case.

The majority of the Supreme Court of Nova Scotia (Rigby, Smith and Thompson JJ., McDonald CJ. and Weatherbe J. dissenting), **Held,** that the prisoner was properly convicted on the third count.

Per Rigby J. delivering the judgment of the court.—Before the indorsement of the original check it was an order for the payment of the sum named to McFatridge, and to him only, but when endorsed it became literally an order for the payment of such sum to whoever should present it; and as the evidence was sufficient to justify the jury in concluding that it was uttered by the prisoner, knowing that the indorsement was forged, it would appear at first sight that the verdict upon the third count at least was sustained by the evidence, which is one of the questions referred to us under the case reserved.

It was contended, however, on behalf of the prisoner, that as the Dominion Act 32 and 33 Vic. cap. 19, provides especially in sec. 26 for the offence of knowingly uttering an order for the payment of money with a forged indorsement that the verdict on the count in question was not sustained by the evidence, because the indorsement of such an order should have been charged in terms.

The strongest case that I have been able to find for the contention is that of *Rex.* v. *Arscott,* cited by the prisoner's counsel from 6 Car. and Payne, p. 408. The prisoner in that case was indicted for forging an indorsement for the payment of money, and also with the uttering of the indorsement; and it was held that as the section of the statute relating to the offence under which he was indicted (sec. 1 Will IV. ch. 66) provided for the forging of orders, and while it also provided for the forging of indorsements of bills of exchange and other similar instruments which were designated, did not mention the indorsement of orders, it was therefore to be concluded that the legislature did not intend that the forging of the indorsement of the latter instrument was to be a punishable offence, although it would really be the forging of an order, and as such might be said to be within the terms of the Act.

Our Act, however, is very different from the imperial Act, under which that case was decided, inasmuch that it draws no such distinction as would exclude from the category of criminal offences the forging of the indorsement, which constitutes a part of the order set out in the third count. * * *

As the instrument is described in the first count as a check, the forgery

Criminal Appeal—Continued.

of which would in no sense be supported by proof of the forgery of the indorsement of a check, I think the conviction upon that count cannot be sustained.

On behalf of the Crown it was urged that the learned Chief Justice had no jurisdiction to reserve the case, because the questions submitted did not arise "on the trial," and therefore were not within the provisions of ch. 171 in the appendix to our Revised Statutes. I was of opinion at the argument, and still think, that the second question submitted to us did arise at the trial, and that we should assume that it did so arise unless the contrary was made to appear.

The other question reserved was, "whether the prisoner was indicted and tried for another and different offence, or other and different offences, than that for which he was extradited at the instance of the Government of Canada; and if so, whether the court had jurisdiction to try and convict the prisoner of such offence or offences."

As it appears that this same question was raised at the trial by demurrer, and was decided by the presiding judge against the prisoner, it is too late to raise it now in this way, as appears by the decision in *Rex* v. *Faderman et al.*, Denison, 572.

Per Weatherbe J. dissenting.—It is admitted that the evidence is not sufficient to convict on the first count, and the only question is whether the verdict can be sustained on the third.

It is argued, however, that an indorsement itself of an order to pay is an order. That the order to pay McFatridge or order by the indorsement of the name of McFatridge, the payee, becomes an order to pay the bearer, and therefore that the charge as stated is supported by the proof.

What we have to do is to interpret the word "order" in the third count. Is the above a strained interpretation, and can the word have two different meanings in the same count? We must not forget that the Legislature has provided for the two distinct cases of the uttering of a forged "order," and of the uttering of a forged "endorsement of an order." If the statute contemplates both a forged order and a forged endorsement of an order, would not the term "order," applied to the instrument in question, refer to the main instrument in contradistinction to the indorsement, even supposing that the whole instrument might be called, in the words of Coleridge J. in *Autey's case* (1 Dearsley & Bell, 298), "under some circumstances," a forged order for the payment of money. In view of the particular statute in question, upon principle, I should think the words "order for the payment of money," should be construed to apply, as they would be considered to refer in the ordinary sense, to the main body of the instrument and not to the

Criminal Appeal—Continued.

indorsement, and in the absence of authority to the contrary I must express this to be upon consideration the best opinion I can form on the subject.

On appeal to the Supreme Court of Canada, **Held,** Per Fournier, Henry and Taschereau JJ. (Ritchie C.J. and Strong J. dissenting), that evidence of the uttering of a forged indorsement of a negotiable check or order is insufficient to sustain a conviction on a count of an indictment charging the uttering of a forged check or order. On the second question reserved, therefore, the judgment of the court below should be reversed and the prisoner ordered to be discharged.

Per Ritchie C.J.—The question raised by the demurrer was not properly before the Court in Appeal, the court below having been unanimous with respect to it.

Per Strong J.—The court below rightly held, on the authority of *Rex* v. *Faderman* (Den. C.C. 572), that the question raised by the demurrer was not properly before the court, the C. J. having given judgment on the demurrer over-ruling it at the trial. Moreover, there was nothing in the law under which the prisoner was extradited to prevent the court from trying him for any offence for which he was, according to the law of the Dominion, justiciable before it.

Appeal allowed.

Queen v. Cunningham—16th March, 1885

Cross Appeal.

See PRACTICE.

Crown—Right of to plead prescription.

See PETITION OF RIGHT 3.

2. Not liable for tort.

See PETITION OF RIGHT 1, 10, 11.

3. Liability of, for Breach of Contract.

See PETITION OF RIGHT 8.

4. Forfeiture and Penalties, right to recover by.

See PETITION OF RIGHT 1.

5. Non-liability on Parliamentary Contract.

See PETITION OF RIGHT 12.

6. Liability on Departmental Contract.

See PETITION OF RIGHT 13.

7. Non-liability for Non-feasance or Misconduct of its servants.

See PETITION OF RIGHT 10, 11.

8. Not a Common Carrier.

See PETITION OF RIGHT 10, 11.

Crown—Continued.

9. Petition of Right to recover Damages for breach of Agreement by.
See PETITION OF RIGHT 15, 17.

10. Representation by Agent of.
See PETITION OF RIGHT 17.

11. Lien for Timber dues.
See PETITION OF RIGHT 18.

12. Property in Quebec North Shore Turnpike Roads.
See ROAD.

13. Interest on profits awarded Suppliant, refused.
See INTEREST 6.

14. Property held by, not liable to Taxation.
See ASSESSMENT AND TAXES 12..

15. **Insolvent bank—Winding-up proceedings—Priority of Crown as simple contract creditor—Estoppel—Acceptance of dividends by Crown not waiver—45 Vic. ch. 23.**

The Bank of Prince Edward Island became insolvent, and a winding up order was made on the 19th June, 1882. At the time of its insolvency the bank was indebted to Her Majesty in the sum of $93,494.20, being part of the public moneys of Canada, which had been deposited by several departments of the government to the credit of the Receiver General. The first claim filed by the Minister of Finance at the request of the respondents (liquidators of the bank), did not specially notify the liquidators that her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid, and on the 28th February, 1884, there was a balance due of $65,426.95. On that day the respondents were notified that her Majesty intended to insist upon her prerogative right to be paid in full. At this time the liquidators had in their hands a sum sufficient to pay in full her Majesty's claim. The following objection to the claim was allowed by the Supreme Court of Prince Edward Island, viz: "That her Majesty, the Queen, represented by the Minister of Finance and the Receiver General, has no prerogative or other right to receive from the liquidators of the Bank of Prince Edward Island the whole amount due to her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, 1. That the crown claiming as a simple contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45 Vic. ch. 23.

Crown—Continued.

2. That the crown had not waived its right to be preferred in this case by the form in which the claim was made, and by the acceptance of two dividends.

The Queen v. The Bank of Nova Scotia—xi, 1.

Curator—To substitution—Rights of action—Art. 154 C. C. P.

See SUBSTITUTION 3.

Custom and Usage—

See PEWHOLDER 1.

Custom of Paris—Arts. 279, 282 and 283.

See COMMUNITY.

Cy Pres, Doctrine of—Reference to master to report scheme for administration of charitable fund.

See CHARITABLE TRUST.

Damages—For disturbance in enjoyment of pew.

See PEWHOLDER 1.

2. Action of trespass for assault against Speaker of N. S. Legislature.

See LEGISLATURE 9.

3. For trespass to wharf.

See NUISANCE.

4. For breach of contract for delivery of goods

See CONTRACT 1.

5. For unlawful arrest.

See CAPIAS.

6. Special and vindictive—Duty of appellate court.

See JURISDICTION 5.

7. Rent, loss of, as.

See CONTRACT 4.

8. Apportionment of in case of collision.

See MARITIME COURT OF ONTARIO 2.

9. Liquidated by provision in contract.

See PETITION OF RIGHT 1.

10. Resulting from breach of contract with Government.

See PETITION OF RIGHT 8.

11. Excessive.

See FISHERY OFFICER 2.

12. Measure of—Breach of contract with captain of vessel.

See CONTRACT 6.

13. At sea.

See SHIPS AND SHIPPING 5.

Damages—Continued.

14. To ship.

See SHIPS AND SHIPPING 4.

15. Special—Excessive.

See LIBEL.

16. For breach of agreement; to be recovered by petition of right—Judgment obtained against joint misfeasor—Effect of, in reduction of damages.

See PETITION OF RIGHT 15.

17. Excessive—Application for new trial.

See JURISDICTION 22.

18. Light and air, interfering with.

See EASEMENT 3.

19. **Action on the case—Injunction, declaration alleging order for obtained maliciously—Demurrer.**

Action for maliciously obtaining an *ex parte* injunction order from a judge, whereby the plaintiff was restrained from disposing of certain lumber, in consequence of which he had sustained damage as was alleged.

The declaration set out that plaintiff was possessed as of his own property of certain lumber, that defendants wrongfully, improperly, maliciously and without any reasonable or probable cause, and without any notice to plaintiff made an *ex parte* application to a judge of the Supreme Court of New Brunswick for an injunction in a suit commenced by them in said Supreme Court on the equity side, in which suit defendants were plaintiffs and the now plaintiff with others were defendants, and procured from said judge an *ex parte* order of injunction whereby, &c., which order defendant caused to be served on plaintiff; that plaintiff afterwards appeared to the said suit and put in his answer, but defendants did not further prosecute their suit, which was dismissed with costs and the order of injunction became of no further effect; that by reason of obtaining and service on plaintiff of said order he was hindered and prevented from manufacturing, &c., said lumber for along space of time whereby said lumber was greatly injured and part thereof lost and the plaintiff lost large gains, &c. To this declaration plaintiffs demurred.

The demurrer was sustained by the Supreme Court of New Brunswick. (*See* 2 Pugs. & Bur. 469.)

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, that the declaration disclosed no cause of action.

By the statute of New Brunswick (2 Revised St. p. 77,) such an order is granted on a sworn bill, or on the bill and an affidavit, and may be granted *ex parte*, subject to be dissolved on sufficient ground shown by affidavit on

Damages—Continued.

the part of the defendant. Here there was no allegation that the injunction was dissolved, or that any application was made for its dissolution, or that the order was obtained by any *suggestio falsi*, or *suppressio veri* on the part of the plaintiff, and for aught that appeared in the declaration, the judge exercised a sound discretion in granting the order.

Appeal dismissed with costs.

Collins v. Everitt.—12th December, 1879.

20. **Adjoining land owners—Where defendant has allowed cellars to remain after building destroyed—Damage from water collecting in them and running against wall of house built by plaintiff—Whether defendant liable—Action on the case—Declaration—Non-suit.**

The plaintiffs owned a building lot in the City of St. John on which they excavated a cellar and foundation, and built a large and valuable building. The soil of the bottom of the cellar and under the foundation was clay. The defendants owned the adjoining lot on which, in 1848, (the time their ancestor, Stephenson, purchased it) there was a house. There was a cellar under the house adjoining the plaintiffs' land. Stephenson, or his tenant, dug another cellar joining the first one, and put up another house on the same lot. Those houses stood until 1871, when they were burned, leaving the cellars uncovered, thus making one large uncovered hole, bounded on the west by Charlotte Street, and on the north by the plaintiffs lot. These holes collected large quantities of water in them from the street and from the surface, and also by percolation from the land adjoining. When the plaintiffs' house was built the cellars being co-terminous with the foundation of the plaintiffs' building, and the soil being clay, these holes retained the water until it gradually softened the clay under plaintiffs' foundation wall, and also gradually destroyed the foundation wall itself, and escaped in that way into the plaintiffs' cellar, and thereby caused the side of the plaintiffs building to settle, and the building itself to topple over and damaged it to a large extent.

The declaration contained two counts. The first count for wrongfully, carelessly, negligently and improperly removing the earth and soil of the defendants' lot, and negligently continuing it so removed so that there remained holes and excavations, which the defendants so negligently managed and left uncovered, that large quantities of water collected and remained in the holes, which they permitted to flow and escape against, under and through the plaintiffs' foundation wall and thereby did damage.

Second count. The defendants improperly and negligently collected water, &c., and by their carelessness caused it to flow into the plaintiffs' premises and did damage.

The only plea was the general issue of not guilty.

Damages—Continued.

A rule for a non-suit pursuant to leave reserved at the trial was made absolute by the Supreme Court of New Brunswick, on the ground that damage and injury must both concur to afford a party a right of action, and the evidence showed only an ordinary and legitimate use of the defendants' own land, which did not constitute an injury, and therefore they were not liable. (*See* 2 Pugs. & Bur. 523).

On appeal to the Supreme Court of Canada, **Held**, that the declaration did not cover the appellant's case, and therefore the non-suit was correct.

Appeal dismissed with costs.

The Trustees of the St. John Young Men's Christian Association v. Hutchison, et. al.—23rd February, 1880.

21. For breach of contract to sell on commission.

See CONTRACT 10.

22. For breach of contract for sale of goods.

See SALE OF GOODS 10.

23. **Damages, action for—Rule for estimating—Finding of judge of first instance not considered excessive—Defendant's abuse of authority as Justice of the Peace.**

The plaintiff by his declaration alleged: That, in the city of Three Rivers, on or about the fifteenth day of the month of June, 1878, the plaintiff sold to defendant a cart-load of wood, for the price of forty cents, which the defendant agreed to pay plaintiff in cash: That the plaintiff went immediately and laid the said wood in the yard of the residence of defendant: That when plaintiff asked defendant for payment the defendant refused and told plaintiff to go and immediately take his wood away if he would not wait for his payment: That then plaintiff returned peaceably to the yard of defendant and began to replace the said wood in his cart to take it away, and that when he was about to finish reloading his cart defendant entered the yard and abused plaintiff, calling him a thief, and threatening to have him arrested and imprisoned for theft if he did not leave the wood in the yard: That the defendant, abusing his capacity of magistrate, or justice of the peace, sent for some policemen or constables to have plaintiff imprisoned for theft: That in fact, two policemen or constables arrived immediately on the spot, and conformably to the order and command of the said justice of the peace, the defendant, summoned the plaintiff to unload his cart and leave the wood in the yard, and if not, they would arrest and take him a prisoner for theft: That the plaintiff at that order answered he was ready to leave and deliver the said wood to defendant, on condition that the latter would consent to give him the price of it; but as defendant was not willing to pay him immediately, he (the plaintiff) was not obliged and was not

Damages—Continued.

willing to leave with him the said wood; that he could not do so, because he wanted some money to provide for his own wants and those of his family: That in obedience to the orders of defendant, the said policemen arrested plaintiff and took measures to hold his person and treat him like any other prisoner, but consented that plaintiff, before being taken to jail or to a magistrate, should take care of his horse and cart and put them out of the yard of the defendant: That for the purpose of taking his cart out of the yard, plaintiff took in his right hand the reins and put his left hand on the forepart of the said cart to be nearer the said cart and not be hurt by the posts of the gate of the yard, and afterwards made his horse slowly advance towards the gate of said yard: That plaintiff was then on the left side of the said cart and his left hand was lying on the end of the frame of the said cart, lying on the back of the shaft of the said cart, on the left side: That the said cart being an upsetting one and then heavily loaded, was kept from upsetting by a stick or piece of wood passed through an iron cramp fixed to the right shaft and rising over the frame (right side) of the said cart through a mortise in the said frame: That while plaintiff was advancing his cart out of the yard, defendant went to the right side of the cart and maliciously, and knowing that his action would cause to plaintiff grievous bodily harm, violently pulled out the stick or piece of wood passed in the said cramp and by so doing upset the said cart and caused the middle finger of plaintiff's left hand to be bruised, torn and pulled out in the middle of the third phalanx, the bone being fractured at the root of the nail and all the part of the said finger, from there to the end of the said finger, being completely separated from the rest of the said finger, and caused all the other fingers and said plaintiff's left hand to be horribly bruised, broken and fractured: That in consequence thereof the amputation of the said middle finger of the plaintiff's left hand became necessary, and a short time after said amputation lockjaw set in, and he for a long time suffered all the convulsions and horrible pains of said disease, and was confined to bed for nearly a month, his life being despaired of, and he was rendered incapable of earning bread for his family, and was permanently disabled from using his left hand.

For these various injuries to his feelings, reputation and health he claimed as damages $4,000.

The Superior Court at Three Rivers (Polette J.) was of opinion the plaintiff had proved these allegations, and assessed his damages at $3,000.

On appeal to the Court of Queen's Bench, that court reduced to $600 the amount of damages allowed to plaintiff and condemned him to pay all the costs of appeal.

On appeal to the Supreme Court of Canada, **Held**, Taschereau J. dissenting, that in view of the very serious injuries sustained by the plaintiff and

Damages—Continued.

of the misconduct of the defendant, who appears to have abused his position of a Justice of the Peace, the amount awarded by the judge of first instance was not so clearly excessive as to justify the pronouncing his judgment erroneous.

Per Taschereau J.—Though the amount awarded by the Court of Queen's Bench was not sufficiently large, yet taking into consideration the position of the plaintiff and the nature of the injuries $3,000 was excessive.

Per Fournier J.—The abuse by the plaintiff of his position of Justice of the Peace was an important element to be taken into consideration in fixing the amount of damages.

Per Gwynne J.—The sound rule to adopt is that in mere matters of fact, or in the estimation of damages not capable of precise calculation, or not ascertainable by the application of any rule prescribing a measure of damage, this court should sustain, the judgment of the judge of first instance, unless satisfied that his conclusions are clearly erroneous.

Levi v. *Reed* 6 Can. S. C. R. 482 (*See* Jurisdiction 5) approved.

Appeal allowed with costs in Court of Queen's Bench and Supreme Court.

Gingras V. Desilets.—11th February, 1881.

24. Action of, against Telegraph Co. for cutting Trees.

See TRESPASS 7.

25. **Action of damages for malicious proceeeings in insolvency—Demurrers, judgment on when not final not appealable—Pleading—Trespass—Order by judge of court below directing payment of part of verdict as condition of stay of execution illegal—Leave granted to appeal on whole case—Security allowed.**

An action for malicious proceedings in insolvency.

The declaration contained eight counts.

"1. For that the defendants falsely and maliciously, and without reasonable or probable cause, on the 18th day of April, 1879, caused and procured a writ of attachment under the Insolvent Act of 1875 and amending Acts, to be issued against the estate and effects of the plaintiff, who was then a trader, saloon-keeper and miner, residing and carrying on business in Cariboo, and in manner aforesaid caused and procured the said writ to be served upon the plaintiff, to be published, and the plaintiff's real and personal property, goods and effects, to be taken from him; and after the issue of the said writ, and within five days from the service thereof, the plaintiff duly presented a petition to the judge authorized to act in the premises, hereinafter called the County Court Judge, praying that the said writ and the attachment made thereunder might be set aside; and such proceedings were thereupon had, that afterwards the said County Court Judge dismissed the said

Damages—Continued.

petition with costs, and directed the proceedings in insolvency to go on; that thereupon the plaintiff duly appealed from such decision to the Supreme Court, and such proceedings were thereupon had, that afterwards, on the 27th day of February, A.D., 1880, the said Supreme Court ordered that the said decision be set aside and condemned the defendants in the costs of appeal* and the proceedings on the said writ were thereupon then ended and determined, and by reason of the premises, the plaintiff was put to inconvenience and anxiety, and incurred great pain and distress of body and mind, and was prevented from transacting his business, collecting his debts, and lost many of his debts by reason of being so deprived, as aforesaid, for a long time, of the opportunity of collecting the same, and was injured in his credit, and his business became and was destroyed, and he incurred great expense in taking and defending the several legal proceedings hereinbefore mentioned, and in re-possessing himself of his estate, and in journeying from Cariboo to Victoria and back for the furtherance of his interests in the premises, and in attending to the said legal proceedings; and his property, while out of the plaintiff's possession, became damaged and deteriorated in value, and the plaintiff has been otherwise greatly injured."

2. The same as the first count as far as the asterisk; it then proceeds as follows: "And afterwards the said County Court Judge, on the 8th day of May, A.D., 1880, having complete jurisdiction in that behalf, ordered that the said writ of attachment be set aside and annulled; that thereupon the defendants appealed from the said order, and on the 26th day of May, 1880, caused the appeal to be set down for hearing on the 14th day of June, A.D. 1880, before the Supreme Court. That on the 14th day of June, 1880, it was considered by the said Supreme Court that the defendants had not proceeded with their appeal according to the law or the rules of practice, and, on the application of the plaintiff, the said Supreme Court ordered that the record (if any) be returned to the officer entitled to the custody thereof, and condemned the defendants to pay the plaintiff the costs by him incurred in the matter of the said appeal."

Conclusion, as in the first count, from asterisk.

"3. And the plaintiff also sues the defendants for that a writ of attachment on the 18th day of April, 1879, having been sued out under the Insolvent Act of 1875 and amending acts by the defendants against the estate and effects of the plaintiff, who was then a trader, saloon-keeper and miner, residing and carrying on business in Cariboo, which writ was duly served upon the plaintiff, and whereby the plaintiff's real and personal property, goods and effects were seized and taken from him, the plaintiff after the issue of the said writ and within five days from the service thereof duly presented a petition to the judge duly authorized in that behalf hereinafter

Damages—Continued.

called the County Court Judge, praying that the said writ and the attachment made thereunder might be set aside, and the said petition came on for hearing before the said County Court Judge on the 15th day of May, 1879; and the defendants maliciously and without reasonable or probable cause appeared before the said County Court Judge, and opposed the said petition and caused and procured the said County Court Judge to decline to hear or adjudicate upon the said petition. That afterwards the plaintiff obtained a summons from one of the judges of the Supreme Court, calling upon the said County Court Judge and upon the defendants to show cause why the said County Court Judge should not proceed to hear and adjudicate upon the said petition, and on return of the said summons, to wit, on the 8th day of September, A.D. 1879, the defendants maliciously and without any reasonable or probable cause opposed the application, and thereupon the said Supreme Court Judge on the said 8th day of September, 1879, ordered the said County Court Judge to proceed to hear and adjudicate upon the said petition. And thereupon the defendants maliciously and without reasonable or probable cause appealed from such last mentioned order to the Supreme Court, but the said court on the 25th day of September, 1879, confirmed the said last mentioned order and dismissed the said appeal. That afterwards in pursuance of the said last mentioned order the said petition came before the said County Court Judge for hearing, and the defendants again maliciously and without reasonable or probable cause appeared upon the hearing of and opposed the said petition, and caused and procured the said County Court Judge on the 31st day of October, 1879, to dismiss the said petition with costs and to direct the proceedings in insolvency to go on. That thereupon the plaintiff duly appealed from the said last mentioned decision to the Supreme Court, and upon the hearing of the said appeal the defendants again maliciously and without reasonable or probable cause appeared and opposed the said appeal, but the said Supreme Court on the 27th day of February, A.D. 1880, set aside the said decision of the said County Court Judge of the 31st day of October, 1879." *

Conclusion as in first count from asterisk.

4. The same as third count down to asterisk, it then continued as follows:—

"And thereupon the plaintiff applied to the said County Court Judge in pursuance of the said petition to set aside and annul the said writ, and the attachment made thereunder, and the defendants again maliciously and without any reasonable or probable cause, appeared before the said County Court Judge and opposed such application, but the said County Court Judge, after hearing the said application, made an order setting aside and annulling the said writ and attachment, and thereupon, the defendants maliciously and

Damages—Continued.

without reasonable or probable cause, appealed from the said last mentioned order of the 8th day of May, 1880, to the Supreme court, and on the 26th day of May, 1880, caused the appeal to be set down for hearing on the 14th day of June, 1880. That on the said 14th day of June, 1880, it was considered by the Supreme Court, that the defendants had not proceeded with their said appeal according to law or the rules of practice, and on the application of the plaintiff, the said Supreme Court ordered that the record (if any) be returned to the officer entitled to the custody thereof, and condemned the defendants to pay the plaintiff the costs by him incurred in the matter of the said appeal."

Conclusion as in the other counts.

5. "And the plaintiff also sues the defendants for that, after the issuing of the writ of attachment as in the third count mentioned, the defendants maliciously and without any reasonable or probable cause, caused, advised and procured divers alleged creditors of the plaintiff to prove their alleged claims against the plaintiff, and caused, advised and procured such creditors to support the writ of attachment, and the said writ was determined as in the third count mentioned, and by reason of the premises the said writ of attachment remained in force for a longer time than otherwise it would, and the plaintiff was put to inconvenience and anxiety &c."

Conclusion as in other counts.

6. The same as the fifth count, except that it refers to the issuing and determination of the writ "as in the fourth count mentioned."

"7. And the plaintiff also sues the defendants for that at the time of the grievance hereinafter mentioned the plaintiff was a trader, saloon keeper and miner, residing and carrying on business in Cariboo, and the defendants maliciously, and without any reasonable or probable cause, caused and procured the plaintiff's houses, situate at Cariboo, to be entered and the plaintiff to be dispossessed thereof for a long time, and his goods and chattels, mines, and books of account to be seized and taken from him, and the plaintiff to be deprived of the use and enjoyment of the same respectively for a long time, and by reason of the premises the plaintiff was put to inconvenience and anxiety, incurred great pain and distress of body and mind, was prevented from transacting his business, collecting his debts, and lost many of his debts by reason of being so deprived as aforesaid for a long time of the opportunity of collecting the same, and was injured in his credit, and his business became and was destroyed during the time the plaintiff was so dispossessed and deprived of the said houses, mines, goods and chattels, and the same became greatly deteriorated in value, and the plaintiff incurred great expense in re-possessing himself of the said houses, mines, and books of account, goods and chattels, and was otherwise greatly injured."

Damages—Continued.

"8. And the plaintiff also sues the defendants for that the defendants with force and arms broke and entered the plaintiff's houses and mines at Cariboo, dispossessed the plaintiff thereof respectively, and remained therein and in possession thereof respectively for a long time, to wit, eighteen calendar months, and also seized and took and for the time aforesaid detained and dispossessed the plaintiff of all his books of accounts, goods, chattels and effects, consisting principally of merchandise and furniture, whereby the plaintiff for and during all that time lost and was deprived of the use of the said houses, mines, goods, chattels and effects, and thereby the same became and were greatly damaged, lessened in value and spoiled, and divers of the plaintiff's book debts were lost."

"And the plaintiff claims thirty thousand dollars."

The defendants pleaded not guilty, and pleas traversing the allegations in the several counts, and, as to the seventh and eighth counts, justifying under the writ of attachment.

They also demurred to all the counts, except the seventh and eighth.

The issues of fact were tried before the Chief Justice Sir M. B. Begbie and a special jury on the 2nd and 3rd of June, 1881, when the jury returned a verdict as follows: "we find a verdict for the plaintiff and award him no damages before the 16th of May, 1879. Subsequent to that date we award him $5,000."

The demurrers were argued before Sir M. B. Begbie and Mr. Justice Crease on the 27th day of June, 1881, and were over-ruled.

Upon the same day (the 27th June) the plaintiff moved for judgment in conformity with the verdict of the jury, which the Chief Justice pronounced ordering the plaintiff to take judgment for $5,000 with costs.

On the 11th of July, 1881, the Chief Justice granted the defendants a stay of execution until the cause could be re-heard before the full court of British Columbia, on condition of the payment of $1,000 and taxed costs to the plaintiff.

On application to one of the Judges of the Supreme Court of Canada, the defendants were permitted to deposit $500 in that court as security for the costs of appeal. (*See Practice—Security*)

The defendants thereupon brought their appeal to the Supreme Court of Canada, but confined it to the judgment on the demurrers, and did not appeal from the judgment of the Chief Justice ordering judgment to be entered on the verdict, being probably under the impression that that judgment should be heard before the full court of British Columbia before an appeal would lie therefrom to the Supreme Court of Canada.

Damages—Continued.

The "case" contained the proceedings on the demurrers, and the formal order over-ruling them. This formal order was added to the "case" after its transmission, by special order. (*See Practice—Case.*).

On the 1st of March, 1882, a motion was made on behalf of the plaintiff to quash the appeal for want of jurisdiction. 1. Because the appeal was not from the final judgment of the highest court of last resort in the Province of British Columbia. 2. Because the judgment over-ruling the demurrers to only six counts of the declaration was not a final judgment from which an appeal would lie.

At the same time a motion was made on behalf of the defendants that, in the event of the court being of opinion the appeal was not regular, leave be given to appeal from the judgment on the whole case as well as on the demurrers, without any appeal being had to any intermediate court of appeal in the Province, and that the "case" might be amended to include the judgment on the whole case, and the pleadings, proceedings and evidence necessary to raise the question for the decision of the court.

On the 22nd June, 1882, the Supreme Court of Canada, **Held**, that the judgment was not one from which an appeal would lie and it ordered the appeal to be quashed. The court further ordered that the defendants might appeal from the judgment on the whole case as well as on the demurrers, provided the "case" and factums of defendants should be filed before the 15th day of September then next, and the appeal brought on for hearing at the then next session of the court; in default, the appeal to stand dismissed with costs without further order. The court further ordered that the $500 paid into court on the 13th September, 1881, (*See Practice—Security,*) should remain in court as security for the costs of the appeal then allowed.

On application the time was further extended for filing the case and factums. (*See Practice—Time.*)

After hearing the argument of the appeal the Supreme Court of Canada **Held**, that the defendants were entitled to judgment both on the demurrers and on the facts. That the 3rd, 4th, 5th and 6th counts of the declaration were admittedly bad, and the 1st and 2nd counts were also bad. It was not alleged that the defendants procured the writ of attachment to issue by any false statement, there was no allegation that the defendants were not creditors of the plaintiff, or that he had failed to meet his engagements as they became due, or that he was not liable to be put into insolvency. That as to the 7th and 8th counts, the jury having confined the damages to acts done subsequently to the 16th May, 1879, and the defendants by their plea to these counts justifying under the writ of attachment, and the acts com-

Damages—Continued.

plained of having been committed on the 3rd May, 1879, under the writ while in force, the finding, which was a general one, was in effect a finding in favor of the defendants upon the issue joined on the plea to the said counts. That the plaintiff should be ordered to repay to the defendants the $1,000 paid by them under the order of the Chief Justice of the 11th July, 1881, there being nothing in the law to justify the court below in ordering such a payment.

Appeal allowed with costs in both courts; judgment on the demurrers over-ruled and demurrers allowed; judgment ordered to be entered for the defendants upon the demurrers and upon the 7th and 8th counts; the order of the 11th July, 1881, set aside; and plaintiff ordered to repay the $1,000 with interest at 6 per cent. from that day, together with the sum paid for costs of suit under that order.

Bank of B. N. A. v. Walker.—19th March, 1883.

26. Caused by tug towing raft—Liability for.

See MARITIME COURT OF ONTARIO 4.

27. Caused by fire communicated from premises of Railway Company.

See RAILWAYS AND RAILWAY COMPANIES 16.

28. For breach of contract to supply meat.

See CONTRACT 21.

29. Caused by neglected condition of streets—Liability of City of Halifax.

See CORPORATIONS 18.

30. **Action for cost of repairs to printing press and freight charges—Lease with privilege of purchasing—Saisie revendication—Dilatory exceptions—Art. 12 O. C. C. P. sub-sec. 7.**

About the 22nd of June, 1878, plaintiffs (printing press manufacturers of New York), made an agreement with the defendant, (the proprietors of the Post newspaper), in the form of a lease of a printing press with its appurtenances, for six months, at a rental of $1,000 payable in advance, plaintiffs obliging themselves to erect the press on the premises of the defendants. The lease contained a stipulation, that the said lessees should have the privilege of purchasing the press, at the expiration of the lease for $4,500.

It was also agreed in said lease, that failing purchase, defendants would deliver the said press and appurtenances at the expiration of the lease in as good order and condition as the same was at the commencement of the said lease, reasonable wear and tear, and accident by fire excepted, free of all charges and unbroken, free on board in Montreal, with freight paid to New York.

Plaintiffs erected a press; defendants paid the $1,000, and held the press under said lease until the expiration thereof; and then, instead of

Damages—Continued.

returning it as stipulated in the clause of said lease lastly recited, continued to use it; and some time after the lease had terminated, plaintiffs, considering that defendants had exercised their option to purchase the press, instituted an action against the defendants, accompanied by an attachment *saisie conservatoire* for the recovery of the purchase price $4,500.

To that action defendants pleaded in effect, that they had never exercised their option to purchase, and had never become purchasers of the press; and that whatever remedy plaintiffs had, they had no right to a suit for the price of the press, as for goods bought and sold; and the result was that the plaintiffs' action was dismissed, and the judgment dismissing it was confirmed in the Court of Review.

During the time the above-mentioned suit was pending defendants, (who had given a friend as guardian of the press seized under *saisie conservatoire*) continued to use and employ the press for a period of sixteen months and twenty-six days, at the expiration of which period plaintiffs obtained possession of the press under a *saisie revendication*, removed it by their own men, and placed it on board of the cars addressed to them at New York, where it ultimately arrived. On arrival there it was found to be in such a state of disrepair that large expenditure was necessary in order to fit it for use and to put it in the condition in which it was at the time that it had been leased to the defendants, reasonable wear and tear excepted.

Plaintiffs then instituted the present suit against the defendants, claiming by one count of their declaration the sum of $2,809.13, as the value of the use and occupation of the press and its appurtenances during the said term of sixteen months and twenty-six days, at the rate established in the lease itself, viz.: $1,000 for six months.

By a second count plaintiffs claimed payment of the like sum of $2,809.13, as damages suffered and sustained by them through the use and employment and retention by the defendants of the said press and its appurtenances, after the expiration of the said lease.

By a third count plaintiffs claimed a further sum of $299.35 as the costs and expenses of taking down, packing, loading and removing said press and appurtenances to New York, including the freight and other necessary charges thereon, defendants having agreed to deliver the said press free on board, freight paid to New York.

Defendants fyled severally dilatory exceptions under Article 120 of the Code of Civil Procedure, sub-section 7, setting up that plaintiffs were not resident in the province and that no power of attorney from them had been produced. These exceptions were dismissed by the Superior Court of Lower Canada (Rainville J.)

Damages—Continued.

The defendants pleas to the merits raised only issues of fact.

The Superior Court (Jetté J.) gave plaintiffs $2,000, in consequence of the deterioration and damages caused to the press, and a further sum of $160.50 for cost of transport.

This judgment was confirmed by the Court of Queen's Bench for Lower Canada (appeal side.)

On appeal to the Supreme Court of Canada, **Held**, that the judgments of of the courts below should be affirmed (Henry J. dissenting).

Appeal dismissed with costs.

Mullin v. Hoe—17th February, 1885.

31. Action against municipal corporation for defective bridge.

See CORPORATIONS 19.

32. Action of, for use and occupation of land—Prescription.

LAND 3.

33. Action against railway company—Negligence—"Res ipsa loquitur."

See RAILWAYS AND RAILWAY COMPANIES 21.

34. To raft by bridge—Powers of Bridge Company—43 Vic. ch. 61 D., and 44 Vic. ch. 51 D.

See NAVIGATION 3.

35. Action for—Illegal arrest—Transient trader—By-law of city of Quebec—License.

See LICENSE 7.

36. Action by land owner in city of Quebec against corporation for authorising use of streets by North Shore Railway Co.

See CORPORATIONS 21.

37. Street railway—Defective track—Accident.

See RAILWAYS AND RAILWAY COMPANIES 23.

38. Railway Company—To husband by loss of wife—To children by loss of mother.

See RAILWAYS AND RAILWAY COMPANIES 24.

39. Corporation—Liability for damages caused by defective sidewalk.

See CORPORATIONS 23.

40. Railway—Agreement by municipal corporation to take stock and to pay for in debentures—Breach of Agreement—Right to sue for special damages.

By their action in the Superior Court, instituted the 19th of June, 1875, the respondents sought to recover from the appellants $500,000 damages, alleging: That the appellants were subscribers to the capital stock of the respondents to the extent of 20,000 shares of $10, amounting to $200,000,

Damages—Continued.

which had been subscribed for under the authority of a by-law of the apellants, the subscription to be payable in debentures of the corporation of $100 each, papable twenty-five years from date and bearing interest at the rate of six per cent. per annum, and to be taken by the company at par in payment of their subscription; that there should be $150,000, payable monthly on the subscription, in proportion as the work progressed; That in March, 1875, work had been done on said railway within the limits of the County of Ottawa, to the value of $300,000, on a length of road of fifty miles, and that in January of that year, work had been done to an extent sufficient to entitle the company to claim from the appellants $112,096, and on the 14th of June, 1875, a notarial demand was made to the appellants for the delivery of debentures for this amount, which the appellants refused.

That the refusal, negligence and omission of the appellants to deliver to the respondents their debentures to the above amount had caused and was causing considerable damage, not only by putting in peril the payment of the sum of $50,000, payable on the condition aforesaid, that the railroad should be completed on the 1st December, 1885, but also by injuring the credit of the respondents and depriving them of considerable sums that the recpondents would have had the right to receive, and would have got and received as well from the City of Montreal, under and in virtue of by-law No. 59., Schedule A. of the Act 36 Vic. ch. 49, as of that of the Government of Quebec, from and out of the subsidy voted to the respondents by and in virtue of the Act of Quebec, 37 Vic. ch. 2, and that besides these damages the respondents had the right to claim from the appellants interest on the amount of debentures from the date of their protest of the 19th January, 1875.

It appeared that another action was pending for the debentures and interest thereon.

The appellants met this action by a demurrer. In this demurrer the appellants say that the obligation contracted was for the payment of a sum of money, and that the only damages to which the respondents could be entitled was interest at six per centum on the amount of debentures over due, and that no other damages or general damages could be claimed.

This demurrer was rejected by the Superior Court for Lower Canada, (Loranger J.) on the 30th April, 1879.

Also by the Superior Court, Torrance J., when rendering the final judgment on the 18th April, 1882.

The views held by these two judgments on the appellants' demurrer were finally adopted by the Court of Queen's Bench.

On appeal to the Supreme Court of Canada, **Held**, affirming the judg-

Damages—Continued.

ments of the courts below, Ritchie C.J. and Gwynne J. dissenting, that the rights of the respondents were not confined to an action for the recovery of the debentures with interest; they were entitled to bring the present action for special damages; and although there might be difficulty in estimating the amount proper to be awarded as such damages the court ought not to reject the demand for that reason, but should give such amount as in equity the respondents were entitled to.

Per Fournier J.—The obligation of the appellants was to deliver debentures according to the agreement—an obligation to do a certain thing, to make the delivery in question, which was what the company had the right to exact, and not the payment of a sum of money that could not be demanded before the end of 25 years. If the obligation were simply to pay a certain sum of money, art. 1077 C. C. would be applicable, and the damages could not exceed the legal interest, but the obligation being to make at the stipulated time the delivery of the promised debentures was one, the execution of which subjected the party contracting it to the consequences of arts. 1065 and 1073 of the C. C. Further, the relation of the appellants to the respondents was one rather of partnership than of an ordinary shareholder. Instead of assuming this latter position, which would only have subjected them to the consequences determined by the statute, they had seen fit to make a special contract which was in no way affected by the statute, and which necessarily came within the C. C., and it was in the arts. of the C. C. concerning the obligations of partners between themselves that the solution of the question was to be found—arts. 1840 and 1841; Laurent Tome 26, No. 249; Aubry et Rau 4th vol. p. 554 par. 380; Massé Dr. Com. p. 325, No. 270; Demante C.C.; Duranton Cours de Dr. Fr. 423 tit. ix; Troplong Con. de Soc. 22.

Per Taschereau J.—The damages asked are for the delay in the issue of the debentures, and do not fall under art. 1077 C. C. To extend this article in the sense asked for by the appellants would lead to grave consequences. No money was due and no money could be asked; there was, consequently, no delay in the payment of money, and the damages are not claimed for any such delay.

Where it is evident the plaintiff must have suffered some damages from the inexecution of a contract, the court will not dismiss his claim because difficult to precisely determine the extent of such damages or the basis upon which the amount may be arrived at, but the court will establish the amount according to the rules of equity. (*De Villeneuve et Carette*, 1884, 2820, p. 550.

Per Henry J.—This was an action for the non-delivery of the bonds and not for the non-payment of money. The obligation did not come within arts.

Damages—Continued.

1066, 1067 C. C., but was governed by arts. 1840 and 1841. Although the plaintiffs were not entitled to the amount of the debentures, they were under the code entitled to damages, independent of the question of time or of interest. When a party has suffered wrong and is unable to prove the damages sustained by that wrong, the court should not dismiss his action, but give him reasonable damages.

Per Ritchie C.J. dissenting.—The claim is to recover damages, apart from the amount of the debentures and interest, for which an action has been brought and is pending. Although expressing his doubts with great hesitancy, he had been unable to discover anything in the case other than simple delay in not paying in the manner agreed on, for which the only claim the plaintiff would have against the defendants would be for the delivery of the debentures, or their value in money and interest. The agreement to take stock and pay for it in debentures was no more than an agreement to take stock securing the payment of the money therefor by debentures, and therefore an obligation to pay money to which art. 1077 C.C. applies. The plaintiffs' action should be dismissed on the twofold ground that the declaration discloses no right of action and that the plaintiffs have not proved that they suffered any loss or damage for which the appellants could be held liable.

Per Gwynne J.—The County of Ottawa could not, by reason of being shareholders in the railway company, be regarded as partners with the company, and so within art. 1840 of the C.C., but if they could be so regarded the damages specially sought to be recovered are not recoverable being altogether too remote and not consequential on the non-execution of the obligation declared upon, nor is there any loss alleged and proved to support a judgment for the $100 given.

Appeal dismissed with costs.

County of Ottawa v. M. O. & W. Ry. Co.—8th March, 1886.

41. Railway company — Accident — Negligence — Wharf — Ferry — Damages increased by adding interest from date of demand.

See RAILWAYS AND RAILWAY COMPANIES 26.

42. Dead freight—Amount of agreed freight which would have been earned on deficient cargo.

See SHIPS AND SHIPPING 8.

43. Nominal damages—Court will not grant new trial when defendant entitled to, for technical breach of contract.

See NEW TRIAL 15.

Dead Freight.

See SHIPS AND SHIPPING 8.

Débats de Comptes.

See EXECUTORS 1.
" EVIDENCE 8.

Debentures—Issued by trustees under statutory authority.

See PETITION OF RIGHT 6.

2. Joint purchase of.

See PARTNERSHIP 2.

3. Agreement by municipal corporation to pay for stock in railway company—Breach—Special damages.

See DAMAGES 40.

Debtor—Appropriation by.

See PAYMENT 5.

Deceit—Action of against company and promoters—Misrepresentation—Concealment—False statements in prospectus.

See CORPORATIONS 24.

Deed—**Escrow—Estoppel.**

To a declaration for quiet enjoyment in a mortgage to the plaintiffs, executed by T., the defendants' grantee, R., one of the defendants, pleaded that T. did not, after the making of that deed, convey to the plaintiffs. The deed from defendants to T. was dated 22nd June, 1855, and the mortgage from T. to the plaintiff was dated 10th April, 1855. Both were registered on the 28th July, 1855—the deed first. It appeared that there were two mortgages from T. to the plaintiffs on another lot. when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found that a deed from the defendants to him was necessary to give the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August, 1855.

Held, on appeal, affirming the judgment of the Court of Queen's Bench, Ontario, that the whole transactions shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and the discharge of the other mortgages for which it was given, and that the plaintiff, therefore, could recover. Also, that assuming the deed of the 10th of April to have been a completed instrument from its date, the usual covenant contained in it that the grantor was seized in fee at the date of the deed created an estoppel, and that the estoppel was fed by the estate T. acquired by deed of 22nd June, 1885. (Henry J. dissenting.)

The Trust and Loan Co. v. Ruttan.—i, 564.

2. Erroneous statement in—Evidence as to.

See JUDICIAL AVOWAL.

Deed—Continued.

3. **Prohibition to alienate in a purely onerous title void—Art. 9 C., 18 Vic. ch. 250.**

By 18 Vic. ch. 250, W. F. and his brother were authorized to sell certain entailed property in consideration of a non-redeemable rent representing the value of the property. On the 7th September, 1860, the appellant and E. F. assigned to their brother, A. F., a piece of land forming part of the above entailed property, in consideration of a *rente foncière* of six pounds, payable the 1st day of October of each year. The deed was registered and contained the following stipulation: "But it is agreed that the assignee cannot alienate in any manner whatsoever the said land, nor any part thereof, to any person without the express and written consent of the assignors under penalty of the nullity of the said deed." The property was subsequently seized by a judgment creditor of A. F., and appellant opposed the sale and asked that the seizure be declared null, because the property seized could not be sold by reason of the above prohibition to alienate.

Held, on appeal, affirming the judgment of the court below, that the deed was made in accordance with the provisions of 18 Vic. ch. 250, and being a purely onerous title on its face, the prohibition to alienate contained in said deed was void. Art, 970 C. C. L. C.

Query—Whether the substitutes may not, when the substitution opens, attack the deed for want of sufficient consideration.

Fraser v. Poullot.—iv, 515.

4. **Held,** Per Taschereau and Gwynne JJ.—That a deed, taken under 9 Vic. ch. 37 sec. 17, before a notary (though not under the seal of the Commissioners) from a person in possession, which was subsequently confirmed by a judgment of ratification of a Superior Court was a valid deed, that all rights of property were purged, and that if any of the *auteurs* of the petitioner failed to urge their rights on the monies deposited by reason of the customary dower, the ratification of the title was none the less valid.

Chevrier v. The Queen.—iv, 1.

5. **Of land—Construction of.**

Held, per Strong J.—Extrinsic evidence of monuments and actual boundary marks is admissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they call for courses, distances, or computed contents which do not agree with those in the deed.

Grassett v. Carter.—x, 105.

6. Intended to operate as mortgage.

See MORTGAGE 9.

7. Varying original promise of sale.

See SALE OF LANDS 9.

Deed—Continued.

8. Of compromise—Action to set aside for fraud and coercion.

See PARTITION.

9. Missing—Evidence of under law of N.S.—Certificate of Registrar—Affidavit.

See EJECTMENT 3.

Delegation—Of authority by Attorney General.

See CRIMINAL APPEAL 1.

2. Of payment—Personal liability under.

See HYPOTHEC.

Delivery—of railway iron.

See RAILWAYS AND RAILWAY COMPANIES 1.

2. Of policy—Effect of.

See INSURANCE, LIFE 5.

Demolition of Works—**In Province of Quebec, how demanded.**

Held, that demolition of works completed may properly be demanded in a petitory action for the recovery of property and that the present action is one in the nature of a petitory action.

Joyce v. Hart.—I, 321.

Demurrage.

See SHIPS AND SHIPPING 8.

Demurrer—In action of conversion against sheriff.

See CORPORATIONS 5.

2. **Petition of right.**

N. C., the suppliant, by his petition of right, claimed, as representing the heirs of P. W. jr., certain parcels of land originally granted by letters patent from the Crown, dated 5th January, 1806, to P. W. senr., together with a sum of $200,000, for the rents, issues and profits derived therefrom by the Government since the illegal detention thereof.

The Crown pleaded to this petition of right—1st, by demurrer, *defense au fonds en droit*, alleging that the description of the limits and position of the property claimed was insufficient in law; 2nd, that the conclusions of the petition were insufficient and vague; 3rd, that in so far as respects the rents, issues and profits there had been no signification to the Government of the gifts or transfers made by the heirs to the suppliants.

Held, that the objection taken should have been pleaded by *exception à la forme*, pursuant to Art. 116 C. C. P., and as the demurrer was to all the rents, issues and profits as well as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer necessary with respect to rents, issues and profits accrued previous to the sale to him by the heirs of P. W. jr.

Chevrier v. The Queen.—IV, 1.

Demurrer—Continued.

3. Judgment on—When final judgment from which appeal lies.
   See JURISDICTION 9, 17, 18, 21.
   " DAMAGES 25.
4. To action of damages for maliciously obtaining injunction.
   See DAMAGES 19.
5. In action on order under Companies Act, 1862 (Imp.)
   See CORPORATIONS 15.
6. To action of damages for malicious proceedings in insolvency.
   See DAMAGES 25.
7. To return to Mandamus.
   See MANDAMUS 6.
8. To plea to jurisdiction of County Court—Prohibition.
   See PROHIBITION 4.

Deposit—In bank to credit of succession—Agency.
See BANKS AND BANKING 4.

Deputy Returning Officer—Conspiracy between, and respondent.
See ELECTION 21.

Description—Of land by reference to plan.
See BOUNDARY.

2. By metes and bounds—when parcel of land granted by specific name.
   See EASEMENT.

Detinue—Action of.
See LIEN.

Director—Of company—sale by to company—Ratification by shareholders.
See CORPORATIONS 26.

Discretion.
See APPEAL 14.
" NEW TRIAL 11.

Distress—**Exemption from—Replevin.**

W. let an unfurnished house to one Mrs. M. to be used as a boarding house. Mrs. M. applied to F. & Son for furniture, which they refused to supply unless W. would guarantee that it would not be distrained for rent. W. thereupon signed the following mem., which was delivered to F. & Son by Mrs. M.: "The bearer, Mrs. M., being about to purchase some furniture from Wm. F. & Son, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by Wm. F. & Son for any rent that may become due." F. & Son then delivered the furniture to Mrs. M., the said furniture to be paid for by monthly payments, and "to remain the property

Distress—Continued.

of F. & Son till paid for in full." W. levied upon the furniture. F. & Son replevied and obtained a verdict, which the court below refused to set aside.

Held, that the mem. signed by W. constituted a binding contract or arrangement with F. & Son not to distrain, and that the judgment of the court below should be affirmed.

Wallace v. Fraser—ii. 522.

2. For mortgage money.

See MORTGAGE 4.

Divorce—**Decree for, obtained in State of New York—In force in Quebec—Effect of submitting to jurisdiction of foreign court—Domicile of parties—Right of wife to sue (ester en jugement) in Quebec without authorization—Art. 14 C. C. P.**

Appeal from a judgment rendered by the Court of Queen's Bench (appeal side) in Montreal, on the 19th day of September, 1883, reversing a judgment of the Superior Court rendered on the 25th of February, 1882.

The facts of the case may be summed up as follows:—

On the 7th of May, 1871, the appellant (Virginia Gertrude Stevens), and respondent (Henry Julius Fisk) both being domiciled in the city of New York, were duly married in that city without ante-nuptial contract. By the laws of the State of New York no community of property is created between persons married there without ante-nuptial contract, and the wife holds and acquires property in her own name, entirely free from marital control, as if she were a *feme sole*.

Before and at the time of her marriage with the respondent, the appellant had a fortune in her own right, amounting to $220,775.74, inherited from her father, and consisting of cash, bonds, and other moveable property. On the 8th of January, 1872, the appellant received this fortune from her trustees, and thereupon placed it in the hands of the respondent, who administered and controlled it until the 25th day of September, 1876. The respondent kept his domicile in New York for about eighteen months after the marriage, when he suddenly removed to Montreal, where he established himself in business, and where he has resided ever since. The appellant accompanied her husband to Canada in 1872, but does not appear to have actually resided there for much more than a year. Since 1872 the appellant lived alternately in Paris and in New York. In 1876, being dissatisfied with her husband's administration of her fortune, she demanded the return of her securities, and obtained a small portion of them. In the latter part of February, the appellant, being then a resident of the State of New York as required by the laws of that State, instituted proceedings for divorce before the Supreme Court of New York, on the ground of her husband's adultery. The respondent was personally served with process in Montreal, and

Divorce—Continued.

appeared in the suit by his attorneys, who were present at every step in the procedure, but fyled no plea to the demand. In December, 1880, the appellant obtained from that court a decree of divorce absolute in her favour, on the ground of her husband's adultery. The effect of this decree, according to the laws of New York, was to dissolve the marriage tie, and to place the appellant in the same position as if she had never been married.

On the 29th of August, 1881, the appellant, after fruitless endeavors to obtain from the respondent an account of his gestion, took the present action in the Superior Court at Montreal to force him to render an account.

The chief grounds of defence raised by the respondent in his pleas were: 1st. That the appellant was still his wife, and, 2nd, that she was not authorized to institute the present action.

The Superior Court overruled the defendant's pleas, and held that the divorce alleged in the declaration was good and valid in the Province of Quebec (5 Leg. News 79), but the Court of Queen's Bench, by a majority of a single judge, reversed this judgment, on the ground that the alleged divorce had no force in the Province of Quebec, and that, consequently, the plaintiff, being still the wife of the defendant, could not institute her proceedings without marital or judicial authorization. (6 Leg. News 329).

On appeal to the Supreme Court of Canada, **Held**, Strong J. dissenting,

1. Per Ritchie C.J. and Henry and Gwynne JJ., that under the circumstances the decree obtained by the appellant from the Supreme Court of New York should have been recognized as valid by the courts of the Province of Quebec.

2. Per Fournier, Henry and Gwynne JJ., that it was not necessary for the appellant, a foreigner, to obtain the authorization required by Arts. 176 or 178 C. C. in order to sue (*ester en jugement*) as in his own country, such authorization was not necessary. Art. 14 C.C.P.

Per Ritchie C.J.—The evidence established that the plaintiff had a sufficient residence in New York to enable her to obtain under the law of New York a valid divorce there, and that she did in accordance with the law of the State of New York, without fraud or collusion, obtain such divorce from a court competent to pronounce it. That if the question of jurisdiction turns on the question of the husband's domicile, the burthen was on the husband of showing that he had actually changed his domicile *animo et de facto*. Having been cited before the court of New York, and having appeared in the suit and submitted to and not disputed the jurisdiction of the court, the legitimate presumption against him was that he had not changed his domicile *animo et de facto*. That independent of any question of domicile, he having appeared and submitted to and not questioned the

Divorce—Continued.

jurisdiction, was bound by the decree and should not be allowed to affirm that the court had no jurisdiction to pronounce it, and to claim that the marriage dissolved in New York in a proceeding to which he was an unobjecting party, and which he had never before questioned, was subsisting in Quebec.

Strong J. dissenting.—Was of opinion that as regards the question as to the validity of the divorce the Court of Queen's Bench was perfectly right.

As regards the other question, one peculiar to French law, that as to the plaintiff's right to institute and maintain the action without the authorization of justice, from the best consideration he had been able to give the point he was of opinion the court below was right in that also.

The judgments of Gwynne and Henry JJ. will be found reported at length in 8 Legal News, p. 42, and the judgment of Fournier J. in the same vol. at p. 53.

Appeal allowed with costs.

Stevens v. Fisk, 12th January, 1885.

Dol personnel.

See SHERIFF 5.

Domicile—Of wife for purpose of taking proceedings for divorce.

See DIVORCE.

Dominion Lands Act, The—

See PATENT.

Donation—**Articles 803, 1034 C. C. P. Q.—Donation in marriage contract—Proof of insolvency of donor at date of donation necessary to set aside.**

On the 27th June, 1876, L. *et al.* sold to M. T. a property for $12,350, of which price $3,789 were paid in cash. On 16th June, 1879, E. T., daughter of M. T., married J. K.. and in their contract of marriage M. T. made a donation to his daughter, E. T., of certain property of considerable value, and remained with no other property than that sold to him by L. *et al.*

In July, 1881, L. *et al.* brought an action to set aside the gift in question, claiming that the property sold having become so depreciated in value as to be insufficient to cover their claim for the balance remaining due to them and secured only by the property so sold, the gift in this marriage contract had reduced M. T. to a state of insolvency, and had been made in fraud of L. *et al.*, and that at the time the gift was made M. T. was notoriously insolvent.

M. T. pleaded, *inter alia*, denying averments of insolvency, fraud or wrong-doing.

The only evidence of the value of the property still held by M. T. at the date of the donation, 16th June, 1879, was the evidence of an auctioneer, who merely spoke of the value of the property in November, 1881, and that

Donation—Continued.

of a real estate agent, who did not know in what condition the property was two years before, but stated that it was not worth more than $6,000 in November, 1881, adding that he considered property a little better now than it was two years before, although very little changed in price.

Held, reversing the judgment of the court below, that in order to obtain the revocation of the gift in question, it was incumbent on the plaintiffs to prove the insolvency or *déconfiture* of the donor at the time of the donation, and that there was no proof in this case sufficient to show that the property remaining to the donor at the date of his donation was inadequate to pay the hypothecary claims with which it was charged.

Treacey v. Liggett.—Ix, 411.

Easement—**Grant of servient tenement—Implied reservation—Implied grant—Plan—Evidence—Boundaries—Description—Riparian proprietor—Diversion of water.**

Held, that one piece of land cannot be said to be burdened by an easement in favor of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do,—and if the title to different parcels comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, and become mere easements in fact—*quasi* easements.

If the *quasi* servient tenement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent.

If the dominant tenement is first granted, all *quasi* easements which have been enjoyed as appendant to it over a *quasi* servient tenement retained by the grantor, pass by implication.

Besides the lands the title to which was derived from their common grantor, the appellant was proprietor of another piece of land, called Block A., situated on the opposite side of the River Maitland, the boundary of said block on the river side being high water-mark.

Held, that the lateral or riparian contact of the land with the water would suffice to entitle the appellant to object to any unauthorized interference with the flow of the river in its natural state.

In 1859 the then owners of part of the lands in question had a plan prepared and registered, and in 1871 they conveyed a parcel which they described as Block F.

Easement—Continued.

Held, that it must be presumed they intended to convey the same parcel of land shown on said plan as Block F., with the same natural boundaries as those thereon indicated.

Held, that the evidence of professional draughtsmen was properly admitted to show what, according to the general practice and usage of draughtsmen in preparing plans, certain shadings and marks on said plan were intended to indicate.

When a close or parcel of land is granted by a specific name, and it can be shown what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not show the whole contents of the land as included in the designation by which it is known.

Attrill v. Pratt—x. 425.

2. Registration of deed creating—Rev. Sts. N.S. 4th series ch. 79 secs. 9 and 19.

See TRESPASS 5.

3. **Light and air—Twenty years' uninterrupted use of—Prescription—Misdirection—Damages, measure of.**

Action on the case for obstructing plaintiff's lights. The plaintiff and defendant were owners of contiguous houses. The defendant's house was built some time prior to 1853 for one Burns, who in April of that year sold and conveyed it to one Seely, who afterwards deeded to one Hogan, from whom the plaintiff purchased under a registered deed. In the summer of 1853, whilst the defendant's house was in the occupation of one Mrs. Ranney, a tenant of Seely, the house owned by the plaintiff was built for one Adams, from whom, through several mesne conveyances, the plaintiff derived his title. In the fall of 1853, whilst the plaintiff's house was in course of erection, two windows were placed in the gable end of it to afford light and air to the bedrooms in the attic. These windows overlooked the house which Burns had erected. Mr. Adams began to live in the house about December, 1854. The windows remained where they were placed and unobstructed until August, 1874, when the defendant, by raising his house and putting a mansard roof upon it, caused the obstruction complained of, by closing up the lower half of the windows.

There was no evidence of an express grant of an easement, the plaintiff relying upon the fact of twenty years' uninterrupted enjoyment as entitling him to recover. For the defendant it was shewn by Seely that he never gave Adams permission to put the windows there, and also that he did not notice them till after he had parted with his title (which was in 1857).

Easement—Continued.

Seely stated, however, that he saw Adams' house being built. The defendant swore that he had examined the county records, and that there was no grant of an easement in the lights in question on record. He also testified that he was ignorant of the windows when he bought, which was in the spring of 1874, and did not know of them till the obstruction was made. The evidence was not certain as to when Mrs. Ranney's tenancy terminated. No question appears to have been raised at the trial as to the time her lease terminated, nor was this point left to the jury, the contention of the plaintiff's counsel being that the time began to run from the period when the windows were put in, and that the tenancy had nothing to do with the question.

The learned Chief Justice of New Brunswick, before whom the case was tried, directed the jury that "if Mr. Seely, the owner of the land, did not occupy the land himself, but it was occupied by his tenants, then he would not be bound by the user, unless he knew of the windows being there; if he knew of the windows being there, and did not obstruct them within twenty years, he would be bound, and the tenancy had nothing to do with the question."

And as to the measure of damages the learned Chief Justice charged that: "The fair measure would be what it would cost the plaintiff to make such alterations in his house as would admit the same quantity of light and air as he had before the defendant raised his roof."

The jury found a verdict for the plaintiff for $400.

A rule *nisi* for a new trial was discharged.

On appeal to the Supreme Court of Canada, **Held**, 1. That the duration of Mrs. Ranney's tenancy was a proper question for the jury, and it should have been left to them without the qualification that it made no difference if Seely had knowledge of the existence of the windows; for if the tenancy continued subsequently to August, 1854, there was manifestly no user for twenty years with the consent or acquiescence of the defendant and those through whom he claimed, for Seely, the then owner of the fee, would have had no right to enter upon the possession of his tenant for the purpose of obstructing the lights.

2. There was also a misdirection as to the measure of damages; the plaintiff should have been limited to a recovery in respect of the loss and inconvenience caused by the darkening of his windows up to the time when the action was brought, and for future damages he could bring successive actions from time to time as long as the nuisance continued.

The court below went at length into the question regarding the nature and effect of the presumption of a lost grant arising from twenty years use of an easement, and the right of rebutting such presumption by evidence, and also dealt with the question as to the effect of a registered conveyance

Easement—Continued.

upon a title to an easement founded upon such a presumption. See the case as reported in 2 Pugs. & Burb. 503. As to the first of these questions see *Angus* v. *Dalton* 6 App. Cases 740.

Appeal allowed with costs and rule *nisi* for a new trial made absolute.

Pugsley v. Ring.—12th December, 1879.

Edit de Secondes Noces, 1560.

See COMMUNITY.

Education—Educational Institution in City of Montreal—Exempt from taxation—Cons. S. L. C. ch. 15—41 Vic. ch. 6 sec. 26—Art. 712 Mun. Code Q.

See ASSESSMENT AND TAXES 13.

2. Educational Institution—Property held by as a farm—Proceeds used at another house—Not exempt from School Taxes—32 Vic. ch. 16 sec. 13 Q.—C. S. L. C. ch. 15 sec. 77.

See ASSESSMENT AND TAXES 14.

3. **Con. Stats. L. C. ch. 15 secs. 31 and 33—40 Vic. ch. 22 sec. 11 P.Q.—Construction of—33 Vic. ch. 25 sec. 7 (P. Q.)—Erection of a School House—Decision of Superintendent—Mandamus.**

Under 40 Vic. ch. 22 sec. 11 the Superintendent of Education for the Province of Quebec, on an appeal to him from the decision of the School Commissioners of St. Valentin, ordered that the school district of the municipality of St. Valentin should be divided into two districts with a school house in each.

The School Commissioners by resolution subsequently decreed the division, and a few days later, on a petition presented by ratepayers protesting against the division, they passed another resolution, refusing to entertain the petition. Later on, without having taken any steps to put into execution the decision of the Superintendent, they passed another resolution, declaring that the district should not be divided as ordered by the Superintendent, but should be re-united into one.

In answer to a peremptory writ of *mandamus* granted by the Superior Court ordering the School Commissioners to put into execution the decision of the Superintendent of Education, the School Commissioners (respondents) contended that they had acted on the decision by approving of it, and that as the law stood they had power and authority to re-unite the two districts on the petition of a majority of the ratepayers, and that their last resolution was valid until set aside by an appeal to the superintendent.

Held, reversing the judgment of the Court of Queen's Bench (appeal side) that the Commissioners having acted under the authority conferred upon them by Con. Stats. L. C. ch. 15 secs. 31 and 33, and an appeal having been made

Education—Continued.

to the Superintendent of Education, his decision in the matter was final (40 Vic. ch. 22 sec. 11 P. Q.), and could only be modified by the Superintendent himself on an application made to him under 33 Vic. ch. 25 sec. 7; and, therefore, that the peremptory *mandamus* ordering the respondents to execute the Superintendent's decision should issue.

Appeal allowed with costs.

Tremblay v. School Commissioners of St. Valentin.—8th March, 1886.

Ejectment.

See WILL 2.

" LETTERS PATENT.

2. Powers of Court of Chancery in action of—R. S. Ont. ch. 40 sec. 87.
See POSSESSION 5.

3. **Missing deed—Evidence of execution and delivery of—Certificate of Registrar of deeds—Affidavit of search—Estoppel.**

Action of ejectment. The action was twice tried. Plaintiffs, executors of original plaintiff, claimed title under a deed dated 18th June, 1856, which Hugh McMaster deceased, the former owner of the land in question, was alleged to have executed, conveying said land to his son Ronald McMaster, who, on the 19th April, 1869, mortgaged to the original plaintiff. This mortgage having been foreclosed, the land was purchased by the mortgagee at Sheriff's sale.

At the trial plaintiff's counsel tendered a copy of the deed of the 18th June, 1856, certified to be a true copy by the registrar of deeds, and accompanied by an affidavit of one the plaintiffs to the effect:

"That the original deed of which the paper writing hereunto annexed, marked A, is a copy certified under the hand of the late registrar of deeds, in and for the said County of Inverness, is not in my or my co-plaintiffs possession, or under our control; and I further say that we have inquired for, and been unable to procure the same."

Donald McMaster, a son of the original owner, and one of the witnesses to the deed, gave the following evidence:

"I went to the registry of deed's office, and proved the deed from my father, Hugh McMaster, to Ronald McMaster, his son. It was registered 17th June, 1856. I took the deed to the registry office, and left it there. * * * I am not aware of Ronald's knowledge of the deed from my father." Ronald swore that he never saw the deed, and never heard of it until a few years before the first trial, in October, 1880.

It was agreed that plaintiff should become non-suited with leave to move to set the non-suit aside, and in case the court should think the non-suit wrong, the court to enter a verdict for plaintiff.

Ejectment—Continued.

The Supreme Court of Nova Scotia (Macdonald C.J. and Rigby, Smith, and Weatherbe JJ.) were divided, Rigby and Weatherbe JJ. being of opinion that the presumption was that Hugh McMaster, the original owner, having signed the deed, delivered it to Donald to take to the registry office to be proved and registered; that by this registration he gave notice to all the world that he had conveyed the land to Ronald, and that there was evidence for a jury; that by his conduct in relation to the conveyance to Ronald he had induced the original plaintiff to accept the mortgage from Ronald, believing the title to be vested in Ronald by virtue of the deed. Therefore the defendant, who also claimed through his father, was estopped from denying the due execution of the deed. Macdonald C.J. and Smith J. were of opinion there was not sufficient evidence of the execution of the deed.

On appeal to the Supreme Court of Canada, **Held,** that there was sufficient evidence to establish the due execution and delivery of the deed to Ronald. The copy having been received in evidence without objection, it was too late to object to its admissibility. Strong J. *dubitante.*

Appeal allowed with costs, and verdict directed to be entered for plaintiffs.

McDonell v. McMaster, 22nd June, 1885.

Election—**Clerical undue influence.**

Held, that the election of a member for the House of Commons guilty of clerical undue influence by his agents is void. That sermons and threats by certain parish priests of the county of Charlevoix amounted in this case to acts of undue influence, and were a contravention of the 95th section of the Dominion Elections Act, 1874.

Per Ritchie J.—A clergyman has no right, in the pulpit or out, by threatening any damage, temporal or spiritual, to restrain the liberty of a voter so as to compel him into voting or abstaining from voting otherwise than as he freely wills.

Charlevoix Election Case, Brassard v. Langevin.—i. 145.

2. **Admissibility of respondent's evidence (P.Q.)—Multiplicity of charges—Bribery and undue influence—Agency—Drinking on nomination and polling days.**

The petition was in the usual form, charging bribery and corruption on behalf of respondent and of his agents; and treating by respondent's agents on the nomination and polling days. In the bill of particulars the petitioners formulated ninety-eight different charges, but, in appeal, they only insisted upon seventeen charges, seven of which attached personally to the defendant, and ten to his agents. The respondent was examined on his own behalf, and there were, in all, 280 witnesses heard.

Election—Continued.

The judgment of the Superior Court of the District of Montreal, dismissing the petition on all the charges, was unanimously affirmed, except as to the charge of bribery and undue influence by one Robert, hereafter more particularly referred to.

It was **Held,**—1st. That the evidence of a candidate on his own behalf, in the Province of Quebec, is admissible.

2nd. That when a multiplicity of charges of corrupt practices are brought against a candidate, or his agents, each charge should be treated as a separate charge, and, if proved by one witness only and rebutted by another, the united weight of their testimony, without accompanying or collateral circumstances to aid the court in its appreciation of the contradictory statements, cannot overcome the effect of the evidence in rebuttal, and that, in such a case, the candidate is entitled to the presumption of innocence to turn the scale in his favor.

3rd. That drinking on the nomination or polling day is not a corrupt practice sufficient to void an election, unless the drink is given by an agent on account of the voter having voted or being about to vote. (39 Vic. ch. 9 sec. 94 D., compared with 17 & 18 Vic. ch. 102 ss. 4, 23 & 36 Imp.)

4th. That a candidate, charged by his opponent with having no influence, is not guilty of a corrupt practice, if, in a public speech, in reply to the attack, he states "that he had had influence to procure more appointments for the electors of the county than any member."

The evidence on the Robert charge was to the following effect: Robert, long before the election was thought of, together with members of his family, (the Paré family) exhibited a strong desire to obtain an employment for his brother-in-law, one Edward Honoré Ouellette. Robert, being a political supporter, a client and a personal friend of Mr. Laflamme, asked him on different occasions if he could procure his brother-in-law (Ouellette) a place. The first time he spoke to him with reference to it was about a year previous to the election; but he did not say anything to him on that occasion about his father-in-law (Paré). Robert's evidence on this part of the case then goes on as follows: "Q. On what occasion did you speak to him (Mr. Laflamme) about it? A. It was when the question of an election arose that I spoke to him about it. Q. Last fall? A. Yes. Q. What was the date at which you spoke to him regarding the Paré family? A. I cannot positively say, but it was four or five weeks before there was question of the election. It was then spoken of in the county and out of the county. Q. That was during the election? A. Yes. Q. At all events, it was at the time the election was spoken of? A. Yes. Q. What did you say to him regarding your brother-in-law and your father-in-law? A. I went to see Mr. Laflamme on different occasions, when I had some accounts to give him to collect, and I said to him:

Election—Continued.

'It would greatly please the Paré family if you could procure a place for my brother-in-law.' Q. Did you say to Mr. Laflamme in what way it would please the Paré family? A. I said this to him: 'It might, perhaps, prevent them from voting at the coming election.' Q. When you told Mr. Laflamme that the Paré family could be useful to him by not voting, what did Mr. Laflamme say? A. He simply told me 'that he would think of me, and that if a vacancy occurred, he would do his best for me.' Mr. Laflamme, on the other hand, states: 'He (Robert) had asked me, not during the election, but many months before, I believe, so far as my memory goes, a year before there was any talk of an election, to try and secure some office or occupation, with a slight remuneration, for his brother-in-law (Mr. Oullette). I told him that I would consider his claims; that he was one of my best supporters; and, if I saw any occasion where it would be possible for me to support his claim, I would do so. The thing remained in that way; and previous to the election particularly, there was never one word said or breathed on that subject between Mr. Robert and myself. I never asked him to use this promise, and never intended to do so; it was merely because he was a personal friend of mine and a man of respectability and importance that I promised to consider his claim, as I was justified as the representative of the county in doing.'" Evidence was given that Robert attended three or four meetings of respondent's committee, organized at Lachine; that he checked lists and reported his acts to some of the members of the committee. Before the election, Robert repeated to the Paré family what had taken place between him and Mr. Laflamme. At the time of the election, Robert, while conversing with the Parés in the family circle, was informed by one of them "they would vote for Girouard (the defeated candidate) but that they would not make use of their influence." He then told them "Do as you please; they will use your votes as an objection to giving Mr. Ouellette a place." This conversation was not reported by Robert to any member of the respondent's committee.

Held, 1. That the respondent, having a perfectly legitimate motive in promising Robert to try and get an office for his brother-in-law—his desire to please a political friend and supporter—was not guilty of a corrupt act in making such promise; and further, that the act of Robert, in relation to the votes of the Paré family, even if a corrupt one, was not committed with the knowledge and consent of the respondent.

2. That whether Robert was respondent's agent or not, the conversations which took place between him and the Paré family do not sufficiently show a corrupt intent on his part to influence their vote, and that he is not guilty of bribery or undue influence within the meaning of the statute.—(Richards C.J. and Strong J. dissenting)..

Election—Continued.

Per Richards C.J. and Strong J.—There was sufficient evidence to declare Robert to be one of respondent's agents. (Henry J. dissenting).

Jacques Cartier Election Case, Somerville v. Laflamme.—li, 216.

3. Preliminary objections—Appeal on.

See JURISDICTION 5.

4. **Dominion Parliament, plenary powers of legislation of—The Dominion Controverted Elections Act, 1874—Jurisdiction of Provincial Superior Courts—Power of Dominion Parliament to alter or add to civil rights—Procedure—British North America Act, 1867, secs. 18, 41, 91, snb-secs. 13 and 14 of sec. 92, and secs. 101 and 129—Dominion Court.**

The Dominion Parliament, by "The Dominion Controverted Elections Act, 1874," imposed on the Provincial Superior Courts and the judges thereof the duty of trying controverted elections of members of the House of Commons. After the general elections of 1878, the respondent fyled an election petition in the Superior Court for Lower Canada, against the return of the appellant as the duly elected member for the electoral district of Montmorency for the House of Commons. The appellant objected to the jurisdiction of the court, held by Meredith C.J., on the ground that "The Dominion Controverted Elections Act, 1874," was *ultra vires*.

Held, affirming the judgment of Meredith C.J., 1st. That "The Dominion Controverted Elections Act, 1874," is not *ultra vires* of the Dominion Parliament, and whether the Act established a Dominion Court or not, the Dominion Parliament had a perfect right to give to the Superior Courts of the respective provinces, and the judges thereof, the power, and impose upon them the duty, of trying controverted elections of members of the House of Commons, and did not, in utilizing existing judicial officers and established courts to discharge the duties assigned to them by that Act, in any particular invade the rights of the local legislatures.

2. That upon the abandonment by the House of Commons of the jurisdiction exercised over controverted elections, without express legislation thereon, the power of dealing therewith would fall, *ipso facto*, within the jurisdiction of the Superior Courts of the provinces by virtue of the inherent original jurisdiction of such courts over civil rights.

3. That the Dominion Parliament has the right to interfere with civil rights, when necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.

4. Per Ritchie C. J. and Taschereau and Gwynne JJ.—That "The Dominion Controverted Elections Act, 1874," established, as the Act of 1873 did, as respects elections, a Dominion Court.

Montmorency Election Case, Valin v. Langlois.—iii, 1.

Election—Continued.

5. **The Dominion Controverted Elections Act, 1874—Sec. 8 sub-sec. 2—Cross petition—Delay for presenting.**

V. (the appellant), the sitting member, against whom an election petition had been fyled by L. (the respondent), an unsuccessful candidate, presented a cross-petition under sec. 8 sub-sec. 2, of the Dominion Controverted Elections Act, 1874, alleging that L. was guilty, as well by himself as by his agents, with his knowledge and consent, of corrupt practices at the said election. This cross-petition was not fyled within thirty days after the publication in the Canada Gazette of the return to the writ of election by the clerk of the Crown in Chancery, but within the delay mentioned in the last part of said sub-sec. 2, sec. 8, viz.: fifteen days after the service of the petition upon V., complaining of his election and return. The cross-petition was met by a preliminary objection, maintained by Meredith C.J., alleging that it was fyled too late.

Held, on appeal, that the sitting member cannot file a cross-petition, within the delay of fifteen days mentioned in the last part of said sub-sec. 2 of sec. 8, against a person who was a candidate and is a petitioner.

Per Fournier, Taschereau and Gwynne JJ.—The said extra delay of fifteen days is given only when a petition has been filed against the sitting member, alleging corrupt practices after the return. (Henry J. dissenting.)

Montmorency Election Case, Valin v. Langlois.—iii, 90.

6. **Controverted Elections Act, 1874—Gifts and subscriptions for charitable purposes—Payment of a just debt without reference to election, not bribery.**

Held,—1. That if gifts and subscriptions for charitable purposes, made by a candidate who is in the habit of subscribing liberally to charitable purposes, are not proved to have been offered or made as an inducement to, or on any condition that, any body of men, or any individual, should vote or act in any way at an election, or on any express or implied promise or undertaking that such body of men, or individual, would, in consequence of such gift or subscription, vote or act in respect to any future election, then such gifts or subscriptions are not a corrupt practice, within the meaning of that expression as defined by the Election and Controverted Elections Acts, 1874.

2. That the settlement by payment of a just debt by a candidate to an elector without any reference to the election, is not a corrupt act of bribery, and especially so when the candidate distinctly swears he never asked the elector's support, and the elector says he never promised it and never gave it. Taschereau and Gwynne JJ. doubting whether the transactions proved were not within the prohibitory provisions of the Act.

South Ontario Election Case, McKay v. Glen.—iii, 641.

Election—Continued.

7. Election appeal, notice of setting down for hearing—Power of Judge who tried the petition to grant an extension of time for giving such notice—S. & E. C. A. sec. 48—Supreme Court Rules 56, 69.

On a motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the Registrar of the court had set down the matter of the petition for hearing, given notice in writing to the respondent, or his attorney or agent, of such setting down, nor applied to and obtained from the judge who tried the petition further time for giving such notice, as required by the 48th section of the Supreme and Exchequer Court Act.

Held, that this provision in the statute was imperative; that the giving of such notice was a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal; that the appellant having failed to comply with the statute, the court could not grant relief under Rules 56 or 69; and that therefore the appeal could not be then heard, but must be struck off the list of appeals, with costs of the motion.

Subsequent to this judgment, the appellant applied to the judge who tried the petition, to extend the time for giving the notice, whereupon the said judge granted the application and made an order, "extending the time for giving the prescribed notice till the 10th day of December then next." The case was again set down by the Registrar for hearing by the Supreme Court at the February session following, being the nearest convenient time, and notice of such setting down was duly given within the time mentioned in the order. The respondent thereupon moved to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, or failed to bring the same on for hearing at the next session, and that the judge who tried the petition had no power to extend the time for giving such notice after the three days from the first setting down of the case for hearing by the Registrar of this court.

Held, that the power of the judge who tried the petition to make an order extending the time for giving such notice is a general and exclusive power to be exercised according to sound discretion, and the judge having made such an order in this case, the appeal came properly before the court for hearing. Taschereau J. dissenting.

North Ontario Election Case, Wheeler v. Gibbs.—III, 374.

8. The Dominion Elections Act, 1874, secs. 96 and 98—Hiring a team to bring voter to poll a corrupt practice—"Wilful" offence—Advance of money when not made in order to induce voter to procure the return of the candidate not bribery.

As to the case of one J. F. G., the charge was that the respondent bribed him by the payment of a promissory note for $89. The evidence

Election—Continued.

showed J. F. G. had been canvassing for respondent a long time before the note fell due, and had always supported him. He was on his way to retire his note, which was overdue, or falling due that day, when respondent asked him to canvass that day, and promised to send into town and have the note arranged for him. At the same time J. F. G. was negotiating for a loan on a mortgage to respondent, and it was at first stipulated that the amount of this note should be taken out of the mortgage money. The agent of the respondent, after the election, at the request of J. F. G., paid the mortgage money in full and allowed the matter of the note to stand until J. F. G. could see respondent. J. F. G. stated that neither the note nor the mortgage transaction influenced him in any way, and that he had to pay the note and did not expect respondent to make him a present of it.

Held, that the evidence did not show that the advance of money was made in order to induce J. F. G. to procure, or to endeavor to procure, the return of the respondent, and was not therefore bribery within the meaning of sub-sec. 3 of sec. 92 of the Dominion Elections Act, 1874.

As to the case of one M., the evidence showed that M.'s team was hired some days before the opening of the poll by C., an agent of the respondent, for the purpose of bringing two voters to the polls. M. went for the voters, returned the day previous to the polling day without the voters and was paid fifteen dollars.

Held, that the term "six preceding sections" in the 98th section of "The Dominion Elections Act, 1874," means the six sections immediately preceding the 98th, and therefore the hiring of a team to convey voters to the polls, prohibited by the 96th section, was a corrupt practice within the meaning of the 98th section. (Henry J. dissenting.)

Selkirk Election Case, Young v. Smith.—iv. 494.

9. **Bribery—Promise to pay legal expenses of a voter, who is a professional public speaker—The Dominion Elections Act, 1874, sub-sec. 3 sec. 92.**

Appeal from a judgment of Armour J. holding that appellant had employed and promised to pay the expenses of one H., a voter, who was a lawyer and a professional public speaker, and therefore was guilty of bribery within the meaning of sub-sec. 3 of sec. 92 of the The Dominion Elections Act, 1874. The evidence as to agreement entered into between H. and appellant was contradictory. It was admitted, however, that H. addressed the meetings in the interest of the appellant, and during the time of the election made no demand for expenses, except on one occasion, when attending a meeting and finding himself without money be asked for and received the sum of $1.50 for the purpose of paying the livery bill of his horse.

Held, that the weight of evidence showed that the appellant only

Election—Continued.

promised to pay H's travelling expenses, if it were legal to do so, and such promise was not a breach of sub-sec. 3 of sec. 92 of The Dominion Elections Act, 1874. Taschereau and Gwynne JJ. dissenting.

Per Fournier J.—Candidates may legally employ and pay for the expenses and services of canvassers and speakers, provided the agreement be not a colorable one intended to evade the bribery clauses of the Act.

Per Taschereau and Gwynne JJ.—Such a payment would be illegal.

North Ontario Election Case, Wheeler v. Gibbs.—Iv, 430.

10. **Election Petition—Supreme Court Act, sec. 44—Right to send back record for further adjudication—Bribery—Appeals from findings upon matters of fact—Insufficiency of return of election expenses—Personal expenses of candidate to be included.**

The original petition came before Mr. Justice McCord for trial, and was tried by him on the merits, subject to an objection to his jurisdiction. The learned judge, having taken the case *en délibéré*, arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained, and the petition of the petitioner was rejected and dismissed." This judgment was appealed from, and the now respondent, under sec. 48 of the Supreme Court Act, limited his appeal to the question of jurisdiction, and the Supreme Court held that Mr. Justice McCord had jurisdiction, and it was ordered that the record be transmitted to the proper officer of the lower court, to have the said cause proceeded with according to law. The record was accordingly sent to the prothonotary of the Superior Court at Montmagny, Mr. Justice McCord, after having offered the counsel of each of the parties a re-hearing of the case, proceeded to render his judgment on the merits and declared the election void. The respondent then appealed to the Supreme Court, and contended that Mr. Justice McCord had no jurisdiction to proceed with the case.

Held, That the Supreme Court on the first appeal could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court below to be proceeded with according to law, gave jurisdiction to Mr. Justice McCord to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment was properly appealable under sec. 48, Supreme Court Act. (Fournier and Henry JJ. dissenting.)

The charge upon which this appeal was principally decided was that of the respondent's bribery of one David Asselin. The learned judge who tried the case found, as a matter of fact, that the appellant had underhandedly slipped into Asselin's pocket the $5 for a pretended purpose, that

Election—Continued.

was not even mentioned to the recipient; that this amount was not included in the published return of his expenses as required by the Election Act, and this payment was bribery.

Held, That an Appellate Court in election cases ought not to reverse, on mere matters of fact, the findings of the judge who has tried the petition, unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding of the court below, that appellant had been guilty of personal bribery.

Per Taschereau J.—The personal expenses of the candidates should be included in the statement of election expenses required to be furnished to the returning officer under 37 Vic. ch. 9, sec. 123. (Fournier and Henry JJ. expressed no opinion on the merits. The judgment of McCord J. on the other charges was also affirmed.)

Bellechasse Election Case, Larue v. Deslaurlers.—v. 91.

11. **The Dominion Elections Act, 1874, secs. 82, 83 and 84—Public peace—Colorable employment—Liability of candidate for the acts of persons employed by agent—Bribery.**

On a charge of bribery against one T. and one A., upon which this appeal was decided, the judge who tried the petition found as a fact that A. had been directed by T., an admitted agent of the respondent, to employ a number of persons to act as policemen at one of the polling places in the parish of Bay St. Paul, on the polling day, and had bribed four voters previously known to be supporters of the appellant by giving them $2 each, but held that A. was not agent of the respondent, and therefore his acts could not void the election.

Held, on appeal, that as there was no excuse or justification for employing these voters, their employment was merely colorable, and these voters having changed their votes in consequence of the moneys so paid to them, and the sitting member being responsible alike for the acts of A., the sub-agent, as for the acts of T., the agent, and they having been guilty of corrupt practices, the election was void. (Taschereau and Gwynne JJ. holding that A. the sub-agent alone, had been guilty of bribery.

Charlevoix Election Case, Cimon v. Perrault.—v. 133.

12. **Ballots—Scrutiny—37 Vic. ch. 9 secs. 43, 45, 55 and 80; 41 Vic. ch. 6 secs. 5, 6 and 10—Effect of neglect of duty by a deputy returning officer—37 Vic. ch. 10 secs. 64 and 66—Recriminatory case.**

In ballot papers containing the names of four candidates, the following ballots were held valid: 1. Ballots containing two crosses, one on the line above the first name, and one on the line above the second name, valid for the two first named candidates; 2. Ballots containing two crosses, one on the line above the first name and one on the line dividing the second and third

Election—Continued.

compartments, valid for the first named candidate; 3. Ballots containing properly made crosses in two of the compartments of the ballot paper, with a slight lead pencil stroke in another compartment; 4. Ballots marked in the proper compartments thus ×. The following ballots were held invalid; 1. Ballots with a cross in the right place on the back of the ballot paper, instead of on the printed side; 2. Ballots marked with an *x* instead of a cross.

On a recount before the County Court Judge, J., the appellant, who had a minority of votes according to the return of the returning officer, was declared elected, all the ballots cast at three polling districts, in which the appellant had polled only 331 votes and the respondent, B., 345, having been struck out on the ground that the deputy returning officer had neglected to place his initials upon the back of the ballot.

On appeal to the Supreme Court of Prince Edward Island, it was proved that the deputy returning officer had placed his initials on the counterfoil before giving the ballot paper to the voter, and afterwards, previous to his putting the ballot in the ballot box, had detached and destroyed the counterfoil, and that the ballots used were the same as those he had supplied to the voters, and Mr. Justice Peters held that the ballots of the said three polls ought to be counted, and did count them.

Thereupon J. appealed to the Supreme Court of Canada, and it was **Held,** affirming the judgment of Mr. Justice Peters, that in the present case, the deputy returning officer having had the means of identifying the ballot papers as being those supplied by him to the voters; and the neglect of the deputy returning officers to put their initials on the back of these ballot papers not having affected the result of the election, or caused substantial injustice, did not invalidate the election. (The decision in the Monck election case commented on and approved of.)

In this case J., the appellant, claimed under sec. 66 of 37 Vic. ch. 10, that if he was not entitled to the seat the election should be declared void, on the ground of irregularities in the conduct of the election generally, but filed no counter petition, and did not otherwise comply with the provisions of 37 Vic. ch. 10, The Dominion Controverted Elections Act.

Held, that sec. 66 of 37 Vic. ch. 10 only applies to cases of recriminatory charges, and not to a case where neither of the parties or their agents are charged with doing a wrongful act.

Quœre: Whether the County Judge can object to the validity of a ballot paper when no objection has been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of sec. 56, 37 Vic. ch. 10, at the time of the counting of the votes by the deputy returning officer.

Queen's County P.E.I. Election Case, Jenkins v. Brecken.—vii, 247.

Election—Continued.

13. —Appeal on Election Petition—42 Vic. ch. 39 (The Supreme and Exchequer Court Amendment Act of 1879) sec. 10, construction of—Rule absolute by Court in banc to rescind order of a Judge in Chambers—Preliminary objection.

A petition was duly filed and presented by appellant on the 5th of August, 1883, under the "Dominion Controverted Elections Act, 1874," against the return of respondent. Preliminary objections were filed by respondent, and before the same came on for hearing the attorney and agent of respondent obtained, on the 13th October, from Mr. Justice Weldon, an order authorizing the withdrawal of the deposit money and removal of the petition off the files. The money was withdrawn, but shortly afterwards, in January, 1883, the appellant, alleging he had had no knowledge of the proceedings taken by his agent and attorney, obtained, upon summons, a second order from Mr. Justice Weldon rescinding his prior order of 13th October, 1882, and directing that, upon the appellant repaying to the clerk of the court the amount of the security, the petition be restored, and that the appellant be at liberty to proceed. Against this order of January, 1883, the respondent appealed to the Supreme Court of New Brunswick, and the court gave judgment, rescinding it.

On appeal to the Supreme Court of Canada, **Held**, that the judgment appealed from is not a judgment on a preliminary objection within the meaning of 42 Vic. ch. 39 sec. 10 (The Supreme Court Amendment Act, 1879), and therefore not appealable.

Gloucester Election Case, Commeau v. Burns.—viii 205.

14. Election petition—Preliminary objections—Onus probandi.

The election petition in this case complained of the return of the respondent as member elect for the County of Megantic, (P.Q.), for the House of Commons. The petition was met by preliminary objections, in which the sitting member alleged, *inter alia*, that the petitioners were not electors, nor qualified to vote at the election in question, &c. A day having been fixed for the hearing of these preliminary objections, no evidence was given upon them, and they were dismissed by Plamondon J., who held, following the practice adopted by the Superior Court of Quebec, sitting as an election court in the L'Islet case *Duval* v. *Casgrain*, that the *onus probandi* was on the respondent to support such objections.

On appeal to the Supreme Court of Canada, Fournier, Henry and Gwynne JJ. were of opinion that the *onus probandi* was on the appellant, who by his preliminary objections had affirmed the disqualification of the petitioner. *Contra*, Ritchie C.J. and Strong and Taschereau JJ. The court being equally divided, the judgment of the court below stood affirmed without costs.

Megantic Election Case, Frechette v. Goulet.—viii, 169.

Election—Continued.

15. Dominion Controverted Election—Ontario Judicature Act, 1881, effect of—Presentation of petition.

The election petition against the election and return of the respondent was entitled in the High Court of Justice, Queen's Bench division, and was presented to the official in charge of the office of the Queen's Bench division, and filed and entered in the books of that office. A preliminary objection was taken that the High Court of Justice had no jurisdiction.

Held, Henry and Taschereau JJ. dissenting, reversing the judgment of Cameron J., that the Ontario Judicature Act, 1881, makes the High Court of Justice and its divisions a continuation of the former courts merged in it, and that those courts still exist under new names; and that the petition had not been irregularly entitled and filed.

West Huron Election Case, Mitchell v. Cameron.—viii, 126.

16. Ballots—Scrutiny—Irregularities by Depnty Returning Officers—Numbering and initialing of the ballot papers by Deputy Returning Officer, effect of—The Dominion Elections Act, 1874, sec. 80—Corrupt practices—Recriminatory case.

In a polling division No. 3 Dawn there was no statement of votes either signed or unsigned in the ballot box, and the deputy returning officer had endorsed on each ballot paper the number of the voter on the voter's list. These votes were not included either in the count before the returning officer, the resumming up of the votes by the learned judge of the County Court, nor in the recount before the judge who tried the election petition.

Held, affirming the judgment of the court below, that the ballots were properly rejected.

Certain ballot papers were objected to as having been imperfectly marked with a cross, or having more than one cross, or having an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper and a line drawn dividing the paper in the middle.

Held, affirming the ruling of the learned judge at the trial, that these ballots were valid.

Per Ritchie C.J.—Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, the ballot should be counted, unless from the peculiarity of the mark made it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary a clear intent not to mark with a cross as the law directs, as, for

Election—Continued.

instance, by making a straight line or round O, then such non-compliance with the law renders the ballot null.

Division 1, *Sombra*—During the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy returning officer, who had been putting his initials and the numbers on the counterfoil, not on the ballot papers, initialled and numbered about twelve of the ballot papers, but finding he was wrong, at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took these ballots out of the box and obliterated the marks he had put upon them.

Held, Gwynne and Henry JJ. dissenting, that the irregularities complained of not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, these ballots should be held good, and that said irregularities came within the saving provisions of sec. 80 of the Dominion Elections Act, 1874.

Per Henry J.—Although the ballots should be considered bad, the present appellant having acted upon the return and taken his seat, was not in a position to claim that the election was void.

Bothwell Election Case, Hawkins v. Smith.—viii, 676.

17. **Railway pass—37 Vic. ch. 9 secs. 92, 96, 98 and 100—Questions of fact in appeal—Agent, limited powers of.**

In appeal, four charges of bribery were relied upon, three of which were dismissed in the court below, because there was not sufficient evidence that the electors had been bribed by an agent of the candidate; and the fourth charge was known as the Lamarche case. The facts were as follows:—One L., the agent of C., the respondent, gave to certain electors employed on certain steamboats, tickets over the North Shore Railroad, to enable them to go without paying any fare from Montreal to Berthier, to vote at the Berthier election, the voters having accepted the tickets without any promise being exacted from or given by them. The tickets showed on their face that they been paid for, but there was evidence L. had received them gratuitously from one of the officers of the company. The learned judge who tried the case found as a fact that the tickets had not been paid for, and were given unconditionally, and therefore held it was not a corrupt act.

Held,—1. Fournier and Henry JJ. dissenting, that the taking unconditionally and gratuitously of a voter to the poll by a railway company, or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by 37 Vic. ch. 9 (D).

Election—Continued.

2. That if a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under section 96, and by virtue of section 98 a corrupt practice, and would avoid the election.

3. That an agent who is not a general agent, but an agent with powers expressly limited, cannot bind the candidate by anything done beyond the scope of his authority.

As to the remaining three charges, the court was of opinion that on the facts the judgment of the court below was not clearly wrong and should therefore not be reversed.

Berthier Election Case, Genereux v. Cuthbert.--ix, 102.

18. **Appeal on matters of fact—Bribery—Corrupt intent.**

Among other charges of bribery and treating which were decided on this appeal was the following:—One Mireau, a blacksmith, who was a neighbour of the respondent, had in his possession for two years several pieces of broken saws which the respondent had left with him for the purpose of making scrapers out of them on shares. A few days prior to nomination the respondent went into Mireau's shop with a scraper he wanted to be sharpened, and in return for sharpening the scraper told him to keep the old pieces of saw which he might still have. Mireau in his evidence answered as follows,—"Q. He did not speak of your vote? A. No. Q. What has he said? A. He said that Mr. Magnan was coming like mustard after dinner? Q. M. Dugas did not ask you for whom you were? A. No. * * Q. Do you swear on the oath that you have taken that M. Dugas left with you these two pieces of saws in question with the intent to buy (*bribe*) you? A. I think so, I cannot say that it is sure, I don't know his mind (*son idée*). It is all I can swear. Q. It has not changed your opinion? A. No. Q. For whom were you in the last election? A. For M. Magnan." The scrapers were worth in all about two dollars, and were of no use to the respondent, and no other conversation took place afterwards between the parties. The judge who tried the case found that there was no intention on the part of the respondent to corrupt Mireau.

Held, that the Supreme Court on appeal will not reverse on mere matters of fact the judgment of the judge who tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous, and that the evidence in support of the charge of bribing Mireau, as well as of the other charges of bribery and treating, was not such as would justify an Appellate Court in drawing the inference that the respondent intended to corrupt the voters.

Montcalm Election Case, Magnan v. Dugas.—ix, 93.

Election—Continued.

19. Status of petitioner, how proved—Gift not a charity or liberality—Bribery—Shorthand writer's notes.

At the trial of the petition the returning officer, who was also the registrar of the county of Megantic, and secretary of the municipality of Inverness, was called as a witness, and produced in court in his official capacity the original list of electors for the township of Inverness, and proved that the name L. McM., one of the petitioners whom he personally knew, was on the list. The original document was retained by the witness, and, as neither of the parties requested that the list should be filed, the judge made no order to that effect. The status of the other petitioners was proved in the same way.

Held, that there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related under 37 Vic. ch. 10, sec. 7 (D).

The shorthand notes of the shorthand writer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him.

Held, that the notes of evidence could not be objected to.

Before setting out on a canvassing tour the appellant, the sitting member, placed in the hands of one B., who was not his financial agent, $100 to be used for the purpose of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to one K., a leading man in that locality, who indicated to B. his dissatisfaction with the candidate of his party, and stated that, although he would vote for the liberal party, he would not exert himself as much as in the former elections. The appellant then went outside, and B. asked his host, "Do you want any money for your church?" And having received a negative reply, added, "Do you want any money for anything?" K. then answered, "If you have any money to spare there are plenty of things we want it for. We are building a town hall, and we are scarce of money." B. then said, "Will $25 do?" K. answered, "Whatever you like, it is nothing to me." The money was left on the table. Then, when bidding the appellant B. good-bye, K. said, "Gentlemen, remember that this money has no influence as far as I am concerned with regard to the election." The appellant did not at the time, nor at any subsequent time, repudiate the act of B. This amount of $25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agent of the appellant.

Held, affirming the judgment of the court below, that the giving of the $25 by B. to K. was not an act of liberality or charity, but a gift out of

Election—Continued.

appellant's money, with a view to influence a voter favorably to the appellant's candidature, and that, although the money was not given in the appellant's presence, yet it was given with his knowledge, and therefore that the appellant had been personally guilty of a corrupt practice.

Megantic Election Case. Frechette v. Goulet.—ix. 279.

20. The Dominion Elections Act, 1874—Wager by agent with voter—Bribery—Corrupt practice—Treating on polling day—Agency.

One Pringle, an acknowledged agent of the respondent and the President of the Conservative Association, whose candidate the respondent was, made a bet of $5 with one Parker, a Liberal, that he would vote against the Conservative party, and deposited with a stakeholder the $5, which, after the election, was paid over to Parker. At the trial Pringle denied that he was actuated by any intention to influence the conduct of the voter, and alleged that the bet was made as a sporting bet on the spur of the moment, and with the expectation that, as he said, Parker would warm up and vote; but he also admitted in evidence that it passed through his mind that some one on the voter's side would make the money good if he voted. Parker said he had formed the resolution not to vote before he made his bet, but the evidence showed that he did not think lightly of the sum which he was to receive for his not voting, his answer to one question put to him being: "Oh! I don't know that $5 would be an insult to any one not to vote."

Held, reversing the judgment of the court below, that the bet in question was colorable bribery within the enactments of sub-sec. 1 of sec. 92 of the Dominion Elections Act, 1874, and a corrupt practice which avoided the election.

The acts complained of in the *Heenan-Beauvais* charge were also relied on as sufficient to have the election set aside. The facts of this charge were that H., a Conservative, prior to the election, canvassed, in company with the respondent, one B. On election day H. was selected by the assistant secretary of the association (an acknowledged agent of the respondent) to represent the respondent at the Burnley poll, and obtained from him a certificate under s. 42 of the Dominion Elections Act, entitling him to vote at the Burnley poll. H. there met B. and treated him by giving him a glass of whiskey, and after B. had voted he gave him $2, and subsequently sent him $50. The treating, according to B.'s evidence, was nothing more than an act of good fellowship; and according to H.'s account, B. was not feeling well, and the whiskey was given in consequence. B. negatived that the $2 were paid him for his vote, and H. said that he supposed it was a dollar bill and told B. to go and treat the boys with it, and that it was not given on account of any previous promise, or for his having voted. The court below

Election—Continued.

held that none of these acts constituted corrupt acts so as to avoid the election.

On appeal to the Supreme Court of Canada, **Held,** per Ritchie C.J. and Henry and Taschereau JJ.—There was sufficient evidence of H.'s agency, but it was not necessary to decide this point.

Per Strong J.—There was no proof of H.'s agency. Agency is not to be presumed from the fact that the respondent permitted H. to canvass B. in his presence, and there is an entire absence of proof of any sufficient authority to H. to bind the respondent by his acts at the polling place in the matters of treating and the payment of the $2.

Per Fournier J.—The treating of B. on polling day, both before and after he had voted, by H., an agent, and the giving of the sum of $2 immediately after he had voted, were corrupt acts sufficient to avoid the election.

West Northumberland Election Case, Henderson v. Gulllet.—x. 635.

21. **Dominion Elections Act, 1874, sec. 95—Intimidation—Undue influence—Conspiracy between Deputy Returning Officer and respondent's agent to interfere with franchise by marking ballots—Effect of—Election void.**

In an election petition it was charged that the respondent personally, as well as acting by C. A. C., P. D. and others, his agents, did undertake and conspire to impede, prevent, and otherwise interfere with the free exercise of the franchise by certain voters, and that, in furtherance of a premeditated scheme which the respondent and his agents well knew to be illegal, they did, in fact, so impede, prevent, and interfere with the exercise of the franchise of certain voters, by getting their ballots marked, rendered identifiable, and consequently void, whereby the franchise of these voters was unjustifiably interfered with.

At a previous election the respondent had been defeated by a majority of three votes, and the election having been contested was set aside, and certain voters were reported by the judge as having been guilty of corrupt practices, under section 104 of the Dominion Elections Act.

At a public meeting before the election C. A. C., the respondent's agent, to intimidate these persons and prevent them from voting, in a speech made by him, threatened them with punishment if they voted; and subsequently printed notices to the same effect were sent to these voters.

On the polling day D. P., who had been appointed deputy returning officer, on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of these voters, consulted with C. A. C., and on his advice and in collusion with him marked the ballots of certain of these voters.

Held, that the election was void by reason of the attempted intimidation practiced by C. A. C., the respondent's agent; and by reason also of the

Election—Continued.

conspiracy between the said agent and the Deputy Returning Officer to interfere with the free exercise of the franchise of voters, violations of sec. 95 of The Dominion Elections Act, 1874, and corrupt practices under section 98 of the said Act.

Soulanges Election Case, Cholette v. Baln.—x, 652.

Engine.—Agreement to discontinue use of traction engine—Construction of.

See AGREEMENT 13.

Engineer—Certificate of.

See PETITION OF RIGHT 1, 2, 8.
" RAILWAYS AND RAILWAY COMPANIES 9.

2. Decision of, binding as to price.

See CONTRACT 17.

Escheat—Property of person dying intestate and without heirs escheats to Crown for benefit of province.

See LEGISLATURE 6.

Escrow.

See DEED 1.

2. Policy not countersigned.

See INSURANCE LIFE 5.

Estate Tail.

See WILL 1.
" MORTGAGE 6.

Estoppel.

See DEED 1.

2. Equitable—Adjoining owner of land allowing a boundary line to be run by a surveyor.

See BOUNDARY.

3. Shareholder not estopped from questioning legality of issue of stock.

See CORPORATIONS 11.

4. **Estoppel—Equitable assignment—Garnishee process—Representation of indebtedness by defendants.**

Plaintiff held a judgment against one George Cutten, and was about to sue Ryerson and Moses, whom he understood to be Cutten's partners. Before doing so he consulted one of the defendants, by whom he was informed that there was a balance of some $2,700, due from the defendants to Cutten, for work performed for the defendants on the Western Counties Railway under a contract, and defendants suggested that this amount might be made available to satisfy plaintiff's claim, if there was a garnishee law. Plaintiff's attorney, on the strength of this representation, issued garnishee process, when defendants pleaded denying that there was any debt due.

Estoppel—Continued.

Previous to the garnishee process being issued, Cutten had drawn an order, requesting defendants to pay all sums coming due to him under the engineer's monthly certificates to one Killam, but there was no evidence of any indebtedness of Cutten to Killam.

Held, affirming the judgment of the Supreme Court of Nova Scotia, (2 Russ. & Geldert 199) Strong and Gwynne JJ. dissenting, that the defendants were estopped by their representation from denying their indebtedness to Cutten; and that there was not evidence of such an assignment as would prevent the attachment from operating on the fund.

Appeal dismissed with costs.

Shanly v. Fitzrandolph—28th April, 1882.

5. Lands taken for railway—Debentures issued by county for damages awarded.

See JURISDICTION 28.

6. When possession of land fraudulently obtained.

See POSSESSION 5.

7. By execution and registration of deed to son.

See EJECTMENT 3.

Evidence—**Special Case—Further Evidence.**

Held, that when a case has, by consent of parties, been turned into a special case, and the judge's minutes of the evidence taken at the trial agreed to be considered as part of the said special case, the court has no power to add anything thereto, except with the like consent, and has no power to order any further evidence to be taken.

Smyth v. McDougall.—1. 114.

2. Admissibility of.

See SALE OF GOODS 1.

3. Contradiction of witness.

See WITNESS 1.

4. **Evidence of plaintiff not admissible—Actions against administrators—Construction of 41st sec. ch. 96, Rev. Stat. N.S., 4th series.**

C. sued M. & R. M. accepted service and acknowledged amount due, but R. pleaded to the action. Before trial both defendants died. Then C. R. & R. R., as administrators of R., were, before trial, made parties to the action. At the trial C. was examined as a witness in support of his own case, and when asked what had taken place between him and the deceased M. & R., the learned judge ruled that the evidence was inadmissible under sec. 41, ch. 96 of the Revised Statutes of Nova Scotia, 4th series.

Held, affirming the judgment of the court below, that under said section, in an action against administrators made parties to an action after

Evidence—Continued.

issue joined, but before trial, the plaintiff cannot give any evidence in his own favor of dealings with a deceased defendant. (Henry J. dissenting.)

Chesley v. Murdock.—ii. 48.

5. **Rejection of—Promissory notes—Joint liability on—Misdirection as to interest.**

Plaintiffs sued W. upon two promissory notes signed by one T. E. and W. The notes were dated at Halifax and made payable to plaintiffs' order in Boston, U.S. The notes were unstamped, but before action brought double stamps were affixed and no contract as to interest appeared on the face of them. W. pleaded, *inter alia*, that he had signed the notes upon an understanding and agreement that he should be liable thereon as surety only for T. E., and that plaintiffs, without his knowledge or consent, agreed to give and gave time to T. E., and forbore to enforce payment when they might have been paid. At the trial W. sought to cross-examine one of the plaintiffs on an affidavit made by the witness, and to which was annexed a letter to plaintiffs from T. E. This evidence was rejected by the judge, and a verdict was given for plaintiffs with interest. A rule *nisi* to set aside verdict was discharged by the Supreme Court of Nova Scotia, but they referred the rate of interest to a master of the court.

Held, that there was an improper rejection of evidence, and that the jury should have been directed as to interest.

Wallace v. Souther.—ii. 598.

6. Of respondent in controverted elections admissible in Province of Quebec.

Somerville v. Laflamme.—ii. 216.

7. **Parol evidence of determination of suit by judgment inadmissible.**

In an action of damages for malicious arrest and imprisonment of plaintiff, under a *capias*, issued by a stipendiary magistrate in Nova Scotia, whose judgment, it was alleged, was reversed in appeal by the Supreme Court of Nova Scotia, oral evidence "that the decision of the magistrate was reversed" was deemed sufficient evidence by the judge at the trial of the determination of the suit below.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that such evidence was inadmissible, and was not proper evidence of a final judgment of the Supreme Court of Nova Scotia.

Gunn v. Cox.—iii. 296.

8. **Débats de Comptes—Sale of stock-in-trade by a father to his son—Onus probandi—Affidavit of a person since deceased not evidence.**

In a *débats de comptes* between A. G. (appellant), in his quality of tutor to M. L. H. C. R., a minor, and Dame H. P. (respondent), universal legatee of her late husband L. R., who had possession of the minor's property (his

Evidence—Continued.

grandchild) as tutor, the following items, viz.:—$5,466.63 (for stock of goods sold by L. R. to his son) and $451.07 and $90.76 for "cash received at the counter," charged by the respondent in her account, were contested. In 1871, L. L. R., the minor's father, married one M. C. G., and by contract of marriage obtained from his father, L.R., two immoveable properties, *en avancement d'hoirie*. At the same time L. R., the father, retired from business and left to L. L. R., his son, the whole of his stock-in-trade, which was valued at $5,466.63, making an inventory thereof. L. L. R. died in 1872, leaving one child, said M. L. H. C. R., and L. R., her grandfather, was appointed her tutor. There was no evidence that the stock-in-trade had been sold by the father and purchased by the son, or that the father gave it to his son. However, when L. R., in his capacity of tutor to his grandchild, made an inventory of his son's succession, he charged his son with this amount of $5,466.63.

Held, reversing the judgment of the court below, that it was for the respondent to prove that there had been a sale of the stock-in-trade by L. R. to his son L. L. R., the minor's father, and that there being no evidence of such a sale, the respondent could not legally charge the minor with that amount.

As to the other two items, these were granted to the respondent by the Court of Queen's Bench on the ground that, although they had been entered as cash received at the counter, there was evidence that they had been already entered in the ledger. The only evidence to support this fact was the affidavit of one Hébert, the book-keeper of L. R, since deceased, filed with the *reddition de comptes* before notary prior to the institution of this action.

Held, reversing the judgment of the court below, that the affidavit of Hébert was inadmissible evidence, and therefore these two items could not be charged against the minor.

Gagnon v. Prince.—vii, 386.

9. Manslaughter—Whether evidence as to Assaults committed within year of death admissible.

See CRIMINAL APPEAL 2.

10. Question for Jury—Contract not under seal.

See AGREEMENT 6.

11. Of acceptance of goods—Parol—Art. 1235 C. C. (P. Q.)

See SALE OF GOODS 6.

12. Of special damages not alleged inadmissible.

See LIBEL.

13. Of professional Draughtsmen to show what certain shadings and marks on Plan are intended to indicate.

See EASEMENT 1.

Evidence—Continued.

14. Of Agent of Company admissible under R. S. N. S. ch. 96 sec. 41, in action on policy of Assurance by Executor.

See INSURANCE, LIFE 6.

15. Verdict against weight of.

See JURISDICTION 23.

16. Parol, to show right to redeem.

See MORTGAGE 8.

17. Of reasonable and probable cause.

See INSOLVENCY 9.

18. Parol, to establish contract.

See SALE OF GOODS 10.

19. Withdrawal of Evidence from Jury.

See NEW TRIAL 3.

20. When whole Evidence before the Court, the case will not be sent back for a new trial.

See NEW TRIAL 4.

21. **Where verdict affirmed by two courts on weight of—Appeal.**

The appellant appealed from two judgments of the Court of Appeal for Ontario, affirming judgments recovered against him by the respondent in two several actions brought on alleged contracts. The cases were tried before a judge without a jury, and the respondent obtained two verdicts. These verdicts having been moved against, were sustained by the Courts of Queen's Bench and Common Pleas, respectively, and both by the Court of Appeal for Ontario.

On appeal to the Supreme Court, **Held**, that the judgments of the Court of Appeal should be affirmed.

Per Gwynne J.—When a judge has tried a case without a jury and found a verdict, which verdict has been affirmed by two courts, this court, sitting in appeal, should not reverse the conclusion arrived at by the lower courts on the weight of evidence, unless convinced beyond all reasonable doubt that all the judges before whom the case came have clearly erred.

Appeal dismissed with costs.

Bickford v. Howard (18 C.L.J. 422)—22nd June, 1882.

22. Of notary, not admissible to contradict deed drawn by him.

See SALE OF LANDS 9.

23. Of husband against wife, in action for removal of latter as executrix, not admissible.

See EXECUTOR 5.

Evidence—Continued.

24. When new trial ordered—Evidence not so clear as to justify Appellate Court in interfering.

See TRESPASS 12.

25. Of missing deed--Under law of N. S.

See EJECTMENT 3.

26. Amendment of pleadings to conform to.

See LICENSE 7.

27. Judgment of court of first instance on the evidence affirmed.

See APPEAL 4, 5, 6, 7, 8.
" ELECTION 10, 18.
" EVIDENCE 21.
" RAILWAYS AND RAILWAY COMPANIES 23.
" SALE OF GOODS 14.
" SOLICITOR AND CLIENT 2.

28. Of fraud—Rescission of executed contract.

See SALE OF LANDS 14.

29. Verdict against weight of—New trial ordered by court below—Appeal will not be heard.

See JURISDICTION 39.

30. Commencement of proof in writing—In case where fraud alleged and proved, not required.

See BANKS AND BANKING 12.

31. Verdict against weight of--New trial ordered.

See NEW TRIAL 14.

Execution—Order directing payment of part of verdict as condition of stay of execution illegal.

See DAMAGES 25.

2. Premature issue of writ of—Irregularity.

See FRAUDULENT PREFERENCE 2.

Execution Debtor.

See TROVER.

Executors—**Liability of (P.Q.)—Débat de compte—Interest—Prescription.**

Respondents, representing one of the universal residuary legatees of one W. D., sen., sued appellants as joint testamentary executors of the said W. D., sen., to render an account and pay over the balance of the estate in their hands. On a *débat de compte* the total value of the estate was proved to be worth $44,525.65. Of this amount appellants in their said capacity, as appeared by an account rendered by them took possession of $14,510.33. The balance of $30,015.33 appeared by the books of W. D. & Co., to be due

Executors—Continued.

to the estate of W. D., sen., by W. D., jun., one of the executors, and to have never come into the possession of the other executors.

Held, that under Art. 913, Civil Code L. C., appellants were jointly and severally responsible only for the amount they took possession of in their joint capacity, and, therefore, that W. D., jun., alone was responsible for the amount of such balance. (Taschereau J. dissenting.)

2. That testamentary executors cannot legally be charged with more than six per cent. interest on the moneys collected by them, after their account has been demanded, in the absence of proof that they realized a greater rate of interest by the use of such moneys.

3. That entries in merchants' books, regularly kept, and unchanged during a term of years, with an annual rendering of accounts conforming to such entries to creditors, make proof against such merchants, particularly after the death of the creditors.

4. That an action against executors for an account of their administration, and of the moneys they have received, or ought to have received, in their said capacity, cannot be prescribed otherwise than by the long prescription of 30 years.

Darling v. Brown—ii, 26.

2. Powers of.

See WILL 9.

3. Action by on policy of assurance.

See INSURANCE, LIFE 6.

4. **Executor, judgment against and sale of lands under—Debt to be proved as against heir—Pro-tutor, action against for an account—Jurisdiction, plea to—Property in Quebec and Ontario—Negligence—Duty to administer en bon pére de famille—Liability of for interest—Civil Code art. 290 et seq.**

Robert F. Coleman and Maria Mansfield Connolly were married at Belleville, in Ontario, on the 4th of November, 1841. The issue of this marriage were two children, Susanna Louisa Coleman and Anna Maria Coleman, the female plaintiff, who was born in 1846. Robert F. Coleman made his will at Belleville on the 10th of February, 1852, giving his wife the enjoyment of his property during her life, or until she remarried, and the property to his children. He appointed his wife, Lewis Wallbridge and William Hope his executors, and died in 1852. Wallbridge and Hope both renounced the executorship. On the 11th of June, 1853, Mrs. Coleman made her will at Montreal, whereby she bequeathed all her property to her two children, and appointed the defendant and Francis Mullins as her executors, authorizing them to continue the execution of the will of her late husband. She also appointed them tutors to her children, to take care of them until their mar-

Executors—Continued.

riage or their age of majority. The defendant was then married to a sister of Mrs. Coleman, and was therefore the maternal uncle of the female respondent and of her sister. Mrs. Coleman died on the 25th of June, 1853. Her property consisted of one quarter of lot No. 1, in the 1st range of the parish of Chateauguay. The children had, besides, the property left to them by their late father, which consisted of a lot of land, with mill and two houses, at Belleville, against which there were several mortgages registered, amounting to about $5,000. On the 12th of June, 1854, Catherine Connolly, a sister of Mrs. Coleman, died intestate, and her property, consisting of one undivided half of certain lots of land in Drummond street, Montreal, went to her brother, Patrick Connolly, and to her sisters, Rosanna, Susan and Sarah Connolly, and to her two nieces, the female plaintiff and her sister, as representing their late mother, who thereby became possessed of one-fifth in the undivided half of said two lots of land in Drummond street. On the 2nd of May, 1856, Susanna Connolly, the wife of the defendant, made her will and bequeathed to him the undivided half of the lots of land in Drummond street for the use and benefit of her two nieces, the female plaintiff and her sister; Mrs. Miller (Susanna Connolly) died shortly after. In 1861, Susanna Louisa Coleman died a minor, leaving the female plaintiff as her sole heir. Patrick Connolly died about 1862, intestate, and the female plaintiff, his niece, inherited one-fourth of his estate, which consisted of his share of the Chateauguay farm and of one-fifth in one undivided half of the Drummond street lots. On the 3rd of August, 1864, Sarah Connolly gave to the female plaintiff her share in the Drummond street property, which apparently consisted of one-fifth and one-fourth in another fifth of one undivided half of said lots. The defendant accepted this donation for the female plaintiff, and assumed in the deed the quality of tutor. In July, 1867, the female plaintiff became of age, and on the 21st of April, 1868, she married Louis Edmond Amédée Globensky. They are separated as to property. A few days before her marriage, that is, on the 9th of April, 1868, the female plaintiff gave a full discharge to the defendant, as having been executor to her mother's last will; she acknowledging by this discharge, that he had rendered to her a true and faithful account of his administration. On the 2nd November, 1868, the female plaintiff, being authorized by her husband, sold to the defendant all the rights and shares she had in an undivided half of the Drummond street property, for $5,000, which sum she acknowledged to have previously received. It is admitted, however, by the defendant that he then only paid to her a sum of $360, leaving the sum of $4,640, to be accounted for. The property sold by this deed was not the undivided half bequeathed by Mrs. Miller to the defendant for the use of her nieces, but

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the shares which came to the female plaintiff by the death of Catherine and Patrick Connolly, by the donation from Sarah Connolly and by the decease of her own sister. These shares consisted of one-half, or about one-half, of the undivided half of the lots on Drummond street, or one-fourth of the whole. This appears from the terms of the deed, and also from the fact that the defendant claimed the other half as having been bequeathed to him by his wife. The female plaintiff, alleging in her declaration that the defendant had had the management of all her property since the death of her mother (25th of June, 1853,) that the discharge of the 9th April, 1868, was null, having been obtained by fraud and without a previous account by the defendant of his administration of her estate and property, and that the sale of the 2nd of November, 1868, of the Drummond street property, was also null, as having been made to the defendant before he had rendered an account of his administration, and further that the defendant had in his hand property belonging to her to the amount of $60,000, prayed that the discharge of the 9th of April, 1868, and the sale of the 2nd of November, 1868, be set aside, and that the defendant be condemned to account to her, for his administration of her property, or to pay to her $60,000, and that he be held to be *contraignable par corps*.

To this action the defendant pleaded :—

1st. Cumulation of action, inasmuch as the plaintiff asked by the same action an account of defendant's administration and the rescission of the deed of sale of the 2nd of November, 1868; 2nd. That the plaintiff sold her share of the Chateauguay property on the 9th of June, 1875, and that he never had the administration of it, nor received any rent from said property; 3rd. That Susanna Connolly, his wife, had bequeathed the one undivided half of the Drummond street property to him, and that she had authorized him to dispose of it, for the interest of the plaintiff and of her sister, and that under that bequest he was entitled to the enjoyment of that property during his life; 4th. That the Belleville property was sold by the sheriff on the 15th of February, 1865, to John Bell for $300, and a deed given of it on the 6th of October, 1865, and that he, the defendant, had purchased the property from Bell in 1868. (The property was sold by defendant in 1870 for $6,250); 5th. That the plaintiff had given him a full discharge on the 9th of April, 1868, and he further denied all the allegations of the declaration.

On the first plea, the Superior Court held that there was cumulation of action and ordered the respondent to make her option between her action *en reddition de compte* and her demand to annul the sale of the 2nd of November, 1868.

The plaintiff did not appeal from this judgment, although the court of Q. B. and also the Supreme Court of Canada appear to have been of opinion

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that it was erroneous, but made her option to proceed with her action *en reddition de compte.*

On the 29th of December, 1871, the discharge given by the respondent was held to be valid, and her action was dismissed.

This judgment was reversed by the Court of Review, whose judgment was confirmed by the court of Q. B., and the defendant was condemned to render an account of his administration. By some oversight, the Court of Review did not formally declare the discharge null and void, and as its judgment was confirmed as rendered, there was no express adjudication setting aside the discharge, although it was virtually annulled by the order given to the defendant to account, on the ground that he had not previously properly accounted for his administration of the plaintiff's property.

On the 6th of October, 1875, the defendant, in pursuance of this judgment, rendered an account by which he credited the respondent with an amount of $12,224.05, including $4,640, being the balance of the sale of the Drummond street property, and he charged her with a sum of $33,116.82 for disbursements and interest, leaving a balance in his favour of $20,892.77, which he claimed by an incidental demand.

In this incidental demand, the defendant raised the objection that the action should have been in Ontario, where the property administered by the appellant was situated.

The Superior Court (Sicotte J.) held that the judgment ordering defendant to account settled the question of the liability to account and the quality in which he was liable, that whether considered as a mandatory, a *negotiorum gestor*, or as a pro-tutor, the defendant having confused his own revenues with those of his ward had acted negligently and contrary to the duty incumbent upon him, and was liable for interest in any case if a *reliquataire* (art. 1714 C. C.), and to *contrainte par corps* (art. 290 C. C.)

All interest, therefore, charged on expenditure was struck out, and the defendant was charged with a sum of $3,000 interest upon the annual balances due after deducting expenditure. The court held, also, that the Belleville property had been sold owing to his negligence, and that he was bound to give its equivalent in money at the time of rendering the account. He was liable to pay $15,000, also, as the value of the half of the Drummond street property, which by his wife's will he had been charged to deliver to the female plaintiff, in default of his delivering it over.

The court disallowed an item of $2,026 charged among the expenses, being the amount of a judgment rendered in his favor on the cognovit of Mrs. Coleman, on the 21st May, 1853, on the ground that no sufficient evidence of a debt existed.

Executors--Continued.

Other items of receipts were charged against him, including the $3,000 for interest, and including, also, sums, as and for rents of the Belleville property from the year 1852, inclusive, making the total receipts $52,500, from which an expenditure of $11,222 was to be deducted, leaving the defendant responsible for $41,278.

The Court of Queen's Bench held, that if there was anything in the objection that the action should have been brought in Ontario, it should have been urged as a plea to the jurisdiction of the court and not by an incidental demand, but in neither form would it be a valid objection, the action to account being a personal action which could be brought either at the domicile of the party accountable, or at the place where he was appointed to the office which makes him liable to account. The defendant had his domicile in Montreal, and was there appointed executor of Mrs. Coleman's will.

The defendant was relieved from an account for the rents of the Belleville property prior to 1855, on the ground that from the death of Mrs. Coleman in June, 1853, to 1855, Mullins alone administered that property, and executors are only responsible for what they have actually received or ought to have received, and are not jointly and severally liable for each other's administration. The rents were also put at a much lower figure than that arrived at by the Superior Court.

The appellant was allowed certain items which had been disallowed by the Superior Court, including the amount of the judgment for $2,014.14, and he was allowed interest on the amount of this judgment and also on the debts which bore interest and which he paid in the interest of the minor and to prevent the sale of her real estate. He was also charged on account of the Belleville property with only $6,250, the amount for which it was sold in 1870, the court considering that this was a fair price and that there was no evidence of fraud.

The result was that a balance of $590.07, with interest from the 6th October, 1875, was found due to the defendant, and each party was ordered to pay his own costs of the court below, and the plaintiff to pay the defendant's costs of appeal. *See* 2 Dorion's Q. B. R. 33.

On appeal to the Supreme Court of Canada, **Held**, that the quality of the defendant was not only *res judicata* by the judgment condemning the defendant to render an account, but had been acquiesced in by the defendant; that the courts below were correct in holding that the action had properly been brought in the Province of Quebec; that, while agreeing with the court of Queen's Bench as to the law respecting the liability of executors, the court was of opinion there was not sufficient evidence that Mullins had acted otherwise than as the agent of the defendant, who was therefore pro-

Executors—Continued.

perly liable for all the rents of the Belleville property after the death of Mrs. Coleman; that the administration of the defendant, although begun before the promulgation of the Civil Code, should have been regulated by the principles contained in the Code, (Art. 290 et seq.) which, with a few exceptions introducing new law, are only a resumé of the old law on the obligations of a tutor. He should therefore have administered *en bon père de famille*, whereas his own evidence was sufficient to prove negligence on his part. He had allowed the tenants of the Belleville property to make only such repairs as they thought right, and moreover to deduct the cost from the rents, although the leases bound them to keep the property in repair. That the defendant should be charged interest on the price of the Belleville property ($6,250), and also on that part of the price of the sale of the half of the Drummond street property unaccounted for ($4,640), from the time of sale, (Art. 1,534C. C.) not being entitled to the delay of six months allowed by the Code for investing the moneys of a minor, because he had claimed to appropriate and had used the moneys as his own; that the charge made for the board of Mrs. Coleman and Louisa, allowed by the Court of Q. B., should be deducted, as Mrs. Coleman and her daughters were living with the defendant as his relatives, and there was no evidence that the defendant had at that time any intention of making them pay board; that the amount of the judgment obtained against Mrs. Coleman should be disallowed, together with the interest thereon; and that certain other items (particularly specified) should be disallowed. The result was that the judgment of the Q. B. was varied by condemning the defendant to pay to the plaintiffs the sum of $12,121.49, but the court did not order a *contrainte par corps*, because it had been admitted that sufficient property belonging to the defendant to secure the plaintiffs had been seized, and because the court not being obliged to pronounce "*la contrainte par corps*" against tutors in every case, did not think it necessary to do so in the present one.

Per Strong J.—The Belleville property having been devised by the plaintiff's father to her mother for life, with remainder to the plaintiff and her sister in fee, a trust was created, and upon the death of Mrs. Coleman there was no trustee to execute this trust, and Miller the defendant, and Mullins, having entered into the estate of the minors and taken the profits were accountable in equity as constructive trustees, and their liability in this respect being entirely a personal one might be enforced in a jurisdiction other than that in which the lands were situated, and the mere pending of a suit in the Ontario Court of Chancery, in which no decree had been made, did not constitute any ground of defence. The defendant ought not to be allowed to claim the amount of the judgment against Mrs. Coleman, because it was a

Executors—Continued.

failure of duty on his part not to see she was protected by accepting her mother's succession under benefit of inventory, and he cannot be allowed to take advantage of his own default by making the plaintiff responsible for her mother's debt to an amount far beyond the value of the succession. Besides, the evidence of a debt was very unsatisfactory, and it was the common practice (so much so that this court might take judicial notice of it) to take judgments in this form in Ontario for the sole purpose of enabling the lands to be sold under execution against the executor or administrator (*Gardiner* v. *Gardiner*, 2 U. C. O. S. 520), and not with any view of binding the executor to an admission of personal assets, and such a judgment was no evidence as regarded the real representatives of the heir or devisee, but as to them was *res inter alios*, and before lands could be made liable to the satisfaction of the judgment creditor he was bound to prove his original debt as strictly as if no judgment against the executor had ever been obtained, and this the defendant had entirely failed to do.

Appeal allowed with costs, and judgments of courts below varied.

Coleman v. Miller.—4th Dec., 1882.

5. **Executrix, removal of for wasteful and fraudulent administration—Husband of may be general agent though will provides that he shall have no control of wife's interest—But not competent to give evidence on behalf of his wife**

An action to set aside an executrix.

The appellant is the sole surviving executrix of the will of the late John Ross, and the appellant and the respondent are the remaining legatees under the will. The complaint of the respondent is:—

1st. That appellant had given a power of attorney to her husband to manage the estate in violation of the terms of the will of the late John Ross.

2nd. Fraud in charging the estate with sums not legally chargeable to the estate. In charging a commission to remunerate her husband for the management of the estate, while paying one Tuggey a commission for the said services; in taking bonuses for leases granted, to wit, from Stearns and Murray, $500, and from Hart and Tuckwell, $500; in making a fraudulent lease to one Miss Cressy at a notoriously insufficient rent to the injury of the estate; in agreeing to pay $1,200 to Hart and Tuckwell for the cancellation of the lease of part of the estate.

3rd. Waste in pulling down and erecting buildings on the estate.

The appellant denied all this waste and fraud, and maintained that she had a right to give her husband a power of attorney. The evidence is very voluminous.

With regard to the first point respondent relied on these words: "And it is furthermore my will and wish, that neither of the husbands of any of

Executors—Continued.

said daughters nor any of my daughters' future husbands, shall have any power over, control or interference in any manner, with the foregoing devise and bequest to them, but shall be as absolutely free from such power, control or interference, as if they had remained unmarried and single.

The appellant also complained that the testimony of her husband had been excluded, and that it was competent to the court to allow her husband to be examined. The appellant relied on Art. 252, C. C. P. and on 35 Vic. ch. 6 sec. 9.

The Superior Court (MacKay J.), while admitting that under the will the husband could act as his wife's attorney, removed the appellant, on the grounds that the administration of the estate had been fraudulent and wasteful, that the lease to Miss Cressy had been imprudent and looked fraudulent, that in the receipt of bonuses by Dr. Thayer, husband of appellant, there had been fraud, for which the appellant was liable, and there had been other irregular transactions.

The Court of Queen's Bench held that it was competent to the appellant under the terms of the will to appoint her husband her general attorney and agent. That the judge of the court below not having permitted the introduction of Dr. Thayer's evidence, under the circumstances it would not be the duty of the court, even if it had the power to send back the record to allow Dr. Thayer to be examined. That it would not feel disposed to set aside an executrix, daughter of the testator, herself a legatee, on the evidence of small payments, which might have been avoided. Nor did it think that the payment of a commission to Dr. Thayer for appreciable services, such as collections, would be ground for displacing the executrix selected by the testator. But that the judgment should be confirmed on account of the Cressy transaction, and the taking of bonuses on several occasions without accounting for them.

On appeal to the Supreme Court of Canada, **Held**, that the judgment of the court below must be confirmed on account of the Cressy transaction, and that the evidence of Dr. Thayer on behalf of his wife had been properly rejected.

Appeal dismissed with costs.

Ross v. Ross—June 23rd. 1884.

6. Power to engage clerks—Art. 914 C. C. L. C.

See CONTRACT 26.

7. **Administrator, acts of misconduct—Acting by agent—Next of kin—Costs charged against personally.**

The plaintiff wished to administer to the estate of his brother, in the county of Westmoreland, (N.B.), but was unable to give the necessary administration bond, until the defendant W. and one J. agreed to become

Executors—Continued.

his bondsmen, securing themselves by having the estate placed in the hands of the defendants. A portion of the estate consisted of some English railway stock, which the defendants wished to convert into money, but plaintiff would not assist them in doing so.

In passing the accounts of the estate in the Probate Court of Westmoreland County, it was found that there were several persons entitled to participate as next of kin of the deceased, and the respective amounts due the several claimants were settled by the court.

Owing the plaintiff's refusal to join in realising the stock, however, the defendants were unable to pay some of these parties their respective shares, and finally plaintiff filed a bill to compel the defendants to pay him his portion of the estate with $1,000, which he claimed as commission, and also to hand over to him the shares of the next of kin. After the hearing a decree was made directing the estate to be disposed of by the defendants, and that they were entitled to their costs as between solicitor and client, which could be retained out of the plaintiff's share of the estate.

On appeal Proudfoot J. reversed that portion of the decree which made the plaintiff's share of the estate liable for the defendants costs, but the Court of Appeal restored the original judgment.

On appeal to the Supreme Court of Canada, **Held,** affirming the judgment of the Court of Appeal, (10 Ont. App. R. 76), that as the misconduct of the plaintiff had caused all the litigation, the Court of Appeal had acted rightly in refusing to compel any of the other next of kin to bear the burden of the costs.

Appeal dismissed with costs.

O'Sullivan v. Harty, (22 C. L. J. 17)—November 16th, 1885.

Explosion—Of gunpowder—Damage caused by—Whether within policy.

See INSURANCE, FIRE 17.

Expropriation—By road trustees.

See ROAD.

2. By-law guaranteeing cost of, invalid.

See RAILWAYS AND RAILWAY COMPANIES 18.

Extradition—Trial for offence other than that for which prisoner extradited.

See CRIMINAL APPEAL 6.

Extra work—Claim for.

See PETITION OF RIGHT 1, 2, 8.

False Imprisonment.

See ASSESSMENT AND TAXES 3.

Fisheries—Continued.

3. Fishery officer—Trespass—31 Vic. ch. 60 ss. 2, 19 (D)—Order in Council, 11th June, 1879, construction of—Notice not necessary Damages, excessive.

Three several actions for trespass and assault were brought by A., B. and C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, against V., for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly-fishing for salmon in front of their respective lots. The defendant was a fishery officer, appointed under the Fisheries Act (31 Vic. ch. 60), and justified the seizure on the ground that the plaintiffs were fishing without licenses in violation of an Order-in-Council of June 11th, 1879, passed in pursuance of section 19 of the Act, which order was in these words :—"Fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited." The defendant was armed and was in company with several others, a sufficient number to have enforced the seizure if resistance had been made. There was no actual injury. A. recovered $3,000, afterwards reduced to $1,500, damages; B. $1,200; and C. $1,000.

Held, that sections 2 and 19 of the Fisheries Act, and the Order-in-Council of the 11th of June, 1879, did not authorize the defendant, in his capacity of Inspector of Fisheries, to interfere with A., B. and C.'s exclusive right as riparian proprietors of fishing at the *locus in quo;* but that the damages were in all the cases excessive, and therefore new trials should be granted.

Held also, Gwynne J. dissenting, that when the defendant committed the trespasses complained of, he was acting as a Dominion officer, under the instructions of the Department of Marine and Fisheries, and was not entitled to notice of action under C. S. N. B. ch. 89 s. 1, or ch. 90 s. 8.

Venning v. Steadman.—ix. 206.

Foreign Bankruptcy.

See INSOLVENCY 2.

Foreign Company—Winding up of.

See CORPORATIONS 12.

Foreign Corporation.

See ASSESSMENT AND TAXES 6.

Forgery.

See CRIMINAL APPEAL 6.

Fraud—Rescission of contract for.

See SALE OF LANDS 8, 14.

Fraudulent Preference—Assignment for benefit of creditors—Power to sell on credit—R. S. O. ch. 118 sec. 2.

In a deed of assignment for the benefit of creditors, the following clause was inserted: "And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, &c., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shown.

Held, affirming the judgment of the court below, that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O. ch. 118 sec. 2.

Slater v. Badenach.—x, 296.

2. **Judgment in default of appearance—Facilitating recovery of—Not a fraudulent preference under R. S. Ont. ch. 118—Premature issue of writs of execution—Irregularity and not a nullity—Ont. Jud. Act, 1881.**

On the 28th March, 1882, a writ was issued by C. *et al.* (respondents) against one M., for the recovery of the sum of $32,155.33, and said writ was duly endorsed, in accordance with the provisions of the Judicature Act, with particulars of the claim of the respondents for the said sum of $32,155.33 on an account previously stated and settled between C. *et al.* and M., such amount being arrived at by allowing to M. a discount of 5 per cent. for the unexpired balance of the term of credit to which M. was entitled on the purchase of the goods. No appearance was entered by M. to the writ, and on the 8th April judgment was recovered for the amount, and on the same day writs of execution were issued. M. *et al.* (appellants), creditors of M., instituted an action against him on the 8th April, 1882, and obtained judgment on the 14th April, and on the same day writs of execution were issued.

The stock-in-trade was sold by the sheriff at public auction, under all the executions in his hands, to the respondents, who were the highest bidders.

On a trial in an interpleader issue, to try whether appellants' execution against M. was entitled to priority over that of respondents, and whether the judgment of the latter was void for fraud, and as being a preference; and whether respondents' executions were void as against appellant's execution, on account of their having issued them before the expiration of eight days from the last day for appearance, Mr. Justice Armour directed a verdict or judgment to be entered in favor of the appellants. That judgment was reversed by the Queen's Bench Division of the High Court of Justice for Ontario, whose judgment was affirmed by the Court of Appeal for Ontario.

On appeal to the Supreme Court of Canada, **Held,** affirming the judgment of the Court of Appeal, that what the debtor did in this case did not

Fraudulent Preference—Continued.

constitute a fraudulent preference prohibited by R. S. O. ch. 118, and that the premature issue of the execution of the respondents was only an irregularity, and not a nullity.

Macdonald v. Crombie.—xi, 107.

3. Assignment for benefit of creditors—Accidental omission of claim from Schedule of debts—Rev. St. O. ch. 118 sec. 2.

By an assignment for the benefit of creditors, dated the 26th May, 1882, after reciting that "Whereas the said party of the first part is justly and truly indebted in sundry considerable sums of money, and has become unable to pay and discharge the same with punctuality or in full, and he, the said party of the first part, is now desirous of making a fair and equitable distribution of his property and effects among his creditors, for the purpose of paying and satisfying ratably and proportionately and without preference and priority all the creditors of said party of the first part their just debts," the insolvent, one J., in consideration of the premises and of one dollar assigned all his property to the plaintiff McL., in trust to take possession, sell, collect, &c., to pay expenses of management, all rents, taxes and assessments due on the lands, and with the residue to "First. Pay and discharge in full the several and respective debts, bonds, notes, or sums of money due or to grow due from said party of the first part, or to which he is liable to the said party of the second part and the several other persons and firms designated in the schedule hereto annexed marked schedule "B" together with all interest monies due or to grow due thereon, and if said net proceeds and avails shall not be sufficient to pay and discharge the same in full, then such net proceeds and avails shall be distributed *pro rata* share and share alike among the said several persons and firms named in the said schedule "B" according to the amount of their respective claims"; and, secondly, "to return the surplus, if any, to the party of the first part."

The defendant, who had been present at the meeting of creditors at which the assignment was decided on, and who was a schedule creditor, on the 15th June, 1882, recovered judgment against J. for $1,758.75 debt and $22 costs, and the sheriff having seized, under a writ of execution issued on the judgment, certain goods claimed by the plaintiff, an interpleader issue was ordered. The issue was tried at Hamilton before Sinclair Co. J. sitting for Patterson, J. A., and he held the deed of assignment to be void as against the defendant. The C. P. Div. upheld this judgment, on the ground that, although the recital was comprehensive enough to include all creditors, the operative part of the deed was clearly restricted to scheduled creditors, and was therefore invalid, there being *primâ facie* evidence that Sinclair was a creditor. (See 32 U. C. C. P. 524.)

Fraudulent Preference—Continued.

On appeal to the Court of Appeal, that court being equally divided the appeal was dismissed with costs (10 Ont. App. R. 405).

On appeal to the Supreme Court of Canada, **Held,** per Ritchie C. J. and Fournier and Taschereau JJ., that the Sinclair debt was not satisfactorily proved; but, assuming it to have been proved, the consideration for the deed, as expressed on its face, was that there should be a distribution of the estate of the insolvent among all his creditors, and the assignee was not restricted to a distribution among the scheduled creditors only. Any creditor accidentally omitted had a right to enforce payment of his ratable proportion with the creditors named in the schedule.

Per Strong J.—There was sufficient *primâ facie* evidence that Sinclair was a creditor; and on the construction of the deed he was not entitled to the benefit of it, as the operative parts controlled the recital, and the trusts declared were expressly for the scheduled creditors. The trustee had no right to add to the list of creditors, nor, on the strength of the mere recital in the deed that it was intended for the benefit of all creditors, taken by itself alone and without more, would a court of equity interfere to rectify an omission in the schedule. But the deed was not void under sec. 2 ch. 118 R.S.O., because evidence was admissible, and the evidence admitted was sufficient, to rebut the presumption of preference which arose from the omission in the schedule. Further, even if proved that the omitted debt had been designedly concealed by the insolvent, the deed would not be void under sec. 2, for when a deed is made at the instance and upon the request of creditors, that section does not apply, unless the creditors are themselves parties to the intent to give a preference, or have notice of the debtor's design so to do and acquiesce in it.

The word "preference" in sec. 2 means a voluntary preference, and is not applicable to the case of a deed obtained by a creditor or creditors, who to obtain it have brought pressure to bear on the debtor. But whether this applies to the case of a general assignment of all the debtor's property does not call for decision in the present case.

Upon the facts proved relief would be given to the omitted creditor upon the ground of accident and mistake.

Appeal allowed with costs, Henry J. dissenting.

McLean v. Garland.—23rd June, 1885.

4. **Interpleader issue—Insolvent company—Chattel mortgage—Preference over other creditors—Intention to prefer.**

The Hamilton Knitting Company, being indebted in a large amount to the appellants, and believing that their charter did not permit them to give

Fraudulent Preference—Continued.

a mortgage on their property to secure an overdue debt, agreed to give such mortgage in consideration of an advance by appellants of more than the amount of the debt, the actual amount to be returned to the mortgagees. This arrangement was carried out, and the balance of the amount advanced on the mortgage, after paying the debt, was put into the business of the company.

At the time this was done the company believed that by getting time from these creditors they would be able to carry on their business and avoid failure. This hope was not realized, however, and they shortly after stopped payment, and, in consequence, certain of their creditors, the above respondents, obtained judgments on their respective claims and issued executions. The property secured by the said chattel mortgage was seized under these executions, and this interpleader issue was brought to test the title to such property.

The learned chancellor, before whom the issue was tried, gave judgment for the execution creditors, holding the mortgage void under the statute relating to fraudulent preferences, and the Court of Appeal sustained this judgment by a division of the court. (12 Ont. App. R. 137.)

On appeal to the Supreme Court of Canada, **Held,** that as the company *bonâ fide* believed that by getting an extension of time from the appellants, they would be able to continue their business, it could not have been given with a view of preferring the appellants and of defrauding the other creditors, and therefore the appellants were entitled to judgment.

Long et al. v. Hancock (22 C. L. J. 16).—16th November, 1885.

See INSOLVENCY 1, 6, 13.

Fraudulent Misrepresentation.

See MISREPRESENTATION.

Garnishee—Equitable assignment—Representation of indebtedness—Estoppel.

See ESTOPPEL 4.

2. Payment by, of an over-due note—Garnishee clauses C. L. P. Act.

See BILLS OF EXCHANGE AND PROMISSORY NOTES 5.

Goods—Sales of.

See SALE OF GOODS.

Great Seal—Of the Province of Nova Scotia.

See LEGISLATURE 4.

Habeas Corpus—Conviction for violation of License Laws—Prisoner discharged before appeal—No jurisdiction.

See JURISDICTION 24.

2. **Habeas Corpus—In criminal matters—No appeal in from any court to Supreme Court of Canada—Sec. 51 S. C. Act—Jurisdiction—Court of Appeal of Ontario, adjudication by in Hab. Corp. matter—Production of prisoner on return of writ—Application to give short notice of hearing not entertained when ex parte—32 & 33 Vic. ch. 32 sec. 19—38 Vic. ch. 47—Intra Vires of Dom. Parliament—Summary trial by Police Magistrate.**

On the 16th January, 1879, the prisoner was charged, for that he did "unlawfully and maliciously cut and wound one Mary Kelly with intent then and there to do her the said Mary Kelly grievous bodily harm," and being tried summarily before the Police Magistrate of the City of Ottawa was found guilty, and sentenced to be imprisoned in the central prison for the Province of Ontario at Toronto, and there to be kept at hard labor for one year.

Upon being brought before the Court of Queen's Bench for Ontario upon a writ of *habeas corpus* issued from that court, the prisoner was remanded back to prison; whereupon the prisoner appealed to the Court of Appeal for Ontario, which court dismissed his appeal on the 20th May, 1879. (See 8 Ont. Pr. R. 20.)

Notice was given of an intention to appeal from this judgment to the Supreme Court of Canada, and the case in appeal was received towards the end of May, too late to be set down for hearing at the then sessions of the Supreme Court, whereupon application was made to Mr. Justice Fournier for leave to bring the appeal on for hearing and to give short notice of hearing. This leave was refused, on the ground that no appeal would lie in such a case to the Supreme Court of Canada.

An application was then made on behalf of the prisoner for a writ of *habeas corpus* to Mr. Justice Gwynne, of the Supreme Court of Canada, who

Held that the application should be refused for two reasons: 1st. The applicant was convicted of an offence, being a misdemeanor, as stated sufficiently in the conviction, which could not be avoided for matter of form; the misdemeanor of which he was so convicted was an offence cognizable by the Court of General Sessions of the Peace, and for such offence the statute of 1875 authorized a punishment to be inflicted such as the Court of General Sessions could award for the like offence, and the punishment awarded was such as the Court of General Sessions might have awarded. 2ndly. The decision of the Court of Appeal should be considered conclusive, and should not be interfered with by a single judge of any court sitting in chambers, but the applicant must be left to any recourse he might have against the adjudication of the Court of Appeal of Ontario. (June 19th, 1879).

Habeas Corpus—Continued.

On the 23rd June an application for a writ of *habeas corpus* was made on behalf of the prisoner to Mr. Justice Henry, of the Supreme Court of Canada, who granted an order for a writ, returnable before the Chief Justice or any judge of said court in chambers, such order providing that, counsel for the prisoner consenting, the actual presence of the prisoner should be dispensed with, and providing, also, for service of the order on the Attorney-General of the Province, or his deputy, or his agent at Ottawa. The writ was returned before Chief Justice Ritchie in chambers on the 5th July, 1879.

Held, by the Chief Justice, that he thought he should not deal with the matter without the prisoner being brought before him according to the exigency of the writ, but he was also of opinion that the prisoner should not be discharged on *habeas corpus;* and he therefore refused the application for his discharge.

On the 18th September, 1879, another application was made to Mr. Justice Henry in Chambers, who granted an order for the writ, returnable before himself in chambers, dispensing with the actual presence of the prisoner on the return of the writ (counsel for the prisoner consenting), and providing for service of the order on the Attorney-General of the Province.

On the 1st October, 1879, upon the return of the writ, after hearing counsel for the prisoner and the Attorney-General, Mr. Justice Henry.

Held, 1st. That the police magistrate derived his power to try the prisoner as he did from the 38th Vic. ch. 47, but reference to 32 & 33 Vic. ch. 32 was necessary to decide upon the nature of the charge and the conviction. In the information the prisoner was charged in the very words of the first clause of sec. 19 of 32 & 33 Vic. ch. 32, and the punishment awarded was that warranted by the terms of the enactment, and the additional words as to the intent should be considered nothing more than surplusage.

2nd. That 38th Vic. ch. 47, giving power to police and stipendiary magistrates to try in a summary manner felonies and misdemeanors, was *intra vires* of the Dominion Parliament.

3rd. That it was unnecessary to consider the point whether the prisoner should be brought before him according to the exigency of the writ, no objection having been taken, and his judgment being unfavorable to the prisoner on the other grounds.

Application to discharge the prisoner refused.

Application was then made to Mr. Justice Fournier in chambers for leave to bring the appeal on for hearing at the next session of the Supreme Court of Canada, and to serve short notice of hearing, but it was **Held**, that sufficient grounds were not shown to take the case out of the regular course of procedure.

Habeas Corpus—Continued.

On the 10th November, 1879, the application was renewed before the full court, but being made *exparte* and without notice the court refused to hear it.

On the 15th November, 1879, the application was again made to the full court, when the attorney-general of Ontario showed cause, and it was

Held, that no appeal would lie in such a case to the Supreme Court of Canada, but even if it did, under all the circumstances and delays that had occurred, the court should not go out of its way to exercise any discretion as to granting leave.

Per Ritchie C.J.—As regards *habeas corpus* in criminal matters, the court has only a concurrent jurisdiction with the judges of the Superior Courts of the various provinces, and not an appellate jurisdiction, and there is no necessity for an appeal from the judgment of any judge or court, or any Appellate Court, because the prisoner can come direct to any judge of the Supreme Court individually, and upon that judge refusing the writ or remanding the prisoner, he could take his appeal from that judgment to the full court.

Motion refused.

In re Boucher—15th November, 1879.

3. **Conviction before magistrate—Arrest on warrant under—Inquiry as to evidence—Jurisdiction of court on Certiorari—S. & E, C. A. sec. 49—R. S. Ont. ch. 70.**

Application was made to the chief justice in chambers on behalf of a person arrested on a warrant, issued on a conviction by a magistrate, for a writ of *habeas corpus*, and for a *certiorari* to bring up the proceedings before the magistrate, the application being based on the lack of evidence to warrant the conviction. The application was dismissed.

On appeal to the Supreme Court, **Held**, Henry J. dissenting, that the conviction having been regular, and made by a court in the unquestionable exercise of its authority, and acting within its jurisdiction, the only objection being that the magistrate erred on the facts, and that the evidence did not justify the conclusion which he arrived at as to the guilt of the prisoner, the Supreme Court could not go behind the conviction, and inquire into the merits of the case by the use of a writ of *habeas corpus*, and thus constitute itself a court of appeal from the magistrate's decision.

The only appellate power conferred on the court in criminal cases, is by the 49th sec. of the S. & E. C. Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of revisal in matters of fact of all the summary convictions before police or other magistrates throughout the Dominion.

Habeas Corpus—Continued.

Section 34 of the S. Ct. Amendment Act of 1876 does not in any case authorize the issue of a writ of *certiorari* to accompany a writ of *habeas corpus*, granted by a judge of the Supreme Court in chambers; and, as the proceedings before the court on *habeas corpus* arising out of a criminal charge are only by way of appeal from the decision of such judge in chambers, the said section does not authorize the court to issue a writ of *certiorari* in such proceedings; to do so, would be to assume appellate jurisdiction over the inferior court.

Semble, per Ritchie C.J., that ch. 70 of the Revised Statutes of Ontario relating to *habeas corpus*, does not apply to the Supreme Court of Canada.

Appeal dismissed.

In re Trepannier.—16th March, 1885.

Harbor, Public—**Letters Patent under the Great Seal P. E. I. of foreshore in Summerside Harbor, void—B. N. A. Act, sec, 108—Public Harbor—25 Vic. ch. 19.**

G. (defendant) was in possession of a part of the foreshore of the harbor of Summerside, and had erected thereon a wharf or block at which vessels might unload. H. *et al.* (plaintiffs) brought an action of ejectment to recover possession of the said foreshore. H. *et al.'s* title consisted of letters patent under the great seal of Prince Edward Island, dated 30th August, 1877, by which the Crown in right of the island, and assuming to act in exercise of authority conferred by a Provincial Statute, 25 Vic. ch. 19, purported to grant to plaintiff in fee simple the land sought to be recovered in the action.

Held, that under sec. 108 B. N. A. Act, the soil and bed of the foreshore in the harbor of Summerside belongs to the Crown, as representing the Dominion of Canada, and therefore the grant under the great seal of P. E. Island to H. *et al.*, is void and inoperative.

Holman v. Green. vl, 707.

Highway—**Right to original road allowance—50 Geo. III. ch. 1, 4 Geo. IV. ch. 10—20 Vic. ch. 69 secs. 5, 6, 7—22 Vic. ch. 99 secs. 305, 318—Cons. Stats. U. C. ch. 54 sec. 318-29—30 Vic. ch. 51 secs. 320, 334—36 Vic. (Ont.) ch. 48 secs. 422, 426—Municipal Acts.**

The plaintiff claimed in right of his wife under a deed to her, dated 1st October, 1867, of the S. ½ of lot 9, in the 5th concession of Haldimand, to be entitled to the original allowance for road between lots 8 and 9, by reason of the Justices of the Quarter Sessions having in 1837, under 50 Geo. III ch. 1, and 4 Geo. IV. ch. 10, laid out a road across this S. ½ in lieu, as was claimed, of the original allowance; and he sued defendant for having destroyed a fence which plaintiff had recently erected across the original allowance for road at its point of intersection with the cross-roads.

Held, by the Supreme Court of Canada, affirming the judgment of the Court of Common Pleas of Ontario, and also the judgment of the Court of

Highway—Continued.

Appeal of Ontario, (*See* 3 Ont. App. R. 175.), that from 36 Vic. (Ont.) ch. 48, and the preceding Municipal Acts, it is apparent that where the original allowance, in lieu of which a new road had been opened, lay between lands owned by different persons (as the road in question does) the owner of the land appropriated for the new road had no claim whatever to the original allowance further than to receive a conveyance from the municipality of a part only, and that only in case the municipality, in its discretion, should be of opinion that the original allowance was useless to the public, in which case the municipality would have to express that opinion by a by-law passed for closing the original allowance. The plaintiff therefore must fail, for there never was any person entitled to call for a conveyance of the road in question, and the municipality had never pronounced it to be useless to the public.

2. The road in question lay along the whole length of the defendant's lot, and therefore came within sec. 422 of 36 Vic. ch. 48, Ont., and the municipality could not close it, or deprive the defendant of the peculiar benefit he might derive from it as a highway adjoining his lands within that sec., and perhaps, also, the 373 sec., which provides for compensation for any damage o owners of property injuriously affected.

3. Further, the proper conclusion from the evidence was that the road established under the authority of the Quarter Sessions was not a road laid out in lieu of the original road allowance, but a wholly independent road.

Appeal dismissed with costs.

Cameron v. Walt, 7th May, 1879.

Husband and Wife.

1. Insurable interest of husband in wife's property.

See INSURANCE, FIRE 14.

2. Evidence of husband not admissible on behalf of wife.

See EXECUTOR 5.

3. Divorce obtained in Quebec—Effect of—Right of wife to sue without authorization—Art. 14 C. C. P.

See DIVORCE.

4. Death of wife by negligence of railway company—Action by husband as administrator—Right to recover damages.

See RAILWAYS AND RAILWAY COMPANIES 24.

Hypothec—Personal recourse in action on—Acceptance of delegation of payment—Amendment of pleadings—Payment of costs as condition precedent.

On the 14th October, 1874, Mrs. Reeves sold to Quesnel the south of lot 4679 on the official plan of Montreal, and Mrs. Cadieux on the same day sold him the north of the same lot. On the 17th October, 1874, Quesnel sold to Geriken, Laframboise and Robitaille three undivided fourths of both properties *en bloc*. On this last Quesnel received $22,246.87, leaving due

Hypothec—Continued.

$27,365.63, which the purchasers promised to pay for Quesnel to Mrs. Reeves with interest in certain instalments arranged to meet Quesnel's liability. Mrs. Reeves was not a party to this last deed, but she subsequently accepted, and served notice of her acceptance of, the delegation of payment made by such deed in her favour. Mrs. Reeves, prior to such acceptance, sued the joint proprietors hypothecarily for Quesnel's debt, and they made a *délaissement* of the portion of the lands sold by her to Quesnel. Subsequently she brought the present action against Geriken under the delegation for one-third part of the said debt of $27,365.63 with interest. Geriken contended that having been obliged to *délaisser* a portion of the property, he could not be sued for any portion of the money.

The Court of Queen's Bench for Lower Canada (appeal side) sustained this contention, Sir A. A. Dorion C.J. and Ramsay J. dissenting.

On appeal to the Supreme Court of Canada, **Held**, that if Geriken in the hypothecary action had been evicted from the whole of the property hypothecated he would have been relieved from personal responsibility under the delegation; but having been evicted from only a part interest in said property he was freed from liability under the delegation merely to the extent to which the eviction might be considered to have paid his share of the debt to Mrs. Reeves.

The court therefore ordered that, upon payment, as a condition precedent, of the costs incurred by plaintiff in the said Supreme Court and the Court of Queen's Bench, together with the costs incurred by plaintiff in the Superior Court since the filing of defendant's pleas on record, the defendant be allowed to amend his pleas and to plead that he had been evicted from a part of the property sold to the said Geriken by Quesnel, and that what had been paid by said Geriken to Quesnel at the time of said sale paid, and even over paid, for the part of said property which the said Geriken detained, and that the cause be thereupon proceeded with in the said Superior Court in the ordinary course, and that in default of such amendment within three months the Superior Court, on motion to that effect, should enter judgment against defendant for $3,281.25 with interest from the 14th October, 1874, and all the costs.

Reeves v. Perrault—x, 617.

2. Hypothecary action against sub-purchasers—*Res inter alios acta*—Variation of original promise of sale by subsequent deed—Notary, evidence of, not admissible to contradict deed.

See SALE OF LANDS 9.

3. Simulated hypothec given in payment of goods—Right to sue for price.

See SALE OF GOODS 14.

Improvements—Claim for, by incidental demand.

See PETITION OF RIGHT 3.

Income.

See ASSESSMENT AND TAXES 6.

Indictment—Directions by Attorney General with reference to.

See CRIMINAL APPEAL 1.

2. Misjoinder of counts.

See CRIMINAL APPEAL 2.

3. For uttering forged cheque or order.

See CRIMINAL APPEAL 6.

Influence—Undue.

See ELECTION 1.

Injunction.

See TIMBER LICENSES 1.

2. Maliciously obtaining.

See DAMAGES 19.

3. To stay proceedings on illegal by-law of municipality.

See RAILWAYS AND RAILWAY COMPANIES 18.

4. For infringement of trade mark.

See TRADE MARK.

5. Interim—Judgment quashing not appealable.

See JURISDICTION 37, 38.

Insanity.

See WILL 7.

Inscription En Faux.

See PETITION OF RIGHT 3.

Insolvency—**Fraud or illegal preference—Presumption—Insolvent Act of 1875, sec. 13, sub-secs. 1 and 3, and Insolvent act of 1869, secs. 86 and 88—Arts. C.C.L.C. 993, 1033, 1035, 1040—Doctrine of pressure opposed to Art. 1981, 1982 C.C.L.C.**

T. F., a hotel keeper, being largely indebted, sold to A. B., his principal creditor, on the 13th January, 1875, by notarial deed, duly registered, certain moveable and immoveable property, being the bulk of his estate, comprising the hotel and furniture, for $15,409.50. The immoveable property, valued by official assessors at $22,000, was sold for $10,000. The sale was also made subject to the right of redemption by F., on re-imbursing, within three years, the stipulated price of $15,409.50, and interest at the rate of 8 p. c., with a provision that, in case of insolvency or default of payment, this right of *reméré* should cease. No delivery took place, and ten months later F., who remained in possession of the property under a lease from A. B. of the same date as that of the sale, also became bankrupt. In the meantime A. B., with F's consent, had leased the furniture to T. & J.,

Insolvency—Continued.

in whose hands it was when appellant (F's assignee) revendicated it as part of the insolvent estate. T. & J. did not plead, but A. B. intervened and claimed the effects under the deed of sale above mentioned. The assignee contested the intervention, alleging that the deeds passed on the 19th January, 1875, had been made by T. F. in fraud of his creditors.

Held, that there was sufficient evidence to prove that the object of the transaction was to defeat F's creditors generally, and therefore the deeds of sale and lease of the 19th January, 1875, were null and void under Arts. 993, 1033, 1035 and 1040, C. C. L. C., and secs. 86 and 88 of Insolvent Act of 1869, and sec. 3, sub-sec. 13, of Insolvent Act of 1875.

Rickaby v. Bell—ii, 560.

2. **Foreign bankruptcy—Assignment thereunder—Lands in Canada**

D., a naturalized British subject, who owned lands in Canada, resided and carried on business in partnership with H. & S., in the State of New York. In November, 1873, the firm of D., H. & S. became insolvent. On the 14th February, 1874, the said firm, under the Bankruptcy Act of the United States (sec. 5, 103 Rev. Stat. U. S.,) executed a deed purporting to "convey, transfer and deliver all their and each of their estate and effects" to one C., as trustee for the creditors. On the 26th September 1874, a writ of execution against D's lands in Canada was placed in the hands of the proper sheriff by the respondents, who had in the meantime recovered judgment against him. Subsequently D., by way of further assurance, and in pursuance of the deed of the 14th February, 1874, granted to C., as trustee, his lands in Canada, specifying the different parcels. M., the appellant, was afterwards substituted to C. as trustee, and, as such, fyled a bill in the Court of Chancery to obtain a declaration that the lands specified in the bill were not liable to the operation of the writ of execution of the respondents.

Held, that a bankrupt assignment, made under the provisions of an Act of the Congress of the United States of America, will not transfer immoveable property in Canada.

Also, that the deed of the 4th February, 1874, was not effectual, either as a deed of bargain and sale, or a deed of grant to pass any legal title or interest in the lands of D. in Canada.

Macdonald v. Georgian Bay Lumber Company—ii, 364.

3. **Plea of insolvency—Discharge not pleaded—Judgment after certificate granted.**

T. J. W. sued F. B., and on the 9th June, 1873, F. B. assigned his property under the Insolvent Act of 1869. On 6th August, F. B. became party to a deed of composition. On the 17th October, F. B. pleaded *puis darrein continuance,* that since action commenced he duly assigned under the Act,

Insolvency – Continued.

and that by deed of composition and discharge executed by his creditors he was discharged of all liability. On the 18th November, 1873, the Insolvent Court confirmed the deed of composition and F. B's discharge, but F. B. neglected to plead this confirmation. Judgment was given in favor of T. J. W. on the 30th January, 1874. On 30th May, 1876, an execution under the judgment was issued, and on the 28th June, 1876, a rule *nisi* to set aside proceedings was obtained and made absolute.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that F. B., having neglected to plead his discharge before judgment, as he might have done, was estopped from setting it up afterwards to defeat the execution. (Strong J. dissenting, on the ground that the rule or order of the court below was not one from which an appeal could be brought under the Supreme and Exchequer Court Act.)

Wallace v. Bossom.—ii, 488.

4. **Insolvent Act, 1875—Trader—Pleading.**

This was an appeal from a judgment of the Supreme Court of Nova Scotia, making the rule *nisi* taken out by the respondents absolute to set aside verdict for plaintiff and enter judgment for the defendants. The action was brought by C. as assignee of L. P. F., under the Insolvent Act of 1875, for several trespasses alleged to have been committed on the property known as the Shubenacadie canal property, and for conversion by C. *et al.* to their own use of the ice taken off the lakes through which that canal was intended to run. The declaration contained six counts, the plaintiff claiming as assignee of F. Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea being that "the said plaintiff was not, nor is such assignee as alleged." After the trial both counsel declined addressing the judge, and it was agreed that a verdict should be entered for the plaintiff with $10 damages, subject to the opinion of the court, that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the court should have power to enter judgment for or against the defendants with costs. A rule *nisi* for a new trial to be granted accordingly, and filed. The rule was taken out as follows:—"On reading the minutes of the learned judge who tried the cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent, subject to the opinion of the court, with power to take all objections arising out of the evidence and minutes, and with power to the court to enter judgment for or against defendants, with costs, be set aside with costs, and a new trial granted herein." This rule was made absolute in the following terms: "On argument, etc., it is ordered that the rule *nisi* be made absolute with

costs and judgment entered for the defendants against the plaintiff, with costs." Thereupon plaintiff appealed to the Supreme Court of Canada.

Held, Henry J. dissenting, that by traversing the allegation of plaintiff being assignee, the defendants put in issue the facts implied in the averment, that the plaintiff was assignee in insolvency, and that F. was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that F. bought or sold in the course of any trade or business, or got his livelihood by buying and selling, that the plaintiff failed to prove this issue.

Per Gwynne J.—Assuming F. to be a trader, still the defendants were entitled to judgment upon the merits, which had been argued at length. That the agreement at *nisi prius* authorized the court to render a verdict for plaintiff or defendant, according as they should consider either party upon the law and the facts entitled; that the court, having exercised the jurisdiction conferred upon it by this agreement, and rendered judgment for the defendants, this court was also bound to give judgment on the merits, and as judgment of the court below in favor of the defendants was substantially correct to sustain it; and it having been objected that as the rule *nisi* asked for a new trial, the rule absolute in favor of defendants was erroneous, that such an objection was too technical to be allowed to prevail, and that the rule *nisi* having, as it did, recited the agreement at *nisi prius*, and the court below having rendered a verdict for the defendants, it should be upheld, except as to the plea of *liberum tenementum*, which should be found for the plaintiff or struck off the record, and that to order a new trial could be but to protract a useless litigation at great expense.

Creighton v. Chittick.—vii, 348.

5. **Judgment on demurrer appealable—3rd sec. Supreme Court Amendment Act, 1879—38 Vic. ch. 16, sec. 3, construction of—Purchase of goods by insolvent outside of Dominion of Canada—Pleadings—Insolvent Act, 1875, ss. 136, 137, intra vires.**

P. *et al.*, merchants carrying on business in England, brought an action for $4,000 on the common counts against J. S. *et al.*, and in order to bring S. *et al.* within the purview of sec. 136 of the Insolvent Act of 1875, by a special count alleged in their declaration that a purchase of goods was made by S. *et al.* from them on the 13th March, 1879, and another purchase on the 29th March of the same year; that when S. *et al.* made the said purchases they had probable cause for believing themselves to be unable to meet their engagements and concealed the fact from P. *et al.*, thereby becoming their creditors with intent to defraud P. *et al.* J. S. (appellant) amongst other pleas pleaded that the contract out of which the alleged cause of action arose was made in England and not in Canada. To this plea P. *et al.*

Insolvency—Continued.

demurred. It was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British subjects resident and domiciled in Canada at the time of the purchase of the goods in question and had subsequently became insolvents under the Insolvent Act of 1875 and amendments thereto.

Held, Taschereau and Gwynne JJ. dissenting, that although the judgment appealed from was a decision on a demurrer to part of the action only, it was a final judgment in a judicial proceeding within the meaning of the 3rd sec. of the Supreme Court Amendment Act of 1879.

Per Ritchie C.J. and Fournier J.—1st. That sec. 136 of the Insolvent Act of 1875 is *intra vires* of the Parliament of Canada.

2nd. That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency, over which subject-matter the Parliament of Canada has power to legislate.

3rd. Although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in Canada, the defendant was not exempt for that reason from liability under the provisions of the 136th sec. of the Insolvent Act, 1875, and therefore the plea demurred to was bad and the appeal should be dismissed.

Per Gwynne J.—The demurrer does not raise the question whether sec. 136 of the Insolvent Act of 1875 is or is not *ultra vires* of the Dominion Parliament, for whether it be or be not the plea demurred to is bad, inasmuch as it confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance or in bar of the action; therefore if the appeal be entertained it must be dismissed.

Per Strong, Henry and Taschereau JJ.—There being nothing either in the language or object of the 136th sec. of the Insolvent Act to warrant the implication that it was to have any effect out of Canada, it must be held not to extend to the purchase of goods in England by defendant, stated in the second count of the declaration. In this view it is unnecessary to decide as to the constitutional validity of the enactment in question, and the appeal should be allowed.

The court being equally divided the appeal was dismissed without costs.

Shields v. Peak.—viii. 579.

6. **Insolvent Act of 1875—Unjust preference—Fraudulent preference—Presumption of innocence.**

W., the respondent, was a private banker, who had had various dealings with one D., and had discounted for him at an exorbitant rate of interest notes

Insolvency—Continued.

received by D. in the course of his business. D.'s indebtedness on new transactions amounted to a large sum of money, but, being a man of very sanguine temperament, he had entered into a new line of business, after obtaining goods on credit to the amount of $4,000 or $5,000, upon a representation to the parties supplying such goods that, although without any available capital, he had experience in business. About twelve days after he had commenced his new business, being threatened by a mortgagee with foreclosure proceedings, he applied to W., who advanced him $300, part of which was applied in paying the over-due interest on the mortgage, and the surplus in retiring a note of D.'s held by W. D. executed a mortgage in favor of W. and was granted a reduced rate of interest on his indebtedness, and was told he would have to work carefully to get through. D. became insolvent about four months afterwards, and a suit was brought by McR., as assignee, impeaching the mortgage to W.

Held, affirming the judgment of the Court of Appeal, that McR. had not satisfied the *onus* which was cast upon him by the Insolvent Act, of showing that the insolvent at the time of the execution of the mortgage in question contemplated that his embarrassment must of necessity terminate in insolvency.

McRae v. White. ix, 22.

7. Agreement to pledge moneys by debtor unable to meet his liabilities—When valid—Deposit in bank.

See AGREEMENT 7.

8. Of donor at date of donation, necessary to set aside donation in marriage contract.

See DONATION.

9. **Insolvent Act—Demand of assignment, when annulled, action for making—Reasonable and probable cause—Order of Judge annulling demand not primâ facie evidence of—Evidence.**

In 1874 the firm of James Domville & Co. was composed of James Domville and James Scovil; and the firm of Estabrooks & Gleeson was then composed of John F. Estabrooks and the plaintiff. The latter firm carried on business then, in the city of Saint John, as dealers in flour, meal, &c., and there had been dealings between the firms for about two years previously, but not, so far as appeared, to any very large extent.

In the fall of that year, three promissory notes, made by Estabrooks & Gleeson in favour of Domville & Co., which had been indorsed by the latter firm, and which had been discounted for them by the Bank of Montreal, were lying in that bank when they matured. The first was a note for $409.81, and it fell due on the 23rd November, 1874; the second was for

Insolvency—Continued.

$109.71, due 4-7 December, and the third was for $137.13, due 11-14 December.

On the 23rd November, when the first of these notes became due, the plaintiff called at the office of Messrs. Domville & Co., where he saw Mr. Scovil, and told him that he was unable to pay the note in full that day, but he offered Mr. Scovil 25 per cent. on account of it then, and asked to be allowed to renew for the difference. Mr. Scovil promised to speak to the defendant on the subject, and requested the plaintiff to call again and get his reply. The plaintiff accordingly called again shortly afterwards and found both Mr. Scovil and Mr. Domville in their office. The defendant then at once refused peremptorily to accept the offer which the plaintiff had made to Scovil, or to accept 50 per cent. and to renew for the balance for one month.

After three o'clock on the same day, the defendant called at the office of Estabrooks & Gleeson and told the plaintiff that if the note was not taken up by one o'clock the following day, an attachment would be issued against the firm of Estabrooks & Gleeson. The plaintiff urged him not to issue any attachment, assuring him that, not only Messrs. Domville & Co., but every one of the creditors of Estabrooks & Gleeson should be paid in full every dollar due to them. The defendant, however, refused to listen to these assurances.

The note for $409.81 was not then retired, neither was the next one, for $109, when it became due; but the third was paid in full at maturity.

Sometime in the month of December, (the plaintiff thought about the 7th,) Estabrooks & Gleeson received a letter from Mr. F. E. Barker, purporting to have been written by him as the solicitor, and on behalf of Domville & Co., intimating that Domville & Co.'s claim must be paid, or that Estabrooks & Gleeson must go into liquidation.

As the solicitor of Domville & Co., Mr. Barker, on the 16th December, 1874, issued an attachment at their suit against the property of Estabrooks & Gleeson, but which, so far as appeared on the trial, was never executed. The Deputy Sheriff, in whose hands it had been placed for execution, testified that no property was pointed out to him, and that he found none to attach under it.

On the 12th January, 1875, a demand was served on Estabrooks & Gleeson at the instance of Domville & Co., requiring Estabrooks & Gleeson to make an assignment under the Insolvent Act of 1869.

Within five days after service of such demand a petition, under the 15th section of the Act, signed by John F. Estabrooks and Patrick Gleeson individually, was presented to Judge Watters, the judge of the County Court of

Insolvency—Continued.

St. John, praying that no further proceedings should be taken under it. And due notice of the presentment of such petition having been given, and all parties being present either in person or by their counsel, before Judge Watters, he proceeded to inquire into the subject-matter of it, and made the following order: "After hearing the parties and their evidence, as adduced before me, and it appearing to me that the said John F. Estabrooks and Patrick Gleeson have not ceased to meet their liabilities generally at the time of such demand, I do order that the prayer of the said petitioners be granted, and that no further proceedings be taken on such demand, with costs to be paid by the said James Domville and James Scovil to the said petitioners or to their attorney upon demand."

Estabrooks & Gleeson effected an arrangement with Domville & Co. for the amount of the indebtedness for which the demand had been made by giving them an indorsed note, payable, with interest, in twelve months; which note the makers subsequently paid in full.

The plaintiff brought this action on the ground "that the defendant falsely and maliciously, and without reasonable and probable cause, made, or procured to be made, a demand under the 14th section of the Act of 1869, signed by the defendant and by one James Scovil, partners, under the name, style and firm of James Domville & Co., requiring plaintiff and the said John F. Estabrooks to make an assignment of his estate and effects for the benefit of his creditors, and falsely and maliciously, and without reasonable or probable cause, caused the same to be served upon the said plaintiff and the said John F. Estabrooks, according to the provisions of the said Act; and the said plaintiff and the said John F. Estabrooks, in pursuance of the provisions of the same Act, applied by, and presented to Charles Watters, Esquire, the Judge of the County Court of the City and County of Saint John, their petition praying that no further proceedings, under the said demand, should be had against them under the said Act; and such proceedings were thereupon had under the said petition, that the said Judge, being authorized to act, and having competent authority in that behalf, ordered that the prayer of the said plaintiff and of the said John F. Estabrooks should be granted, and thereafter and thereby such demand so made and served as aforesaid became and was of no force, &c., and the proceedings thereon were determined; and by reason whereof the plaintiff was put to inconvenience and anxiety, and was prevented from transacting his business and carrying on his said trade with the said John F. Estabrooks, and was injured in his credit and incurred expense in procuring the said demand to be annulled," &c.

Insolvency—Continued.

At the trial Duff J. directed the jury that the annulling of the demand by the order of Judge Watters was *primâ facie* evidence of the absence of reasonable and probable cause, and threw upon the defendant the burthen of proving the affirmative.

This ruling was upheld by the Supreme Court of New Brunswick (3 Pugs. & Bur. 77.)

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, that such order was not in itself even *primâ facie* evidence of the absence of reasonable and probable cause; but, further, the evidence sufficiently established the existence of reasonable and probable cause for making the demand of assignment.

Appeal allowed with costs.

Domville v. Gleeson.—10th June, 1880.

10. Deposit in bank to meet composition notes.

See NEW TRIAL 4.

11. Action of damages for malicious proceedings in—

See DAMAGES 25.

12. Voluntary assignment by insolvent—Right of assignee to sue—Arts. 13 and 19 C. C. P.

See ASSIGNMENT 6.

13. **Insolvent act of 1875, and amending acts—Mortgage of insolvent's property—Transfer within thirty days in contemplation of insolvency—Fraudulent preference under sec. 133—Merchants shipping act 1854.**

F., a ship owner in Yarmouth, N. S., employed as his agents in Liverpool, J. & Co., the defendant J. being a member of their firm, and, as agents in New York, he employed the the firm of S. P. B., of which the defendant S. was a member. In the course of his dealings with these agents he became indebted to both firms for acceptances by them of his drafts made when he was in want of money, towards the payment of which they received the freights of his vessels and remittances in money. On one occasion he said that he would give to the Liverpool firm a mortgage on the "Tsernogora," or the "Magnolia," when they should require it, and, in a subsequent conversation with a member of the firm, he agreed to give such mortgage on certain conditions, which were not carried out. He also promised the firm in New York to give them security "in case anything happened," and mentioned as such security a mortgage on the "Tsernogora." According to F's own statement, he had sufficient property to pay his liabilities when these conversations took place. A few weeks after these conversations F. executed a mortgage of 20-64 shares of the "Tsernogora," in favor of the defendants J. & S., and had the same recorded, and within thirty days

Insolvency—Continued.

thereafter a writ of attachment in insolvency was issued against him. The plaintiff, who was appointed assignee of F's estate by his creditors, filed a bill to have the mortgage set aside, claiming that it was void under section 133 of the Insolvent Act of 1875. The defendant J. did not answer the plaintiff's bill, and the other defendants denied that the mortgage was made in contemplation of insolvency, and also claimed that, as it was made under the provisions of "The Merchants Shipping Act," (Imperial), it was not affected by the "Insolvent Act of 1875." The judge in equity, Nova Scotia, before whom the cause was heard, made a decree in favor of the plaintiff, and ordered the mortgage to be set aside, and the Supreme Court of Nova Scotia dismissed an appeal from that judgment.

On appeal to the Supreme Court of Canada, **Held**, affiirming the judgment of the Supreme Court of Nova Scotia, Henry J. dissenting, that the promise to give security "in case anything should happen," could only mean "in case the party should go into insolvency," and that the transfer was void under section 133 of the Insolvent Act of 1875.

Held, also, that the provisions of the Merchants Shipping Act, did not prevent the property in the ship passing to the assignee under the insolvent Act. (5 Russ. & Geld. 244).

Appeal dismissed with costs.

Jones v. Kinney—12th May, 1885.

14. Mortgage given by company in insolvent circumstances—Preference—Intention.

See FRAUDULENT PREFERENCE 4.

15. Advances by bank to insolvent—Security on shares held by—Liability for maladministration of estate.

See BANKS AND BANKING 12.

Institute.

See DEED 3.

" WILL 10.

Insurance, Fire—Interim Receipt—Description of premises in policy—Authority of agent.

On the 9th of August, 1871, the plaintiffs (respondents) applied to the defendants (appellants) through their agent H., at Hamilton, for an insurance on goods to the amount of $6,000, contained in a store on the south side of King street, described in the application as No. 272 in defendants' special tariff book, and marked No. 1 on a diagram endorsed in pencil by the secretary of the company at Montreal; this diagram being a copy of the diagram on a previous application for policy by insured. The premium was fixed at 62½ cents on the $100, and was paid on the 10th of August. On the said 10th of August the plaintiffs gave a written notice to H. that they had added two

Insurance, Fire—Continued.

flats next door to their former premises (which would form part of No. 273 in defendants' special tariff book), and that part of their stock was then in these new flats. A few days later H. inspected the building, and said the rate would have to be increased in consequence of the cuttings. On the 29th of August, H. notified defendants of the opening into the adjoining building, but did not communicate the written notice in its entirety. An increased rate, making it one per cent., was fixed, and paid by the 23rd September, the agent issuing an interim receipt, dated back the 9th of August, for the full premium. The policy issued immediately thereafter, dated as of the 9th of August, describing the premises substantially as in the application of the 9th of August, and referring to the diagram endorsed on the application of the insured, S. T., 272. On the policy there was an N. B. in reference to "an opening in the east end gable of the premises, through which communication is had with the adjoining house occupied by one ———." The policy was handed to the plaintiffs in September, 1871, and the loss by fire occurred in March, 1872.

The plaintiffs brought an action in the Court of Queen's Bench on the policy, but failed on the express ground that the description therein did not extend to nor cover goods which were in the added flats.

Thereupon the plaintiffs filed their bill to reform the policy or restrain the defendants from pleading in the action at law that the policy covered only goods contained in S. T., No. 272.

Held, per Richards C.J. and Strong and Taschereau JJ., that the construction of the application, written notice and interim receipt, read together, established a contract of insurance between the plaintiffs and the defendants, embracing the goods situated in the flats added by plaintiffs, and that notwithstanding the acceptance of a policy which did not cover goods in the added flats, plaintiffs were entitled to recover for the loss sustained in respect of the goods contained in such added flats.

Per Ritchie, Fournier and Henry JJ., that the evidence did not establish an application for insurance on the goods in the added flats, nor an agreement for such insurance by the agent, but that the application, interim receipt and agreement were confined to the goods in the premises, S. T., No. 272.

The court being equally divided the appeal was dismissed without costs.

The L. and L. and Globe Ins. Co. v. Wyld.—i, 604.

2. **Misrepresentation as to situation of risk—Survey made by agent.**

C. M., appellants' agent, solicited and prevailed on T. S. to insure his premises with the appellants. Previously he had examined the premises to be insured, and on the 22nd April, 1874, T. S. signed the application which

Insurance, Fire—Continued.

C. M. had caused to be filled up, and upon the back of which was a diagram purporting to represent the exact situation of the building in relation to adjoining buildings. T. S. stated at the time of signing the application that the distances put down in the diagram were not accurate. C. M. promised he would go to the property and make an accurate measurement of the distances. By one of the conditions of the policy it was provided, that if an agent should fill up the application, he should be deemed to be the agent for that purpose of the insured and not of the company, but the company will be responsible for all surveys made by their agents personally.

Held, affirming the judgment of the Court of Error and Appeal, that with respect to the survey, description and diagram the assured was dealing with C. M., not as his agent, but as the agent of the company, and that therefore any inaccuracy, omissions or errors therein were those of the agent of the company, acting within the scope of his deputed authority, and not of the assured.

Hastings Mutual Fire Insurance Co. v. Shannon.—il. 395.

3. **Misstatement as to encumbrances—Indivisibility of policy—36 sec. ch. 44, 36 Vic. Ont.**

The appellants issued to the respondents, in consideration of $190, a policy of insurance to the amount of $3,000, as follows, viz.. $1,000 on their building, and $2,000 on the stock. In the respondents' application, which had been signed in blank and delivered to the person through whose instrumentality the policy was effected, it was stated that there were no encumbrances on the property, although there were several mortgages. It was also proved that after the issuing of the policy the respondents effected a further encumbrance on the land, but did not notify defendants. The policy was made subject to 36 Vic. ch. 44, O. The proviso (since repealed by 39 Vic. ch. 7,) to sec. 36 declared, "That the concealment of any encumbrances on the insured property, or on the land on which it may be situate, * * shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the board of directors shall see fit in their discretion to waive the defect." One of the conditions of the policy provided that the policy should be made void by the omission to make known any fact material to the risk. On an action upon the policy the Court of Common Pleas refused to set aside the verdict in favor of the appellants, but on appeal to the Court of Error and Appeal for Ontario it was held that the policy was divisible and that respondents were entitled to recover the insurance on the stock.

Held, on appeal, that the contract of insurance on the building and on the stock was entire and indivisible, and that the misrepresentations as to

Insurance, Fire—Continued.

encumbrances, by the conditions of the policy, as well as by the 36 sec. of 36 Vic. ch. 44 O., rendered the policy wholly void.

The Gore District Mutual Fire Insurance Co. v. Samo.—ii. 411.

4. **Trust Assignment—Conditions of Policy—Notice to agent—Loss payable to Creditors—Right of action.**

The appellant, being indebted to certain persons and desiring to have his stock of goods insured, applied to the agents of respondents for insurance to the amount of $2,000 for three months, "loss if any to be payable to his creditors of whom G. McK. is one and McM. & Co. are second." An interim receipt was issued by the company, dated 19th November, 1877, which stated the insurance to be subject to the conditions contained in and endorsed upon the printed form of policy in use by the company, one of which conditions (No. 4) stated, that if the property insured should be assigned without a written permission endorsed on the policy by an agent of the company duly authorized for such purpose, the policy should be void. On the 28th November the appellant transferred the insured property to the said G. McK., in trust for his creditors, the balance, if any, to be payable to himself. The agent of the company was notified of this transfer and assented to it, stating that no notice to the company was necessary, the policy being made payable to the creditors. The property was destroyed by fire on the 15th January, 1878. The policy sued upon was dated the 12th December, 1877, but was not delivered until the morning after the fire. By it the loss was made "payable to G. McM. and McM. & Co. and others as creditors, as their interests may appear." After the fire the inspector of the company wrote twice to McK. calling for proof of loss.

Held, reversing the judgment of the Court of Appeal for Ontario, that the notice of the trust assignment to the company's agent was sufficient, that the company must be considered as having assented to such assignment, and as having executed the policy with full knowledge of it; and that such assignment was not one contemplated by the condition of the policy.

2. That the words "loss payable, if any, to G. McK., &c.," operated to enable the respondents, in fulfilment of that covenant, to pay the parties named; but as they had not paid them, and the policy expressly stated the appellant to be the person with whom the contract and the respondents' covenant was made, the action for a breach of that covenant was properly brought by him alone.

McQueen v. The Phœnix Mut. F. Ins. Co.—iv, 660.

5. **Mutual insurance Company—Uniform conditions Act, R. S. O. ch. 162, not applicable to mutual insurance companies—Action premature.**

Appellants, a mutual insurance company, issued in favor of J. F., a policy of insurance, insuring him against loss by fire on a general stock of

Insurance, Fire—Continued.

goods in a country store, and under the terms of the policy, the losses were only to be paid within three months, after due notice given by the insured, according to the provisions of 36 Vic. ch. 44, sec. 52 O., now R.S.O., ch. 161, sec. 56, which provides that, in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidence, and examinations, called for by or under the policy, must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claim as aforesaid, the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st May, 1877. On the next morning J. F. advised the insurance company by telegraph. On the 29th June, 1877, the secretary of the Company wrote to J. F's. attorneys, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July. 1877, J. F. furnished the company with the claim papers, or proofs of loss, and the 13th July he was advised that, after an examination of the papers at the board meeting, it was resolved that the claim should not be paid. On the 23rd of August, 1877, J. F. brought this action upon the policy. The appellants pleaded *inter alia* that the policy was made and issued subject to a condition, that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd July, 1877, and that less than three months elapsed before the commencement of this suit.

Held, on appeal, 1st. That a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O., ch. 162.

2nd. That the appellant company under the policy were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought. *Ballagh* v. *The Royal Mutual Fire Insurance Company* (5 Ont. App. R. 87) approved.

The Mutual Fire Insurance Co. of the County of Wellington v. Frey.--v, 82.

6. **Subsequent and further insurance—Substituted policy.**

The appellants sued upon a policy of insurance made by the respondents on the 28th April, 1877. On the face of the policy it appeared that there was "further insurance, $8,000," and the policy had endorsed upon it the following condition, being statutory condition No. 8, R. S. O., ch. 162: "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other

Insurance, Fire—Continued.

company, unless and until the company assent thereto by writing signed by a duly authorized agent." Among the insurances, which formed a portion of the "further insurance" for $8,000 mentioned in the policy, was one for $2,000 in the Western Insurance Company, which appellant allowed to expire, substituting a policy for the same amount in the Queen Insurance Company, without having obtained the consent of, or notified the respondents.

Held, reversing the judgment of the court below, that the condition as to subsequent insurance must be construed to point to further insurance beyond the amount allowed by the policy, and not to a policy substituted for one of like amount allowed to lapse, and therefore the policy sued upon was not avoided by the non-communication of the $2,000 insurance in the Queen Insurance Company.

Parsons v. The Standard Fire Insurance Company.--v, 233.

7. **Insurable interest—Advances made to build a vessel.**

C. made advances to B. upon a vessel, then in course of construction, upon the faith of a verbal agreement with B., that after the vessel should be launched, she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When vessel was well advanced C. disclosed the facts and nature of his interest to the agent of the respondent's company, and the company isued a policy of insurance against loss by fire to C. in the sum of $3,000. The vessel was still unfinished, and in B.'s possession when she was burned.

Held, reversing the judgment of the court below, that C.'s interest, relating as it did to a specific chattel, was an equitable interest which was insurable, and therefore C. was entitled to recover.

Clarke v. The Scottish Imperial F. Ins. Co.—1v. 192.

8. **Insurable interest—Transfer of—Art. 2482 C.C.L.C.**

The appellants granted a fire policy to one T. on divers buildings and their contents for $3,280. In his written application T. represented that he was the owner of the premises, while he had previously sold them to S., the respondent, subject to a right of redemption, which right T., at the time of the application, had availed himself of by paying back to S. a part of the money advanced, leaving still due to S. a sum of $1,510. Subsequent to the application, and after some correspondence, the respective interests of T. and S. in the property were fully explained to the appellants through their agents. Thereupon a transfer for—(the amount being in blank) was made to S. by T. and accepted by the appellants. The action was for $3,280, the amount of insurance on the building and effects.

Insurance, Fire—Continued.

Held, that at the time of the application for insurance T. had an insurable interest in the property, and as the appellants had accepted the transfer made by T. to S., which was intended by all parties to be for $1,500, the amount then due by T. to S., the latter was entitled to recover the said sum of $1,500.

2nd. That S. having no insurable interest in the moveables, the transfer made to him by T. was not sufficient to vest in him T.'s rights under the policy with regard to said moveables. Art. 2482.

The Ottawa Agricultural Insurance Company v. **Sheridan.**—v. 157.

9. Insurable interest.

See INSURANCE, MARINE 2.

10. **Existing Insurance—Notice to agent—Application and Policy.**

The plaintiff, desiring to effect further insurance for two months on certain machinery, applied to defendants' company, through one S., their agent at D., authorized to receive applications, accept premiums and issue interim receipts, valid only for thirty days. He informed S. that there were other insurances on the property, but not knowing the amount that there was in the Gore Mutual, requested him to ascertain it, and signed the application partly in blank, paid the premium and obtained an interim receipt, valid only for thirty days. S. failed to do what he promised to do, and what plaintiff had entrusted him to do, and forwarded the application to the head office at T., making no mention of the insurance in the Gore Mutual. The company accepted the risk, and, in accordance with their practice, where the risk extended only over a short period, instead of a formal policy, they issued a certificate, which stated that the plaintiff was insured subject to all the conditions of the company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. The machinery was subsequently destroyed by fire, after the thirty days, but within the two months, and a policy was thereupon issued, endorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the company and endorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect; and another was, that all notices for any purpose must be in writing. The insurance in the Gore Mutual was not endorsed on the policy.

Held, that as the application in writing did not contain a full and truthful statement of previous insurances, the verbal notice to the agent of the existing policy in the Gore Mutual, without stating the amount, was inoperative to bind the company; the plaintiff was not entitled to have the policy reformed by the endorsement of the Gore Mutual policy thereon, and could not recover.

Billington v. Provincial Insurance Co.—ii, 182.

Insurance, Fire—Continued.

11. **Interim receipts—Agents, powers of.**

This was an action brought on an interim receipt, signed by one S., an agent for the respondent company at L. One of the pleas was that S. was not respondent's duly authorized agent, as alleged. The general managers of the company for the Province of Ontario had appointed, by a letter, signed by them both, one W. as general agent for the city of L. S., the person by whom the interim receipt in the present case was signed, was employed by W. to solicit applications, but had no authority from, or correspondence with, the head office of the company. In his evidence S. said he was authorized by W. to sign interim receipts, and the jury found he was so authorized. He also stated that W't one of the joint general managers, was informed that he (S.) issued interim receipts, and that the former said he was to be considered as W.'s agent. There was no evidence that the other general manager knew what capacity S. was acting in.

Held, affirming the judgment of the Court of Appeal for Ontario, that W. had no power to delegate his functions, and that S. had no authority to bind the respondent company.

Per Strong J.—That the general agents, being joint agents, could only bind the respondent company by their joint concurrent acts; the appointment of S. as agent by W't, without the concurrence of the other general manager, would have been insufficient.

Summers v. The Commercial Union Insurance Co.—vi. 19.

12. Action for calls against shareholder in.

See CORPORATIONS 9.

13. Jurisdiction of Local Legislature over subject-matter of.

See LEGISLATURE 5.

14. **Fire Insurance Policy—Termination by Company—Surrender—Waiver—Estoppel—Husband and wife—insurable interest in wife's property—Tenant for life—Damages—Practice—Parties—Striking out name of wife joined as co-plaintiff.**

A. effected insurance on C.'s property, on which he held a mortgage, under authority from and in the name of C., with loss payable to himself. During the continuance of the policy the company notified A. that the insurance would be terminated, and advised him to insure elsewhere. Such notice also stated that unearned premiums would be returned, but no payment or tender of same was made according to conditions of policy. A. took policy to agent of insurers, who was also agent of the W. Ins. Co., and left it with him, directing him to put risk in latter company. No receipt was given, and property was destroyed by fire immediately after. Company resisted payment on the ground that policy was surrendered, and contended on the

Insurance, Fire—Continued.

trial, in addition, that C. had parted with his interest in the property by giving a deed to one B. who had re-conveyed to C.'s wife, and that proper proofs of loss had not been given, claiming, in reply to a plea of waiver in regard to such proofs, that such waiver should have been in writing, according to a condition in the policy. They had refused to return policy on demand.

Held, reversing the judgment of the court below, Fournier J. dissenting, that C. had an insurable interest in the property at the time of the loss, as the husband of the owner in fee and tenant by the courtesy initiate, and having had also an insurable interest when the insurance was effected, the policy was not avoided by the deed to B.

That the company, by wrongfully witholding the policy, were estopped from claiming that proofs of loss had not been given according to endorsed condition, and were equally estopped from setting up the condition requiring waiver of such proofs to be in writing, if such condition applied to waiver of proofs of loss.

That the measure of damages recoverable by tenant for life of the insured premises is the full value of such premises to the extent of the sum insured.

Per Fournier J. dissenting, that the sending of the circular by the company, and compliance with its terms by the assured in giving up the policy to the company's agent, was a surrender of said policy, and plaintiff therefore could not recover.

Under the practice in Nova Scotia where the wife is improperly joined as co-plaintiff with the husband the suit does not abate, but the wife's name must be struck out of the record and the case determined as if brought by the husband alone.

Appeal allowed with costs.

Caldwell v. The Stadacona Fire and Life Ins. Co.—12th January, 1883.

15. **Appeal—New trial ordered by court below—Questions of law—Insurance policy—Insurable interest—Special condition—Renewal—New contract.**

J., the manager of appellants firm, insured the stock of one S., a debtor to the firm, in the name and for the benefit of the appellant. At the time of effecting such insurance J. represented appellant to be mortgagee of the stock of S. S. became insolvent, and J. was appointed creditor's assignee, and the property of the insolvent was conveyed to him by the official assignee. On March 8th, 1876, S. made a bill of sale of his stock to J., having effected a composition with his creditors under the insolvent Act of 1875, but not having had the same confirmed by the court. The insurance policy was renewed on August 5th, 1876, one year after its issue. On

Insurance, Fire—Continued.

January 12th, 1877, the bill of sale to J. was discharged and a new bill of sale given by S. to the appellant, who claimed that the former had been taken by J. as his agent, and the execution of the latter was merely carrying out the original intention of the parties. The stock was destroyed by fire on March 8th, 1877. An action having been brought on the policy it was tried before Smith J. without a jury, and a verdict was given for the plaintiff. The Supreme Court of Nova Scotia set aside this verdict, and ordered a new trial, on the ground that plaintiff had no insurable interest in the property when insurance was effected, and that no interest subsequently acquired would entitle him to maintain the action.

One of the conditions of the policy was "that all insurances, whether original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself, or by the surrounding or adjacent buildings."

On appeal the Supreme Court of Canada, **Held**, 1. That the appeal should be heard. *Eureka Woollen Mills Company* v. *Moss*, (11 Can. S. C. R. 91) approved and distinguished.

2. That the appellant having had no insurable interest when the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract.

Howard v. The Lancashire Insurance Company---xl, 92.

16. **Condition in policy—Not to assign without written consent of company—Breach of condition—Chattel mortgage.**

Appeal, by consent, from the decree of Mr. Justice Palmer, Judge in Equity for the Province of New Brunswick, in favor of the respondent (plaintiff below). The firm of Peters & Sutherland, of the city of St. John, N. B., effected an insurance for the sum of $2,000 with the Sovereign Fire Insurance Company on their stock of boots and shoes in the premises in which they did business. Not long after, the said Peters & Sutherland executed a chattel mortgage on their stock of boots and shoes, being the property covered by the said insurance, in favor of Charles H. Peters, the respondent, who allowed them to remain in possession of and sell the said stock. While the said mortgage was outstanding, the said stock was destroyed by fire, and the company refused to pay the insurance thereon, on the ground that the chattel mortgage was a breach of the following condition in the policy: "If the property insured is assigned without the written consent of the company at the head office endorsed hereon, signed by the secretary or assistant

Insurance, Fire—Continued.

secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease."

Held, affirming the judgment of the court below, that a chattel mortgage of the property insured was not an assignment within the meaning of such condition.

Appeal dismissed with costs.

Sovereign F. Ins. Co. of Can. v. Peters.—8th March, 1886.

17. **Condition in policy - Loss by explosion—Loss by fire caused by explosion—exemption from liability.**

A policy of insurance against fire contained a condition that "the company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning." A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured, the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire, but not for that caused by the explosion.

Held, reversing the judgment of the Court of Appeal for Ontario (11 Ont. App. R. 741) Taschereau J. *dubitante*, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion.

Appeal allowed with costs.

Hobbs v. The Northern Assurance Company.—9th April, 1886.
Hobbs v. The Guardian Assurance Company. "

Insurance, Life—Mistake as to amount insured—Premium—Parol evidence.

Action to recover the amount of a policy of insurance issued by the appellants for the sum of $2,000, payable at the death of the respondent, or at the expiration of eight years, if he should live till that time. The premium mentioned in the policy was the sum of $163.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants by their plea alleged that the insurance had been effected for $1,000 only, and that the policy had by mistake been issued for $2,000; that as soon as the mistake had been discovered they had offered a policy for $1,000, and that previous to the institution of the action they had tendered to the respondent the sum of $832.97, being the amount due, which sum, with $25.15 for costs (which had not been tendered) they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants, under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice to be obtained after the insurance should have become due and payable. Parol evidence was given to show how the mistake occurred,

Insurance, Life—Continued.

and it was established that the premium paid was in accordance with the company's rates for a $1,000 policy.

Held, that the insurance effected was for $1,000 only and that the policy had by mistake been issued for $2,000.

The Ætna Life Insurance Co. v. Brodie.---v, 1.

2. **Policy—37 Vic. ch. 85 Ont.—Want of seal—Fraud—Pleadings—Power of courts of equity.**

The seventh section of the statute incorporating the appellants (37 Vic. ch. 85 Ont.) after specifying the powers of the directors, enacts as follows: "but no contract shall be valid unless made under the seal of the company, and signed by the president or vice-president, or one of the directors, and countersigned by the manager, except the interim receipt of the company, which shall be binding upon the company on such conditions as may thereon be printed by direction of the board."

J. E. W. brought an action to recover the amount of a policy issued by the appellants in favor of her father.

The policy sued on was on a printed form and had the attestation: "In witness whereof, The London Life Insurance Company, of London, Ont., have caused these presents to be signed by its president, and attested by its secretary, and delivered at the head office in the city of London, &c."

To a plea that the policy sued on was not sealed, and therefore not binding upon the appellants, the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all as a valid policy, but the seal was inadvertently omited to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal, or ordered to affix it.

Held, affirming the judgment of the Court of Appeal, that the setting up of "the want of a seal," as a defence, was a fraud which a court of equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears; and therefore the respondent was entitled to the relief prayed as founded upon the facts alleged in her equitable replication. (Ritchie C.J. and Taschereau J. dissenting.)

London Life Insurance Company v. Wright--v. 466.

3 **Insurable interest—Transfer—Wager policy—Payment of premiums.**

G. applied to respondents' agent at Quebec for an insurance on his life, and having undergone medical examination and, signed and procured the usual papers, which were forwarded to the head office at New York, a policy was returned to the agent at Quebec for delivery. G. was unable to pay the

Insurance, Life—Continued.

premium for some time, but L., at the request of the agent at Quebec, who had been entrusted with a blank, executed assignment of the policy, paid the premium and took the assignment to himself. Subsequently, L. assigned the policy, and the premiums were thenceforth paid by the assignee. Prior to G.'s death, the general agent of the company enquired into the circumstances and authorized the agent at Quebec to continue to receive the premiums from the assignee.

Held, Gwynne J. dissenting, that at the time the policy was executed for G., he intended to effect a *bonâ fide* insurance for his own benefit, and, as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy, and the mere circumstance that the assignee, who did not collude with G. for the issue of the policy, had paid the premium and obtained an assignment, did not make it a wagering policy.

Vezina v. The New York Life Insurance Company.—vi, 30.

4. Action on policy—New trial—Setting aside verdict—S. & E. C. A. secs. 20, 22.

See JURISDICTION 20.

5. **Policy, delivery of—Not countersigned, effect of—Premium, proof of payment of—Delivery of policy insufficient—Escrow.**

On an action on a policy, the appellant company claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from Toronto to the agent at Halifax, to receive the premium and countersign the policy and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed: "This policy is not valid unless countersigned by ——— agent at ———, countersigned this ——— day of ———. Agent." The agent, in his evidence, said he delivered the policy to W. O'D. (the party assuring) not countersigned in order that he might read the conditions, and swore the premium had not been paid. The policy was found among W. O'D.'s papers after his death, not countersigned. The policy was dated 1st October, 1872, and the first premium would have covered the year up to the 1st October, 1873. W. O'D. died the 10th July, 1873. The case was tried before McDonald J., without a jury, and he gave judgment in favor of respondent for $3,000, the amount of the policy, and this judgment was confirmed by the Supreme Court of Nova Scotia.

On appeal to the Supreme Court of Canada, it was **Held,** Fournier and Henry JJ. dissenting, that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore the company was not liable.

Insurance, Life—Continued.

Per Gwynne J.—That the instrument was delivered as an *escrow* to the agent, not to be delivered as a binding policy to W. O'D. until the premium should be paid and until the agent should in testimony thereof countersign the policy, and that there was no sufficient evidence to divest the instrument of its original character of an *escrow*, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed.

Confederation Life Association of Canada v. O'Donnell.—x, 92.

6. **Executor or administrator, action by—Insurance company, agent of—Evidence, admissibility of—Revised statutes of N. S. ch. 96 sec. 41.**

Action on a policy of life assurance. The defendants alleged in one of their pleas that the policy was never delivered to the assured, or to anyone on his behalf. F. A., the agent of the company was called as a witness at the trial, and on being questioned as to conversations between himself and the assured, the evidence was objected to, and rejected by the judge as inadmissible under the Rev. Statutes of N. S. ch. 96 sec. 41. A verdict was given for the plaintiff. A rule *nisi* to set aside this verdict was made absolute by the Supreme Court of Nova Scotia (2 Russ. & Ches. 570).

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, that the evidence was not inadmissible under the statute in question, and should not have been withheld from the jury. Appeal allowed with costs.

The Confederation Life Association of Canada v. O'Donnell—11 Feb. 1879.

7. **Accident policy—Condition—Voluntary exposure to unnecessary danger—Practice—Extending time for appealing.**

The plaintiff (appellant) brought an action to recover upon a policy of insurance effected by the respondents upon the life of her deceased husband, J. N., who met his death during the currency of the policy from being run over by a train of cars upon one of the lines of the Northern Railway through the company's yard at Toronto. In answer to the plaintiff's claim the respondents, amongst other defences, by their fourth plea invoked a condition to which the policy sued on was subject, to wit:—"No claim shall be made under this policy when the death or injury may have have happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure." The uncontradicted evidence was that the deceased was killed by the train coming against the vehicle in which he was driving alone on a dark night in what was called a network of railway tracks in the company's station yard at Toronto, at a place where there was no roadway for carriages.

Held, affirming the judgment of the court below (7 Ont. App. R. 570), that the undisputed facts established by the plaintiff shewed "that the

Insurance, Life—Continued.

deceased came to his death in consequence of voluntary exposure to unnecessary danger," and that, therefore, respondents were entitled to a non-suit. Appeal dismissed with costs.

[In this case the Court of Appeal of Ontario held that an appeal will not lie to such court from the order of a judge of that court extending the time for appealing to the Supreme Court of Canada. See 9 Ont. App. R. 54.]

Neill v. Travellers' Ins. Co.—23rd June, 1884.

Insurance, Marine—**Warranty—"Vessel to go out in tow"—Construction of.**

The appellants issued a marine policy of insurance at Toronto, dated the 28th November, 1875, insuring in favor of the respondent $3,000 upon a cargo of wood goods laden on board of the barque "Emigrant," on a voyage from Quebec to Greenock. The policy contained the following clause:—"J. C., as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may or shall appertain, in part or in all, doth make insurance and cause three thousand dollars to be insured, lost or not lost, at and from Quebec to Greenock, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near Indian Cove, which forms part of the harbour of Quebec, and was abandoned with cargo by reason of the ice four days after leaving the harbour and before reaching the Traverse.

Held, Fournier and Henry JJ. dissenting, that the words "from Quebec to Greenock, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of Quebec on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty.

Per Ritchie C. J.—The question in this case was not, if the vessel had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of Quebec, if any existed in relation thereto.

Per Gwynne J.—The evidence established the existence of a usage to tow down the river as far as might be deemed necessary, having regard to the state of the wind and weather, sometimes beyond the Traverse, but ordinarily at the date of the departure of the plaintiff's vessel at least as far as the Traverse.

The Provincial Ins. Co. of Canada v. Connolly.—v. 258.

Policy—Total loss—Sale by master—Notice of abandonment.

T., respondent, was the owner of a vessel called the "Susan," insured for $800 under a valued time policy of marine insurance, underwritten by G.,

Insurance, Marine—Continued.

the appellant, and others. The vessel was stranded and sold, and T. brought an action against G. to recover as for a total loss. From the evidence, it appeared that the vessel stranded on the 6th July, 1876, near Port George, in the County of Antigonish, adjoining the County of Guysboro', N.S., where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, the vessel was advertized for sale on the following day, and sold on the 11th July for $105. The captain did not give any notice of abandonment and did not endeavour to get off the vessel. The purchasers immediately got the vessel off, &c., had her made tight, and taken to Pictou, and repaired, and they afterwards used her in trading and carrying passengers.

Held, on appeal, that the sale by the master was not justifiable, and that the evidence failed to show any excuse for the master not communicating with his owner so as to require him to give notice of abandonment, if he intended to rely upon the loss as total.

Per Gwynne J.—It is a point fairly open to enquiry in a court of appeal, whether or not, as in the present case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts.

Gallagher v. Taylor.—v, 368.

3. **Policy, condition in, as to default in payment of premium, effect of—Premium note, guarantee of, in case of insolvency—Condition precedent—Reference to arbitration—Award, effect of.**

W. *et al.* effected in A. M. Ins. Co., a policy of insurance on a ship. The policy among other clauses contained the following: "In case the premium, or the note, or other obligation given for the premium, or any part thereof, should be not paid when due, this insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insurer shall he entitled to recover for loss or damage which may have occurred before such fault. Should the person or any of the persons liable to the company for the premium, or on any note or obligation given therefor, or any part thereof, fail in business, or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company." There was also in the policy an arbitration clause, by which arbitrators were to decide any difference which might arise between the company and the insured "as to the loss or damage, or any other matter relating to the insurance," in accordance with the terms and conditions of the policy and the laws of Canada, and the obtaining of the decision of the arbitrators was to be a condition precedent to the maintaining of an action by the insured against the

Insurance, Marine—Continued.

company. W. *et al* gave a promissory note for the premium, which was not yet due when they became insolvent; and C., the respondent was appointed assignee. A guarantee was then given, and accepted by the company as a satisfactory security for the premium. The note became due on the 30th September, 1878, and was not paid, but remained overdue and unpaid at the date of loss, on the 12th October, 1878. After the loss the matters in dispute arising out of the policy were submitted to three arbitrators, who awarded $5,769.29. An action was then brought on the policy, the declaration containing a count on the award.

Held, affirming the the judgment of the court below. 1. That the premium having, on the insolvency of the insured, been satisfactorily guaranteed to the company, the policy was thereby kept in full force and effect, and did not become void on non-payment of the premium note at maturity. (Strong J. dissenting.)

2. That the award was binding on the company, the question as to the payment or default in payment of the premium being a difference "relating to the insurance" within the meaning of the policy, and the award not appearing on its face to be bad from any mistake of law or otherwise.

Anchor Marine Insurance Co. v. Corbett—ix, 73.

4. **Policy—Construction of—Trading voyage—Insurable interest.**

The respondents (plaintiffs), by an arrangement with M., who had chartered the schooner "Mabel Claire" for a trading voyage from Nova Scotia to Labrador and back, were to furnish the greater part of the cargo, and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advance, and pay over any balance remaining to S. and others. In trading on the voyage S. and others were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of, so as to obtain a return cargo in lieu thereof. The plaintiffs put on board the vessel at Halifax merchandise to an amount exceeding $6,000, and after having done so and upon the day on which the vessel sailed from Halifax, effected with the appellants (defendants) the policy sued upon, and an extract from which is as follows:—"Rumsey, Johnson & Co. have this day effected an insurance to the extent of $2,000, on the undermentioned property, from Halifax to Labrador and back to Halifax on trading voyage. Time not to exceed four (4) months, shipped in good order and well conditioned on board the schooner "Mabel Claire," whereof Mouzar is master, this present voyage. Loss, if any, payable to Rumsey, Johnson & Co. Said insurance to be subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, copies of which are

Insurance, Marine—Continued.

printed on the back hereof. Description of goods insured, merchandise under deck, amount $2,000, rate 5 per cent., premium $100, to return two (2) per cent., if risk ends 1st October, and no loss claimed; additional insurance of $5,000, warranted free from capture, seizure and detention, the consequences of any attempt thereat." Against the respondents right to recover it was contended that they were merely unpaid vendors and had no insurrable interest, and that goods previously put on board at Liverpool, N. S., were not covered by this policy, and that it was not to cover the return cargo.

Held, affirming the judgment of the court below, discharging a rule *nisi* to set aside a verdict for the plaintiffs, that the policy covered not only goods put on board at Halifax, but all the merchandise under deck shipped in good order on board said vessel during the period mentioned in the policy.

Held, also, that there was sufficient evidence to show that the plaintiffs had an insurable interest in all the goods obtained and loaded on the vessel.

Merchants' Marine Insurance Co. v. Rumsey.—Ix, 577.

5. **Voyage policy—Mortgagee who assigns as collateral security has an insurable interest—Total loss—Right to recover—Notice of abandonment by mortgagee—Constructive total loss.**

While the barque "Charley" was at Cochin, on or about the 12th April, 1879, the master entered into a charter party for a voyage to Colombo, and thence to New York by way of Alippee. The vessel sailed on the 22nd April, 1879, and arrived at Colombo, which place she left on the 13th May, and while on her way to Alippee she struck hard on a reef and was damaged and put back to Colombo. The vessel was so damaged that the master cabled to the ship's husband at New York on the 23rd May, and in reply received orders to exhaust all available means and do the best he could for all concerned. The repairs needed were extensive and it was impossible to get them done there, and Bombay, 1,000 miles distant, was the nearest port. After proper surveys and cargo discharged, on the 10th June the vessel was stripped and the master sold the materials in lots at auction. On the 21st May the respondent, a mortgagee of $\frac{43}{64}$ in the vessel, which he had assigned to the Bank of Nova Scotia by endorsement on the mortgage, as a collateral security for a pre-existing debt to the Bank of Nova Scotia, being aware of the charter from Cochin to New York, insured his interest with the appellant company, the nature of the risk being thus described in the policy: "Upon the body, &c., of the good ship or vessel called the barque "Charley" beginning the adventure (the said vessel being warranted by the insured to be then in safety), at and from Cochin *via* Colombo and Alippee to New York."

To an action on the policy for a total loss, the defendants pleaded, *inter alia*, 1st, that the plaintiff was not interested; 2nd, that the ship was not

Insurance, Marine—Continued.

lost by the perils insured against; 3rd, concealment. A consent verdict for $3,206 for plaintiff was taken, subject to the opinion of the court upon points reserved to be stated in a rule *nisi*, and upon the understanding and agreement that everything which could be settled by a jury should, upon the evidence given, be presumed to be found for the plaintiff.

Held, 1st. That this was a voyage policy, and that the warranty of safety referred entirely to the commencement of the voyage and not to the time of the insurance.

2nd. That the fact of the plaintiff having assigned his interest as a collateral security to a creditor did not divest him of all interest so as to disentitle him to recover.

3rd. That the vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed, the mortgagee was entitled to recover for an actual total loss, and no notice of abandonment was necessary.

Per Strong J.—A mortgagee, upon giving due notice of abandonment, is not precluded from recovering for a constructive total loss.

Anchor Marine Insurance Co. v. Keith.—ix, 483.

6. **Total or constructive total loss, what constitutes—Notice of abandonment not accepted by underwriters—Right to abandon—Sale by master.**

C., as assignee of W., was insured upon the schooner "Janie R." to the amount of $2,000 by a voyage policy. On the 14th February, 1879, the "Janie R.," which had been in the harbor of Shelburne since the 7th of February, left with a cargo of potatoes to pursue the voyage described in the policy, but was forced by stress of weather to put back to Shelburne, and on the morning of the 15th she went ashore, when the tide was about its height. On the 17th notice of abandonment was given to the defendants (appellants) and not accepted, and on the 18th the master, after survey, sold her. The next day the purchaser, without much difficulty, with the assistance of an American vessel that was in the harbor, and by the use of casks for floating her (appliances which the master did not avail himself of), got her off. There was no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or to have been so much damaged that she would not have been worth, after having been repaired, more than the money expended for that purpose. The vessel afterwards made several voyages, and was sold by the purchasers for $1,560. In an action brought on the policy against the defendant company, tried before a judge without a jury, a verdict was given in favor of plaintiff for $1,913, which verdict was sustained by the Supreme Court of Nova Scotia.

Insurance, Marine—Continued.

On appeal to the Supreme Court of Canada, **Held,** reversing the judgment of the courts below, 1. That the sale by the master was not justified in the absence of all evidence to show any "stringent necessity" for the sale after the failure of all available means to rescue the vessel.

2. That the undisputed facts disclosed no evidence whatever of an actual total loss and did not constitute what in law could be pronounced either an absolute or a constructive total loss.

Per Strong J.—The right to abandon must be tested by the condition of the vessel at the time of action brought, and not by that which existed when notice of abandonment was given.

Providence Washington Insurance Co. v. Corbett.—Ix. 256.

7. **Marine insurance—Policy, cancellation of—Premium, retention of portion of.**

The plaintiffs by their agents in Pictou, insured in the St. Lawrence Insurance Association, of which defendant was the broker and an underwriter, the sum of $2,000 on their schooner "Nimrod" for twelve months. In a written application were the words, "insurance elsewhere not to exceed $2,000." The policy was afterwards issued, dated 25th October, 1870, without any reference to this condition. On the day the application was made the plaintiffs insured a further sum of $2,000 on the schooner in the Mutual Insurance Association of Pictou. In November afterwards another sum of $2,000 was insured in the Union Marine Insurance Company at Halifax. After all these insurances had been effected, the schooner proceeded on her voyage and was, as was long afterwards ascertained, abandoned at sea as a total wreck on the 19th February, 1871.

On the 20th February, 1871, the defendants' association, none of the parties having had any intimation of the loss, cancelled their policy on account of the insurance in the Mutual Marine Insurance Company at Halifax, charging the plaintiffs premium up to that date and remitting the portion payable after that date.

In an action brought on the policy, the Supreme Court of N. S. directed judgment to be entered for defendants.

On appeal to the Supreme Court of Canada, **Held,** reversing the judgment of the court below, that the defendants could not be allowed to contend that the cancellation operated, not from the 20th February, 1871, up to which date the premium was charged, but from November previous. Appeal allowed with costs.

McDonald v. Doull—24th February, 1879.

Insurance, Marine—Continued.

8. Promissory representation in application—Coasting voyages—Time policy.

The policy sued on was a time policy issued on a slip or application containing a statement in these words: "Voyage at and from date to 31st December, coasting principally Canso to Halifax, using Prince Edward Island and Newfoundland." In the policy the exceptions on the time risks were as follows: "Prohibited from the River and Gulf of St. Lawrence and ports in Newfoundland, and between the 1st November and 1st May." Sealing voyages and voyages to Greenland and Iceland were also excepted, and "not to use the ports of Schooner Pond, Blockhouse Mines and Chimney Corner, except during the months of June, July and August, the use of such waters not to vitiate this policy, except during the time such waters are used." The vessel was lost on a voyage from Baltimore to St. Thomas.

The Supreme Court of Nova Scotia held that notwithstanding the representation in the slip, the insured was justified in sailing wherever the policy permitted. (4 Russ. & Geld. 50).

On appeal to the Supreme Court of Canada, **Held,** reversing the judgment of the court below, that, taking the slip and policy together, a perfectly consistent contract of assurance could be made out, namely, a contract to assure the vessel for the time named, provided she was confined to coasting voyages, and did not, whilst so employed, use any of the prohibited waters. Henry J. dissenting.

Appeal allowed with costs.

McKenzie v. Corbett.—19th June, 1883.

9. Total loss—Notice of abandonment—Waiver.

On a voyage from Porto Rico to New Haven respondents' vessel sustained damage and put into St. Thomas. A survey was held by competent persons named by the British consul, and according to their report the cost of putting her in good condition would exceed her value. The captain, under instructions from owners to proceed under best advice, advertized and sold vessel, and purchaser had her repaired at a cost much less than the report, and sent her to sea.

Held, that there was no evidence to justify the jury in finding that the vessel was a total loss.

Owners of vessel gave notice to agent of underwriters that they would abandon, which agent refused to accept. Owners telegraphed to Captain that they had abandoned and for him to proceed under the best advice.

Held, that this act of telegraphing to the Captain did not constitute a waiver of the notice of abandonment. (*See* 23 N. B. R. 160.)

Appeal allowed with costs.

Millville Mutual Mar. and Fire Ins. Co. v. Driscoll.—23rd June, 1884.

Insurance, Marine—Continued.

10. Concealment of material facts—Policy void.

The appellant (defendant) is a member of an insurance association, doing business at Halifax, known as the Halifax Marine Insurance Association.

On the 13th August, 1880, the respondent company (plaintiffs) through J. Scott Mitchell, their agent, applied to the association for insurance on the cargo of the steamship "Waldensian," on a voyage from Montreal to Glasgow *via* port or ports, and the risk was accepted the same day by the appellant and other underwriters, but no policy was issued or premium paid at the time.

The "Waldensian" left Montreal on the 11th August, 1880; she got aground that afternoon about four o'clock, but succeeded in getting off the same day and proceeded to Quebec, where she arrived about six o'clock, leaking badly, and was there grounded to prevent further damage to cargo.

The respondent company knew on the 12th day of August of the accident to the steamship, but this fact was not disclosed to the underwriters when the insurance was applied for on the 13th, the day following.

The appellant became aware of the accident a day or two after the application for insurance, and a policy was after that issued to respondent company, bearing date the 13th August, 1880 (the date of the application), and the premium settled in account with the broker of the association, of which appellant was a member.

Appellant contended there was no evidence whatever that the appellant, or any of the underwriters, or their broker, knew at the time that the policy was issued or premium paid that the accident was known to the respondent company at the time the insurance was effected, and concealed from the underwriters.

This action was brought to recover for damage done to the cargo by the leaking of the steamship in consequence of her getting on shore as above stated.

The appellant pleaded among other things, that the respondent company concealed from appellant a fact known to respondent and material to the risk, and unknown to the appellant, viz.: that the steamship had been on shore after leaving Montreal.

The respondent replied that after appellant became aware of the facts alleged in the said pleas, he took the premium and issued the policy.

The cause was tried before Mr. Justice Rigby, at Halifax, on 7th Nov., 1883, who found that when the insurance was applied for, and the contract therefor completed, the respondent company was aware of the facts above stated, and concealed them from appellant, also that they were not then

Insurance, Marine—Continued.

known to appellant, and were material to the risk. He also found that before the policy was issued or premium paid the appellant became aware of said facts, and elected to treat the contract as binding, and he found a verdict for the plaintiffs (the respondents) for the amount claimed.

A rule *nisi* was taken to set aside this verdict, which was argued before the court during the following term.

This rule *nisi* was discharged by the court, Judge Weatherbe dissenting.

A rule absolute discharging the rule *nisi* was granted on the 22nd day of April, 1884, from which rule the appellant, Allison Smith, appealed to the Supreme Court of Canada.

Held, the evidence showed that at the time of the payment of the premium the appellant did not know that the accident was known to the respondent company, and the policy therefore void for concealment of material facts, and there could be no waiver of the omission to communicate the information material to the risk, for the appellant could not waive that which he did not know.

Appeal allowed with costs.

Smith v. The Royal Canadian Insurance Co.---18th November, 1884.

11. **Condition of policy—Not to load more than registered tonnage with stone, &c., without agent's consent—Loading with phosphate rock—Evidence of consent by agent—Proof of contract—Prior insurance.**

A voyage policy on the plaintiff's vessel "Pretty Jemima," contained, *inter alia*, the following clauses:—"Warranted not to load more than registered tons with stones, marble, lead, ores or brick, without the consent of the agent of the Providence Washington Insurance Company, of Providence. Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy then the said Providence Washington Insurance Company, of Providence, shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby assured."

In an action on the said policy, it appeared that the vessel was loaded with phosphate rock, and the plaintiff gave evidence of a conversation with the company's agent in which the latter wanted to charge more premium than on a previous policy, because the vessel was going to carry phosphate." He also cautioned plaintiff about loading the vessel; how to lay the floor so as to distribute the weight over the ship. The plaintiff's evidence on this matter closes as follows: "Ranney (the agent) said I could load down to the mark, the load line, same as if loading coal." It also appeared that there was $1,100 prior insurance on one eighth of the vessel, which plaintiff had bought, but of which he had never received the title.

Insurance, Marine—Continued.

Held, affirming the judgment of the Supreme Court of New Brunswick, Gwynne J. dissenting, that the agent's consent had been obtained to the loading of the vessel beyond her registered tonnage, and there was consequently no breach of the above condition of the policy.

Held, also, that the defendants were liable, up to the amount insured, only for so much of the assured value as was not covered by the prior insurance of $1,100.

Per Gwynne J.—That the consent of the agent should have been alleged by the plaintiff in his pleading, and, not having been so alleged, could not be set up as an answer to the defendant's pleas. That the jury should have been requested to find whether or not phosphate rock was stone within the meaning of such condition, and that there should be a new trial to have such a finding by the jury.

The policy was signed by Ranney, as the company's agent; he issued and countersigned it as agent, received the premium and acted throughout as such agent, and was so recognized by the president of the company.

Held, that this was sufficient in the first instance, if uncontradicted, to justify the jury in finding that Ranney was the agent of the company.

Robertson v. *Provincial Insurance Company*, 3 All. N. B. 379 followed.

Appeal dismissed with costs.

Providence Washington Insurance Co. v. Chapman.—12th January, 1885.

12. Policy to be countersigned by agent—Proof of agency.

A policy of insurance on the respondent's vessel contained the following reservation: "But this policy shall not be valid unless countersigned by Henry R. Ranney, the said company's duly authorized agent, at his office in St. John, N.B." The policy was not countersigned by Ranney, and in an action thereon, the respondent gave evidence to show that it was issued by Ranney and sent by him, as directed by the respondent, to a person in Nova Scotia. A verdict was given for the plaintiff at the trial, and the company moved for a non-suit on the ground, *inter alia*, that the policy was invalid on account of not being so countersigned. The non-suit was refused.

On appeal to the Supreme Court of Canada, **Held** Fournier and Henry JJ. dissenting, that the appeal must be allowed and a non-suit entered.

The policy, as set out in the plaintiff's declaration, contained a stipulation that the vessel was not to load more than register tonnage with stone, ores, &c. The defendants pleaded to this count that she did load more than her register tons with stone or ores, namely, phosphate rock, contrary to such condition. The plaintiff replied that phosphate rock was not stone or ore within the meaning of such condition; the defendants demurred to

Insurance, Marine—Continued.

the replication, and, on argument on the demurrer, the replication was held good. 19 N.B. Reps. (3 P. & B.) 28.

The Delaware Mutual Insurance Co. v. Chapman.—16th February, 1885.

13. Agreement to keep Ship insured to amount of advances.

See AGREEMENT 10.

14. **By Ship's husband who is mortgagee—For the benefit of all concerned—Authority—Ratification—Concealment of material facts.**

A ship's husband, who held a power of attorney from the owners authorizing him to insure on their behalf, and who was also a mortgagee of the vessel, insured "for the benefit of all concerned," and the insurance was accepted by the owners. When the insurance was effected the vessel was sailing under the Haytien flag, and neither that fact, nor the fact of the insured having a mortgage interest, was communicated to the underwriters. The vessel was lost and the insured realized more than the amount of the mortgage from a prior insurance. The defendant, one of the underwriters, resisted payment on the ground of such prior insurance covering all the interest of the insured, and also of concealment of the above facts.

Held, affirming the judgment of the court below, that the underwriters were liable, the owners having authorized, or subsequently ratified, the insurance effected by the ship's husband, who was under no obligation to disclose his individual interest, in a policy for the benefit of all concerned, nor to disclose the nationality of the vessel, there being no representation or warranty required respecting it by the policy, and no circumstances within his knowledge attaching to the national character of the vessel exposing her to detention and capture.

West v. Seaman.—16th February, 1885.

15. **Amendment—Constructive total loss of ship—Sale of—Facilities for making repairs.**

In the course of her voyage, on Saturday, the 3rd August, 1882, the "John D. Tupper" went ashore on Phinney's Point, on the Bay of Fundy shore, in a very dangerous position and no doubt much injured. An anchor was got out ready for the tide. When the tide came in the pumps were sounded and there were fourteen inches of water. Half an hour after the first sounding there were three or four feet of water, but by the aid of the kedge anchor and starboard anchor the vessel was hove off and floated and anchored. The witness who details this says: "I piloted her up to Port Williams; I was at the wheel; we made sail and thought she would fill; the pumps were going all the time; we did not set the upper sail; I kept as close to the shore as I could in case she filled and rolled over with her deck-load; at Port Williams she ran aground about 100 feet

from the breakwater; we could not swing her closer; she was then lying on the beach of the Bay of Fundy; some of the deals of the deck load were thrown over at Phinney's Point."

At Port Williams the vessel floated once every day. The master on Monday discharged the cargo deck-load and hauled the vessel into the pier.

There were no facilities for repairing vessels of this class, at Port Williams, but there were near at hand, viz., at the port of St. John, where she could be, and actually was, repaired, and which place, one of the witnesses says, could be seen on a fine day from Port Williams; but the captain appears to have made no efforts whatever to take the vessel to St. John, or to procure a tug from St. John to aid him in doing so, if such was deemed necessary, or to have made any enquiries in reference thereto, but on the 20th August, notified the shipper that the voyage was at an end. The vessel was sold at auction (a Mr. Troop, one of the mortgagees acting as auctioneer) and transferred by bill of sale dated the 4th September to the purchaser, who thereupon, immediately after the sale, without the slightest apparent difficulty, with her original crew, sailed her to St. John, and there repaired her, and in the course of four or five weeks sent her in a seaworthy condition on a voyage to the West Indies with a cargo of shooks.

Held, in view that there never was any pressing necessity for the sale, or any time when the ship was unnavigable without any reasonable hope of repair, that the damage never was so great that the owner could not have put her in a state of repair necessary for pursuing the voyage at a convenient and suitable place, and at an expense less than the value of the ship, and that the cargo was not in a perishable condition, but in a place of safety, there was no ground for saying. there was either a total or a constructive total loss, or that there ought to have been a loss of the voyage; and therefore no question of abandonment arose.

Appeal dismissed with costs.

Patch v. Pitman.—16th February, 1885.

16. Constructive total loss—Sale of vessel—Repairs—Value after.

In an action to recover insurance on freight, it appeared that on the voyage, which was from Boston to St. Pierre, the vessel sprung a leak and put into Glasgow harbor near Cape Canso, where a survey was held; some repairs were made, and, in accordance with the recommendation of the surveyors, she proceeded to Port Hawkesbury for further repairs. On the day she left Port Hawkesbury she went ashore, and when the tide ebbed, fell over on her side; part of the cargo was damaged and sold, and the rest taken by the Boston underwriters; the vessel sustained further damage while lying on the shore. The captain made no *bonâ fide* efforts to get her

Insurance, Marine—Continued.

off, and after being several times advertized she was finally sold for $140; she was got off at a cost of $70, by the purchasers, repaired for considerably less than her value and sailed for two years, when she was again sold for $1,800. In the policy she had been valued at $1,500, and two years before had sold for $2,000.

Held, reversing the judgment of the court below, Gwynne J. dissenting, that the vessel was not a constructive total loss. *Providence Washington Ins. Co.* v. *Corbett*, 9 Can. S. C. R. 256, approved.

The Providence Washington Ins. Co. v. Almon.—17th February, 1885.

17. **Warranted no other insurance—Construction of.**

Action upon a policy of insurance in the usual form upon the schooner "Smiling Waters." The application contained the words, written on its face, "no other insurance," and the policy issued on the application so made contained the words, "warranted no other insurance." The policy was issued in favor of James Butler & Co., on account of whom it might concern. The declaration was in the usual form and averred interest in the persons composing the firm of James Butler & Co., and Henry Walfield, or some or one of them.

The defence was rested solely on the warranty, which, the defendants contended, meant that there should be no other insurance on the vessel during the continuance of the risk.

It was admitted upon the trial, that after the policy was issued, the Henry Walfield mentioned, being indebted to one Sperry for assistance in building said vessel, instructed Sperry to effect insurance on the vessel to cover his debt, which Sperry did for $400 with J. E. and others, on behalf of whom it might concern, and both policies were in full force at the time of the loss.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the words "no other insurance," and "warranted no other insurance," meant that there should be no other insurance on the vessel during the continuance of the risk.

Appeal dismissed with costs.

Butler v. Merchants' Marine Insurance Co.—17th February, 1885

18. **Voyage policy—Sailing directions—Time of entering Gulf of St. Lawrence—Attempt to enter.**

In an action on a voyage policy containing this clause "warranted not to enter, or attempt to enter, or to use the Gulf of St. Lawrence, prior to the tenth day of May, nor after the thirteenth day of October (a line drawn from Cape North to Cape Ray, and across the Strait of Canso, to the northern entrance thereof, shall be considered the bounds of the Gulf of St. Lawrence

Insurance, Marine—Continued.

seaward)," the evidence was as follows:—The captain says: "The voyage was from Liverpool to Quebec, and ship sailed on April 2nd. Nothing happened until we met with ice to the southward of Newfoundland, shortened sail and dodged about for a few days trying to work our way around it. One night ship was hove to under lower main-topsail, and about midnight she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in this ice three or four hours; laid to all the next day; could not get any further along on account of the ice. In about twenty-four hours we started to work up towards Quebec." The log book showed that the ship got into this ice on the 7th May, and an expert examined at the trial swore that from the entries in the log book of the 6th, 7th, 8th, and 9th of May, the captain was attempting to enter the Gulf of St. Lawrence. A verdict was taken for the plaintiff by consent, with leave for the defendants to move to enter a nonsuit or for a new trial, the court below to have the power to mould the verdict, and also to draw inferences of fact the same as a jury.

Held, reversing the judgment of Supreme Court of New Brunswick (24 N. B. R. 39) Henry J. dissenting, that the above clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the Gulf contrary to such clause.

Taylor v. Moran 22 C.L.J. 14).—16th November, 1885.

Intercolonial Railway.

See PETITION OF RIGHT 1, 8.

Interest—Arrears of, prescription against.

See PRESCRIPTION 1.

2. Chargeable against testamentary executors.

See EXECUTORS.

3. Misdirecting Jury as to, on Promissory Note.

See EVIDENCE 5.

4. On deposit in Court under 31 Vic. ch. 12 and 37 Vic. ch. 13 (N.S.)—Officer of Court not entitled to.

See JURISDICTION 13.

5. On covenant in mortgage—Evidence.

A note dated 11th January, 1882, payable to and endorsed by one S. H., was for $3,000 with interest at the rate of two per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of $3,000 on the 11th day of July, 1862, with interest thereon at the rate of

Interest—Continued.

twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment.

Held, that the proper construction of the terms of both the note and covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid.

St. John v. Rykert.—x, 278.

6. **Petition of right—Government contract—Unliquidated damages—Interest—Right of contractor to.**

M. & Co. brought an action by petition of right against the Dominion Government, for damages for an alleged breach of contract whereby the suppliants contracted for the Paliamentary and Departmental printing for a certain specified period. The alleged breach consisted in the Government giving a portion of the said printing to other parties, the suppliants claiming that, by the terms of the contract, they were entitled to the whole of it. The Crown demurred to the petition, and as to the departmental printing, the demurrer was overruled (8 Can. S. C. R. 210.) The petition subsequently came on for hearing in the Exchequer Court, and a reference was made to the Registrar and Queen's Printer to ascertain and report as to the profit lost to the suppliants by not being allowed to do the departmental printing. The referees found a certain sum as the profit lost to suppliants, stating in their report, that the suppliants claimed interest on the amount, but that the referees were of opinion they had no power, under the order of reference, to consider the question of interest.

No exception was taken to the report of the referees, and the suppliants moved in the Exchequer Court for judgment for the amount found by the referees with interest, as the damages to which they were entitled under their petition of right. Mr. Justice Henry, before whom the motion was made, gave judgment for the amount found by the referees with interest thereon at 6 per cent., such interest to be computed on the aggregate of the sums which, according to said report, the suppliants, up to the thirty first day of December, in each year during the currency of the said contract, would have received as profit.

On appeal to the Supreme Court of Canada from that part of the judgment allowing interest, **Held,** Henry J. dissenting, that the suppliants were not entitled to interest on the amount found by the referees for loss of profits.

Appeal allowed with costs.

The Queen v. MacLean et al.—12th May, 1885.

Interpretation Act—31 Vic. ch. 1, D., applicable to P. E. Island.

See CANADA TEMPERANCE ACT, 1878, 5.

Interrogatories—On articulated facts—Evasive answers—C. C. P. Arts. 228, 229.

See CONTRACT 12, 17.

2. **Commission from Supreme Court of N. B.—Cons. Stats. ch. 37—Directed to two Commissioners—Return signed by one only—Failure to administer interrogatories.**

A commission was issued out of the Supreme Court of New Brunswick directed to two commissioners—one named by each of the parties to the suit—to take evidence at St. Thomas, W. I., with liberty to plaintiff's commissioner to proceed *ex parte* if the other neglected or refused to attend. Both commissioners attended examination and defendant's nominee cross-examined the witness, but refused to certify to the return, which was sent back to the court signed by one commissioner only. Some of the interrogatories and cross-interrogatories were not put to the witnesses by the commissioners.

Held, reversing the judgment of the court below (23 N. B. R. 160), that the failure to administer the interrogatories according to the terms of the commission was a substantial objection, and rendered the evidence incapable of being received.

Per Ritchie C.J., and Strong, Fournier and Henry JJ., that the refusal of one commissioner to sign the return was merely directory, and did not vitiate it.

Per Gwynne J., that the return should have been signed by both commissioners, and not having been so signed, was void, and the evidence under it should not have been read.

Appeal allowed with costs, and rule absolute for a non-suit.

Milville Mutual Marine and Fire Ins. Co. v. Driscoll.—23rd June, 1884.

Intimidation.

See ELECTION 21.

Inventory—And partition, between co-heirs, action to annul.

See PARTITION.

Issue—Any of his body lawfully begotten or children of such issue surviving him—Meaning of.

See WILL 2.

Judicial Avowal—**Deed, erroneous statement in—Art. 1,243, C. C. L. C.**

By notarial deed, dated 3rd May, 1875, F. McN. and P. K. purchased from one F. C. certain printing materials. The agreed price was $5,000, and was paid; but the deed erroneously stated the price to be $7,188.40, which amount was acknowledged in the deed to have been paid and received. C. remained in possession, and, after being in partnership with M. for several

Judicial Avowal—Continued.

months, failed. On 7th March, 1876, F. McN. and P. K. claimed the plant, and their petition stated the purchase had been made in good faith, and that they had paid the agreed price, but that the deed erroneously stated the price to be $7,188.40. The evidence as to the price agreed upon and paid was that of F. McN., and his statement was confirmed by F. C. The appellant, as assignee to the insolvent estate of F. C. & M., claimed the payment of $2,188.40, being the balance between the consideration price mentioned in the deed and the $5,000 admitted to have been paid.

Held, affirming the judgment of the court below, that the only evidence in support of appellant's contention being that of F. McN., the respondent, the appellant, could not divide the respondent's answers (*aveu judiciare*) in order to avail himself of what was favorable and reject what was unfavorable.

Per Strong J. dissenting.—Although there is an error, or even a false statement in a deed, the obligation to pay the consideration proven to be the true and legitimate one remains.

Fulton v. McNamee.—11, 470.

Judgment—When appealable.

See JURISDICTION.

2. Of confirmation.

See PETITION OF RIGHT 3.

3. Against joint misfeasors—Effect of.

See PETITION OF RIGHT 15.

4. Requête Civile against—Application to stay entry and execution of.

See OPPOSITION 2.

5. Revocation of—Requête Civile—Opposition.

See SHERIFF 5.

6. **Setting aside—Execution—Assignment—Executors—Fraud—Estoppel—Appeal.**

The plaintiffs by their agent, Patrick Rooney, in April, 1877, procured a judgment to be signed against Peter Rooney, the defendant, who, for purposes of his own, suffered the judgment to go by default. No execution was ever issued thereon. After the death of Peter, the plaintiffs assigned the judgment to the wife of Patrick, who paid them $50 therefor; and, on her application, Armour J. made an order allowing execution to issue against the executors of Peter. The executors then applied to set aside the judgment, as having been fraudulently obtained, and to be allowed to defend the action, or for such other order as should seem just; and upon such application Wilson C.J. made an order setting aside the judgment and all proceedings in the action, and directing the plaintiffs to repay the $50. This order was affirmed on appeal by the Common Pleas Division.

Judgment—Continued.

The case was appealed to the Court of Appeal for Ontario. The facts will be found more fully set out in the report of the judgments of that court. 11 Ont. App. R. 673.

As appears from that report the Court of Appeal, **Held**, that an appeal lay from the order of the Common Pleas Division to the Court of Appeal, as it was in effect a final disposition of the whole matter and a bar to the plaintiff's further proceeding, but, although the members of the court were all of opinion for different reasons, that the order below was wrong, they did not agree as to the extent to which it should be modified or reversed, and therefore the appeal was dismissed without costs.

Per Hagarty C.J.O., and Osler J.A.—The judgment should merely be set aside and the executors allowed in to defend.

Per Burton J.A.—The executors cannot be heard to allege their testator's fraudulent purpose; they are estopped from confining the operation of the judgment within the limit of his intended fraud; and the judgment should be allowed to stand.

Per Patterson J.A.—The judgment should not be set aside, but the order of Armour J. should be rescinded, and it should be declared that Patrick's wife, as assignee of the judgment, was not entitled to issue execution, because the judgment was procured by Patrick, her husband, and suffered by Peter, for a fraudulent purpose, of which she had notice when she took the assignment.

On appeal to the Supreme Court of Canada, **Held**, that it was doubtful if an appeal would lie to the Supreme Court of Canada in such a case, but, if it would, the order of Wilson C.J., affirmed by the judgment of the Divisional Court, should not be interfered with.

Per Gwynne J. (delivering the judgment of the court):

I entertain great doubt that an appeal lies to this court from the judgment of the Common Pleas Divisional Court, of the High Court of Justice for Ontario, in a case like the present, which originates in the decision of a judge in chambers from whose judgment an appeal lay to the Divisional Court.

In granting the rule against which this appeal is taken, that court exercised a jurisdiction inherent in it, and resting wholly, as it appears to me, on its discretion, to remove from the records of the court a judgment, the enforcing which in the interest of the person having an assignment of it, against the estate of the deceased defendant, would, in the opinion of the court, under the circumstances appearing in the case, work a very great wrong to that estate, and so, to prevent the abuse of the process of the court for the perpetration of what appeared to the court to be a great fraud, it

Judgment—Continued.

ordered the judgment and subsequent proceedings thereon to be set aside, as the only effective mode of affording protection to the estate of the deceased defendant from a protracted and expensive litigation upon proceedings which might be taken to enforce the judgment by writ of revivor, or by action upon it, to be carried on in the name of the judgment plaintiffs, but in the interest of the fraudulent assignee, who procured the judgment to be entered without the knowledge of the nominal plaintiffs, as is sworn by Carl Schrœder, and admitted by Patrick Rooney, who procured the judgment, and who admits that the nominal plaintiff did not know of the judgment previous to December, 1882, when upon his procurement it was assigned to his wife. But if it be appealable we should not interfere with the finding of the learned Chief Justice Wilson sitting in chambers, affirmed by the judgment of the Divisional Court thereon. The case is so pregnant with fraud on the part of Patrick Rooney, the substantial assignee of the judgment, as to raise doubts in my mind, whether his brother Peter was not rather his dupe under circumstances which by reason of the death of Peter cannot now be disclosed, than a party to the contrivance of any fraud against Dolan, to perpetrate which is now suggested as having been Patrick's sole motive in causing the action to be brought in the name of Schroeder and Company, and the suffering judgment therein by default by Peter, for it appears that Peter left this country for Ireland a few days after the service of the writ upon him, and it is not improbable that he left his interests in the defence of this suit, as he did in his defence to the suit brought in Montreal by Dolan against him and Francis Rooney, to the care of Patrick, who appears to have represented both Peter and Francis in that suit, and to have done whatever was done in it in their names, and to have effected the final settlement thereof, which is signed by him as their attorney.

By whomsoever the goods in question were ordered, a point which is not made quite clear, and whatever Mr. Carl Schrœder, the agent of the nominal plaintiffs at New York, may have thought as to the liability of Peter to the firm of Schrœder & Co. originally for those goods in virtue of the order given for them, it appears very clear that Patrick Rooney, who was the agent at Montreal of Schrœder & Co., well knew that in truth and in fact Peter never was liable therefor, for before the goods were sent out to this country he had left the firm, and the goods arrived at Montreal subject to control of Patrick as agent of Schrœder & Co., and with his assent only they could have been and were delivered to Rooney & Dolan, and, on the failure of that firm, Patrick, as agent for Schrœder & Co., proved for the whole claim against the estate of Rooney and Dolan, in pursuance and by reason of which proof

Judgment—Continued.

Carl Schrœder, the agent at New York, received dividends from that estate upon the whole amount, and, as is sworn by Roughan, the firm accepted Rooney and Dolan as their debtors and never looked to Peter Rooney for the amount.

Carl Schroeder now swears, and in this he is confirmed by Patrick Rooney, that Schroeder & Co. never knew of the recovery in their name of any judgment against Peter Rooney until December, 1882, when Patrick applied to Carl for an assignment of it, and it was immediately upon his request assigned to his wife without any consideration paid therefor. The fifty dollars afterwards paid to Carl Schroeder by Patrick was paid quite voluntarily and evidently for the purpose of endeavouring to give a semblance of *bona fides* to the transaction and of assisting Patrick in setting up the claim to the judgment now made by him on behalf of his wife as if purchased *bonâ fide* for value. The only objection which can, I think, be taken to C. J. Wilson's order is that he has ordered this sum of fifty dollars to be paid to Patrick by Peter's executors. By this time Schroeder & Co. were doubtless well aware that they never had any claim against Peter for the amount or any part of the amount mentioned in the judgment procured to be entered in their name as plaintiffs against Peter, and that they set no value upon that judgment appears from their having assigned it, at Patrick's request, to his wife, the moment they heard of its existence, and for no consideration whatever paid at the time, or bargained for being paid in future.

As to the objection that it was not competent for Chief Justice Wilson to entertain a motion which, if successful, would have the effect of annulling Mr. Justice Armour's order to let execution issue on the judgment, even though he did so after conference with Mr. Justice Armour, and with his assent, it is sufficient to say that a question as to the propriety of such matter of judicial etiquette, is not a matter which is appealable, and the statement in Chief Justice Wilson's order as to what took place before him, and as to the matter which was submitted to and argued before him must be taken to be conclusive.

It is agreed by all that execution should not under the circumstances appearing in the case be allowed to issue in favor of the assignee of this judgment. What objection then can there be to setting it aside altogether, the court being satisfied that to enforce it in favor of Patrick and his wife would operate as a fraud on Peter's estate? If the judgment be not set aside, it will be competent for Patrick on behalf of his wife and himself to use the names of Schroeder & Co., as plaintiffs, to sue upon the judgment, or to bring a writ of revivor of it, and to neither of such proceedings could the matters which have been the subject of investigation

Judgment—Continued.

on the motion before Chief Justice Wilson be pleaded as a defence, and so, although the court is of opinion that Patrick and his wife should derive no benefit from the assignment they will be able to recover the whole amount of the judgment, unless it be absolutely set aside. But it is said that the judgment ought not to have been set aside except upon terms of allowing the action to go against Peter's executors. But for what purpose should this have been directed when it appears that the nominal plaintiffs do not claim to have had any cause of action against Peter, and that they were not aware of an action having been brought against him in their name as plaintiffs, and that if they ever had any cause of action against Peter, they have assigned it without consideration, to Patrick's wife, at the request of Patrick, who, however, well knew that in truth no such cause of action ever did exist?

The setting aside the judgment and all proceedings thereon, is, in fact, the only mode of giving to Peter's executors effectual relief against what I think very clearly appears to be a fraud upon Peter's estate, attempted to be perpetrated by Patrick Rooney.

Appeal dismissed with costs.

Schroeder, et al. v. Rooney,—9th April, 1886.

Jurisdiction—Appeal—Right to.

Held, an appeal lies direct to the Supreme Court of Canada from the Supreme Court of Judicature of the Province of Prince Edward Island, as being the highest court of final resort in that Province.

Kelly v. Sulivan, P.E.I.—i, 1.

2. **Appeal—In matter of discretion.**

Held, under sec. 22 of the Supreme and Exchequer Court Act, no appeal lies from the judgment of a court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion.

Boak v. The Merchants' Marine Ins. Co.—i, 110.

3. **Appeal—Right to appeal under 38 Vic. ch. 11 sec. 26—Sum or value in dispute.**

Held, that the court proposed to be appealed from, or any judge thereof, cannot, under sec. 26 of the Supreme and Exchequer Court Act, allow an appeal when judgment had been signed, entered or pronounced previous to the 11th day of January, 1876.

Taylor v. The Queen.—i, 65.

4. **Appeal—Right to appeal by defendant, (P.Q.)**

The 38th Vic. ch. 11 sec. 17, enacts that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value in dispute does not amount to two thousand dollars. H. brought an action against J., praying that J. be ordered to pull down wall, and

Jurisdiction—Continued.

remove all new works complained of, &c., in the wall of H.'s house, and pay £500 damages, with interest and costs. H. obtained judgment for $100 damages against J., who was also condemned to remove the works complained of, or pay the value of "*mitoyenneté*."

Held, Strong J. dissenting, that in determining the sum or value in dispute in cases of appeal by a defendant, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment.

Per Strong J., dissenting.—The amount in dispute was the sum awarded for damages and the value of the wall of which the demolition was ordered by the judgment appealed against.

Joyce v. Hart.—i, 321.

5. **Appeal—Sum or value in dispute—Jurisdiction—Slander—Damages, special and vindictive—Appeal as to quantum of damages.**

L., appellant, sued R., the respondent, before the Superior Court at Arthabaska, in an action of damages (laid at $10,000) for verbal slander. The judgment of the Superior Court awarded to the appellant a sum of $1,000 for special and vindictive damages. R. appealed to the Court of Queen's Bench (appeal side), and L., the present appellant, did not ask, by way of cross appeal, for an increase of damages, but contended that the judgment for $1,000 should be confirmed. The Court of Queen's Bench partly concurred in the judgment of the Superior Court, but differed as to the amount, because L. had not proved special damages, and the amount awarded was reduced to $500, and costs of appeal were given against the present appellant. L. thereupon appealed to the Supreme Court.

Held, Taschereau J. dissenting, that L., the plaintiff, although respondent in the court below, and not seeking in that court by way of cross appeal an increase of damages beyond the $1,000, was entitled to appeal; for, in determining the amount of the matter in controversy between the parties, the proper course was to look at the amount for which the declaration concluded, and not at the amount of the judgment. *Joyce* v. *Hart* (1 Can. S. C. R. 321) reviewed and approved.

2. In an action of damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice, and to make it apparent that there was error or partiality on the part of the judge (the exercise of a discretion on his part being in the nature of the case required) an appellate court will not interfere with the discretion such judge has exercised in determining the amount of damages. (*See Damages* 23.)

Levi v. Reed.—vi, 482.

Jurisdiction—Continued.

6. **Appeal from P. Q.—Amount claimed.**

Held, that although the amount claimed by the declaration was made to exceed $2,000 by including interest which had been barred by prescription the appeal would lie. (*See Succession.*)

Ayotte v. Boucher.—ix, 460.

7. **Appeal—Election petition—Preliminary objections, judgment on, not appealable—Sec. 48 ch. 11 38 Vic.**

On the 21st April, 1877, an election petition was fyled in the Prothonotary's office at Murray Bay, district of Saguenay, against the respondent. The latter pleaded by preliminary objections that this election petition, notice of its presentation and copy of the receipt of the deposit had never been served upon him. Judgment was given maintaining the preliminary objections and dismissing the petition with costs. The petitioners, thereupon, appealed to the Supreme Court under 38 Vic. ch. 11 sec. 48.

Held, that the said judgment was not appealable, and that under that section an appeal will lie only from the decision of a judge who has tried the merits of an election petition. (Taschereau and Fournier JJ. dissenting.)

Per Strong J. (Richards C.J. concurring,) that the hearing of the preliminary objections and the trial of the merits of the election petition are distinct acts of procedure. [But see now S. C. A. A. 1879 sec. 10.]

Brassard v. Langevin.—ii, 317.

8. **Appeal—Right to, in Criminal matters—38 Vic. ch. 11 sec. 49—Conviction when unanimous.**

In Michaelmas term, 1877, certain questions of law reserved, which arose on the trial of the appellants, were argued before the Court of Queen's Bench for Ontario, composed of Harrison C.J. and Wilson J., the third judge of said court being absent; and on the 4th February, 1878, the said court, composed of the same judges, delivered judgment affirming the conviction of the appellants for manslaughter.

Held, that the conviction of the Court of Queen's Bench, although affirmed but by two judges was unanimous, and therefore not appealable.

Amer v. The Queen.—ii, 592.

9. **Appeal—Final judgment—Demurrer—Supreme and Exchequer Court Act.**

Held, an order setting aside a demurrer as frivolous and irregular under the Nova Scotia Practice Act is an order on a matter of practice and not a final judgment appealable under the 11th section of the Supreme and Exchequer Court Act.

Kandick v. Morrison.—ii, 12.

10. **Rule or order setting aside judgment and execution—Appealable.**

T. J. W. sued F. B., and on the 9th June, 1873, F. B. assigned his property under the Insolvent Act of 1869. On 6th August F. B. became party

Jurisdiction—Continued.

to a deed of composition. On the 17th October F. B. pleaded *puis darrein continuance,* that since action commenced he duly assigned under the Act, and that by deed of composition and discharge executed by his creditors he was discharged of all liability. On the 18th November, 1873, the Insolvent Court confirmed the deed of composition and F. B.'s discharge, but F. B. neglected to plead this confirmation. Judgment was given in favor of T. J. W. on the 30th January, 1874. On 30th May, 1876, an execution under the judgment was issued, and on the 28th June, 1876, a rule *nisi* to set aside proceedings was obtained and made absolute.

Held, Strong J. dissenting, that the rule or order of the court below was one from which an appeal would lie.

2. Reversing the judgment of the Supreme Court of Nova Scotia, that F. B., having neglected to plead his discharge before judgment, as he might have done, was estopped from setting it up afterwards to defeat the execution.

Wallace v. Bossom.—ii. 488.

11. **Appeal—Mandamus—Supreme and Exchequer Court Act, secs. 11, 17 and 23.**

Held, that the appeal in cases of *mandamus,* under section 23 of the Supreme and Exchequer Court Act, is restricted by the application of sec. 11 to decisions of the "highest court of final resort" in the Province; and that an appeal will not lie from any court in the Province of Quebec but the Court of Queen's Bench. (Fournier and Henry JJ. dissenting.) Query: Can the Dominion Parliament give an appeal in a case in which the legislature of a province has expressly denied it?

The appeal was quashed with costs, which included general costs of the appeal up to hearing of motion to quash. The registrar taxed the full fee of $25 on argument of motion. This was increased to $75 by Henry J. The objection to the jurisdiction was taken by motion, and also in respondent's factum.

Danjou v. Marquis.—iii. 251.

12. **Court of Review (P.Q.)—Appeal direct from—Security for costs of appeal—Supreme and Exchequer Court Act, sec. 31—Supreme Court Rule 6.**

The following certificate was fyled with the printed case, as complying with Rule 6 of the Supreme Court Rules: "We, the undersigned, joint prothonotary for the Superior Court of Lower Canada, now the Province of Quebec, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section (31) thirty-first of the Supreme Court Act, passed in the thirty-

Jurisdiction—Continued.

eighth year of Her Majesty, chapter second. Montreal, 17th January, 1878. Signed, Hubert, Honey & Gendron, P.S.C."

On motion to quash appeal, **Held**, per Ritchie C.J. and Strong, Fournier and Henry JJ.—The deposit of the sum of $500, in the hands of the prothonotary of the court below, made by appellant, without a certificate that it was made to the satisfaction of the court appealed from, or any of its judges, was nugatory and ineffectual as security for the costs of the appeal.

Per Henry J.—Although not within the functions of the Supreme Court to decide upon the sufficiency of the security, the court might have allowed appellant reasonable time to obtain the necessary certificate, had it been asked to do so within a reasonable time after the appeal was first inscribed, but no such request having been made and so long a time having elapsed, the court should not now permit such a course to be taken.

Per Taschereau J.—The case should be sent back to the court below in order that a proper certificate might be obtained.

Per Strong and Taschereau JJ.—An appeal does not lie from the Court of Review (P.Q.) to the Supreme Court of Canada. (Henry J. *contra.*)

Macdonald v. Abbott.---iii, 278.

13. **Appeal—Order of court upon its own officer, when obtained by a third party, is a final order appealable under sec. 11 of 38 Vic. ch. 11—Interest on deposit in court under 31 Vic. ch. 12 and 37 Vic. ch. 13—Officer of court not entitled to interest, if received by him—Summary jurisdiction of court over its officers.**

Under 31. Vic. ch. 12, and 37 Vic. ch. 13, the Minister of Public Works of the Dominion of Canada appropriated to the use of the Dominion certain lands in Yarmouth county, known as "Bunker's Island." In accordance with said Acts, on the 2nd April, A. D. 1875, he paid into the hands of W., prothonotary at Halifax, the sum of $6,180 as compensation and interest, as provided by those Acts, to be thereafter appropriated among the owners of said island. This sum was paid at several times, by order of the Supreme Court of Nova Scotia, to one A., as owner, to one G., as mortgagee, and to others entitled, less ten dollars. As the money had remained in the hands of W., the prothonotary of the court, for some time, H., attorney for G., applied to the Supreme Court for an order of the court calling upon W., the prothonotary, to pay over the interest upon G's. proportion of the moneys, which interest (H. was informed) had been received by the prothonotary from the bank where he had placed the amount on deposit. W. resisted the application on the ground that he was not answerable to the proprietor of the principal, or to the court, for interest, but did not deny that interest had been received by him. A rule *nisi* was granted by

Jurisdiction—Continued.

the court and made absolute, ordering the prothonotary to pay whatever rate of interest he received on the amount.

Held, 1. That the prothonotary was not entitled to any interest which the amount deposited earned while under the control of the court. That, in ordering the prothonotary to pay over the interest received by him, the court was simply exercising the summary jurisdiction which each of the Superior Courts has over all its immediate officers. (Fournier and Henry JJ. dissenting.)

2. That the order appealed from, being a decision on an application by a third party to the court, was appealable under the 11th sec. of 38 Vic. ch. 11. (Fournier J. dissenting, and Taschereau J. doubting.)

Wilkins v. Geddes.--iii, 203.

14. **Election appeal—Notice of setting down for hearing.**

Held, notice of setting down an election appeal for hearing is a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal.

North Ontario Election Case, Wheler v. Gibbs.—iii. 374.

15. **Queen's Counsel, power of appointment of—Rule absolute granting precedence to—Appeal - Jurisdiction.**

By 37 Vic. ch. 20, N.S. (1874), the Lieutenant-Governor of the Province of Nova Scotia was authorized to appoint provincial officers under the name of Her Majesty's Counsel learned in the law for the Province. By 37 Vic. ch. 21, N.S. (1874), the Lieutenant-Governor was authorized to grant to any member of the bar a patent of precedence in the courts of the Province of Nova Scotia. R., the respondent, was appointed by the Governor-General on the 27th December, 1872, under the great seal of Canada, a Queen's Counsel, and by the uniform practice of the court he had precedence over all members of the bar not holding patents prior to his own. By letters patent, dated 26th May, 1876, under the great seal of the Province, and signed by the Lieutenant-Governor and Provincial Secretary, several members of the bar were appointed Queen's Counsel for Nova Scotia, and precedence was granted to them, as well as to other Queen's Counsel appointed by the Governor General after the 1st of July, 1867. A list of Queen's Counsel to whom precedence had been thus given by the Lieutenant-Governor was published in the *Royal Gazette* of the 27th May, 1876, and the name of R., the respondent, was included in the list, but it gave precedence and preaudience before him to several persons, including appellants, who did not enjoy it before. Upon affidavits disclosing the above and other facts, and on producing the original commission and letters patent, R., on the 3rd January, 1877, obtained a rule *nisi* to grant him rank and prece-

Jurisdiction—Continued.

dence over all Queen's Counsel appointed in and for the Province of Nova Scotia since the 26th December, 1872, and to set aside, so far as they affected R.'s precedence, the letters patent, dated the 26th May, 1876. This rule was made absolute by the Supreme Court of Nova Scotia on the 26th March, 1877. A preliminary objection was raised to the jurisdiction of the court to hear the appeal.

Held, that the judgment of the court below was one from which an appeal would lie to the Supreme Court of Canada (Fournier J. dissenting.) (For the decision on the merits see *Legislature* 4.)

Lenoir v. Ritchie.—iii, 676.

16. **Appeal—Original Court not a Superior Court—Judgment not appealable—Supreme and Exchequer Court Act sec. 17.**

Held, On a motion to quash, that an appeal will not lie to the Supreme Court of Canada in cases in which the court of original jurisdiction is not a Superior Court, and that the Court of Wills and Probate for the County of Lunenburg, Nova Scotia, is not a Superior Court within the meaning of the 17 sec. of "The Supreme and Exchequer Court Act."

Beamish v. Kaulback.—iii, 704.

17. **Appeal—Final judgment—Judicial proceeding—42 Vic. ch. 39 secs. 3 and 9.**

In an action instituted in the Superior Court of the Province of Quebec by the appellant against M. A. C. and nine other defendants, the respondents, three of the defendants, severally demurred to the appellant's action, except as regards two lots of land, in which they acknowledged the appellant had an undivided share. The Superior Court sustained the demurrer, and, on appeal, the Court of Queen's Bench for Lower Canada (appeal side) affirmed the judgment. The appellant thereupon appealed to the Supreme Court, and moved to quash the appeal, on the ground that the Supreme Court had no jurisdiction.

Held, that as the judgment of the Court of Queen's Bench (the highest court of last resort having jurisdiction in the Province) finally determined and put an end to the appeal, which was a judicial proceeding within the meaning of sec. 9 of "The Supreme Court Amendment Act of 1879," such judgment was one from which an appeal would lie to the Supreme Court of Canada; and though an appeal cannot be taken from a court of first instance directly to the Supreme Court until there is a final judgment, yet, whenever a Provincial Court of Appeal has jurisdiction, this court can entertain an appeal from its judgment finally disposing of the appeal, the case being in other respects a proper subject of appeal.

Chevalier v. Cuvillier.—iv, 605.

Jurisdiction—Continued.

18. Appeal—Final judgment—Demurrer—3rd sec. Supreme Court Amendment Act, 1879—38 Vic. ch. 10 (Insolvent Act, 1875) sec. 130 and 137, Construction of—Intra vires—Purchase of goods by Insolvent outside of Dominion of Canada—Pleadings.

P. *et al.*, merchants carrying on business in England, brought an action for $4,000 on the common counts against J. S. *et al.*, and in order to bring S. *et al.* within the purview of sec. 136 of the Insolvent Act of 1875, by a special count alleged in their declaration that a purchase of goods was made by S. *et al.*, from them on the 13th March, 1879, and another purchase on the 29th March of the same year; that when S. *et al.* made the said purchases they had probable cause for believing themselves to be unable to meet their engagements and concealed the fact from P. *et al.*, thereby becoming their creditors with intent to defraud P. *et al.* J. S. (appellant), amongst other pleas, pleaded that the contract out of which the alleged cause of action arose, was made in England and not in Canada. To this plea P. *et al.* demurred. It was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British subjects, resident and domiciled in Canada at the time of the purchase of the goods in question and had subsequently become insolvents under the Insolvent Act of 1875, and amendments thereto.

Held, Taschereau and Gwynne JJ. dissenting, that although the judgment appealed from was a decision on a demurrer to part of the action only, it was a final judgment in a judicial proceeding within the meaning of the 3rd sec. of the Supreme Court Amendment Act of 1879.

Shields v. Peak.—viii, 889.

19. Appeal—Judgment by court of Appeal, partly final partly interlocutory—Effect of—Experts, reference to.

St. L. claimed of S. $2,125.75, balance due on a building contract. S. denied the claim, and, by incidental demand, claimed $6,368 for damages resulting from defective work. The Superior Court, on 27th March, 1877, gave judgment in favor of St. L. for the whole amount of his claim, dismissing S's. incidental demand. This judgment was reversed by the Court of Review, on the 29th December, 1877. St. L. appealed to the Court of Queen's Bench, and on the 24th November, 1880, that court held that St. L. was entitled to the balance claimed by him, from which should be deducted the cost of rebuilding the defectively constructed work, and in order to ascertain such cost, the case was remitted to the Superior Court, by whom experts were appointed to ascertain the damage, and, on their report, the Superior Court, on the 18th June, 1881, held that it was bound by the judgment of the Court of Queen's Bench, and, deducting the amount awarded by the experts from the balance claimed by St. L., gave judgment for the

Jurisdiction—Continued.

difference. This judgment was affirmed by the Court of Queen's Bench, on the 19th January, 1882.

Held, on appeal, that the judgment of the Court of Queen's Bench of the 24th November, 1880, was a final judgment on the merits, and that the Superior Court, when the case was remitted to it, rightly held that it was bound by that judgment, and that St. L. was entitled to the balance thereby found due to him.

Per Fournier J.—1. That the judgment of the 24th November, 1880, though interlocutory in that part of it which directed the reference to experts, was final on the other points in litigation, and could therefore have properly been appealed from as a final judgment.

2. That although on an appeal from a final judgment an appellant may have the right to impugn an interlocutory judgment rendered in the cause, yet he loses this right if he voluntarily and without reserve acts upon such interlocutory judgment.

Shaw v. St. Louis.--VIII, 335.

20. **New trial—Life insurance—Power of court to set aside verdict and enter another—37 Vic. ch. 7 secs. 32 and 33, Ont.—Secs. 264, 283 ch. 50 Rev. Stats. Ont.—38 Vic. ch. 11 secs. 20, 22.**

In an action on a life policy tried before a judge and a jury, in accordance with the provisions of 37 Vic. ch. 7 sec. 32, Ont., the learned judge, in place of requiring the jury to render a general verdict, directed them to answer certain questions, and the jury having answered all the questions in favor of the plaintiff, the judge entered a verdict for the plaintiff. Upon a rule *nisi* to show cause why this verdict should not be set aside and a nonsuit or a verdict entered for defendants pursuant to the "Law Reform Act," or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendants, the Court of Queen's Bench made the rule absolute to enter a verdict for the defendants. The appellant then appealed to the Court of Appeal for Ontario, and the court being equally divided, the appeal was dismissed.

Held, Taschereau J. dissenting, that the Court of Queen's Bench had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendants in direct opposition to the finding of the jury on a material issue. That the court below might have ordered a new trial upon the ground that the finding of the jury upon the questions submitted to them was against the weight of evidence, but they exercised their discretion in declining to act, or in not acting, on this ground; and therefore no appeal to the Supreme Court of Canada would lie on such ground, under sec. 22, 38 Vic. ch. 11.

Jurisdiction—Continued.

That if an amendment to a plea was authorized by the court below, but such amendment was never actually made, the Supreme Court has no power to consider the case as if the amendment had in effect been made. [But see Supreme and Exchequer Courts Amendment Act, 1880.]

Per Gwynne J.—That the plaintiff never could have been non-suited in virtue of 37 Vic. ch. 7 sec. 33 Ontario, as it is only where it can be said that there is not any evidence in support of the plaintiff's case, that a non-suit can be entered; and that in this case, the proper verdict which the law required to be entered upon the answers of the jury was one in favor of the plaintiff.

[This case was appealed, and the Lords of the Judicial Committee of the Privy Council affirmed the first holding of the Supreme Court. As to the second holding, it was held that the Supreme and Exchequer Court Act, sec. 38, gives the Supreme Court power to give any judgment which the court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power was not taken away by section 22 in this case in which the court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject. *See* Report of Case 6 App. Cases, 644. The judgment of the Judicial Committee will also be found printed as an appendix to the Supreme Court Report. *See* also Report of Case in 41 U. C. Q. B. 497, and in 3 Ont. Appeal Rep. 331.]

Moore v. The Connecticut Mut. Life Ins. Co.—vi, 634.

20 (*a*). As to new trial on Criminal Appeal.

See NEW TRIAL 7.

21. Appeal—Final judgment—Demurrer—Supreme and Exchequer Court Act, 1875—S. C. Am. Act, 1879—Case defective, not having formal judgment—Costs as of motion to quash.

Action for assault and false imprisonment. The defendants by their second plea justified the assault, &c., by virtue of a writ of *capias ad satisf.* issued against the plaintiff under a judgment recovered against him.

To this plea the plaintiff by his second replication alleged that the *capias* was issued and delivered to the defendant's attorney in blank and filled up with the necessary particulars after the sealing and delivering.

And by a fourth replication to the second plea the plaintiff alleged that the writ was sealed, issued and delivered without any præcipe therefor having been filed with the prothonotary.

To these replications the defendants demurred. To the fourth replication the defendants pleaded a second rejoinder to the effect that forth-

Jurisdiction—Continued.

with after the issuing of the writ the attorney of the defendants having duly paid the legal fees transmitted to the phrotonotary a sufficient and proper prœcipe.

To this second rejoinder the plaintiff demurred.

Judgment was rendered for the plaintiff on all the demurrers by the Supreme Court of Prince Edward Island.

The defendants appealed to the Supreme Court of Canada, and the printed case contained, in addition to the demurrer book, and the reasons for judgment, a certified extract from the minutes of the prothonotary of the entry of the judgment delivered by the court on the demurrers:

"Demurrers argued 30th October last, when the court took time to consider. The Chief Justice now gives judgment for the plaintiff on all the demurrers. Mr. Justice Peters concurs; Mr. Justice Hensley concurs."

Held, 1. The case was defective in not showing that a judgment had been entered up on the demurrers.

2. Even if judgment had been entered up such judgment would not be a final judgment from which an appeal would lie within the meaning of the Sup. & Ex. Ct. Act, 1875, or the Sup. Ct. Amend. Act of 1879.

Appeal quashed with costs of a motion to quash. The objection to the jurisdiction was taken by the respondent in his factum.

Reid et al. v. Ramsay.—6th June, 1879.

22. **New trial—Damages, excessive—Discretion—Sec. 22 S. C. Act, 1875—Sec. 4 S. and Ex. C. Am. Act, 1880—Costs.**

The plaintiff declared on a special contract for the sale of a vessel by the plaintiff to the defendant, averring the performance by the appellant of all conditions precedent necessary to entitle the plaintiff to the payment by the respondent of the agreed price of the said vessel, and assigning as a breach the non-payment of the said price by defendant. The plaintiff further declared on the common counts.

The defendant pleaded non-assumpsit, non-delivery of the vessel, payment and set off.

The cause was tried before the chief justice of Nova Scotia and a jury at Amherst, in June 1878. The jury found a verdict for plaintiff for $3,000. A rule *nisi* was thereupon taken out to set aside this verdict, and this rule the court below made absolute on the ground that the damages were excessive, observing that it was unnecessary to decide whether the verdict was objectionable on other grounds.

On appeal to the Supreme Court of Canada, **Held,** on motion to quash, Henry J. *dubitante,* that the judgment of the court ordering a new trial on the ground of excessive damages, proceeded upon matter of discretion only,

Jurisdiction—Continued.

and that such judgment was not appealable. [But see now Sup. & Ex. Ct. Am. Act 1880, sec. 4.]

Appeal quashed with the general costs of appeal to hearing. By fiat of Taschereau J. a counsel fee of $50 on motion was taxed.

McGowan v. Mockler—13th October, 1879.

23. Appeal quashed for want of jurisdiction—Verdict against weight of evidence—scc. 20 and 22 Sup. C. Act—Costs.

Appeal from a judgment of the Supreme Court of New Brunswick, making absolute a rule to set aside a verdict for the defendants, and for a new trial, on the several grounds of improper reception of evidence, misdirection, and because the verdict was against the weight of evidence.

Held, that the court below having proceeded as well on the ground that the verdict was against the preponderance of the evidence, as on the law, the appeal came within sec. 22 of the Supreme Court Act, and would not lie. [But see now S. & Ex. Ct. Am. Act 1880, sec. 4.]

Appeal quashed for want of jurisdiction, but without costs, the appeal having been heard *exparte*, the respondent not appearing.

Domville v. Cameron—9th February, 1880.

24. Conviction for violation of license laws—Habeas corpus, motion for—Judgment dismissing not appealable when prisoner is discharged before appeal—Jurisdiction—R.S. N.S. ch. 75—R.S. N.S. ch. 99—Appeal—Costs.

The prisoner, Simon Fraser, had been convicted before F. A. Laurence, Stipendiary Magistrate for the Town of Truro, of violating the license laws in force in the town, and was fined $40 and costs as for a third offence. Execution was issued in the form given in the Rev. Stats. ch. 75, under which Fraser was committed to jail. While there he was convicted of a fourth offence and fined $80 and costs, and was detained under an execution in the same form. The matter came before the Supreme Court of Nova Scotia on a motion to make absolute a rule *nisi* granted by Weatherbe J. under ch. 99 of the Rev. Stats. of N. S., of "Securing the Liberty of the Subject." The rule was discharged.

It appeared that before the institution of the appeal to the Supreme Court of Canada, the time for which the appellant had been imprisoned had expired and he was at large.

On motion to dismiss the appeal for want of jurisdiction, **Held,** that an appeal will not lie in any case of proceedings for or upon a writ of *habeas corpus* when at the time of bringing the appeal the appellant is at large.

Appeal dismissed. The question of costs was reserved and subsequently the court ordered that the respondent should be allowed his general costs of the appeal.

Fraser v. Tupper.—21st June, 1880.

Jurisdiction—Continued.

25. Appeal—Allowance of—Security—Ont. Jud. Act, 1881, sec. 43.

Where the Court of Appeal of Ontario, under sec. 43 Ont. Jud. Act, 1881, refused leave to appeal to the Supreme Court of Canada, the matter in controversy being under $1,000.

Held, that the appellant should be permitted to pay $500 into the Supreme Court as security for the costs of the appeal. The court expressed great doubts as to the constitutionality of the section mentioned. (*See Practice—Security.*)

Forristal v. McDonald.—7th Nov. 1882.

26. No appeal from Court of Queen's Bench (P.Q.) when case has originated in the Circuit Court (P.Q.)—No costs of appeal when objection to jurisdiction taken by the court.

This was an appeal from a judgment of the Court of Queen's Bench (P.Q.) reversing the judgment of the Circuit Court at Three Rivers, setting aside a seizure for a tax of $10 imposed by by-law of the city of Three Rivers on strangers and non-residents selling goods by samples. The case was settled and agreed to by both parties, who took no objection to the jurisdiction.

Held, that an appeal will not lie to the Supreme Court of Canada from a final judgment of the Court of Queen's Bench (P.Q.) in cases in which the court of original jurisdiction is the Circuit Court for the Province of Quebec.

Appeal quashed for want of jurisdiction, but without costs, the objection having been taken by the court.

[This precedent was followed in the case of *The Mayor, &c., of Terrebonne* v. *The Sisters of the Providence Asylum. See Jurisdiction* 42.]

Major v. Corporation of City of Three Rivers. (18 C.L.J. 422).—17th Nov. 1882.

27. Motion to rescind an order of a Judge of the Court of Queen's Bench, Province of Quebec, made in Chambers, or to compel such Judge or Court to receive security refused—Quœre as to jurisdiction to entertain appeal from Q. B., Pr. of Q., where opposition filed to seizure under execution for an amount less than $2,000—S. C. A. Act, 1879, sec. 8.

Bourget, the plaintiff, obtained a judgment in the Superior Court of Quebec against the defendants for a sum of $723, and issued an execution therefor against the defendants' immoveable property, in virtue of which a certain lot and building were seized. To this seizure the defendants filed an opposition on the ground that their late father's will, under which they held this property, contained a clause prohibiting them to alienate it. To this opposition Bourget filed a contestation, but the Superior Court dismissed this contestation, and maintained the defendants' opposition, holding the prohibition to alienate in the said will legal and valid, and quashing the plaintiff's seizure of the property. The plaintiff, Bourget, appealed from

Jurisdiction—Continued.

that judgment to the Court of Queen's Bench, but was again unsuccessful and his appeal was dismissed.

He then applied to Mr. Justice Tessier of the Q. B., in Chambers, for leave to appeal to the Supreme Court of Canada, but was refused, on the ground that an appeal would not lie in such a case, under sec. 8 of the S. C. A. Act, 1879.

The plaintiff then made a motion in the Supreme Court of Canada asking leave to appeal from the judgment of the Court of Queen's Bench (appeal side), and praying that the order of Mr. Justice Tessier be rescinded, and that the said judge, or any other judge of the said Court of Queen's Bench, be ordered to receive security.

Held, that the Supreme Court had no jurisdiction to grant the conclusions of the motion, even if the appellant had a right to an appeal in such a case. (*See Jurisdiction* 31.)

Motion refused with costs fixed at $25.

Bourget v. Blanchard.—29th November, 1882.

28. **Railway acts of Nova Scotia—Railway, appraisement of lands for—Order to set aside proceedings—Estoppel—Judgment not appealable.**

This was an application to the Supreme Court of Nova Scotia, asking it to set aside, in a summary manner, the whole appraisement of land damages awarded to be paid by the county to the several proprietors of lands in Pictou county, whose lands had been expropriated for the line of railway extending from New Glasgow, in Pictou county, to the Strait of Canso, and known as the Eastern Extension. This appraisement was made on the assumption that under the contract with the Nova Scotia Government for the construction of this line of railway, and the statutes relating thereto, and providing for the expropriation of lands for right of way, &c., appraisement of damages or compensation to the proprietors, and payment thereof, the right of way was furnished to the company free, and the compensation for land damages was to be paid after appraisement in the manner prescribed, by the Custos of the various counties through which the line ran issuing debentures for the amounts due to the proprietors, which debentures were to be redeemed by means of local taxation.

Before the Provincial Government of Nova Scotia had entered into the contract for the construction of the Eastern Extension Line, and while they were negotiating therefor, the Nova Scotia Legislature, on the 4th April, 1876, passed ch. 3 of the Acts of 1876, to enable the government to enter into a contract for the construction of this line of railway, and made provision thereby for the payment of a subsidy and grants of land to those undertaking it, and for the expropriation of land for the right of way for the line.

Jurisdiction—Continued.

On the same date ch. 74 of the Acts of 1876 was passed, and, in order to incorporate and give any contractors whose tender for construction should thereafter be accepted the same corporate powers and privileges as those mentioned in ch. 74, ch. 4 of the Acts of 1876 was passed.

By sec. 36 of ch. 74, and also by sec. 6, ch. 3, Acts of 1876, certain secs. of ch. 70 of the Rev. Stats., third series, are incorporated in these enactments and made applicable to this line of railway, which sections more particularly relate to the mode of acquiring lands for the right of way, stations, &c., the procedure for appraising damages, and the mode of assessing the various counties for the payment of the amounts awarded.

Ch. 70 Rev. Stats., third series, comprises in consolidated form all enactments in force in Nova Scotia at that date, relating to provincial railways. For convenience the various railway companies in Nova Scotia, such as the Windsor and Annapolis Railway Company, the Western Counties Railway Company, (*See* ch. 34 Acts of 1868; ch. 81 Acts 1870) have, in obtaining their Acts of incorporation, availed themselves of similar clauses from ch. 70 Rev. Stats. third series, by express enactment, without repeating them in the Act or providing other machinery for the expropriation of lands, and the ascertaining of land damages.

When the Rev. Stats., 4th series, was prepared, certain Acts of the Province not re-enacted were continued in force, and among them so much of ch. 70 of the third series as was therein specified. (*See* the Act to provide for the publication of the Consolidated Statutes, 30th April, 1873, Rev. Stats, fourth series, page 2.

Mr. Harry Abbott, having entered into the contract with the Government for the construction of this line, sought, under ch. 4 of the Acts of 1876, incorporation and the benefit of the provisions of ch. 74 Acts 1876, and obtained a certificate of incorporation under the name of the Halifax and Cape Breton Railway and Coal Company.

The company was organized under this Act, and the right of way having been obtained under the statutes, the damages were appraised and the work of construction began and was carried on.

In 1877 an order was made by the Chief Justice of the Supreme Court of Nova Scotia, on the petition of a number of the property owners whose lands would be affected by the building of the railway, directing the prothonotary of the county to draw and strike a jury, under the provisions of ch. 70 of the Rev. Stats., third series, to appraise the lands and property taken for the purpose of the Eastern Extension Railway.

In 1878 a rule *nisi* was taken to set the whole proceedings aside, but a year later it was discharged on motion of the party who had obtained it.

Jurisdiction—Continued.

A question having been raised as to the validity of the incorporation of the company under ch. 4 Acts 1876, by the Local Government, and legislation being about to be passed to remove such doubts, another rule was obtained in 1879, on the ground that the Halifax and Cape Breton Railway and Coal Company had no legal existence. After the argument of this rule, and before judgment, chs. 66 and 70 of the Acts of 1879 were passed by the Legislature of Nova Scotia. After hearing the Custos of the county by counsel before a committee of the Legislature, two sections of the Act were added in the interest of the county.

The Supreme Court of N.S. held that the County of Pictou were estopped by these statutes last mentioned from disputing the appraisement of the lands taken, and by their act in issuing debentures to parties to whom damages had been awarded for the lands appropriated to the railway, some of which had been indorsed to third parties. (See 1 Russ. & Geldert, 448.)

On appeal to the Supreme Court of Canada, **Held,** that the judgment of the court below was not one from which an appeal would lie, there being no finality about the order made by the Chief Justice of the court below in 1877, which was what this appeal sought to set aside.

Hockin v. Halifax and Cape Breton Ry. & Coal Co.—29th Oct. 1880.

29. Of Supreme Court and judges thereof—In habeas corpus, in criminal matter.

See HABEAS CORPUS 2, 3.

30. Demurrer—Judgment on, not final.

On appeal brought from a judgment over-ruling a demurrer to some of the counts of a declaration only, and not from the final judgment on the whole case,

Held, that the appeal must be quashed for want of jurisdiction, but liberty given to appeal on whole case upon certain terms. (For full statement of facts see *Damages* 25.)

Bank B.N.A. v. Walker.—22nd June, 1882.

31. Appeal from Quebec—Judgment—Supreme Court Act, 1879, sec. 8—Opposition to seizure for an amount under $2,000—Appeal quashed for want of jurisdiction—Without costs.

The contestation in question arose on an opposition put in by the respondent to a seizure which the appellant had caused to be made of the immoveable property of the defendant in the cause in virtue of a writ of execution, based on a judgment obtained by the appellant against the defendant for $640.

The respondent in his opposition alleged that he was a creditor of the defendant for $31,000, and he asked the nullity of the seizure on the ground

Jurisdiction—Continued.

that by a certain agreement dated the 17th October, 1876, it had been stipulated that no property of the defendant should be sold without the respondent's consent. The defendant was a building society, and the respondent further alleged that the appellant, as one of the directors of the society had become a party to and ought to be bound by the agreement mentioned. This opposition was maintained by the Superior Court, and also by the majority of the Court of Queen's Bench for Lower Canada.

On appeal to the Supreme Court of Canada, **Held**, that the appeal did not come within any of the cases mentioned in 42 Vic. ch. 39 sec. 8 (Sup. Ct. Amendment Act, 1879,) providing for appeals from the Province of Quebec. The demand was for a sum of money amounting only to $640; the opposition was not for any particular sum and did not ask for the payment of the debt of $31,000, but attacked only the seizure for $640 and sought to interfere with the execution of a judgment for that sum; the amount in dispute therefore was this $640, and the question of jurisdiction was governed by this amount and not by the value of property seized, although such value exceeded the sum of $2,000. Henry J. dissenting.

Appeal quashed for want of jurisdiction, but without costs, the objection having been raised by the court.

Champoux v. Lapierre.---19th June, 1883.

32. **Final judgment—Rev. Stats. N.S. 4th series, ch. 94 sec. 56—Order of a Judge refusing leave to defend, after judgment entered by default—Procedure.**

This is an action of replevin brought in the Supreme Court of Nova Scotia by the plaintiffs against the defendant and appellant to recover one hundred and twenty-five barrels of flour. The plaintiffs were endorsees of a bill of lading of the goods sued for, which were held by the defendant as freight agent of the Intercolonial Railway at Truro.

The action was begun on the 9th day of April, A.D., 1881, and the goods were replevied and the writ was served upon the defendant on the same day.

A default was marked on the 25th April, 1881. Subsequently, on the 10th day of September, 1881, the plaintiffs' attorney caused to be issued a writ of inquiry, under which damages were assessed under the provisions of sec. 56 ch. 94 Rev. Stats. of Nova Scotia, fourth series.

An order *nisi* for the purpose of removing the default and letting in the defendant to defend, was taken out on the 11th October, 1881, and, on argument, was discharged with costs by an order of Mr. Justice James, presiding at chambers.

From the last named order an appeal was had to the Supreme Court of Nova Scotia, which confirmed the judgment. (4 Russ. & Geld. 168.)

Jurisdiction—Continued.

Sec. 75 of ch. 94 of the Rev. Stats. of Nova Scotia, fourth series, enacts that it shall be lawful for the court or a judge, upon such terms as to costs or otherwise as they shall think fit, at any time within one year after final judgment, to let in the defendant in any action or appeal to defend the same upon an application supported by satisfactory affidavits accounting for his non-appearance, and disclosing a defence upon the merits with the particular grounds thereof; and affidavits shall not be received in reply unless the court or judge shall otherwise order.

On appeal to the Supreme Court of Canada, **Held**, that the judgment appealed from was not a final judgment within the meaning of sec. 3 of the Supreme Court Amendment Act of 1879, and was not appealable.

Held, also, that if the court could entertain the appeal, the matter was one of procedure and entirely within the discretion of the court below, and this court would not interfere.

Appeal dismissed with costs.

Gladwin v. Cummings,—3rd November, 1883.

33. Appeal—Justice of the peace—Certiorari—Court of original jurisdiction not a superior court—No appeal.

Conviction by a justice of the peace of the defendant for selling liquor contrary to the provisions of "The Canada Temperance Act, 1878," in the Globe Hotel, in Portage La Prairie, in the county of Marquette West, in the Province of Manitoba.

The conviction and papers connected therewith were brought before the Court of Queen's Bench in Manitoba, by writ of certiorari, and on the papers so brought before the court, a rule *nisi* to quash the conviction was on motion granted, and was after argument made absolute.

On appeal to the Supreme Court of Canada, **Held**, that the appeal would not lie, the cause not having arisen in a Superior Court of original jurisdiction.

Appeal quashed for want of jurisdiction. The question of costs was reserved. The court subsequently determined that the respondent should have the costs of appeal, although the objection had been taken by the court.

The Queen v. Nevins.—Jan. 18th, 1884—23rd May, 1884.

34. Appeal—Final judgment—Supreme and exchequer courts act, 1875, sec. 25—Supreme court amendment act, 1879, sec. 9—Promissory note overdue in hands of payee—Garnishee clauses, C. L. P. act—Payment by maker into court by order of a judge, effect of.

An action was brought by repondent as endorsee of a promissory note made by appellants in favor of one J. A., and by him endorsed to respondent. The appellants pleaded that the amount of the note had been

Jurisdiction—Continued.

attached in their hands by one of A's. judgment creditors and paid, under the garnishee clauses of the Common Law Procedure Act of P. E. I., transcripts of secs. 60 to 67 inclusive of the English C. L. P. Act, 1854. To this plea respondent demurred on the ground that the debt was not one which could properly be attached, and on the 5th February, 1883, the Supreme Court of P. E. I. gave judgment in favor of the respondent on the demurrer. No rule for judgment on the demurrer was taken out by the respondent. On the 19th March following an order was obtained to ascertain amount of debt and damages, for which final judgment was to be entered, and judgment was signed for the respondent on the 2nd May following. The appellants then appealed to the Supreme Court of Canada.

On motion to quash for want of jurisdiction, it was contended on behalf of respondent that the appellant should have appealed from the judgment rendered on the demurrer on the 5th February, 1883, and within thirty days from that date; but,

Held, that the judgment entered on the 2nd May, 1883, was the "final judgment" in the case from which an appeal would lie to the Supreme Court.

Held, also, reversing the judgment of the court below, that an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor, under the C. L. P. Act, and payment by the garnishee of the amount to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge.

Roblee v. Rankin.—xi, 137.

35. **In matter of procedure Court of Appeal should not interfere—Amended pleas, motion to add—Insufficiency of affidavit—Staying proceedings on interlocutory judgment—C.C.P. art. 1120, C.S.L.C. ch. 77 sec. 26.**

Respondent sued appellant on his promissory note, and the action was returned into court on the 22nd June, 1883.

On the 6th of July, 1883, appellant fyled a plea of payment. On the 3rd September, 1883, the case was inscribed for proof and hearing at the same time, under art. 243 of the C. C. P. L. C., for the 17th day of September, 1883.

On the 14th September, 1883, appellant served a motion for permission to fyle new pleas, on the respondent's attorney.

This motion was made on the 17th September and refused by the court on the 18th, the day following.

The reasons given by the Superior Court, in the interlocutory judgment for refusing appellant's demand, was the insufficiency of the affidavit in support thereof.

The appellant served notice of his intention to appeal from this interlocutory judgment to the Court of Queen's Bench.

Jurisdiction—Continued.

On the 20th September, 1884, the respondent moved for and obtained judgment from the Superior Court, and this judgment was affirmed by the Court of Queen's Bench for Lower Canada (appeal side) on the 8th of February, 1884.

On appeal to the Supreme Court of Canada, **Held,** per Ritchie C.J. and Strong and Taschereau JJ., that on a question of procedure the court should not interfere.

Per Fournier and Henry JJ.—The affidavit filed by the appellant in support of his amended plea was insufficient, not being sufficiently positive and precise.

Per Taschereau J.—Only a rule for leave to appeal would have the effect of staying proceedings, not a mere service of a motion for leave to appeal (art. 1120 C. C. P. and C. S. L. C. ch. 77 sec. 26.)

Appeal dismissed with costs.

Dawson v. Union Bank.—17th February, 1885.

36. Judgment—On an opposition claiming less than $2,000—Supreme Court Act, 1879, sec. 8—Quebec, appeal from—Costs.

The appellants, being creditors of the late Isaac Gouverneur Ogden, Sheriff of the District of Three Rivers, sued and obtained a judgment on the 16th March, 1874, against his sole heir, Isaac Low Evans Ogden, for $528.83 with interest.

The latter having died, the appellants recovered another judgment, on the 18th January, 1881, declaring that the former could be enforced by execution against his representative, Charles Kinnis Ogden, to the extent of $231 with interest and costs.

By virtue of the last judgment, the appellants caused to be made a seizure of an immoveable derived from the succession of Sheriff Ogden by Isaac Low Evans Ogden, and from the succession of the latter by Charles Kinnis Ogden.

The respondents contested the seizure of that lot of land, by an opposition *à fin de distraire.*

They alleged in their opposition, that Isaac Low Evans Ogden had sold them the land seized, for the price of $2,000 paid cash, and they prayed that they might be declared the true owners and proprietors of the said lot of land, and that the seizure of it might be annulled and set aside.

The appellants contested this opposition, pleading several pleas, impugning the alleged sale and the title of the respondents to the land in question.

On appeal to the Supreme Court of Canada from the judgment rendered by the Court of Queen's Bench for Lower Canada, reversing the judgment of the Superior Court on this contestation, **Held,** that the opposition having

Jurisdiction—Continued.

been filed in a suit in which the amount in dispute was less than $2,000, the appeal would not lie. (*Macfarlane* v. *Leclaire*, 15 Moo. P. C. C. 181, referred to; also *Champoux* v. *Lapierre*. *See* Jurisdiction 31.)

Appeal quashed for want of jurisdiction, but without costs, a motion to quash not having been made at the earliest covenient moment.

Gendron v. McDougall.—4th March, 1885.

37. Judgment by Court of Appeal quashing interim injunction—Not appealable.

In this case, on the 1st September, 1883, Mr. Justice Torrance, of the Superior Court for Lower Canada, ordered the issue of a writ of injunction, returnable on the 30th day of October, then next, enjoining the respondents and certain other persons named from issuing or dealing with certain bonds until otherwise ordered by the said court or a judge thereof.

About the 13th November, 1883, the Canada Atlantic Railway Company presented a motion to quash the injunction. On the 13th December following, Mr. Justice Mathieu, of the Superior Court, declared that the said writ of injunction had been issued without reason (*sans cause*) and he suspended it until the final adjudication of the action on the merits.

Both the appellants and respondents appealed from this judgment to the Court of Queen's Bench (appeal side), which court, on the 21st of January, 1885, rendered judgment quashing the injunction absolutely.

On the 9th of February following, the appellants gave notice of their intention to appeal to the Supreme Court of Canada, and on the 19th February presented a petition to Mr. Justice Monk, one of the judges of the Court of Queen's Bench, for the allowance of the appeal. On the 20th of February Mr. Justice Monk rendered judgment, refusing to allow the appeal on the ground that the judgment quashing the writ of injunction was not a final judgment, and "notwithstanding the offer and sufficiency of the security." On the 27th of February the appellants, by their attorneys, served notice of their intention to move before a judge of the Supreme Court to be allowed to give proper security to the satisfaction of that court, or of a judge thereof, for the prosecution of their appeal to that court, notwithstanding the refusal of the court below to accept said security, and notwithstanding the lapse of thirty days from the rendering of the judgment from which they desired to appeal, and further to obtain an extension of time for settling the case in appeal.

This motion came before Mr. Justice Henry, in chambers, on the 5th March, who enlarged it into court, and it was on the same day argued at length before the court.

Jurisdiction—Continued.

Held, that the judgment of the Court of Queen's Bench (appeal side), quashing the interim injunction, was not a final judgment from which an appeal would lie. Motion refused.

Stanton v. Canada Atlantic Ry. Co. (21 C.L.J. 355 18th March, 1885.

38. Interim Injunction obtained ex parte—Order dissolving—No appeal from—Trespass—Appeal.

This is an action of trespass, brought by the plaintiff against the defendants on the 10th of October, 1884, and in the statement of claim the plaintiff claimed damages for the alleged acts of trespass, and an injunction to restrain the defendants from proceeding with the digging of trenches and laying of pipes.

An *ex parte* restraining order was granted by the Chief Justice of Nova Scotia, on the application of plaintiff's counsel without notice to the defendant, and on the affidavit of the plaintiff alone.

On the 18th day of October notice of motion was served on the plaintiff to set aside said restraining order, and on argument of the motion before Mr. Justice Thompson, an order passed on the 25th day of October, 1884, dissolving said injunction.

From this order the plaintiff appealed to the Supreme Court of Nova Scotia in Banco. On the 24th day of January, 1885, that court made an order dismissing the said appeal.

On appeal to the Supreme Court of Canada, **Held,** that the order of the Supreme Court of Nova Scotia was not one from which an appeal would lie.

Appeal quashed with costs.

Kearney v. Dickson.—8th May, 1885.

39. New trial ordered by Court below—Verdict against weight of evidence.

Held, that the Supreme Court will not hear an appeal where the court below, in the exercise of its discretion, has ordered a new trial on the ground that the verdict is against the weight of evidence.

Eureka Woollen Mills Co. v. Moss.—xi, 91.

40. Action for instalment of church rates, under $2,000—Not appealable.

On the 27th June, 1874, by deed executed before notary, duly registered, Joseph Ross Hutchins sold to Henri Girard a property therein described for the sum of $24,000.00, which was made payable on the terms mentioned in the deed.

By deed executed before notary on the 19th January, 1876, and duly registered, Joseph Ross Hutchins transfered to Walter Bonnel, the said sum of $24,000.00, and by deed executed before notary on the same day, and duly registered, the said walter Bonnel transfered to the Bank of Toronto, the appellants, the said sum of $24,000.00.

Jurisdiction—Continued.

This amount represented the claim of the said Joseph Ross Hutchins against the said Henri Girard, for the price of the property, and an hypothec of *bailleur de fonds* to-wit: the first privilege and mortgage upon the said property. Henri Girard being incapable of paying the said sum so transfered, together with the interest, transferred to the Bank of Toronto, by deed of the 1st of June, 1880, all right of property which he had in the said immoveable, on payment of the amount due to the Bank of Toronto, the said Henri Girard being discharged of all personal liability for the payment of the consideration money.

The said Joseph Ross Hutchins was not a Catholic, nor the said Bonnel. Whilst the said Henri Girard held the said real estate, the trustees of the Catholic Church of the Parish of La Nativité de la Ste. Vierge, obtained the right to impose a tax on the real estate of the Catholics of the parish, wherein the said immoveable property is situate.

The respondents claimed, by their action, the sum of $165.82, the first instalment of this tax, on the ground that the said Henri Girard had been the proprietor of the property in question during his occupancy and reputed ownership of the same.

Held, that the case did not come within sec. 8 of 42 Vic. ch 39 (S. C. Am. Act, 1879) and was not appealable.

Per Fournier J.—The action being hypothecary, concluding in the alternative, either for payment of the sum of $165.82 or for the *delaissement* of the immoveable, the value of the immoveable could not affect the right of appeal. The rights of the respondent in the immoveable did not exceed the sum which he claimed. The action is to obtain payment only of the sum of $165.82, demanded by virtue of a personal obligation, and the Supreme Court has no jurisdiction to entertain an appeal in a personal action under $2,000, under the proviso of sec. 17 of the S. and E. C. Act, unless the case falls within one of the class of cases mentioned in sec. 8 of the S. C. A. Act 1879, which this case did not. The only question here was the personal obligation of the respondent to pay the $165.82 for a church rate imposed by the levy (*répartition*) of a fixed sum, the payment of which was to be made by two annual instalments. This tax, although in the nature of a hypothec and and privilege on the land, has not the character of a permanent charge, it is only temporary and cannot be repeated yearly like rents, or the duties or revenues due to her Majesty, which are of a permanent nature; and it is not "a duty," which expression can apply only to duties due to her Majesty; nor has the demand any relation to titles concerning lands or tenements; and as the tax was payable in two years it was evident the judgment in no way compromised future rights.

Jurisdiction—Continued.

Per Taschereau J.—From the Province of Quebec four cases only are appealable:—1. Any case wherein the matter in controversy amounts to the sum or value of $2,000; 2. Any case wherein the matter in controversy involves the question of the validity of an Act of Parliament, or of any of the Local Legislatures; 3. Any case wherein the matter in controversy relates to any fee of office, or any duty, or rent, or revenue payable to her Majesty, or any sum of money payable to her Majesty, where the rights in future might be bound. These last words must be read as qualifying all this third class as well as the next. If, for instance, a fee of office is claimed, but the right to it is denied by the defendant, the case is appealable. But if in an action for a fee of office the defendant pleads payment, the case is not appealable, if under $2,000; 4. Any case wherein the matter in controversy relates to any title to lands, or tenements, or title to annual rents, or such like matters or things where the rights in future might be bound.

It is evident that this case does not fall within any of the three first classes. Though the value of the immoveable in question may be over $2,000, it is the amount claimed in an hypothecary action, which is in controversy, and here it is clearly below the appealable amount. The title to the lands is not disputed, nor in controversy, nor do the words "such like matters, or things where the rights in future might be bound," support the appeal. The right of the plaintiffs to tax the property as they have done is not disputed here, nor is its liability to future taxation in contestation. And the fact that the taxes claimed are payable by instalments, some of which may not yet be due, cannot render the case appealable. The present liability of the bank, or rather the heir on this property is the only matter of controversy. It is *debitum in præsenti, solvendum in futuro.* The case of *Savageau* v. *Gauthier*, L. R. 5 P. C. 494, is in that sense.

The other judges concurred.

Appeal quashed for want of jurisdiction, but without costs, the objection having been taken by the court.

Bank of Toronto v. Le Curé et les Marguilliers, &c., of the Parish of the Nativity.—8th March, 1886.

41. Appeal—Rights in future—S. C. A. Act, 1879, sec. 8.

One Duhaime, being desirous of establishing a cheese factory in the town of Montmagny, an agreement was entered into between himself of the first part and the defendant and certain others of the second part, whereby the parties of the second part agreed to furnish for twenty years all the milk of their cows to the said Duhaime, to be manufactured into cheese, Duhaime to receive a percentage for manufacturing.

Jurisdiction—Continued.

By certain mesne conveyances the plaintiff became proprietor of the cheese factory and vested with all the rights of Duhaime.

The defendant, among others, contrary to the agreement, sold his milk to an opposition factory, whereupon the plaintiff brought an action of damages against defendant in the Circuit Court of the Province of Quebec. By a judgment of the Superior Court for the Province (Angers J.) the action was evoked into the Superior Court on the ground that a matter affecting future rights was in question. The Superior Court, by its judgment, held that the plaintiff was entitled to $8.51 as damages for the breach of the agreement by the defendant.

On appeal to the Court of Queen's Bench that court reversed the judgment of the Superior Court and dismissed the plaintiff's action. The plaintiff thereupon applied to a judge of the Court of Queen's Bench (Tessier J.) for leave to appeal to the Supreme Court of Canada. This was refused on the ground that the future rights invoked were for a limited time, and that these rights multiplied by their duration would not reach the amount required for an appeal to the Supreme Court.

On application to Gwynne J. of the Supreme Court, in chambers, for leave to appeal and give the necessary security, the learned judge

Held, that he considered the case similar to one of a contract for payment of a sum by certain instalments to an amount of $170.20 in all, and, apart from the amount sought to be recovered, not coming within the words "rights in future," as used in sec. 8 of the Supreme Court Amendment Act of 1879, so as to give an appeal to the Supreme Court of Canada.

Beaubien v. Bernatchez.—13th March, 1886.

42. **Order made in chambers setting aside judgment—Not appealable—Conclusive as to statements in it.**

Where an order was granted by Wilson C.J. in chambers, and affirmed by the C. P. Division of the High Court of Justice for Ontario, setting aside a judgment and all proceedings thereon.

Held, that it is doubtful if an appeal would lie in such a case to the Suprem Court of Canada, and the statement in the order as to what took place before the Chief Justice and as to the matter which was submitted to and argued before him, must be taken to be conclusive.

[For full statement of the facts and judgment see *Judgment* 6.]

Schroeder v. Rooney.—9th April, 1886.

43. **Circuit Court P.Q.—No appeal where action has originated in.**

The appellants by an action returnable and returned before the Circuit Court in and for the district of Terrebonne the 30th November, 1883, claimed from the respondents a sum of one hundred and twenty-five dollars and

Jurisdiction—Continued.

interest thereon, at rate of ten per cent., being the amount of taxes imposed and levied upon the real estate (immoveables) of which the said respondents were in possession for the year 1883.

Counsel for respondents moved to quash appeal for want of jurisdiction, on the ground that no appeal lies to the Supreme Court of Canada when the action has originated in the Circuit Court of the Province of Quebec. He relied on sec. 3 of the Sup. Ct. Am't. Act of 1879, which says: "An appeal shall lie from final judgments only in actions * * * originally instituted in the Superior Court of the Province of Quebec." He cited *Major* v. *Corporation of Three Rivers* (*See Jurisdiction* 26). Counsel for appellants contended that in the district of Montreal and some other districts an action like the present, in which future rights would be bound, would be brought in the Superior Court, and only by virtue of a special statute was it brought in the Circuit Court in the district of Terrebonne; that such statute was applicable to only some of the districts of the province; and that if the contention of the counsel for appellants was correct, the anomaly would arise that in such a case if the action were brought in one district there would be no appeal, while, if brought in another district there would be an appeal. He argued that in this case, therefore, the Circuit Court must be considered as substituted for and in lieu of the Superior Court.

Held, that the statute was clear, and in no case would an appeal lie in an action which originated in the Circuit Court. *Major* v. *The Corporation of Three Rivers* (*See Jurisdiction* 26) followed.

Motion granted and appeal quashed with costs. The objection to the jurisdiction was taken by respondents in the factum.

Le Maire et les Conseillers de Terrebonne v. Les Sœurs de l'Aisle de la Providence.—18th May, 1886.

44. Appeal—S. C. Am. Act, 1879, sec. 8—Duty payable to the Crown—Future Rights.

Appeal from Queen's Bench (appeal side), Province of Quebec.

Motion to quash appeal on ground that amount involved ($222.80) was below $2,000, and that the case did not come within any of the exceptions provided for in 42 Vic. ch. 39 sec. 8 (S. C. Am. Act, 1879), allowing an appeal in cases involving less than $2,000.

The actions (two, combined at the trial,) which constituted the case in appeal were brought by Darling, an importer of crockery, &c., against the Collector of Customs at Montreal for the recovery of the difference on duty between 20 per cent. and 30 per cent. *ad valorem* duty on dutiable value of certain importations made by Darling of earthenware crockery known in the trade as "Printed Ware."

Jurisdiction—Continued.

The Tariff Act of 1879, 42 Vic. ch. 15, schedule A, imposed a duty of 30 per cent. *ad valorem* duty on "earthenware, white granite or iron stoneware, and 'C. C.' or cream colored ware." This was the only enumerated class of goods under which the appellant's goods in question could come. At the end of the schedule all enumerated goods and goods not declared free from duty were subjected to a duty of 20 per cent. The collector (Ryan) insisted upon duty being paid by appellant on his goods as coming under the class enumerated as above, "earthenware, white granite," &c., whilst the appellant insisted that they should not be classified, but come under the unenumerated class, and should only pay duty at 20 per cent. *ad valorem*. He, however, paid the 30 per cent. and brought the actions in question to recover the 10 per cent. back from the collector.

The importations in question were in spring and summer of 1883. Judgment was given in January, 1884, in favor of defendant. Appellant appealed therefrom to the Queen's Bench. Judgment was given dismissing appeal May, 1885. In session of 1884, 47 Vic. ch. 30, sec. 2, schedule, Parliament amended the Tariff Act as to earthenware as follows: "Earthenware, decorated, printed or spanged, and all earthenware, not elsewhere specified, 30 per cent. *ad valorem*," thus distinctly covering appellant's description of his own importations and declaring such goods subject to 30 per cent., and making it relate back to March, 1884.

Respondents contended that if before the Act of 1884 the matter in question was a proper subject of appeal to this court, by the 42 Vic. ch. 39 s. 8, by reason of its relating to a duty or revenue payable to the Crown in respect of which the decision appealed from might affect appellant's future rights, it ceased to be such a case by virtue of the Act of 1884, because that amending Act declared distinctly that from March, 1884, and for the future, the particular class of goods in question was to be subject to a 30 per cent. duty, and that, therefore, appellant's future rights could not be affected.

Held, 1. That for all that appeared there might have been importations of the same class of goods by appellant subsequent to those in question in the appeal, and before the amendment of 1884 effected a change, in respect of which the decision in the present cases would bind appellant, and that, therefore, the case in that respect at least would still come within the meaning of 42 Vic. ch. 39, sec. 8, that is to say, being in respect of a duty payable to the Crown, the decision of which might affect the then future rights of appellant.

2. That there might be a dispute still as to whether the amending Act of 1884 expressly covered the same class of goods as were in question in this

Jurisdiction—Continued.

case, in order to decide which the evidence and merits would require to be discussed, and that this should not be discussed on a motion to quash.

3. That if the appellant had a right to appeal, such right could only be taken away by express and clear words, and there was nothing to show that such right was taken away.

Motion refused, with $25 costs.

Darling v. Ryan.—18th May, 1886.

45. Jurisdiction of County Court, Halifax—Plea to—Demurrer to plea, over-ruled—Prohibition granted to restrain trial of cause.

See PROHIBITION 4.

46. Of High Court of Justice (Ont.) in Dominion Controverted Elections.

See ELECTION 15.

47. Of Maritime Court of Ontario.

See MARITIME COURT OF ONTARIO.

Justice of the Peace—Abuse of authority by—Aggravation of damages.

See DAMAGES 23.

2. Notice of action to.

See NOTICE 8.

3. Conviction by—Removal of conviction by *certiorari* into Q. B., Man.—No appeal.

See JURISDICTION 33.

4. Conviction by Justices, in prosecution under Canada Temperance Act, 1878, sec. 105—"Absent"—Meaning of.

See CANADA TEMPERANCE ACT, 1878, 6.

Laches—By cestui que trust.

See SALE OF LANDS 5.

Land, description of—By reference to plan.

See BOUNDARY.

2. Grant of for School.

See CHARITABLE TRUST.

3. Damages—Use and occupation of land, action for—Valuation of—Different and prospective capabilities to be considered—Quasi-delit—Prescription of two years under arts. 2261, 2267, C. C.—Art. 1608 C. C. applicable and prescription of five years under art. 2250 C. C.—To this tribunals bound to give effect under art. 2188 C. C., although not pleaded.

Action brought by the appellant, William Breakey, to recover compensation for the use of certain lands on the River Chaudière, occupied by the firm of Henry King & Co., for storing logs, attaching booms in summer and

Land—Continued.

storing booms in winter, and which were submerged by means of a dam erected by King & Co. for that purpose, and made use of for about five years as a booming ground for saw-logs coming down the river to their mills.

The declaration contained two counts; one for damages, and one for the value of the use and occupation.

The respondent pleaded by demurrer a prescription of two years as for a *quasi délit* under articles 2261 and 2267 of the Civil Code; that the alleged works were for the efficient working of a mill, and that proceedings should have been taken under Con. Stat. L. C. ch. 51, by means of arbitration, and by that statute the remedy by action was taken away.

And by her perpetual exception the respondent repeated the plea of prescription of two years; that on the 5th December, 1877, a sale by licitation of the property known as Breakey's Mills took place, and the same were purchased by John Breakey, and from the last mentioned date, the respondent Carter had nothing to do with the mills; and that no proceedings under Con. Stat. L. C. ch. 51, had been adopted by appellant; respondent further pleaded the general issue.

The demurrer of the respondent setting up a prescription of two years, and the necessity of proceedings by arbitration under Con. Stat. L. C. ch. 51, was dismissed by Casault J. of the Superior Court for Lower Canada (see 7 Q. L. R. 286).

On the evidence given on the issues of fact the judge found that the appellant was entitled to $1,600, as compensation for the use of the premises for four years, at the rate of $400 per annum.

The Court of Queen's Bench for Lower Canada (appeal side) reduced the amount to $200, or at the rate of $50 per annum, being merely the value of the land for agricultural purposes.

On appeal to the Supreme Court of Canada, **Held**, that not merely the value of the property for agricultural purposes should have been considered. In valuing property its different and even its prospective capabilities should be taken into consideration (*Montreal* v. *Brown and Springle*, 2 App. Cases 184.) In this case not only was the keeping logs in safety a prospective use, but the actual use to which the property was put by the defendants. If land be well adapted for a particular purpose, as this was, and there are those who require it for such purpose, the value of the property is to be determined, not by what it might be worth if used for other purposes, but by the value which its exceptional adaptation to special purposes gives it in the estimation of those conversant with property of that description and capable of speaking of the value of the fair use of such property. The evi-

Land—Continued.

dence justified the finding of the Superior Court, that the property was worth $400 per annum.

2. That the prescription of two years under art. 2261 of the Code, did not apply, because ch. 51 of the C. S. of L. C., recognising the right of a proprietor in the case of improvement of water courses to erect works which may have the effect of damming back the water on a neighboring property, the construction of a dam having that effect, as in this case, could not be considered a *quasi délit*, but rather as a right of servitude which gave to him who was injured by it a legal recourse for indemnity for the damage.

3. The mode of proceeding given by ch. 51 of the C. S. of L. C. did not exclude the right to proceed by ordinary action.

4. Under art. 1608 of the C. C., the respondents were to be considered lessees (*locataires*) and subject to all the rules concerning leases (*les baux*) and the annual value of their occupation should be considered the rent, none having been fixed by the parties. Therefore the appellant was subject to the prescription of five years under art. 2250 C. C., and this prescription in virtue of art. 2188 C. C., is one which the tribunals are bound to give effect to although not pleaded, and only set up for the first time in the respondent's factum in the Court of Queen's Bench.

Appeal allowed with costs and judgment of Superior Court varied.

Breakey v. Carter.—12th May, 1885.

Landlord and Tenant—Relation of—Whether created between Mortgagor and Mortgagee by provisions in Mortgage.

See MORTGAGE 4.

2. Lease, cancellation of by *force majeure*.

See LEASE 1.

3. Agreement not to distrain.

See DISTRESS.

4. **Lessee, negligence of—Fire—Civil Code—Arts. 1054, 1627, 1629.**

The defendant was, on the 7th April, 1873, in the occupation of a varnish factory, which he had leased from the plaintiff, when a fire originating in the factory consumed it as well as the adjoining premises belonging to the plaintiff. This latter brought an action to recover $8,500 damages, occasioned by the fire, which he alleged to have taken place through the negligence of the defendant and his employés.

The Superior Court for Lower Canada (Beaudry J.) found that the weight of evidence was that no fault could attach to the defendant or his employés, and dismissed the plaintiff's action.

Landlord and Tenant—Continued.

The Court of Queen's Bench for Lower Canada (Ramsay and Tessier JJ. dissenting,) reversed this finding and awarded the plaintiff $5,000 damages and costs, holding the defendant liable under art. 1054 of the Civil Code.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Queen's Bench, Henry J. dissenting, 1. As to the part of the building leased to defendant, there was no doubt as to his responsibility, as he had failed to account for the fire according to arts. 1627 and 1629 of the C. C.

2. As to the buildings of the plaintiff and in his own occupation the defendant might be considered as a trespasser, on account of gross negligence in the use of dangerous materials and the neglect of the most simple precautions to guard against the accident.

Appeal dismissed with costs.

Jamieson v. Steel.—29th January, 1878.

Land Owners—Liabilities and rights of adjoining.

See DAMAGES 20.

Larceny.

See CRIMINAL APPEAL 3.

Lease—Cancellation of—Rendering of account—Art. 19, C. C. P. L. C.

S. on the 1st August, 1868, transferred to appellants (plaintiffs), as trustees of S.'s creditors, his interest in an unexpired lease he had of a certain hotel in Montreal, known as the Bonaventure building, and in the furniture. On the 1st April, 1870, A. P., the proprietor, after cancelling, with the consent of all concerned, the several leases of the said building and premises, gave a lease direct for a term of ten years to one G., at $6,000 a year, of the building, and also of the furniture belonging to S.'s creditors, and on the same day by a notarial deed, "agreement and accord," A. P. promised and agreed to pay to appellants, as trustees of S.'s creditors, whatever he would receive from the tenant beyond $5,000 a year. In February, 1873, the premises were burned, with a large proportion of the furniture, and appellants received $3,223 for insurance on fixtures and furniture, and $791, being the proceeds of sale of the balance of the furniture saved. The lease with G. was then cancelled, and A. P., after expending a large amount to repair the building, leased the premises to L. P. & Co. for $6,000 a year from October, 1873. Appellants thereupon, as trustees of S.'s creditors, sued respondents representing A. P., and called upon them to render an account of the amount received from G. and L. P. & Co. above $5,000 a year.

The Superior Court at Montreal held that the appellants were entitled to what A. P. had received from L. P. & Co. beyond $5,000; and on appeal to the Court of Queen's Bench (appeal side) this judgment was reversed.

Lease—Continued.

Held, 1. Affirming the judgment of the Court of Queen's Bench (appeal side), that the lease to G. terminated by a *force majeure*, and that the obligation of A. P. to pay appellants the sum of $1,000 out of the said rent of $6,000 ceased with the said lease.

2. That the fact of appellants having alleged themselves in their declaration to be the "duly named trustees of S.'s creditors," did not give them the right to bring the present action for S.'s creditors, the action, if any, belonging to the individual creditors of S. under Art. 19 C. C. P. L. C.

Browne v. Pinsonneault—iii, 102.

2. Of pew.

See PEWHOLDER.

3. Liability of lessee for fire.

See LANDLORD AND TENANT 4.

Legatee—Universal—Particular—Liability.

See WILL 8.

Legislature—**British North America Act, 1867, sub-sec. 14 of sec. 92.**

Held, that the exclusive power of legislation given to Provincial Legislatures by sub-sec. 14 of sec. 92, B. N. A. Act, over procedure in civil matters, means procedure in civil matters within the powers of the Provincial Legislatures.

Valin v. Langlois.—iii, 1.

2. Licenses—Powers of Dominion and Provincial Legislatures to impose—Sale of liquor—37 Vic. ch. 32 O.—British North America Act, 1867, secs. 91, 92—Brewer, trade of.

S., after the passing of the Act 37 Vic. ch. 32 O., intituled: "An Act to amend and consolidate the Law for the Sale of Fermented or Spirituous Liquors," then being a brewer licensed by the Government of Canada under 31 Vic. ch. 8 D., for the manufacture of fermented, spirituous and other liquors, did manufacture large quantities of beer, and did sell by wholesale, for consumption within the Province of Ontario, a large quantity of said fermented liquors so manufactured by him, without first obtaining a license as required by the said Act of the Legislative Assembly of Ontario. The Attorney General thereupon filed an information for penalties against S. On demurrer to the information the special matter for argument was that the Legislature of the Province of Ontario had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information.

Held, on appeal, that the Act of the Provincial Legislature of Ontario, 37 Vic. ch. 32, is not within the legislative capacity of that Legislature.

Legislature—Continued.

2. That the power to tax and regulate the trade of a brewer, being a restraint and regulation of trade and commerce, falls within the class of subjects reserved by the 91st sec. of the British North America Act for the exclusive legislative authority of the Parliament of Canada; and that the license imposed was a restraint and regulation of trade and commerce and not the exercise of a police power.

3. That the right conferred on the Ontario Legislature by sub.-sec. 9, sec. 92 of the said Act, to deal exclusively with shop, saloon, tavern, auctioneer and "other licenses," does not extend to licenses on brewers or "other licenses" which are not of a local or municipal character. *Regina* v. *Taylor*, 36 U. C. Q. B. 218, overruled, Ritchie and Strong JJ. dissenting.

Severn v, The Queen.—11, 71.

3. License tax on merchants, traders, &c.—Power to impose—33 Vic. ch. 4 N. B.

See LICENSE 1.

4. **Queen's Counsel, no power to appoint—37 Vic. ch. 20 and 21 N.S., ultra vires—Letters patent of precedence, not retrospective in their effect—Great Seal of the Province of Nova Scotia—40 Vic. ch. 3 D.—Appeal—Jurisdiction.**

By 37 Vic. ch. 20 N.S. (1874), the Lieutenant Governor of the Province of Nova Scotia was authorized to appoint provincial officers under the name of Her Majesty's Counsel learned in the law for the Province. By 37 Vic. ch. 21 N.S. (1874), the Lieutenant Governor was authorized to grant to any member of the bar a patent of precedence in the Courts of the Province of Nova Scotia. R., the respondent, was appointed by the Governor General on the 27th December, 1872, under the great seal of Canada, a Queen's Counsel, and by the uniform practice of the court he had precedence over all members of the bar not holding patents prior to his own. By letters patent, dated 26th May, 1876, under the great seal of the Province, and signed by the Lieutenant Governor and Provincial Secretary, several members of the bar were appointed Queen's Counsel for Nova Scotia, and precedence was granted to them, as well as to other Queen's Counsel appointed by the Governor General after the 1st of July, 1867. A list of Queen's Counsel to whom precedence had been thus given by the Lieutenant Governor, was published in the *Royal Gazette* of the 27th May, 1876, and the name of R., the respondent, was included in the list, but it gave precedence and pre-audience before him to several persons, including appellants, who did not enjoy it before. Upon affidavits disclosing the above and other facts, and on producing the original commission and letters patent, R., on the 3rd January, 1877, obtained a rule *nisi* to grant him rank and precedence over all Queen's Counsel appointed in and for the Pro-

Legislature—Continued.

vince of Nova Scotia since the 26th December, 1872, and to set aside, so far as they affected R.'s precedence, the letters patent, dated the 26th May, 1876. This rule was made absolute by the Supreme Court of Nova Scotia on the 26th March, 1877, and the decision of that court was in substance as follows:—1. That the letters patent of precedence, issued by the Lieutenant Governor of Nova Scotia, were not issued under the great seal of the Province of Nova Scotia; 2. That 37 Vic. ch. 20, 21, of the Acts of Nova Scotia, were not *ultra vires;* 3. That sec. 2, ch. 21, 37 Vic. was not retrospective in its effect, and that the letters patent of the 26th May, 1876, issued under that Act could not affect the precedence of the respondent. On the argument in appeal before the Supreme Court of Canada the question of the validity of the great seal of the Province of Nova Scotia was declared to have been settled by legislation, 40 Vic. ch. 3 D. and 40 Vic. ch. 2 N. S. A preliminary objection was raised to the jurisdiction of the court to hear the appeal.

Held, 1. That the judgment of the court below was one from which an appeal would lie to the Supreme Court of Canada; (Fournier J. dissenting.)

2. Per Strong, Fournier and Taschereau JJ.—That ch. 21, 37 Vic. N. S., has not a retrospective effect, and that the letters patent issued under the authority of that Act could not affect the precedence of the Queen's counsel appointed by the Crown.

3. Per Henry, Taschereau and Gwynne JJ.—That the British North America Act has not invested the Legislatures of the Provinces with any control over the appointment of Queen's counsel, and as Her Majesty forms no part of the Provincial Legislatures as she does of the Dominion Parliament, no Act of any such Local Legislature can in any manner impair or affect her prerogative right to appoint Queen's counsel in Canada directly, or through her representative the Governor General, or vest such prerogative right in the Lieutenant Governors of the Provinces; and that 37 Vic. ch. 20 and 21 N. S. are *ultra vires* and void.

4. Per Strong and Fournier JJ.—That as this court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case to express an opinion upon the validity of the Acts in question.

Lenoir v. Ritchie.—iii, 676.

5. **Insurance—Jurisdiction of Local Legislature over subject-matter of insurance—British North America Act, 1867, secs. 91 and 92—Statutory conditions—R. S. O ch. 162—What conditions applicable when statutory conditions not printed on the policy.**

The Citizens' Insurance Company, a Canadian company, incorporated by an Act of the Parliament of Canada, since the passing of R. S. O. ch. 162,

Legislature—Continued.

issued, in favor of P., a policy against fire which had not endorsed upon it the statutory conditions (R. S. O. ch. 162), but had conditions of its own, which were not printed as variations in the mode indicated by the Act. The Queen Insurance Company, an English company, carrying on business under an Imperial Act, issued in favor of P., after the passing of R. S. O. ch. 162, an interim receipt for insurance against fire, subject to the conditions of the company. The Western Assurance Company, a Canadian company, incorporated by the Parliament of Canada before Confederation, issued a policy of insurance against fire in favor of J., the conditions of the policy, which were different from those contained in R. S. O. ch. 162, not being added in the manner required by the statute. The three companies were authorized to do fire insurance business throughout Canada by virtue of a license granted to them by the Minister of Finance, under the Acts of the Dominion of Canada relating to fire insurance companies. The properties insured by these companies were all situated within the Province of Ontario, and being subsequently destroyed by fire, actions were brought against the companies. The Supreme Court of Canada, after hearing the arguments in the three cases, delivered but one judgment.

Held, that "The Fire Insurance Act," R. S. O. ch. 162, was not *ultra vires* and is applicable to insurance companies (whether foreign or incorporated by the Dominion) licensed to carry on insurance business throughout Canada, and taking risks on property situate within the Province of Ontario.

2. That the legislation in question, prescribing conditions incidental to insurance contracts, passed in Ontario, relating to property situate in Ontario, was not a regulation of trade and commerce within the meaning of these words in sub-sec. 2, sec. 91, B. N. A. Act.

3. That an insurer in Ontario who has not complied with the law in question, and has not printed on his policy or contract of insurance the statutory conditions in the manner indicated in the statute, cannot set up against the insured his own conditions or the statutory conditions, the insured alone, in such a case, is entitled to avail himself of any statutory condition. [Taschereau and Gwynne JJ. dissenting.]

Per Taschereau and Gwynne JJ.—That the power to legislate upon the subject-matter of insurance is vested exclusively in the Dominion Parliament by virtue of its power to pass laws for the regulation of trade and commerce under the 91st sec. of the B. N. A. Act.

The Citizens', &c., Ins. Cos. v. Parsons.—iv, 215.

6. **Escheat—The Escheat Act, R.S.O. ch. 94, ultra vires—B.N.A. Act secs. 91, 92, 102 and 109.**

On an information filed by the Attorney General of Ontario, for the pur-

Legislature—Continued.

pose of obtaining possession of land in the city of Toronto, which was the property of one Andrew Mercer, who died intestate and without leaving any heirs or next of kin, on the ground that it had escheated to the Crown for the benefit of the Province, and to which information A. M., the appellant, demurred for want of equity, the Court of Chancery held, over-ruling the demurrer, that the Escheat Act, ch. 94, R.S.O., was not *ultra vires*, and that the escheated property in question accrued to the benefit of the Province of Ontario. From this decision A. F. appealed to the Court of Appeal for Ontario, and that court affirmed the order overruling the said demurrer and dismissed the appeal with costs. On an appeal to the Supreme Court the parties agreed that the appeal should be limited to the broad question, as to whether the Government of Canada or the Province is entitled to estates escheated to the Crown for want of heirs.

Held, Ritchie C.J. and Strong J. dissenting, that the Province of Ontario does not represent Her Majesty in matters of escheat in said Province, and therefore the Attorney General for Ontario could not appropriate the property escheated to the Crown in this case for the purposes of the Province, and that the Escheat Act, ch. 94, R.S.O., was *ultra vires*.

Per Fournier, Taschereau and Gwynne JJ.—That any revenue derived from escheats is by sec. 102 of the B.N.A. Act placed under the control of the Parliament of Canada as part of the Consolidated Revenue Fund of Canada, and no other part of the Act exempts it from that disposition.

Mercer v. The Attorney General for Ontario.—v. 538.

7. **Taxation—Constitutional law—Tax upon filings in court—Indirect tax—Jurisdiction of Provincial Legislature—43 and 44 Vic. ch. 9 sec. 9 Q.**

By the Quebec Act, 43 and 44 Vic. ch. 9 sec. 9, it is enacted that "A duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars and exhibit whatsoever, produced and filed before the Superior Court, the Circuit Court, or the Magistrates' Court, such duties payable in stamps." The Act is declared to be an amendment and extension of the Act 27 and 28 Vic. ch. 5, "An Act for the collection by means of stamps, of office dues and duties, payable to the Crown upon law proceedings and registrations." By sec. 3, sub-sec. 2, the duties levied are to be "deemed to be payable to the Crown." The appellant obtained a rule *nisi* against the prothonotaries of the Superior Court at Montreal for contempt in refusing to receive and file an exhibit unaccompanied by a stamp, as required by the Act. Upon the return of the rule the Attorney General for the Province obtained leave to intervene and show cause.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, (appeal side) Strong and Taschereau JJ. dissenting, that the Act

Legislature—Continued.

imposing the tax in question was *ultra vires*, the tax being an indirect tax and the proceeds to form part of the Consolidated Revenue Fund of the Province for general purposes.

Per Strong and Taschereau JJ. dissenting.—Although the duty is an indirect tax, yet, under secs. 65, 126 and 129 of the B. N. A. Act, the Provincial Legislature had power to impose it.

Reed v. Mousseau.—vlii, 408.

8. **Legislature, Provincial—Powers of—Obstructions in tidal and navigable rivers—45 Vic. ch. 100 N. B. ultra vires—B. N. A. Act, 1867, sec. 91.**

Professing to act under the powers contained in their Act of incorporation, 45 Vic. ch. 100 N. B., the Q. R. B. Co. erected booms and piers in the Queddy River which impeded navigation—the *locus* being in that part of the river which is tidal and navigable.

Held, that the Provincial Legislature might incorporate a boom company, but could not give it power to obstruct a tidal navigable river, and therefore the Act 45 Vic. ch. 100, N. B., so far as it authorizes the acts done by the company in erecting booms and other works in the Queddy River obstructing its navigation, was *ultra vires* of the New Brunswick Legislature.

Queddy River Driving Boom Co. v. Davidson.—x, 222.

9. **Nova Scotia—Legislative Assembly of—Power of punishing for contempt—Removal of a Member from his seat by Sergeant-at-Arms—Action of trespass for assault against Speaker and Members—Damages.**

W., a member of the House of Assembly of the Province of Nova Scotia, on the 16th of April, 1874, charged the then Provincial Secretary, without being called to order for doing so, with having falsified a record. The charge was subsequently investigated by a committee of the House, who reported that it was unfounded. Two days after the House resolved, that, in preferring the charge without sufficient evidence to sustain it, W. was guilty of a breach of privilege. On the 30th April, W. was ordered to make an apology dictated by the house, and, having refused to do so, was declared, by another resolution, guilty of a contempt of the House, and requested forthwith to withdraw until such apology should be made. W. declined to withdraw, and thereupon another resolution was passed ordering the removal of the said W. from the House by the Sergeant-at-Arms, who, with his assistant, enforced such order and removed W. W. brought an action of trespass for assault against the Speaker and certain members of the House, and obtained a verdict of $500 damages.

Held, on appeal, affirming the judgment of the Supreme Court of Nova Scotia, that the Legislative Assembly of the Province of Nova Scotia has, in the absence of express grant, no power to remove one of its members for contempt, unless he is actually obstructing the business of the House; and

Legislature—Continued.

W. having been removed from his seat, not because he was obstructing the business of the House, but because he would not repeat the apology required, the defendants were liable. *Kielley* v. *Carson* (4 Moore P. C. C. 63) and *Doyle* v. *Falconer* (L. R. 1 P. C. App. 328) commented on and followed.

Landers. v. Woodworth.—II, 159.

10. **Police regulations—42 & 43 Vic. ch. 4, sec. 1 Q., construction of—Prohibition, writ of—Sale of liquors.**

Under the authority of the Act of the Legislature of Quebec, 42 and 43 Vic. ch. 4 sec. 1, a penal suit was, on the 20th of January, 1880, instituted against P. in the name of the corporation of Q., before the Recorder's Court of the city of Q., alleging that "on Sunday, the 18th day of January, 1880, the said defendant has not closed, during the whole of the day, the house or building in which he, the said defendant, sells, causes to be sold, or allows to be sold, spirituous liquors by retail, in quantity less than three half pints at a time, the said house or building situate, &c." P. was convicted. A writ of prohibition, to have the conviction revised by the Superior Court, was subsequently issued, and upon the merits was set aside and quashed.

Held, per Ritchie C.J. and Strong and Fournier JJ. —That the provisions of the Provincial Statute, 42 and 43 Vic. ch. 4, ordering houses in which spirituous liquors, &c., are sold, to be closed on Sundays, and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations, within the power of the Legislature of the Province of Quebec, and as the complaint was clearly within the Act, the recorder could not be interfered with on prohibition.

Per Henry, Taschereau and Gwynne JJ.—That the penalty imposed upon P. by the recorder was not authorized by the statute, even if such statute was *intra vires* of the Provincial Legislature, and that the prohibition was therefore rightly granted.

The court being equally divided, the appeal was dismissed without costs.

Poulin v. The Corporation of Quebec.—IX, 185.

11. Ontario Judicature Act, 1881, sec. 43—Constitutionality of.

See JURISDICTION 25.

12. **Provincial Legislatures—Power to legislate respecting procedure and residence of judges—B.N.A. Act sec. 92 sub-sec. 14—Delegation of power to Lieutenant Governor in Council—"Judicial District Act, 1879," B.C. —"Better Administration of Justice Act, 1878" (42 Vic. ch. 20 B.C.)—Act to amend same (42 Vic. ch. 12 B.C.)**

The case respecting the status of the Supreme Court of British Columbia, and the power of the Legislature of the Province to legislate in regard to procedure in that court, and the residences of the judges thereof referred to the Supreme Court of Canada for hearing and consideration by His Excel-

Legislature—Continued.

lency the Governor General in Council under the provisions of section 52 of the Supreme and Exchequer Court Act by Order in Council bearing date the 15th day of May, 1883.

1st Question: Is the Supreme Court of British Columbia a provincial court within the meaning of the 14th sub-section of section 92 of the British North America Act?

Opinion: The Supreme Court of British Columbia is a provincial court within the meaning of the 14th sub-section of section 92 of the British North America Act.

2nd Question: Has the Legislature of the Province exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the Province? If not, to what extent has it such authority?

Opinion: The Legislature of the Province has exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the Province which come within the legislative jurisdiction of the Provincial Legislature.

3rd Question: If that Legislature can make rules to govern the procedure of that court, can it delegate this power to the Lieutenant Governor in Council?

Opinion: The Legislature can make rules to govern the procedure of that court in all such matters as limited by the preceding answer, and can delegate this power to the Lieutenant Governor in Council.

4th Question: Is the "Judicial District Act, 1879," British Columbia, within the powers of the Legislature of that Province? If so, does it apply to judges appointed before that Act came into force?"

Opinion: "The Judicial District Act, 1879," is within the powers of the Legislature of that Province and does apply to judges appointed before that Act came into force.

5th Question: Are the following Acts passed by the Legislature of British Columbia, namely, the "Better Administration of Justice Act, 1878," (42 Vic. ch. 20, 1878); 42 Vic. ch. 12 (1879) "An Act to amend the Practice and Procedure of the Supreme Court of British Columbia, and for other purposes relating to the Administration of Justice;" 44 Vic. ch. 1., An Act to carry out the objects of the "Better Administration of Justice Act, 1878,' and "The Judicial District Act, 1879," so far as they relate to procedure in the Supreme Court of British Columbia within the legislative authority of the Legislature of the Province?

Opinion: So far as they relate to procedure in the Supreme Court of British Columbia, they are within the legislative authority of the Legislature of British Columbia.

Sewell v. B. Columbia Towing Co., "The Thrasher Case." 18th June, 1883.

Legislature—Continued.

13. Powers of Local Legislatures—Regulation of the Sale of liquor—License fees—British North America Act, 1867, sec. 91—41 Vic. ch. 3 Q.—38 Vic. ch. 76 Q.—Intra vires—By-law—Mandamus.

Held. The Quebec License Act (41 Vic. ch. 3) is *intra vires* of the Legislature of the Province of Quebec. (*Hodge* v. *The Queen*, 9 App. Cas. 117, followed.)

As this Act does not interfere with the existing rights and powers of incorporated cities, a by-law passed by the corporation of the city of Three Rivers, on the 3rd April, 1877, in virtue of its charter (20 Vic. ch. 129, and 38 Vic. ch. 76), imposing a license fee of $200 on the sale of intoxicating liquors, is within the powers of the said corporation.

Sulte v. Corporation of Three Rivers.—xi, 25.

Letters Patent—Crown lands—Parliamentary title—Equitable defence—38 Vic. ch. 12 Man.—35 Vic. ch 23 D.

L., in 1875, applied for a homestead entry for the S.W. ¼ of sec. 30, township 6, range 4 west, pre-empted by F., and paid $10 fee to a clerk at the office, but was subsequently informed by the officers of the Crown that his application could not be recognized, and was refunded the $10 he had paid. F. subsequently paid for the land by a military bounty warrant in pursuance of sec. 23 of 35 Vic. ch. 23. L. entered upon the land and made improvements. In 1878, after the conflicting claims of F. and L. had been considered by the officers of the Crown, a patent for this land was granted by the Crown to F., who brought an action of ejectment against L. to recover possession of the said land. F., at the trial, put in, as proof of his title, the letters patent, and L. was allowed, against the objection of F.'s counsel, to set up an equitable defence and to go into evidence for the purpose of attacking the plaintiff's patent as having been issued to him in error, and by improvidence and fraud. The judge, who tried the case without a jury, rendered a verdict for the defendant.

Held, on appeal, reversing the judgment of the Court of Queen's Bench (Man.), that L., not being in possession under the statute, had no parliamentary title to the possession of the land, nor any title whatever that could prevail against the title of F. under the letters patent.

Per Gwynne J.—Under the practice which prevailed in England in 1870, which practice was in force in Manitoba under 38 Vic. ch. 12 at the time of the bringing of this suit, an equitable defence could not be set up in an action of ejectment.

Farmer v. Livingstone.—v. 221.

Libel—Telegraph message—Liability of telegraph company—Special damages—Inadmissibility of evidence as to, when not alleged—Excessive damages.

S. *et al.* (respondents) partners in trade, sued the D. T. Co. (appellants)

Libel—Continued.

for defamation of the respondents in their trade. In the declaration it was alleged: 1. That they were wholesale and retail merchants at Halifax. That appellants wrongfully, falsely and maliciously, by means of their telegraph lines, transmitted, sent and published from their office at Halifax to their office in St. John, and there caused to be printed, copied, circulated and published the false and defamatory message following:—"John Silver & Co., wholesale clothiers, of Grenville street, have failed; liabilities heavy." 2nd. That same message was caused also to be published in other parts of the Dominion. 3rd. That the appellants promised and agreed with the proprietor or publisher of the St. John "Daily Telegraph" newspaper, and entered into an arrangement with him, whereby the appellants agreed to collect and transmit, by means of their telegraph lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages, and should publish them in his newspaper, and that in pursuance of said agreement the appellants wrongfully, maliciously, and by means of said telegraph, transmitted, sent and published from their office in Halifax to their office in St. John, and there falsely and maliciously caused to be written, printed, copied, circulated and published the above message, whereby many customers who had heretofore dealt with plaintiffs ceased to do so, and their credit and business standing and reputation were thereby greatly damaged. The D. T. Co. denied the several publications charged, and also the entering into this agreement mentioned in the third count and the forwarding of the messages as alleged. At the trial it was proved that the telegram which was published in the morning paper was corrected in the evening edition, and that the publisher's agreement was with one Snyder, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original despatch was not produced. The only evidence as to damage was the evidence of two witnesses, who proved that by reason of the publication they ceased to do business with the respondents as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was received. The dealings of these witnesses with the plaintiffs consisted in selling their exchange and sometimes discounting their notes. The counsel for the defendants moved for a non-suit which was refused and the case was submitted to the jury, who, upon the evidence, rendered a verdict for the plaintiffs with $7,000 damages.

On appeal to the Supreme Court of Canada, it was **Held,** Taschereau and Gwynne JJ. dissenting, that the appellants, the D. T. Co., were responsible for the publication of the libel in question.

Per Taschereau and Gwynne JJ., dissenting.—Assuming the agreement

Libel—Continued.

in question to be one within the scope of the purposes for which the defendants were incorporated, and that Snyder had sufficient authority to enter into it on behalf of the defendant company, the evidence established that the defendants collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the said proprietor and publisher of said news, for which the damages were awarded.

2. That the damages were excessive, and therefore a new trial ought to be granted. Ritchie C.J. doubting, and Henry J. dissenting.

Held, also, per Strong, Taschereau and Gwynne JJ.—No special damages having been alleged in the declaration, the evidence as to such damages having been objected to, was inadmissible, and therefore a new trial should be granted.

Dominion Telegraph Company v. **Silver.**—x, 238.

2. On plaintiff as Commissioner of Expropriations.

See MALICIOUS PROSECUTION.

See SLANDER.

License—**Power to impose license tax on merchants, traders, &c.—Discrimination between residents and non-residents—33 Vic. ch. 4 N. B.—By-law.**

J. brought an action against G., the police magistrate of the city of St. John, for wrongfully causing the plaintiff, a commercial traveller, to be arrested and imprisoned on a warrant issued on a conviction by the police magistrate, for violation of a by-law made by the common council of the city of St. John, under an alleged authority conferred on that body by 33 Vic. ch. 4, passed by the Legislature of New Brunswick. Sec. 3 of the Act authorized the mayor of the city of St. John to license persons to use any art, trade, &c., within the city of St. John, on payment of such sum or sums as may from time to time be fixed and determined by the common council of St. John, &c.; and sec. 4 empowered the mayor, &c., by any by-law or ordinance, to fix and determine what sum or sums of money should be from time to time paid for license to use any art, trade, occupation, &c., and to declare how fees should be recoverable; and to impose penalties for any breach of the same, &c. The by-law or ordinance in question discriminated between resident and non-resident merchants, traders, &c., by imposing a license tax of $20 on the former and $40 on the latter.

Held, that assuming the Act 33 Vic. ch. 4, to be *intra vires* of the Legislature of New Brunswick, the by-law made under it was invalid, because the Act in question gave no power to the common council of St. John of discrimination between residents and non-residents, such as they had exercised in this by-law.

Jonas v. **Gilbert.**—v, 356.

License—Continued.

3. To ferry.

See FERRY.

4. **Sale of intoxicating liquors—License law of Quebec—Omission in Statute—Tender—Costs - Mandamus.**

By section 63 of the Quebec License Law, 41 Vic. ch. 3, it was enacted:

"63. In addition to a fee of one dollar on the granting of each license, "the duties comprised in the following tariff shall be payable by the appli- "cant therefor to the license inspector, preliminary to the granting of the "different licenses hereinbefore mentioned.

"Tariff of duties payable for licenses under the present law.

"On licenses for the sale of intoxicating liquors.

"1. On each license to keep an inn and for the sale of intoxicating "liquors.

"(A) In the city of Montreal, two hundred dollars, if the annual value "or rent of the premises for which the license required is less than four "hundred dollars, and three hundred, if the annual value or rent is four "hundred dollars or more.

"(B) In the city of Quebec, one hundred and twenty-five dollars, if the "annual value or rent is less than four hundred dollars, and one hundred "and seventy-five dollars, if the annual value or rent is four hundred dollars "or more.

"(C) In every other city eighty dollars.

"(D) In every incorporated town seventy dollars..... ....."

By section 11 of the 42-43 Vic. ch. 3, it was enacted as follows:

"11. Sub-sections A, B and C of number 1 of section 63 of the said Act "(the Quebec License Law of 1878) are repealed and replaced by the fol- "lowing:

"In the cities of Quebec and Montreal fifty per cent. of the rental or "annual value of the premises for which such license is required: Provided "that in no case shall the price of the license exceed the sum of three "hundred dollars, or be less than seventy-five dollars."

No proviso for replacing class C repealed was yet enacted in May, 1880.

At the beginning of May, 1880, appellant went to the respondent Lassalle, who was license inspector for the district of Three Rivers, for the purpose of obtaining from him a license to keep an inn at Nos. 14 and 16 Badeaux street, in the city of Three Rivers. Appellant then and there produced the certificate approved by the corporation of the city of Three Rivers, and necessary for him to get such license. He offered at the same time the one dollar fee, according to § 1—41 Vic. ch. 3, sec. 63, and requested respondent to grant him a license, which respondent refused to

License—Continued.

do. After respondent's said refusal, appellant obtained the issuing of a writ of *mandamus* to compel respondent to grant the said license.

On the case being heard, both in the Superior Court at Three Rivers and in the Court of Queen's Bench at Quebec, the respondent urged that admitting he could not claim the sum of $80 as originally enacted for cities other than Montreal and Quebec; and admitting he could not claim $70 as for incorporated towns, he was at all events entitled to claim the duty of £1.16.0 mentioned in sections 66 and 67 of 41 Vic. ch. 3, which had never been repealed.

These two clauses read as follows:—

"66. The Lieutenant Governor may, when and so often as he deems it "expedient, by regulation reduce the rate of duty on licenses, as mentioned "in article 63 of this law, provided that this rate be not below the rate "imposed by the fifth section of the Imperial Act George III ch. 88.

"67. The duties imposed by this law on licenses of inns, restaurants, "steamboats, bars, railway buffets, or liquor shops, include those imposed by "said Imperial Act, but should the same be hereafter repealed, such repeal "shall not have the effect of reducing the amount of such duties."

The fifth section of the 14th George III ch. 88 reads as follows:—

"5. And be it further enacted by the authority aforesaid that there "shall, from and after the fifth day of April, one thousand seven hundred "and seventy-five, be raised, levied, collected and paid, unto his Majesty's "Receiver General of the said Province (Quebec), for the use of his Majesty, "his heirs and successors a duty of one pound, sixteen shillings, sterling "money of Great Britain, for every license that shall be granted by the "Governor, Lieutenant Governor, or Commander-in-Chief of the said Pro- "vince to any person or persons, for keeping a house or any other place of "public entertainment or for the retailing of wine, brandy, rum, or any other "spirituous liquors, within the said Province; and any persons keeping any "such house or place of entertainment, or retailing any such liquors, without "such license, shall forfeit and pay the sum of ten pounds for every such "offence, upon conviction thereof; one moiety to such person, as shall "inform or prosecute for the same and the other moiety shall be paid into "the hands of the Receiver General of the Province, for the use of his "Majesty."

The Superior Court (Plamondon J.) held that the offer of $1 was sufficient and ordered the issuing of a peremptory writ of mandamus enjoining the respondent to grant the license asked for. This judgment the Court of Queen's Bench set aside.

On appeal to the Supreme Court of Canada, **Held**, that the appellant

License—Continued.

would not have been entitled to his license without offering to pay the £1.16.0 stg. required by the Imperial Act in addition to the fee of $1, even if the respondent had been authorized to issue a license, but owing to the repeal of sub-sec. C. of sec. 63 of 41 Vic. ch. 3, without provision being made for the issue of licenses in other cities than Montreal and Quebec, under no circumstances could a license be issued for the city of Three Rivers for the year in question.

Per Ritchie C.J. and Fournier J.—The mandamus could not go, because the period for which the appellant claimed the license had expired, and a mandamus is never granted to compel a party to do an impossibility. If appellant had been entitled to his license and the time had expired after he had come to the court, it would have materially affected the question of costs, but not being entitled to his license the appeal must be dismissed with costs.

Per Henry J.—The appellant was entitled to his license upon payment of the £1.16.0 stg., together with the fee of $1, and having been misled by the respondent into making a tender of a larger sum than the respondent was entitled to demand, and not of the exact sum as required by the law, the respondent ought to pay the costs.

[Sub-sec. C. of sec. 63 of 41 Vic. ch. 3, has been re-enacted by 46 Vic. ch. 5 sec. 3 Q.]

Appeal dismissed with costs.

Bergeron v. Lassalle.—29th March, 1882.

5. Liquor License Act, 1883, and Act amending, *ultra vires* of Parliament of Canada.

See LIQUOR LICENSE ACT, 1883.

6. Quebec License Act (41 Vic. ch. 3) *intra vires* of Legislature of the Province.

See LEGISLATURE 13.

7. **By-law imposing license on Transient Merchants and Traders—Validity of, under 29 & 30 Vic. ch. 57 sec. 20, 21, (Q.—Commercial Traveller—Arrest of, for selling without license—Action for illegal arrest—Evidence—Damages—Amendment of pleadings by Supreme Court of Canada—Supreme C. Am. Act, 1879.**

On the 12th of October, 1866, under the statute 29–30 Vic. ch. 57 sec. 20 the corporation of the City of Quebec passed the following by-law:—

1. "That no person shall hereafter follow the occupation of a transient merchant or trader, or agent, clerk, or employee of a transient merchant or trader, in the City of Quebec, or shall sell in the said city by samples, without having previously taken out from the clerk of the said city a license for which there shall be paid to the treasurer of the said city the sum of sixty

License—Continued.

dollars; the said license shall not be valid for any longer period than one year from the date thereof.

2. "That any person contravening the present by-law shall, on conviction before the Recorder's Court, pay a fine not exceeding two hundred dollars, and in default of immediate payment of the said fine and of the costs, shall be imprisoned and detained in the common gaol of the district of Quebec, for a period not exceeding two months, unless the said fine and costs, together with those of imprisonment, be sooner paid."

The plaintiff, a commercial traveller for a firm in Montreal, was in a store in Quebec, writing down an order for his firm, and had a small screw in his hand as a sample when he was arrested by a policeman, and brought to the station. He subsequently paid the license, and brought an action against the corporation, complaining of the false and illegal arrest and imprisonment. The corporation by their plea justified the arrest upon the ground that P. had openly committed a breach of the by-laws and municipal regulations in force, by selling by sample, and without having first obtained a license.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), Henry J. dissenting, that the plaintiff's acts were of such a nature that there was probable cause under the statute and by-law for the arrest, which, therefore, was not a tort by the corporation.

Per Strong and Fournier JJ.—The evidence fell short of establishing the allegation of the defendant's plea that the plaintiff was actually engaged in selling, there being no proof of any actual sale, but did show that he was openly pursuing the occupation of a transient merchant or trader, or employee of a transient merchant or trader, without license, and the court would permit of an amendment of the pleadings, which would adapt the allegations of the parties to the case as disclosed by the evidence. (See 11 Q. L. R. 249).

Appeal dismissed with costs.

Piché v. The City of Quebec.—22nd June, 1885.

Lien—**Detinue, action of.**

W. left with C. a chronometer for the purpose of its being repaired. C., after taking chronometer to pieces, found detent spring much rusted, and sent it to Boston to have it made right. W. offered C. 25.50 for his work, but C. said he would not deliver the chronometer until full charges were paid, viz., $47. W. thereupon sued C. to recover possession and use of his chronometer. The evidence of the making of the contract was conflicting, and the learned judge at the trial charged the jury, as a matter of law, that even if defendant's version were correct as to the orders given him by

Lien—Continued.

plaintiff in reference to putting the instrument in order, plaintiff was entitled to recover, because such order or instructions would give no authority to send the instrument to a foreign country to have any portion of the work done; and that, if it was so sent, no lien would exist in defendant's favor for the value of the work without special instructions or plaintiff's consent; that no such order or consent was shown in the evidence, and that consequently no lien existed. The jury, however, found a verdict for defendant, stating, at the delivery of it, that they had adopted the defendant's statement as to the authority and instructions that he had received from the plaintiff in regard to the instrument when it was left with the defendant.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the rule *nisi* for a new trial should be discharged, and, as no fault was found with the work done, the respondent had a lien until he was paid his charges.

Webber v. Cogswell.—ii, 15.

2. **Lien for advances to get out timber under agreement—Right to enforce as against another creditor, and to demand an account.**

In January, 1876, the defendant (Bew) and plaintiffs (Shortreed & Co.) entered into a written agreement with themselves and with one Joseph Gordon, a lumberer who was then engaged in manufacturing, under a contract with Messrs. Allan Gilmour & Co., waney white pine timber, in the Muskoka district, in Ontario, and to whom the defendant (Bew) had already made advances to the extent of nearly $4,000 for that purpose. Under this agreement the defendant was to complete his advance to $4,000; and to enable Gordon to go on with his lumbering operations in Muskoka, the plaintiffs undertook to advance him, on his own drafts, drawn on the defendant, the sum of $7,000, "or so much as with the said $4,000 would put the said timber on the track of one of the said railway lines (the Northern Railway or its extension) free of all claims." The defendant was then to furnish money to convey the timber so got out to Quebec. The plaintiffs were to have a first lien for their advances, commission and interest. Subject to this lien the defendant was to have the sale of the timber and was to repay himself his advances out of the proceeds, and the balance, if any, was to be paid over to Mr. Dalton McCarthy.

The declaration alleged, that in pursuance of the said agreement the plaintiffs made advances to Gordon to the extent of $23,881.83; that Gordon manufactured a large quantity of timber, which was conveyed to Quebec; that a part of it was sold from which the plaintiffs received $18,800, leaving a balance of $8,000, including interest and commission due to them; that the remainder of the timber, of the value of more than $8,000, and upon which the plaintiffs had a lien, as aforesaid, and which was amply sufficient

Lien—Continued.

to pay the claim of the plaintiffs, was taken possession of by the defendant and appropriated to his own use; and the plaintiffs, in consequence, prayed that the defendant should be condemned to pay the balance so due to them on their said advances.

The defendant by his plea set forth the special circumstances under which the agreement in question was entered into, and averred, among other things, that he advanced to Gordon $4,000 to enable him to manufacture the timber in question; that he advanced him a further sum of $3,500 to enable Gordon to convey it from the Northern Railway to Quebec; that plaintiffs had no right to make any advances on the timber except for the purpose "of manufacturing it and getting it out, and placing it on the railroad."

The defendant wholly denied that the plaintiffs made advances to the extent of $23,000, and alleged that the sum of $18,800, which the plaintiffs admitted they received, was much more than sufficient to pay what was really due to the plaintiffs. The defendant also alleged that the plaintiffs, under the agreement, had no right to advance more than the sum of $7,000, provided for in the agreement, and that the portion of the timber which came into his possession was unsaleable and unmerchantable; that it was placed in his hands by Messrs. Gilmour & Co., and Messrs. Burstall & Co., at the request of the plaintiffs.

The last allegation in the plea was that the plaintiffs and Gordon owed him, the defendant, for the causes mentioned in the plea, $8,000, and that he had a right to apply the proceeds of the unmerchantable timber so placed in his hands for the payment of his said claim.

The plaintiff's declaration therefore set forth two distinct grounds of action.

The first, that there was a balance of $8,000 due to the plaintiffs upon the whole of their advances, and that for that amount they had a right to look to the defendant.

The second, that the defendant had appropriated to his own use timber of the value of $8,000, upon which the plaintiffs, under the said agreement, had a first lien for the said sum of $8,000, and that the defendant was therefore bound to pay to the plaintiffs the said sum of $8,000, of which they had been so deprived by the defendant.

The action was tried at Quebec, before Meredith C.J., who found (1) that the plaintiffs had established their making advances to Gordon to the extent alleged, viz., $23,861.83, for the making and manufacturing of the timber mentioned in the declaration, and for its conveyance to Quebec, for the repayment of which sum out of proceeds they had a first lien. (2) That

Lien—Continued.

after the timber reached Quebec, a part thereof was sold by the plaintiffs to Messrs. Burstall and Gilmour, as alleged in their declaration, that they received from the sale so made $18,800 currency, and that there remained a balance of $900 in the hands of Messrs. Allan Gilmour & Co., as being part of the price of the timber so sold them by the plaintiffs. (3) That thus, when the action was brought, there was a balance of $4,161 due the plaintiffs on account of their said advances. (4) That of the timber brought down the defendant received and converted to his own use timber of the value of $4,322.93. (5) That for the value of this timber the defendant was accountable to the plaintiffs under the agreement, there being no personal liability whatever from him to them for the advances. (6) That the defendant was entitled to deduct from this sum $2,309.92, money laid out by him for the plaintiffs' benefit, and that for the balance, $2,012, the plaintiffs were entitled to judgment. (7) Further, the learned Chief Justice, while admitting that the conventional lien, to which the defendant was a party, was limited to the advances made by the plaintiffs towards the manufacturing of the said timber and its delivery on the track of the Northern Railway and the Northern Extension Railway, held that they had a common law lien for their expenditure in bringing the timber to Quebec; and on this ground, no attempt having been made to show what part of the advance went for one object and what part for the other, considered them entitled to priority over the defendant's expenditure for the whole of their own.

This judgment was confirmed by the Court of Queen's Bench for Lower Canada.

On appeal to the Supreme Court of Canada the defendant contended:—1. That it was proved the plaintiffs had retained a portion of the timber for which they had not accounted; 2. That contrary to the agreement the advances had not been made on drafts drawn on defendant, who was therefore prevented from establishing and controlling the amount of advances; 3. That a sum of $3,500 had been sent by defendant to Gordon to pay railway freight, and this sum should have been credited to defendant, although it appeared that Gordon did not account for it and the plaintiffs were not aware of its having been advanced; 4. That the plaintiffs' alleged advances were not established by the evidence.

Held, Ritchie C.J. and Henry J. dissenting, that the appeal must be allowed.

Per Strong J.—The advances not having been made in manner prescribed, on Gordon's bills drawn on defendant, and the defendant being thus deprived of the power to control the amount of advances, and there being no proof that the defendant ever acquiesced in a departure from the mode of making

Lien—Continued.

the advances prescribed by the agreement, or waived his strict rights under it, the plaintiffs were not entitled to the prior lien which the agreement provided for in case the money to be furnished by them was advanced according to the terms of the agreement. The defendant had therefore a right to retain an amount out of the proceeds of the timber equivalent at least to his advance of $4,000.

Per Strong, Fournier and Gwynne JJ.—The defendant was also entitled to the $3,500 advanced to Gordon for the purpose of paying the railway charges, Gordon being the proper person to be entrusted with the funds, and no negligence being imputable to the defendant, who advanced the money to carry out his agreement. Further, the plaintiff's action ought to be dismissed on the ground that they had failed to account for the timber which came to their hands, or to prove the advances which they claimed to have made.

Appeal allowed with costs.

Bew. v. Shortreed.—23rd June, 1884.

3. Under Mechanics' Lien Act, as against prior mortgagee.

See MECHANICS' LIEN.

4. By bank on shares of insolvent.

See BANKS AND BANKING I2.

Life Rent—Transfer of arrears of.

See COMMUNITY.

Light and Air.

See EASEMENT 3.

Limitations—Action on bond given as collateral security to mortgage —Cons. Stats. N. B. ch. 85 secs. 1 and 6—3 and 4 Wm. IV. ch. 42.

See MORTGAGE 2.

2. **Trespass—Plea of liberum tenementum—Possession, title by.**

In an action of trespass *quare clausum fregit* for the purpose of trying the title to certain land adjoining the city of Belleville, the defendants pleaded not guilty; and 2nd. That at the time of the alleged trespass the said land was the freehold of the defendants, M. E. McC. and J. L. McC., and they justified breaking and entering the said close in their own right, and the other defendants as their servants, and by their command. The case was tried by Armour J., without a jury, and he rendered a verdict for plaintiff with thirty dollars damages. The judgment was set aside by the Court of Common Pleas, and they entered a verdict for the defendants in pursuance of R. S. O. ch. 50 sec. 287. On appeal, the Court of Appeal for Ontario reversed this judgment and restored the verdict as originally found

Limitations—Continued.

by Armour J. The defendants thereupon appealed to to the Supreme Court.

Held, that the appellants (defendants) on whom the onus lay of proving their plea of *liberum tenementum*, had not proved a valid documentary title, or possession for twenty years of that actual, continuous and visible character necessary to give them a title under the Statute of Limitations; therefore plaintiff was entitled to his verdict. Henry J. dissenting.

McConaghy v. Denmark.—IV, 609.

3. Possession by tenant at will.

See TENANCY AT WILL.

4. Statute of—May be pleaded by the Crown.

See PETITION OF RIGHT 7.

5. As against against interest on taking accounts.

See PAYMENT 5.

" PRESCRIPTION.

6. Action of trespass—Title by possession.

See TRESPASS 9.

7. In suit to redeem by heirs of mortgagee—Purchase under decree for sale by mortgagee—Trustee for sale—R. S. Ont. ch. 108 sec. 19.

See MORTGAGE 16.

8. Title by possession acquired under Statute of Limitations, 38 Vic. ch. 160.

See POSSESSION 7.

Liquor—Sale of.

See LEGISLATURE 10.

Liquor License.

See LICENSE 4.

" LEGISLATURE 13.

Liquor License Act, 1883—Amending act—47 Vic. ch. 32 sec. 26—Reference by Governor in Council—Act ultra vires of Dominion Parliament.

Case referred by the Governor General in Council under sec. 26 of 47 Vic. ch. 32, "An Act to amend the Liquor License Act 1883."

1ST QUESTION—Are the following acts, in whole or in part, within the legislative authority of the parliament of Canada, namely :—

(1.) The Liquor License Act, 1883 ?

(2.) An Act to amend the Liquor License Act, 1883.

2D QUESTION.—If the court is of opinion that a part or parts only of the said acts are within the legislative authority of the parliament of Canada, what part or parts of said acts are so within such legislative authority ?

Liquor License Act, 1883—Continued.

OPINION.—The acts referred to are, and each of them is, *ultra vires* of the legislative authority of the parliament of Canada, except in so far as the said acts respectively purport to legislate respecting those licenses mentioned in sec. 7 of the said "The Liquor License Act, 1883," which are there denominated Vessel Licenses and Wholesale Licenses, and except also, in so far as the said acts respectively relate to the carrying into effect of the provisions of "The Canada Temperance Act, 1878." The Hon. Mr. Justice Henry being of opinion that the said acts are *ultra vires* in whole.

[On appeal to the Privy Council, the Acts were held *ultra vires* in whole.]

In re The Liquor License Act, 1883—12th January, 1885.

Loan—By trader to non-trader—Interest—Prescription—C. C. L. C. Art. 2,250.

See PRESCRIPTION 1.

Loss—Constructive—Total.

See INSURANCE, MARINE 2, 5, 6, 9, 15, 16.

Magistrate.

See JUSTICE OF THE PEACE.

Malicious Proceedings—Obtaining injunction maliciously.

See DAMAGES 19.

2. In insolvency.

See DAMAGES 25.

" INSOLVENCY 9.

Malicious Prosecution—**Action for Libel—Slander—Prescription arts. 2262 and 2267 C. C.—Proceedings instituted to remove plaintiff from position of commissioner of expropriations.**

This action was instituted by James K. Springle in his life time Civil Engineer, for $20,000 for damages which he alleged he had suffered in consequence of his having been unjustly removed by the defendants (the Mayor, &c., of the City of Montreal) from the position of commissioner of expropriations for the widening of St. Joseph Street, in the City of Montreal. The appellants, widow and daughters of the late James K. Springle, became plaintiffs *par reprise d'instance.*

On the 14th April, 1868, Springle and two others, Brown and Masson, were named joint commissioners to determine the amount which should be accorded to the Hon. C. Wilson for the expropriation of a part of his property.

Messrs. Springle and Brown after valuing the compensation which should be given to Mr. Wilson at $19,500, on certain objections being made,

Malicious Prosecution—Continued.

reduced the amount in their final report to $13,666. Mr. Masson, not agreeing with his colleagues, in his report declared that $7,500 would be a sufficient compensation.

Thereupon, on the 7th August, 1868, the defendants passed the following resolution:

"That their attention had been called to the extraordinary award "recently declared by two of the commissioners (meaning the plaintiff in "this cause and the said Thomas S. Brown) appointed in the matter of "expropriation for the widening of St. Joseph street in front of the "property of the Honorable Charles Wilson; and that the exorbitant "amount awarded by the majority of the commissioners in that case was "such as to require in their opinion that steps should be adopted imme-"diately to stay the proceedings in the interest of the public, and they "therefore instructed the attorney of the corporation to apply by summary "petition to the Superior Court, or to a judge thereof, to stay the proceed-"ings and to remove and replace the two commissioners whose award is "complained of, and who, in their opinion, forfeited their obligations as such "commissioners."

Conformably to this resolution the defendants, on the 10th August, 1868, presented a petition to the Honorable Mr. Justice Berthelot, by which they asked that the proceedings of the commissioners might be suspended, and that Springle and Brown might be removed for having violated and forfeited their obligations. The defendants also alleged in their petition:

"That they had been credibly informed that the terms of intimacy "between the said Charles Wilson, the party to be expropriated, and James "Key Springle and Thomas Storrow Brown were inconsistent and incom-"patible with the faithful and impartial discharge of their duties, and that, "in fact, during the enquête the said James Key Springle and Thomas "Storrow Brown frequently dined with the said Charles Wilson, and had "private conversation with him upon the subject of the expropriation and "received suggestions and impressions *ex parte* conveyed by the said Charles "Wilson in a private and clandestine manner, and calculated to produce "the effect of obtaining the excessive award complained of; that during the "argument of the counsel engaged by the parties interested, the said James "Key Springle and Thomas Storrow Brown affected to be interested and to "take notes, but that such affectation of interest was merely a mockery and "insult to the understanding of the said petitioners (to wit, the said defendants "in this cause,) and the parties interested; that after a lengthened argu-"ment continuing till past four o'clock, the said Thomas Storrow Brown "declared his desire to retire for ten minutes to prepare his judgment which,

Malicious Prosecution—Continued.

" he stated, was then in a written condition, and that he had little or no doubt " of the concurrence of his co-commissioner, James Key Springle, such con- " duct being unworthy of a commissioner and productive of the gravest " suspicions as to their impartiality or love of justice; that the said T. S. " Brown, hath frequently acted as commissioner in other cases of expropri- " ation, and specially with the said Damase Masson, and hath always con- " formed in opinion with his co-commissioners, and has never differed " from the said Damase Masson nor exhibited an extravagant and absurd " award before the present one to wit, the said award now in question. " That the said James Key Springle and Thomas Storrow Brown were " appointed by the judge at the urgent instance and request of the said " Charles Wilson."

" That the said James Key Springle and Thomas Storrow Brown have " been at many periods of time, and still are under pecuniary obligations to " the said Charles Wilson, and that the said James Key Springle and Thomas " S. Brown have not fulfilled their said duties in a faithful, diligent and " impartial manner, and that, therefore, the said petitioner prayed in and " by their said petition, for an order of the said judge, adjudging that the " proceedings of the said three commissioners should be stayed, and that " the said James Key Springle and Thomas S. Brown should be removed " from the office of commissioners as having violated and forfeited their " obligations."

On the 17th September, 1870, the conclusions of the petition were granted on the ground that the commissioners had committed an error of judgment in the execution of their duty as commissioners, and had proceeded on a wrong principle in estimating the amount payable for expropriation. The charges of fraud and partiality were held unfounded.

On the 20th September, 1873, the Court of Queen's Bench for Lower Canada re-instated the said Springle and Brown in their position as commissioners.

On the 4th November, 1876, this judgment was confirmed by the Privy Council. Their Lordships say:—

" The petitions contained charges of very scandalous fraud and parti- " ality.

" Their Lordships think it unfortunate that such charges were made, " because it turned out there was no ground whatever for them. The res- " pondents were removed, not for having carried into effect a right principle " erroneously, but for having adopted an erroneous principle. Their Lord- " ships consider that the principle adopted by the respondents was not

Malicious Prosecution—Continued.

" erroneous, and therefore that the inference of want of diligence drawn " from it fails."

In the meantime, in May, 1871, Springle had brought the present action of damages against the defendants—and this action was prosecuted, on his death, by the present respondents.

At the hearing on the merits, the present appellants urged three points and they submitted:

1st. That the action was absolutely barred under Arts. 2262 and 2267 of the Civil Code of Lower Canada, which read respectively as follows, Art. 2262: "The following actions are prescribed by one year: 1. For slander or "libel, reckoning from the day that it came to the knowledge of the party "aggrieved."

Art. 2267. "In all the cases mentioned in Arts. 2250, 2260, 2261 and "2262, the debt is absolutely extinguished, and no action can be maintained "after the delay for prescription has expired."

2nd. That the appellants had not been actuated by malice, that they had considered it a duty to adopt proceedings for the redress of grievances complained of by the interested parties, that there was reasonable and probable cause for their acts, and that Springle had suffered no damage for which they were amenable to law.

The Superior Court, relying on the provisions of the code, dismissed the action on the 31st May, 1880, without entering into the merits, but the Court of Appeals, on the 27th January, 1883, reversed the judgment and allowed $3,000.00 damages to the present respondents, being of opinion that, as the matter was still in course of litigation, Arts. 2262 and 2267 C. C. did not apply, and the action was not prescribed; that there was no proof of the fraud and misconduct; that the proceedings were without reasonable and probable cause, and malice should be inferred.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Queen's Bench, Fournier J. dissenting, that the action was not an action merely for the libel contained in the resolution of the 7th August, 1868, but for a malicious prosecution, following up that resolution by proceedings instituted in the courts, maliciously and without any reasonable and just cause, and prescription did not begin to run until the termination of such proceedings. The action, therefore, and judgment for damages should be sustained, no objection having been raised that the action was prematurely brought.

Per Strong J.—Following the practice adopted in the Court of Queen's Bench for Lower Canada, where they either increase or lessen the amount of

Malicious Prosecution—Continued.

damages according to their appreciation of the facts, the damages in this case should be increased to $10,000.

Per Gwynne J.—The meaning of a malicious prosecution is that a party, from a malicious motive, and without reasonable or probable cause, sets the law in motion against another; and as the want of probable cause for instituting the legal proceeding complained of is the essential foundation of the action, the termination of such proceeding in favor of the plaintiff must be alleged in the declaration. It is obvious therefore that the period when prescription of such an action will begin to run cannot be until such termination.

Appeal dismissed with costs.

Montreal v. Hall.—12th January, 1885.

Mandamus—Appeal in cases of.

See JURISDICTION 11.

2. By member of benefit society to be reinstated.

See BENEFIT SOCIETY.

3. To compel issue and delivery of debentures.

See BY-LAW 3.

4. **Rule nisi for—County school rates for 1873-78—Rev. stat. ch. 32, sec. 52, N. S.**

A mandamus was applied for at the instance of the sessions for the county of Halifax, to compel the warden and council of the town of Dartmouth to assess, on the property of the town liable for assessment, the sum of $16,976 for its proportion of county school rates for the years 1873-78, under sec. 52 of the Educational Act, R.S.N.S. ch. 38. The Supreme Court of Nova Scotia, without determining whether the required assessment was possible and was obligatory when the writ was issued, made the rule *nisi* for a mandamus absolute, leaving these questions to be determined on the return of the writ.

On appeal to the Supreme Court of Canada, it was **Held**, Strong and Gwynne JJ. dissenting, that the granting of the writ in this case was in the discretion of the court below, and the exercise of that discretion cannot at present be questioned.

Per Ritchie C.J.—That the town of Dartmouth is not, but that the city of Halifax is, exempted by ch. 32 R.S.N.S. from contribution to the county school rates.

The Queen v. Warden and Council of the Town of Dartmouth.—ix, 509.

5. Never granted to compel a person to do what is impossible.

See LICENSE 4.

Mandamus—Continued.

6. **Writ of—Return to—Demurrer to return.**

Ou an appeal from an order of the Supreme Court of Nova Scotia, quashing, on demurrer, a return to a writ of mandamus, and ordering a peremptory writ to issue, the objection was taken that under the practice in Nova Scotia a demurrer would not lie to a return to a writ of mandamus.

Held, that this objection must be over-ruled and the appeal heard on its merits.

Dartmouth v. The Queen.—12th May, 1885.

7. To compel school commissioners to carry out decision of Superintendent of Education. 40 Vic. ch. 22 sec. 11 Q.

See EDUCATION 3.

Maritime Court of Ontario—**Act establishing, intra vires.**

Held, that 40 Vic. ch. 21, establishing a court of maritime jurisdiction for the Province of Ontario, is *intra vires* of the Dominion Parliament.

"The Picton."—iv, 648.

2. **Appeal and cross-appeal—Collision with anchor of a vessel—Contributory negligence—Damages, apportionment of.**

On the 27th April, 1880, at Port K., on Lake Erie, where vessels go to load timber, staves, &c., and where the "Erie Belle," the respondent's vessel, was in the habit of landing and taking passengers, the "M. C. Upper," the appellant's vessel, was moored at the west side of the dock, and had her anchor dropped some distance out in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, and without buoying the same or taking some measure to inform incoming vessels where it was. The "Erie Belle" came into the wharf safely, and in backing out from the wharf she came in contact with the anchor of the "M. C. Upper," making a large hole in her bottom. On a petition filed by the owner of the "Erie Belle," in the Maritime Court of Ontario, to recover damages done to his vessel by the schooner "M. C. Upper," the judge who tried the case found, on the evidence, that both vessels were to blame, and held that each should pay one-half of the damage sustained by the "Erie Belle."

On appeal by owner of "M. C. Upper" and cross-appeal by owner of "Erie Belle" to the Supreme Court of Canada, **Held,** per Ritchie C.J. and Fournier and Taschereau JJ., that as the "Erie Belle," being managed with care and skill, went to the wharf in the usual way, and came out in the usual way, and as the "M. C. Upper" had wrongfully and negligently placed her anchor (as much a part of the vessel as her masts) where it ought not to have been, and without indicating, by a buoy or otherwise, its position to the "Erie Belle," the owner of the "Erie Belle" was entitled to full compensation, and the "M. C. Upper" should pay the whole of the damage.

Maritime Court of Ontario—Continued.

Per Strong, Henry and Gwynne JJ., that the "M. C. Upper" had a right to have her anchor where it was, and that it was not in the line by which the "Erie Belle" entered and by which she could have backed out; that the strain on the anchor chain when the crew of the "M. C. Upper" were hauling on it all the time the "Erie Belle" was at Port K. sufficiently indicated the position of the anchor, and therefore that the accident happened through no fault or negligence on the part of the "M. C. Upper."

The court being equally divided, the appeal and cross-appeal were dismissed without costs, and the judgment of the Maritime Court of Ontario affirmed.

McCallum v. Odette.—vii, 36.

3. **Jurisdiction of—Rev. Stats. Ont. ch. 128—Collision—Negligence, causing death—Action in rem by mother of deceased child—Master and servant.**

The appellant's child, a minor, was killed in a collision between two vessels by the negligence of the officers in charge of one of them, "The Garland." Petition against "The Garland," libelled under the Maritime Court Act at the port of Windsor, on behalf of the appellant, claiming $2,000 damages suffered by her, owing to the death of her son and servant, caused by the negligence of the officers in charge of said "Garland." The respondent intervened, and demurred on the ground that the petition did not set forth a cause of action against "The Garland" within the jurisdiction of the court.

Held, Fournier and Taschereau JJ. dissenting, that the Maritime Court of Ontario has no jurisdiction apart from R. S. O. ch. 128 (re-enacting in that Province Lord Campbell's Act, 9 and 10 Vic. ch. 98), in an action for personal injury resulting in death, and therefore the appellant had no *locus standi*, not having brought her action as the personal representative of the child.

Per Fournier, Taschereau, Henry and Gwynne JJ., reversing the judgment of the Maritime Court of Ontario, that Vice-Admiralty Courts in British possesions and the Maritime Court of Ontario have whatever jurisdiction the High Court of Admiralty has over "any claim for damages done by any ship, whether to person or to property."

Per Fournier and Taschereau JJ. dissenting, that apart from and independently of ch. 128 Rev. Stats. Ont., the Maritime Court of Ontario has jurisdiction in a proceeding *in rem* against a foreign vessel for the recovery of damages for injuries resulting in death; that the appellant, either in the capacity of parent or of mistress, was entitled to claim damages for the loss of her son or servant.

Monaghan v. Horn.—vii, 409.

Maritime Court of Ontario—Continued.

4. **Maritime court of Ontario, appeal from—Collision—Negligence—Damages.**

Appeal from a judgment of the judge of the Maritime Court of Ontario at Sandwich and Windsor.

The suit was brought by the owners of the tug "Minnie Morton" to recover damages occasioned by the tug being run into by and getting foul with a raft in tow of the tug John Owen. The collision occurred on the evening of the 1st October, 1881. At the time of the collision the Minnie Morton, which had been during that and the preceding day acting as a deck for divers, who were engaged in the endeavor to float a vessel named the Swain, then grounded to the north of Bois Blanc Island, in the Detroit River, was tied on the North side of the Swain, that is further in the channel, when the John Owen towing a raft of logs passed down the river to the eastward of the same island, and the tail of the raft collided with the Minnie Morton, and carried her down the river where she sank, and could not afterwards be found. The Detroit River is divided into two channels by Bois Blanc Island, and the eastward channel on the Canadian side is used for towing rafts down that stream. The petitioner averred that the master and crew of the Owen in passing the point where the Morton was lying, negligently steered the Owen nearer to the island than they should have done; that the Owen on account of the size of the raft was unable to exercise proper control over it, and it was carried by the current in a westerly direction against the Morton, and that the slow rate of speed at which the Owen proceeded in passing, either from the inability of the tug, or through the negligence of the master and crew to proceed faster, in conjunction with the neglect of the Owen to pursue a proper course, directly contributed to the disaster by permitting the raft to approach so near to the Morton, and with an insufficient rate of speed to resist the action of the current.

The answer denied the charge of negligence; averred that the tug and her raft were navigated with all due skill; that the "Owen," after having passed Lime Kiln Crossing, kept as near to the easterly bank of said river as she could be kept with safety; that she was proceeding with as much speed as it was practicable to maintain; that there was a strong north-easterly wind, and that the action of the wind caused the end of the raft to be thrown toward the upper end of the island, and if it came into collision with the "Morton," the same was not imputable to any fault, negligence or misconduct on the part of the tug, her officers and crew.

The defendant contended that there is a great deal of traffic in the river, most of which passes to the eastward of the island referred to; that many rafts in every year, and at all seasons, are towed down the river, and such rafts

Maritime Court of Ontario—Continued.

vary in size, some of them numbering, according to the evidence, 4,000,000 feet; that these rafts necessarily require a great deal of room, in fact occupy while passing the Bois Blanc Island, nearly all the space of the stream navigable at this point; that the "Minnie Morton," being so lying in the channel, was at the time of the accident without any lookout or watch of any kind; that she had not any light, or if a light, that it was not of a sufficient size or brightness, nor in accordance with the statute requirement in that behalf, and that the "Minnie Morton," lying in this navigable river, not in a harbor nor at a wharf or dock, ought to have been manned so as to have easily moved out of the way of passing vessels or rafts, so as to be out of the position of danger to herself in which she was lying and out of the course of vessels lawfully navigating the stream.

The Judge of the Maritime Court pronounced in favor of the petitioners and condemned the "Owen" for all damages sustained by the petitioners in consequence of the collision and total loss of the "Morton," and fixed the damages at $2,600.

On appeal to the Supreme Court of Canada, **Held**, that the finding of the judge of the court below should be affirmed. Gwynne J. dissenting.

Appeal dismissed with costs.

Owen v. Odette.—19th June, 1883.

Marriage.

See DIVORCE.

Marriage Contract—Donation in.

See DONATION.

Master of Ship—Dismissal of by Company—Part owner.

See CONTRACT 6.

Master and Servant—Right of action for loss of Servant—By Mother for death of Child.

See MARITIME COURT OF ONTARIO 3.

Mechanics Lien—**Prior mortgage—Delay—Rev. S. O. ch. 120.**

The period of 90 days limited by the 21st sec. of the Mechanics' Lien Act (R. S. O. ch. 120), for the commencement of proceedings to enforce the lien applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that whether proceedings have or have not been previously taken against the owner within the 90 days.

The plaintiffs, assignees of a mechanics' lien, brought an action against the owner and a prior mortgagee, but their action was dismissed as against the mortgagee for want of prosecution. Having succeeded in obtaining a judgment establishing their lien against the owner, they brought this action after the lapse of more than 90 days from filing their lien to obtain a declaration

Mechanics Lien—Continued.

of priority over the prior mortgagee to the extent that the work increased the selling value of the land.

Held, affirming the judgment of the Court of Appeal for Ontario, that the lien had ceased to exist as against the mortgagee.

(For a full statement of the facts see *Bank of Montreal* v. *Haffner* 3 Ont. Rep. 183 and 10 Ont. App. R. 592.)

Appeal dismissed with costs.

Bank of Montreal v. Worswick.—12th May, 1885.

Merchants' Shipping Act, 1854 (Imp.)—Does not prevent property in ship passing to assignee under Insolvent Act, 1875.

See INSOLVENCY 13.

Mesne Profits—In action for use and occupation.

See TENANTS IN COMMON.

Misrepresentation—By co-obligor, as to effect of bond.

See AGREEMENT 11.

2. By vendor of patent, as to duration of right.

See PATENT OF INVENTION 2.

3. By promoters of company—False statements in prospectus—Fraudulent concealment—Action for deceit.

See CORPORATIONS 24.

4. Fraudulent, as to security given in payment of goods.

See SALE OF GOODS 14.

Misfeasor, Joint—Judgment obtained against—Effect of.

See PETITION OF RIGHT 15.

Mitoyenneté—Common wall.

Held, that an owner of property adioining a wall cannot make it common unless he first pays to the proprietor the part he wishes to render common, and half the value of the ground on which such wall is built.

Joyce v. Hart.—1, 321.

Mortgage—Agreement to postpone—Non-registration—Priority.

In 1861, W. M., the owner of real estate, created a mortgage thereon in favor of J. T. for $4,000. In 1863 he executed a subsequent mortgage in favor of J. M, the appellant, to secure the payment of $20,000 and interest, which was duly registered on the day of its execution. In 1866 W. M. executed another mortgage to the respondent C., for the sum of $4,000, which was intended to be substituted for the prior mortgage of that amount, and the money obtained thereon was applied towards the payment thereof, and J. M. executed an agreement under seal—a deed poll—consenting and agreeing that the proposed mortgage to respondent C. should have priority

Mortgage—Continued.

over his. In 1875 J. M. assigned his mortgage for $20,000 to the Quebec Bank, without notice to the bank of his agreement, to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which C. had neglected to register. C. filed his bill against the executors of W. M., and against J. M. and the bank. The Court of Chancery held that the respondent was not entitled to relief upon the facts as shown, and dismissed the bill. The Court of Appeal affirmed the decree as to all the defendants, except as to J. M., who was ordered to pay off the respondent's (plaintiff's) mortgage, principal and interest, but without costs. J. M. thereupon appealed to the Supreme Court of Canada.

Held, affirming the judgment of the Court of Appeal, Strong J. dissenting, that as appellant could not justify the breach of his agreement in favor of C., he was bound both at law and in equity to indemnify C. for any loss he sustained by reason of such breach.

McDougall v. Campbell.—vi, 502.

2. **Limitations—Statutes of—Ch. 84 sec. 40 and ch. 85 secs. 1 & 6 Con. Stats. N. B.—Covenant in mortgage deed—Payment by co-obligor.**

J. H. borrowed $4,000 from M. C. on the 27th September, 1850, at which date J. H. & J. W. gave their joint and several bond to M. C., conditioned for the repayment of the money in five years, with interest quarterly in the meantime. At the same time, and to secure the payment of the $4,000, two separate mortgages were given: one by J. H. and wife on H.'s wife's property, and one by J. W. and wife on W.'s property. Neither party executed the mortgage of the other. The mortgage from J. W. contained a provision that upon repayment of the sum of £1,000 and interest, according to the condition of the bond, by J. W. and J. H., or either of them, their, or either of their, heirs, etc., then said mortgage should be void; a similar provision being inserted in the mortgage from J. H. The bond and mortgages were assigned to L. *et al.* (the appellants) in 1870, and the principal money has never been paid. J. W. died in 1858, and by his will devised all his residuary real estate, including the lands and premises in the above mentioned mortgage, to G. W. (one of the respondents) and others. J. W., in his lifetime, was, and since his death the respondents have been, in possession of the premises so mortgaged by J. W. Neither J. W., nor any person claiming by, through, or under him, ever paid any interest on said bond and mortgage, or gave any acknowledgment in writing of the title of M. C., or her assigns. J. J. H., the co-obligor, paid interest on the bond from its date to 27th March, 1870. On 20th January, 1881, under Consolidated Statutes of New Brunswick, ch. 40, a suit of foreclosure and sale of the premises mortgaged by J. W. was commenced by the appellants in the Supreme Court of New Brunswick in equity, and the court gave judgment for the respondents.

Mortgage—Continued.

On appeal to the Supreme Court of Canada, **Held,** affirming the judgment of the court below, Strong J. dissenting,—1. That all liability of J. W.'s personal representatives and of his heirs and devisees to any action whatever upon the bond was barred by secs. 1 and 6 of ch. 85 Consolidated Statutes of New Brunswick, although payment by a co-obligor would have maintained the action alive in its integrity under the English Statute 3 and 4 William IV. ch. 42.

2. That the right of foreclosure and sale of the lands included in the J. W. mortgage was barred by the Statute of Limitations in real actions, Cons. Stats. N. B. ch. 84 sec. 40.

Per Gwynne J.—The only person by whom a payment can be made, or an acknowledgment in writing can be signed, so as to stay the currency of the Statute of Limitations to a point which, being reached, frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say, the mortgagor, or some person in privity of estate with him, or the agent of one of such persons, and that moneys paid by J. H. in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by W.'s mortgage.

Lewin v. Wilson.—ix, 637.

3. Mortgagee of vessel who assigns as collateral security has an insurable interest—Notice of abandonment by.

See INSURANCE, MARINE 5.

4. **R. S. O. ch. 104—Wrongful distress for mortgage money.**

A mortgage made in pursuance of the Act respecting Short Forms of Mortgages, R. S. O. ch. 104, contained the clauses mentioned in the statute, and among the rest those which provided that the mortgagees on default of payment for two months, might on one month's notice, enter on and lease or sell the lands; that they might, distrain for arrears of interest, and that until default of payment, the mortgagors should have quiet possession. In addition to the statutory clauses the mortgage contained the following provision and variation: "And the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the company, subject to the said proviso."

Held, per Strong, Fournier and Henry JJ. affirming the judgment of the Court of Appeal for Ontario, Ritchie C.J. and Taschereau and Gwynne JJ. *contra*, that upon the proper construction of the deed there was no reservation of rent entitling the mortgagees to claim a landlord's right as against an execution creditor of a year's arrears of interest on their mortgage before removal of goods on mortgaged premises by the sheriff.

The court being equally divided the appeal was dismissed without costs.

Trust & Loan Company v. Lawrason & al.—x, 679.

Mortgage—Continued.

5. Of shares.

See CORPORATIONS 11.

6. **Of estate tail—Statutory discharge, effect of—R. S. O. ch. 111 secs. 9 and 67.**

Held, reversing the judgment of the court below, Henry J. dissenting, that the execution and registration, in accordance with the Revised Statutes of Ontario, ch. 111, sec 67, of a discharge of a mortgage made by a tenant in tail reconveys the land to the mortgagor barred of the entail.

Lawlor v. Lawlor.—x, 194.

7. By railway company of road.

See RAILWAYS AND RAILWAY COMPANIES 1.

8. **Statute of frauds—Bill for redemption—Absolute deed—Parol evidence to show that it was to take effect as a mortgage held admissible—Evidence of plaintiff uncorroborated insufficient—36 Vic. ch. 10 Ont.**

The bill, which was filed in 1876 by the children and heirs-at law of Jesse W. Rose, alleged that the deceased had, in 1861, conveyed certain real estate to his brother, Isaac Newton Rose, upon the expressed trust that he would advance him $1,000, and hold the property as security for the repayment of that sum with interest; that he never did advance that sum; that Jesse W. Rose died in 1872; that Isaac Newton Rose died in 1874, having devised this property to his son; that the trusts upon which it had been conveyed had been fulfilled; and sought an account of Isaac Newton Rose's dealings therewith. The defendant, the executor and executrix of Isaac Newton Rose, set up an absolute sale, and relied on the Statute of Frauds and the Statute of Limitations.

The evidence will be found set out fully in the report of the case in the court below (*See* 3 Ont. App. R. 309); part of such evidence consisted of the testimony of Colin Henderson Rose, one of the plaintiffs, a son of Jesse W. Rose, to the effect that his father being in difficulties in 1861, Isaac Newton Rose told him (C. H. R.) that he would take an assignment of the property, pay off certain mortgages thereon, advance Jesse W. Rose $1,000 and reconvey it at any time.

Proudfoot V.C. made a decree directing an account, and allowing the plaintiffs to redeem the lands on payment of the amount due to the defendants in respect of the advances made.

The Court of Appeal for Ontario held that the evidence showed the transaction to be a sale, and reversed the decree, Patterson J.A. being of opinion that oral evidence was not admissible to vary the deed, and Burton J.A. being of opinion that the evidence of Colin required corroboration under 36 Vic. ch. 10 (Ont.) Blake V.C. dissented, holding that parol evidence was admissible, and that he was not prepared to decide against the judgment of the V. C. in determining the weight to be attached to the evidence.

Mortgage—Continued.

On appeal to the Supreme Court of Canada, **Held,** that parol evidence was admissible to show that the absolute conveyance was intended to take effect as a mortgage, but the judgment of the court below, so far as it proceeded upon the ground that the testimony of the plaintiff, Colin Henderson Rose, required confirmation, was correct and ought to be affirmed.

Appeal dismissed with costs.

Rose v. Hickey.—13th March, 1880.

9. **Deed intended to operate as—Purchase for value without notice—Registration—Mortgage or sale—Purchase with agreement to resell—Amendment, right to order, under A. J. A. Ont. sec. 50.**

The plaintiff, alleging herself to be the owner of the land in dispute, filed her bill alleging that she conveyed the said lands on the 31st day of August, 1866, to one James McFarlane, deceased, by a deed absolute in form, but which was intended to be a security only for the repayment of the sum of $500, then advanced by McFarlane to her; that subsequently McFarlane, by deed absolute in form, dated the 13th of June, 1871, conveyed the lands to defendants Rose and McKenzie; that Rose and McKenzie had at the time of the conveyance to them notice of the plaintiff's rights; that subsequently and on the 21st of June, 1872, the defendants Rose and McKenzie conveyed the lands, by deed absolute in form, to the defendant Thomas Burke; that Burke had, before the time of the conveyance to him, notice of the plaintiff's rights; that in order to secure the payment of part of his purchase money to the defendants Rose and McKenzie, Burke mortgaged the lands to them by indenture of mortgage dated the 12th day of July, 1872, which they subsequently assigned to one Watson; and she prayed that it might be declared that the deed to McFarlane was intended to operate only as a security and that the plaintiff might be let in to redeem the lands; and that the defendant Burke might be restrained from cutting timber and ordered to account for the timber cut; and that the defendants might be ordered to remove the mortgage made to Rose and McKenzie, and for other relief.

By their answers, the defendants, Rose, McKenzie and Burke, while admitting that the conveyance to McFarlane was intended only to operate as a security, denied that they had any notice of that fact, and claimed to be entitled to hold the lands as purchasers for value without notice of the plaintiff's claim.

The cause was heard by Spragge, Chancellor, before whom evidence on the part of the plaintiff and defendants was taken on the 5th of May, 1875. During the progress of the cause, and before the evidence had all been adduced, and before any argument of the case, an application was made to his Lordship, on behalf of the defendant Burke, for leave to file a supple-

Mortgage—Continued.

mental answer, setting up the registry laws as a defence to the plaintiff's claim. This was refused, and a decree was made declaring that the conveyance to McFarlane was only as security for the payment of the $500; that Rose and McKenzie bought with actual knowledge of the plaintiff's claim, and that Burke bought from them with actual notice.

Burke then appealed to the Court of Appeal of Ontario, which court held that the evidence did not shew that Burke had actual notice of the plaintiff's claim when he purchased, that the amendment should have been allowed, and that the Court of Appeal had power then to allow it under the A. J. Act, sec. 50, but as it would not be proper to conclude the plaintiff without an opportunity of producing further evidence, the case was sent down for another hearing.

Proudfoot V.C. dissented, on the ground that the permission to amend was in the discretion of the judge, and that the court should not interfere with his decision. (See 4 Ont. App. R. 25.)

On appeal to the Supreme Court of Canada, **Held**, per Gwynne J. delivering the judgment of the court, that the judgment refusing the amendment was properly appealable to the Court of Appeal of Ontario, but when that court had made an order allowing the amendment in the exercise of its discretionary power, it might be doubted whether the Supreme Court had jurisdiction to entertain an appeal from such order. Assuming the Supreme Court to have such jurisdiction, it should be chary in exercising it, lest by so doing it should injuriously fetter the very extensive discretion in matters of amendment with which the Legislature of Ontario had thought fit to invest all courts in that province.

The doctrine that where a purchaser without notice has paid a portion of the purchase money and has given a mortgage for the balance, and before payment of this mortgage becomes affected with notice of an equitable title in plaintiff, who subsequently files a bill to set aside the sale, the purchaser shall be entitled to no relief or consideration whatever in a court administering equity in respect of the purchase money paid before he became affected with notice, was questioned in *Totten* v. *Douglas* (18 Grant 352), and the assertion of it in this case for the purpose of supporting the decree was also a reason for affirming the allowance of the amendment. These claims of transfers of the legal estate to relations upon an alleged verbal promise to hold as a mortgage subject to redemption, or to recovery upon repayment of a sum of money, ought to be scrutinized with the utmost jealousy, but more especially when the rights of third persons who have paid large sums of money to the apparent owners upon the faith of their title being good are brought in question, and it might prove pro-

Mortgage—Continued.

motive of the ends of justice that the allowance of the proposed amendment would give further opportunity for the consideration of this point.

Further, the decree took no notice of the interests of Watson, the assignee of the mortgage, who could not be deprived of the estate by anything done in the suit as constituted.

Per Ritchie C. J. dissenting.—The Supreme Court should determine whether or not the Chancellor was right in his opinion that the amendment refused by him, and directed by the Court of Appeal, would not on the facts as proved be of any avail to the defendants if it had been on the record at the time of his decision; and if not the amendment should not have been allowed by the Court of Appeal, but the judgment of the Chancellor should have been affirmed.

Appeal dismissed with costs, Ritchie C. J. and Henry J. dissenting.

21 June, 1880.

The defendant Burke subsequently put in a supplemental answer denying notice of the plaintiffs claim, and claiming the protection of the registry laws, and that he was a purchaser for value without notice. The case was again brought on for the examination of witnesses and hearing, on 31st March, 1881, before Spragge C., who held that the defendant had notice of the plaintiff's claim at the time he purchased, and was not a *bonâ fide* purchaser for value without notice.

On appeal to the Court of Appeal of Ontario that court was equally divided. (*See* 9 Ont. App. R. 429.)

On appeal to the Supreme Court of Canada, **Held**, Gwynne J. dissenting, that the redeemable character of the transaction being admitted on the pleadings, was not open to discussion. The only point to consider was whether the learned chancellor was wrong in finding as matter of fact that the defendants had actual notice. If they had actual notice this would defeat the registered title. The court being unable to say the learned chancellor was wrong, thought the appeal should be dismissed.

Per Gwynne J., dissenting, that the transaction was a sale of the land to McFarlane, and the evidence only established that McFarlane verbally and voluntarily, and so in a manner not binding upon him, promised James Peterkin, who acted as plaintiff's agent, and whom McFarlane regarded as selling the land although the deed was made by the plaintiff, that he might re-purchase the land, and that he (McFarlane) would re-sell and re-convey it to him upon repayment of the sum of $500 at any time during his (McFarlane's) lifetime; and further, that there was no evidence establishing any notice whatever binding upon the defendant Burke, or which could have any effect to defeat his purchase. Appeal dismissed with costs.

Peterkin v. McFarlane.--12th January, 1885.

Mortgage—Continued.

10. Assignment of mortgages as collateral security—Duty of Assignee as to collecting—Bond, action on—Equitable plea—Transfer of action to Court of Chancery under administration of Justice Act, Ont.

Action on a bond conditioned to pay the sum of £18,250 on 1st July, 1863, with interest at six per cent. half yearly in advance. Plea upon equitable grounds, in substance, that before the making of the bond the plaintiffs through the late John Hillyard Cameron, their trustee and manager, agreed to advance to defendants the sum of £18,250 by transferring to them certain sterling debentures of the town of St. Catharines to that amount, for which the defendants should give to the plaintiffs good mortgages upon real estate to be approved by plaintiffs' said manager, and that in the meantime the defendants should execute said bond, but that the debentures should only be handed over to the defendants as and when such approved mortgages should be delivered to the plaintiffs; that defendants assigned certain mortgages and executed others upon their own real estate, which were accepted and approved by plaintiffs' manager, who handed over debentures amounting at their par value to £14,000 stg.; that plaintiffs realized upon some, if not all, the mortgages, and defendants also paid large sums on account and defendants believed their bond was fully paid, but had received no account, and as the payments were numerous and extended over many years and the accounts were complicated, they prayed that the suit should be transferred under the Admn. of Justice Act to the Court of Chancery and the accounts there taken. The case was transferred to the Court of Chancery, where with the consent of the parties, a decree was made referring it to the Master to take the account between the parties. The Master made his report and the defendants appealed therefrom on three grounds: —

1. Because the Master had not charged the plaintiffs with the amount of a draft for $1,697 with interest.

2. Because the Master ought to have charged the plaintiffs with the difference between £2,000 in sterling debentures and $8,000 currency, the amount due on a mortgage, referred to as the Ross mortgage.

3. Because the Master ought to have charged plaintiffs with interest on $6,484 (the amount of a mortgage given by one McQueen and assigned to the plaintiffs) from 10th August, 1859.

The first ground of appeal turned entirely on the weight to be given to the evidence on one side or the other respecting the draft in question, which the plaintiffs contended was an accommodation draft given by one of the defendants to their manager, the defendants alleging that it was given in payment of an instalment of interest. Proudfoot V. C. allowed the appeal on this ground and his judgment was upheld by both the Court of Appeal and the Supreme Court of Canada.

Mortgage—Continued.

As to the second ground of the appeal, it appeared that among the mortgages assigned to the plaintiffs was one for $6,484 bearing interest at 6 per cent., executed by one McQueen upon certain land sold to him by one of the defendants to secure the balance of purchase money. The land was subject to a mortgage for $8,000, called the "Ross Trust Mortgage," and, at the time of the sale to McQueen, it was agreed the defendants should pay off this prior mortgage. At the time of the assignment of the mortgage to the plaintiffs they were informed of this agreement, and to secure the plaintiffs, their manager retained two of the sterling debentures amounting to £2,000 to pay this mortgage for $8,000. The defendants claimed that the plaintiffs were responsible for the application of the $8,000 out of the proceeds of the debentures from the 9th March, 1860, the date of the assignment of the mortgage, or that they should only be charged with $8,000 of the £2,000 sterling. The plaintiffs contended that nothing should be allowed, because their manager was also the manager of the Ross estate, and that the defendants consented to his retaining the two debentures in his character as agent of the Ross estate to be applied in satisfaction of the Ross mortgage, which was not satisfied until 1875.

Proudfoot V. C., **Held**, that the *onus* lay upon the plaintiffs to establish clearly that the debentures passed from them to the defendants, and were held by Cameron as agent of the Ross trust and not as their agent, and as the evidence was insufficient to support this contention the plaintiffs should bear the loss.

This holding was also upheld by both the Court of Appeal and the Supreme Court of Canada.

As to the third ground of appeal—although the plaintiffs took proceedings on the McQueen mortgage, the suit was conducted in such a dilatory manner that the final order of foreclosure was not obtained till 2nd April, 1875, and the property was then sold by plaintiffs to McQueen at a price much less than the principal and interest upon his original mortgage amounted to.

Proudfoot V.C., **Held**, that the defendants were not merely in the position of sureties for the assigned mortgages, who could not make the plaintiffs liable for mere delay in proceeding upon the mortgages, but that when mortgages, or judgments, or securities of these kinds are assigned, the assignees are affected with a trust in regard to them, which imposes upon them the duty of diligence in their management; the assignment removing the property from the control of the debtor, and placing it within the control of the creditor, imposes upon him the duty of using proper exertions to render it effectual for the purpose for which it was assigned. The plaintiffs

Mortgage—Continued.

were therefore liable for not having collected the interest in question; it having been lost by the wrongful act of themselves, or their manager, for whose conduct they were responsible.

The Court of Appeal and the Supreme Court of Canada affirmed the judgment of Proudfoot V.C.

Appeal dismissed with costs.

The Synod of the Diocese of Toronto v. De Blaquière—12th Feb. 1881.

11. Agreement in general terms to give a mortgage in part payment of purchase money is not complied with by assigning a second mortgage.

See SALE OF LANDS 11.

12. Foreclosure of mortgage—Sale of land under—Right to sue for residue of debt—Prohibition.

The testator, Michael Kearney, jr., had given to the plaintiff a mortgage on certain lands to secure the payment of some $7,000 due to the plaintiff, and had also given to the plaintiff a bond conditioned for the due payment of said debt according to the terms of the said mortgage. The mortgagor made default in payment of the said money, and the mortgage was foreclosed, and the mortgaged premises were sold by the sheriff, according to the usual practice, and bought in by the plaintiff for $4,000. The sheriff's report of the proceedings under the decree of foreclosure and the sale of said land and application of the proceeds, was duly confirmed by the court, and there being still some $3,000 due the plaintiff, he brought this action on the bond. The special case admitted that the proceedings in the foreclosure suit were regular in every respect, and also that the plaintiff had since the said sale conveyed the lands in question to a third party. The defendant applied for a writ of prohibition to restrain the plaintiff from proceeding with the action, claiming that such action opened up the foreclosure, and the plaintiff, not being in a position to re-convey the mortgaged premises to the defendant, or the heirs of the mortgagor, his remedy on the bond was barred.

The Supreme Court of Nova Scotia held that the English rule did not apply, as the practice was different in Nova Scotia, the sale of the mortgaged lands not being the act of the mortgagee but of the court, and refused the writ.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, that the mortgagee was not prohibited from proceeding on the bond to recover the residue of his debt.

Appeal dismissed with costs.

Chisholm v. Kenny.—16th February, 1885.

13. Of interest in ship.

See INSOLVENCY 13.

Mortgage—Continued.

14. Mechanic's lien as against prior mortgagee.

See MECHANICS LIEN.

15. **Assignment of equity of redemption in trust—Re-conveyance—Foreclosure against trustee—Subsequent sale—Power of sale, exercise of, by deed after foreclosure.**

Kelly gave a mortgage of leasehold premises to respondents, with covenant authorizing them to sell on default, with or without notice to the mortgagor, and at either public or private sale. The mortgage conveyed the unexpired portion of the current term and "every renewed term." Afterwards Kelly conveyed the equity of redemption in the mortgaged premises to one O.'S., in trust, to carry out certain negotiations, and left the country. During his absence the lease of the ground expired, and it was renewed in the name of O.'S. Default having been made in payment of interest under the mortgage, a suit was brought against O.'S. for foreclosure, prior to which O.'S., having been threatened with such suit, re-conveyed equity of redemption to Kelly, but deed was never delivered. O.'S. then filed an answer and disclaimer of interest in said suit, which he afterwards withdrew and consented to a decree, and the mortgagees subsequently sold the mortgaged premises to the defendant Damer for a sum less than the amount due on the mortgage; the deed to Damer recited the proceedings in foreclosure and purported to be made under the decree.

Kelly brought suit to have the decree of foreclosure opened and cancelled, the deed to Damer set aside, and to be allowed to come in and redeem the premises.

Held, affirming the judgment of the Court of Appeal (11 Ont. App. R. 526) Strong J. dissenting, that even if the decree of foreclosure were improperly obtained, and consequently void, yet the sale to Damer was a proper exercise of the power of sale in the mortgage and should be sustained, and that it passed the renewed term which was included in the mortgage.

Appeal dismissed with costs.

Kelly v. Imperial Loan Ins. Co. (22 C.L.J. 18, 6 C.L. Times 117) 16th Nov. 1885.

16. **Foreclosure and sale—Purchase by mortgagee—Right to redeem—Statute of limitations—R. S. Ont. ch. 108 sec. 19—Trustee for sale—Acquiescence.**

In a foreclosure suit against the heirs of a deceased mortgagor, who were all infants, a decree was made ordering a sale; the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee, who had not received permission from the court to bid; J. H., immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands

Mortgage—Continued.

became vested in the defendant M. H., who sold them to the defendant L., a *bonâ fide* purchaser, without notice, taking a mortgage for the purchase money. In a suit to redeem the said lands brought by the heirs of the mortgagor some eighteen years after the sale and more than five years after some of the heirs had become of age (See 9 Ont. App. R. 537),

Held, that the purchase by the mortgagee through J. H. was void in equity; the evidence showed that the arrangement had a prejudicial effect upon the sale, and the price was less than the fair value of the property; the suit was one impeaching a purchase by a trustee for sale, and the defendants and those under whom they claimed never having been in possession in the character of mortgagees, the Statute of Limitations had no application and the right of the plaintiffs to redeem was not barred; nor had the plaintiffs lost such right either by laches or acquiescence, as it appeared they were not aware of the fraudulent character of the sale until just before commencing their suit. That L., being a purchaser for valuable consideration without notice, was entitled to retain the benefit of his purchase subject to the mortgage, which should be deposited in court, and upon which, and the money thereby secured, the plaintiffs should have a lien for the amount which might be found due to them, and L. should be ordered to pay the mortgage money into court as it should become due, L. to be paid his costs by his co-defendants. Appeal allowed with costs.

Faulds v. Harper. 22 C. L. J. 162; 6. C. L. T. 246.--9th March, 1886.

Mortmain—Statutes of—Not in force in New Brunswick.

See WILL 6.

Municipal Acts—Relating to original road allowance.

See HIGHWAY.

Municipal Corporation—Power to raise level of streets.

See CORPORATIONS 16.

2. Liability of for non-repair of streets.

See CORPORATIONS 18.

3. Liability of for defective bridge.

See CORPORATIONS 19.

4. Municipality—Drainage in—Petition for—Extending into adjoining Municipality—Report of Engineer—Not defining proposed termini—Benefit to lands in adjoining Municipality—Assessment on adjoining Municipality.

Under the drainage clauses of the Municipal Act a by-law was passed by the township of Chatham founded on the report, plans and specifications of a surveyor, made with a view to the drainage of certain lands in that township. The by-law, after setting out the fact of a petition for such work having

Municipal Corporation—Continued.

been signed by a majority of the ratepayers of the township to be benefitted by the work, recited the report of the surveyor, by which it appeared that in order to obtain a sufficient fall it was necessary to continue the drain into the adjoining township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line between Dover and Chatham, for part of the cost as for benefit to be derived by the said lots and roads therefor. The township of Dover appealed from this report, under sec. 582 of 46 Vic. ch. 18, on the grounds, *inter alia*, that a majority of the owners of property to be benefitted by the proposed drainage works had not petitioned for the construction of such work as required by the statute; that no proper reports, plans, specifications, assessments and estimates of said proposed work had been made and served as required by law; that the council of Chatham, or the surveyor, had no power to assess or charge the lands in Dover for the purposes stated in the said report and by-law; and that the report did not specify any facts to show that the council of Chatham, or their surveyor, had any authority to assess the lots or roads in Dover for any part of the cost of the proposed work; that the assessment upon lots and roads in Dover was much too high in proportion to any benefit to be derived from the proposed work and that no assessment whatever should be made on the lands or roads in Dover as the work would, in fact, be an injury thereto; and that the report did not sufficiently specify the beginning and end of the work, nor the manner in which Dover was to be benefitted.

Three arbitrators were appointed under the provisions of the act, and at their last meeting they all agreed that the Township of Dover would be benefitted by the work, but R. F., one of the arbitrators, thought $500 should be taken off the town line, and W. D., another of the arbitrators, held that while the bulk sum assessed was not too great the assessment on the respective lands and roads and parts thereof should be varied, but that this was a matter for the Court of Revision. A memorandum to this effect was signed by W. D. and A. E. the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award "if in accordance with the above memoranda." Later, on the same day, W. D. and A. E. met and signed an award determining that the assessment on the lands and roads in Dover, and on the town line made by the surveyor should be sustained and confirmed; that the appeal should be dismissed, and that the several grounds mentioned in the notice of appeal had not been sustained.

The Queen's Bench Division set aside this award on two grounds, namely, want of concurring minds in the arbitrators, and of defect in the surveyor's report in not showing specifically the beginning and end of the work. 5 O.

Municipal Corporation—Continued.

R. 325. The judgment of the Queen's Bench Division was sustained by the Court of Appeal. 11 Ont. App. R. 248. On appeal to the Supreme Court of Canada:

Held, Ritchie C.J. dissenting, that the award should have been set aside upon the ground that it was not shown that a petition for the proposed work was signed by a majority of the owners of the property to be benefitted thereby, so as to give to the corporation of Chatham jurisdiction to enter the township of Dover and do any work therein.

That the arbitrators should have adjudicated, upon the merits of the appeal, against the several assessments on the lots and roads assessed, as their award was, by secs. 400 and 403 of 46 Vic. ch. 18, made final, subject to appeal only to the High Court of Judicature, and it was not a matter for the Court of Revision to deal with at all, as held by one of the arbitrators.

That the award should have been set aside because it did, in point of fact, as it stood, profess to be a final adjudication against the township of Dover upon all the grounds of appeal stated in the notice of appeal, and did, in point of fact, charge every one of the lots and roads so assessed with the precise amount assessed upon them respectively, although, by a minute of the proceedings of the arbitrators who signed the award, it appeared that they refused to render any award upon such point and expressed their intention to be to submit that to the Court of Revision.

That the arbitrators should have allowed the appeal to them against the surveyors assessment, and that their award should have been set aside on the merits, because the evidence not only failed to show any benefit which the lots or roads in Dover which were assessed would receive from the proposed work, but the evidence of the surveyor himself showed that he did not assess them for any benefit the work would confer upon them, but for reasons of his own which were not sufficient under the statute and did not warrant them to be assessed.

Appeal dismissed with costs.

The Corporation of the Township of Chatham and North Gore v. The Corporation of the Township of Dover East and West.—April 9th, 1886.

Mutual Insurance Companies—Uniform Conditions Act, R. S. O. ch. 162, not applicable to.

See INSURANCE, FIRE 5.

Navigation—**Obstruction in navigable waters, below low water mark—Nuisance—Trespass.**

E. *et al.* brought an action of tort against W. for having pulled up piles in the harbor of Halifax below low water mark, driven in by them as supports to an extension of their wharf, built on certain land covered with

Navigation—Continued

water in said harbor of Halifax, of which they had obtained a grant from the provincial government of Nova Scotia in August, 1861. W. pleaded, *inter alia*, that "he was possessed of a wharf and premises in said harbor, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to Halifax harbour, to and from the south side of said wharf, with steamers, &c., and because certain piles and timbers, placed by the plaintiffs in said waters, interfered with his rights, he (defendant) removed the same." At the trial there was evidence that the erections which E. *et al.* were making for the extension of their wharf did obstruct access by steamers and other vessels to W's. wharf. A verdict was rendered against W., which the full court refused to set aside.

On appeal to the Supreme Court of Canada it was **Held,** reversing the judgment of the Supreme Court of Nova Scotia that, as the Crown could not, without legislative sanction, grant to E. *et al.* the right to place in said harbor below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and as W. had shown special injury, he was justified in removing the piles which were the trespass complained of.

Wood v. Esson.--ix, 239.

2. Obstruction in navigable rivers.

See LEGISLATURE 8.

3. **Impeding navigation of river—Obstructions placed for purpose of repairing bridge—Powers of Bridge Company—Negligence—Damages to raft—43 Vic. ch. 61 D.—44 Vic. ch. 51 D.**

The plaintiff, by his declaration in this action, in substance alleged that he was possessed of a raft of oak logs and was lawfully floating the same down the Red River, which is a navigable river, and that the defendants had unlawfully placed certain piles and obstructions in the bed of the said river and obstructed the free navigation thereof, so that the raft of the plaintiff struck against the said piles and obstructions, and thereby the said raft and the said logs composing the same were carried away, destroyed and sunk.

The defendants, by their pleas, denied that they placed said piles and obstructions in the bed of the said river, and alleged that the said raft was not the plaintiff's, and also alleged that they were a body corporate, empowered by certain Acts of the Parliament of Canada (43 Vic. ch. 61, and 44 Vic. ch. 51,) to erect, construct, work, maintain and manage a bridge across the Red River, and that in pursuance of said Acts they have erected such a bridge, and that before the happening of the events complained of it became necessary, for the purpose of keeping up and maintaining the said bridge, to place the said piles and obstructions, in the declaration mentioned,

Navigation—Continued.

in the bed of said river, at and under the said bridge, and that thereupon they lawfully placed the said piles and obstructions there for the purposes aforesaid, and not otherwise, and that they used the utmost care and diligence in the placing of said piles and obstructions, so as not to interfere with the free navigation of said river, and that the said piles and obstructions did not interfere with the free navigation thereof, and that the damages complained of happened through the appellant's own negligence.

The bridge having been injured by the ice in the spring of 1882, it became necessary to repair it. The piles, &c. complained of were placed in the space where the plaintiff's raft struck, for the purpose of being used in the repairing of the bridge and rebuilding the permanent structure after its injury.

The bridge was constructed with a swing or draw, and two spaces of between eighty and ninety feet were left, one upon each side of the swing pier, as required by the Acts of incorporation. These spaces were open at the time of the injury complained of, no piles having ever been placed in them.

A verdict was found for the plaintiff. The Court of Queen's Bench for Manitoba set the verdict aside and ordered a non-suit to be entered.

On appeal to the Supreme Court of Canada, **Held**, that the defendants had not exceeded, nor been guilty of negligence, in carrying out the powers conferred upon them by their charter, and were therefore not liable.

Appeal dismissed with costs.

Rolston v. Red River Bridge Co.—12th May, 1885.

4. **Navigation, interference with—Water lots—Crown grant—Easement—Trespass.**

This is an appeal from the judgment of the Court of Appeal for Ontario dismissing the appeal of the defendants, the London and Canadian Loan and Agency Company (limited), Sidney S. Hamilton and Robert B. Hamilton, from the judgment of the High Court of Justice, Queen's Bench Division.

The action was brought for certain trespasses committed by the defendants in entering upon the plaintiffs' water lot and forcibly preventing the plaintiffs from using or filling in the same, the defendants pretending that they were entitled as owners of the adjoining lot to a right of way over the plaintiffs' property, "together with the right to anchor ships, vessels, tugs, schooners and boats, and allow them to remain upon the lands so claimed by the plaintiffs during the time navigation is closed in each year, and also at other times for shelter and repairs, or other causes of detention, as well as for the purpose of loading and unloading at all times of the year."

Navigation—Continued.

The water lot in question is bound on the north by the Toronto Esplanade, on the south by the Windmill Line (an imaginary line which forms the southerly boundary of all the water lots in the city of Toronto), on the west by the production of the eastern limit of George street, and on the east by the water lot of the defendants, and is occupied by the plaintiff, George Warin, who continues to carry on the business of boat building in which he was engaged at the commencement of this action, in partnership with his brother, James Warin, deceased.

The facts will be found more fully set out in the reports of the case in the court below. 7 Ont. R. 706; 12 Ont. App. R. 327.

The Court of Appeal for Ontario **Held**, affirming the judgment of the Queen's Bench Division, that the plaintiffs claiming under a grant from the crown to the city of Toronto, which gave a right to the city and its lessees to occupy and use for the purposes of stores and buildings certain lots covered with water, which grant was confirmed by legislation, had the right to build as they chose upon the lots, subject to any regulations which the city had the power to impose upon the lots, and in doing so to interfere with the rights of the public to navigate the waters.

The finding of the jury, negativing an easement contended for by the defendants, was also affirmed by that court.

On appeal to the Supreme Court of Canada, **Held**, that the judgment of the court below should be affirmed.

Per Ritchie C.J.—The jury in the case negatived the supposed easement claimed by the defendants, the Divisional Court sustained such finding and the Court of Appeal found it impossible to say that the jury had erred. No good reason has been assigned in this court to justify its interference. Without the establishment of such an easement and an interference therewith it is clear defendants cannot succeed. The combined effect of the Crown grant and the subsequent legislation clearly gave a right to interfere with the navigation by building on or filling up the lots. Until built on or filled up the public, no doubt, had the right to use the open waters for the purposes of trade and navigation; but such a user by any one individual would not give him a prescriptive right against the owner. The tying of the vessels by defendants at their wharf was avowedly for the purpose of preventing plaintiffs using their property. Defendants having built on their own property and having turned it to its full advantage claimed they could not get the benefit of it unless allowed to use part of plaintiffs' lot. There was no reasonable ground for interfering as an Appellate Court with the decision of the court below.

Fournier, Henry and Taschereau JJ. concurred.

Navigation—Continued.

Per Gwynne J.—The position taken by the defendants, by way of defence to this action, is utterly untenable. The defendants, the Loan Company, are owners in fee, and the other defendants are in possession under them of a piece of land covered with water known as the east half of a certain water lot called water lot number 17, situate on the south side of the esplanade, in the city of Toronto, by title derived from one George Monro, deceased, and the plaintiffs are tenants of the west half of the same water lot under J. M. Monro, who is the devisee thereof in fee under the will of the said George Monro. The southerly limit of this water lot, that is its limit on the water side, is a line drawn across the Bay of Toronto from a point near the site of the French fort, west of Toronto garrison, to Gooderham's mills, as described in letters patent under the great seal of the late Province of Upper Canada, granted in the year 1840, which letters patent and the title to the lands covered with water thereby granted, including this water lot number 17, were confirmed by two Acts of the Parliament of the late Province of Canada, namely 16 Vic. ch. 219, and 23 Vic. ch. 2 sec. 35.

Now to an action of trespass brought by the plaintiffs against defendants for forcibly and wrongfully entering upon the plaintiff's half of the said water lot, and breaking down certain fences of the plaintiffs thereon, and with vessels trespassing on the same, and forcibly preventing the plaintiffs from filling up the said water lot and enjoying the same, the defendants plead that at the time of the alleged trespass complained of, the defendants Hamilton were in possession of the said east half of the said water lot No. 17, under a contract for the purchase of the same made with the defendants, the company, who were the owners thereof in fee simple, and that the occupiers of the said east half of the said water lot for twenty years before this suit enjoyed as of right without interruption for the more convenient use, occupation and enjoyment of the said land of the defendants a way for, in, and with, ships, vessels, schooners, tugs, and boats, from a public highway on the waters of the bay in front of the city of Toronto over the said land in the statement of claim claimed by the plaintiffs to the said water lot of the defendants, and from the said last mentioned water lot over the said land so claimed by the plaintiffs to the said public highway at all times of the year, together with the right to anchor all such ships, vessels, schooners, tugs and boats, and allow them to remain upon the lands so claimed by the plaintiffs during the time navigation is closed in each year, and also at other times for shelter, or repairs, or other cause of detention, as well as for the purpose of loading and unloading at all times of the year, and the plaintiffs on the occasion of the trespasses alleged in their statement of claim and at other times drove piles in the land claimed

Navigation—Continued.

by the plaintiffs, and in that way and by other means and devices interfered with and obstructed the defendants in the use and enjoyment of the said way and the said rights, and the plaintiffs threaten and intend to, and they will, unless restrained from so doing, continue to interfere with and obstruct the defendants in the use and enjoyment of the said way and rights. What in effect the defendants assert by this plea is, that as appurtenant to the east half of this water lot, No. 17, and the erections thereon, the defendants have acquired by prescription a perpetual easement and right of way from the waters of the bay in front of the city of Toronto lying outside of the line known as the wind-mill line across those waters of the bay inside of that line, which cover the west half of the said water lot, No. 17, to a wharf erected in the waters of the same bay, situate on the east half of the same water lot, and have so made the west half of the said water lot, No. 17, and the waters of the bay which cover it servient to the east half of the same water lot. But if the waters covering the west half of the said water lot be, as they in evidence appear to be, situate in the navigable portion of the Bay of Toronto they are, although inside the wind-mill line, so long as the water lot remains unreclaimed or unimproved, equally open to all members of the public navigating the same, and no private easement therein can be acquired by any particular person by reason of his being the owner of an improved or reclaimed water lot or otherwise. To meet this view the defendants, by way of alternative defence, have pleaded that the lands claimed by the plaintiffs, that is to say, the west half of the said water lot No. 17, are and were, at the time of the trespasses alleged in the statement of claim, covered by the waters of Lake Ontario or of the harbor of the City of Toronto, which is an inlet of said Lake Ontario, which were then, and had always theretofore been and now are, public navigable waters flowing and being over and upon said lands, and such waters were not at any time, and are not now, the property of the plaintiffs, and the defendants at the time of the alleged trespass, and before and since, were entitled equally with the plaintiffs in exercise of the right as part of the public of Canada, to the full and uninterrupted use and enjoyment of the said public waters flowing and being over and upon the lands claimed by the plaintiffs, and the plaintiffs wrongfully, on the occasion of the alleged trespasses in the statement of claim mentioned, and at other times, by the means stated in the statement of claim, and by driving piles in the lands claimed by the plaintiffs so that the same stood up through the said public waters, and by other means and devices, interfered with and obstructed the navigation of the said waters and the defendants, in the enjoy-

Navigation—Continued.

ment of the same, and if the defendants did any of the acts complained of, which they deny, they did so for the purpose of abating a public nuisance existing in the said waters and obstructing the the navigation thereof, and which acts of the plaintiffs were also a nuisance and injury to the defendants, and hindered them from the free enjoyment and use of the said public right of navigation.

Neither of these contradictory defences is at all tenable, not the first because the waters covering the water lots, so long as they remain unreclaimed, being navigable waters of the Bay of Toronto, no private easement can be acquired in such waters, which are equally open to all her Majesty's subjects to navigate upon, and not the second, because, although until reclaimed or enclosed the waters covering the water lots as granted are open to the public to navigate upon, still the right to reclaim them, and to appropriate them to their own private purposes and uses by the grantees in the terms of the grants, which was the right which the plaintiffs were exercising, and with which the defendants interfered, belongs to the grantees of the respective water lots, and their heirs and assigns. The effect of the letters patent granting the water lots, as confirmed by the Acts of Parliament, is to pass to the grantees their heirs and assigns in fee simple the land covered with water, together with the right of reclaiming the water lots by filling them up wholly and making dry land of them up to the wind-mill line, or by erecting wharves, warehouses, or other structures thereon at their will and pleasure, within the terms and provisions of the letters patent and the confirming Acts of Parliament. In view of the high-handed and vexatious way in which the defendants interfered with the plaintiffs in the exercise of their undoubted rights, the damages awarded by the jury, although large, cannot be said to be excessive. The appeal must therefore, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Warin v. The London & Can. Loan & Agency Co.—9th April, 1886.

Negligence—Accident—Failure to use Air Brakes.

See RAILWAYS AND RAILWAY COMPANIES 2.

2. Contributory—Collision with Anchor.

See MARITIME COURT OF ONTARIO 2.

3. Collision causing death.

See MARITIME COURT OF ONTARIO 3.

4. Of servants of the Crown.

See PETITION OF RIGHT 1, 10, 11, 15.

2. **In criminal appeal—Cons. Stats. U. C. ch. 112, and Cons. Stat. L. C. ch. 77. secs. 57, 58, and 59, as the same may be effected by 32 and 33 Vic. ch. 29 sec. 80, and 38 Vic. ch. 11, sec. 49.**

Held, that, since the passing of 32 and 33 Vic. ch. 29, sec. 80, repealing so much of ch. 77 of Cons. Stat. L. C. as would authorize any court of

New Trial—Continued.

the Province of Quebec to order or grant a new trial in any criminal case, and of 32 and 33 Vic. ch. 36, repealing sec. 63 of ch. 77 Cons. Stats. L. C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial, and that the Supreme Court of Canada, exercising the ordinary appellate powers of the court, under secs. 38 and 49 of 38 Vic. ch. 11, should give the judgment which the court whose judgment is appealed from ought to have given, viz: to reverse the judgment which has been given, and order prisoner's discharge.

Laliberté v. The Queen.--1, 117.

3. **New trial—Evidence—Where improperly received and afterwards withdrawn by judge from jury—License to cut timber.**

The plaintiff was the licensee of certain crown lands, under license from the Crown, to cut timber and logs thereon. These licenses did not contain any description or boundaries, but were described as (1) "No. 192 "east half block 176 Muzerall Brook, containing three square miles," and (2) "South of main S. W. Miramichi River, N. east quarter of block 42, and "the southern 1¼ miles of block 41." The plaintiff endeavored by the evidence of one Braithwaite and one Freeze to identify the lands alleged to be included in these licenses, and in their evidence and that of one Flynn proved that logs had been cut upon these blocks by two parties, respectively named Sutherland and Kirwan, and on the trial the plaintiff offered to prove the statements of these two parties and admissions made by them. The defendant's counsel objected to these statements as no evidence against the defendant, and on the objection being taken, the chief justice only admitted it on the plaintiff's counsel undertaking to connect the defendant with these parties, Sutherland and Kirwan. This he failed to do, but called one Coleman, an agent of the plaintiffs, to depose as to certain statements of the defendant. The plaintiff's counsel addressed the jury upon the whole evidence, commenting upon all the facts, but the learned chief justice in charging the jury said that if the case rested on the evidence of Braithwaite, he was of opinion that the plaintiff failed to make out his case, and also stated his opinion that the declarations of Sutherland and Kirwan were not evidence against the defendant, and that the plaintiff's case must depend upon the conversations between Coleman and the defendant respecting the logs. Upon this charge, the jury found a verdict for the plaintiff for $965.

A rule *nisi* was obtained for a new trial, and after argument, the rule was discharged by the first division of the Supreme Court of New Brunswick, the judges holding, under authority of *Wilmot* v. *Vanwart* (1 P. & B. 496), that when evidence, which has been improperly received, has been

New Trial—Continued.

withdrawn by the judge from the consideration of the jury, such improper admission of evidence is not a ground for a new trial.

On appeal to the Supreme Court of Canada, **Held**, that the Supreme Court of New Brunswick was correct in refusing a new trial on the ground of the improper admission of evidence; the plaintiff having failed to connect the statements of Sutherland and Kirwan with the defendant, such evidence was properly and sufficiently withdrawn from the jury. But as regards Coleman's evidence there was not sufficient to go to the jury, and the learned Chief Justice should have left nothing to the jury. On this ground the rule *nisi* for a new trial should be made absolute.

Appeal allowed with costs.

Snowball v. Stewart.—16th February, 1881.

4. **New trial—Banker and customer—Deposit for special purpose—Where whole evidence before the Court, case not sent back—Sec. 22 S. C. Act.**

A firm in Ottawa, called Satchell Brothers, effected a composition under the Insolvent Act of 1875, for 33⅓ per cent.

By their deed of composition and discharge the insolvents covenanted with their creditors to pay the composition in four payments, and to give each creditor their promissory notes for the several payments—the notes falling due: the first series on 4th November, 1876, the second on 4th May, 1877, the third on 4th November, 1877, and the fourth on 4th May, 1878.

The first notes, viz: those falling due on 4th November, 1876, were to be secured by the endorsement of a Mr. Hill and a Mr. Dobier, and all the notes were to be further secured by the assignee, Mr. Eastwood, holding in trust, as security for their due payment by the insolvents, certain real estate, which formed part of the assets.

The notes were duly given as agreed, and all of the first series were paid, except two, both of which were held by the Ontario Bank.

The gross amount of the composition was $11,931.89; each instalment, therefore, was a little under $3,000, the exact amount being $2,982.97. The two unpaid notes were for $260.84, and $1,036.30. Satchell Brothers kept their account with the Ontario Bank. When these two notes matured they were charged to the account of Satchell Brothers, and a renewal note was taken from them with the same endorsers for two months, for the amount of both notes which was $1,297.14, and the original notes were cancelled.

The note was three times again renewed, always with the same endorsers, viz: for twenty days, ten days and thirty days. The last renewal note fell due on 1st May, 1877, three days before the second series of the composition notes. It was a note for $1,310.97.

New Trial—Continued.

Sometime in the fall of 1876, Satchell Brothers, being unable to meet the composition payments, made application to the Trust and Loan Company for a loan of $9,000—and subsequently for an additional sum of $5,000—making together the sum of $14,000, on the security of their real estate, which the Trust and Loan Company agreed to advance. The firm of Stewart, Chrysler and Gormully, solicitors, of which the plaintiff was the senior partner, was employed by the Trust and Loan Company as their agents in Ottawa, to see that the title to the property mortgaged was made satisfactory, and thereupon to complete the loan. A mortgage for $9,090 was executed and registered in December, 1876, and a mortgage in the further sum of $5,000 was given in March, 1877. On investigating the title it was found that the lands of Satchell Brothers were vested in the assignee, who held the same as security for the payment of the composition notes given by Satchell Brothers under the terms of the deed of composition above referred to and set out, and it became necessary to pay the whole composition and to obtain from the assignee a re-conveyance to Satchell Brothers, to protect the title of the Trust and Loan Company, as mortgagees, before the loan could be carried out by that company. To secure that company the plaintiff was instructed to purchase or pay all the composition notes remaining unpaid, and for that purpose, on the 3rd May, 1877, the Trust and Loan Company, through their solicitors in Toronto, enclosed two cheques to the plaintiff for the respective sums of $8,599.90 and $4,780.70, with directions to pay the notes falling due the following day. On the 4th May the plaintiff deposited in the appellants' bank the following cheque of his firm:

"Ottawa, May 4th, 1877.

"The Canadian Bank of Commerce,

"Pay Manager Ontario Bank or order $4,500 to purchase composition "notes of Satchell Brothers for Trust and Loan Company of Canada.

Stewart Chrysler & Gormully."

"$4,500."

This was endorsed by the Manager: "Credit Satchell Brothers' composition account. Sd, J. H. Woodman, Manager."

The second instalment of composition notes which fell due on that day, together with the said note for $1,310.97 were paid and charged against said deposit.

Mr. Woodman, the bank manager who held the one note then three days over due, and at whose office all the notes falling due that day were payable, had been assured by the Satchells in the previous October or November that the over-due note should be the first thing paid out of the loan they had then in contemplation, and he was therefore prepared to find that that

New Trial—Continued.

note was being provided for. One Harper was bookkeeper for the Satchells, and had in fact been their agent in procuring Mr. Woodman to hold over the note in expectation of payment from the loan. He does not appear to have known that the money was lent to pay the latter notes only, and he had that very day a statement showing notes to the amount of $4,100 to be paid, including the $1,310.97 note. But while Woodman and Harper were thus depending on having this particular note paid, the plaintiff was ignorant of its existence.

As soon as the plaintiff became aware that the note had been charged to this account, he protested against the right of the defendants to do so. He afterwards paid in other moneys from time to time to meet the third and fourth instalments, and at last he signed the formal confirmation of his account, required by some banks when the customer's cheques are returned to him. This was an oversight and was corrected by a tender of the note in question, and a demand of the money.

This action was instituted to recover from the bank the sum of $1,310.97.

The case was tried before Mr. Justice Cameron and a jury. The only question left by the learned judge to the jury was the following:

"Was this $1,310 note a composition note or was it not? Was it a com-"position note of Satchell Brothers?" And he directed the jury that if it was not such, the defendants (the Ontario Bank) were not justified in charging it against the deposit of $4,500, and that the plaintiff would be entitled to recover. The jury rendered a verdict for the plaintiff $1,503.50; the learned judge reserving leave to the defendants to move to enter a non-suit. The defendants obtained a rule *nisi* in the Court of Common Pleas, calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial had between the parties, or a non-suit entered pursuant to the leave reserved at the trial, or why a new trial should not be had between the parties, on the ground that the verdict was contrary to law and evidence and against the weight of evidence. Judgment was given making absolute the said rule *nisi* and ordering that the verdict be set aside and a new trial had between the parties without costs, on the ground that the note was a composition note and that the only question left to the jury being, whether this note was or was not a composition note, and the jury (having found a verdict for the plaintiff) must have been of the opinion that it was not, and consequently the finding of the jury was contrary to the evidence.

From the judgment of the Court of Common Pleas the respondent appealed to the Court of Appeal for Ontario, which allowed the said appeal with costs, and directed that the rule *nisi* in the Court of Common Pleas

New Trial—Continued.

should be discharged with costs, on the ground that the question as to whether the note in question was a composition note or not was immaterial, and that there was no evidence proper to leave to the jury on behalf of the defendants, and the defence set up was not maintainable in law upon the undisputed facts in evidence.

On appeal to the Supreme Court of Canada, **Held,** Ritchie C.J. doubting, and Gwynne J. dissenting, that the judgment of the Court of Appeal should be affirmed; that the deposit in the defendants' bank was for the specific purpose of meeting the notes due that day, and the manager was not authorized to apply the money to take up the note in question, and there was no ratification by plaintiff of his act. The whole case being before the court on undoubted evidence it was unnecessary to refer it to another jury.

Per Gwynne J.—The case having been tried only upon a question wholly irrelevant, as to whether the note in question was a composition note or not, and nothing else having been submitted to the jury, the verdict was the result of a defective proceeding, and there was a total miscarriage which could only be rectified by a new trial.

This court has been given by special statute jurisdiction in its discretion to order a new trial if the ends of justice may seem to require it, although such new trial may be deemed necessary upon the ground that the verdict is against the weight of evidence—that is to say, upon a ground for which it would have been competent for the court of first instance in the mere exercise of its discretion to have ordered a new trial. But that this court should prevent the taking place of a trial, which the court of first instance had thought fit to order, purely in the exercise of the discretionary power vested in that court, is an assertion of jurisdiction which is wholly beyond the powers vested in this court by its constitution.

Appeal dismissed with costs.

Ontario Bank v. Stewart.—11th April, 1881.

5. Directed by Court of Review—34 Vic. ch. 4 sec. 10 and 35 Vic. ch. 6 sec. 13 (P.Q.)

See RAILWAYS AND RAILWAY COMPANIES 14.

6. Where rule taken for new trial only, the rule was affirmed, and non-suit or verdict for defendant refused, though the Court was of opinion there was no binding contract between the parties.

See SALE OF GOODS 13.

7. Where case reserved on questions of fact as well as of law.

See CORPORATIONS 19.

8. When ordered by Court below—Evidence not so clear as to justify a reversal of decision.

See TRESPASS 12.

New Trial—Continued.

9. Appeal by defendants from Rule ordering a new trial—Affirmed, though plaintiff held entitled to recover, there being no cross-appeal.

See RAILWAYS AND RAILWAY COMPANIES 21.

10. Sale of lands by Real Estate Agents—Mistrial—Omission to submit material questions to Jury.

See SALE OF LANDS 12.

11. Verdict against weight of evidence—Appeal.

Where court below in exercise of its discretion has ordered a new trial on the ground that the verdict is against the weight of evidence, the Supreme Court will not hear the appeal.

Eureka Woollen Mills Co. v. Moss.—xi, 91.

12. But where new trial granted on questions of law as well as of fact, appeal will be heard—*Eureka Woollen Mills* v. *Moss* (11 Can. S. C. R. 91) approved and distinguished.

See INSURANCE, FIRE 15.

13. Where evidence of contributory negligence not properly left to the Jury—Defective sidewalk—Liability of Corporation.

See CORPORATIONS 23.

14. Verdict against weight of evidence.

An action was brought to recover the price and value of goods sold by the plaintiff to the defendant's brother, and on the trial the plaintiff gave evidence of an agreement with the defendant whereby the latter, as the plaintiff alleged, undertook to give notes at four months to retire notes at three months given by his brother, the purchaser of the goods. The plaintiff swore that this agreement was carried out for a time, but that the defendant finally refused to continue it any longer. The evidence showed that the defendant always gave his notes to his brother who carried them to the plaintiff. The defendant, on the other hand, swore that he never made any such agreement, but only gave notes to his brother to help him in his business. The evidence of the plaintiff was entirely uncorroborated. A verdict was found for the plaintiff and the Supreme Court of New Brunswick refused a new trial.

Held, Ritchie C.J. and Taschereau J. dissenting, that the weight of evidence was not sufficiently in favor of the plaintiff to justify the verdict, and there must be a new trial.

Appeal allowed with costs and new trial granted.

Fraser v, Stephenson.—8th March, 1886.

New Trial—Continued.

15. **Verdict for plaintiff—Technical breach of contract—Defendant entitled to nominal damages for.**

In an action on a contract and also on the common counts to recover the balance of the contract price for work done for the defendant, the evidence showed that there was a technical breach of the contract by which, however, the defendant had sustained no substantial damage. A verdict was found for the plaintiff and a rule for a new trial was refused by the Divisional Court, and also by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, that a verdict would not be set aside merely to enter a verdict for the other party for nominal damages.

Appeal dismissed with costs.

Beatty v. Olle.—8th March, 1886.

16. When doubtful whether a non-suit has been voluntary or otherwise, a new trial will be ordered.

See NON-SUIT 1.

Nonjoinder—Of tenants in common in action for use and occupation.

See TENANTS IN COMMON.

Nonsuit—**Voluntary—New trial.**

On the trial of an action in Nova Scotia the plaintiff was non-suited, and on the argument of a rule to set such non-suit aside, and for a new trial, it was contended that the non-suit was voluntary. The minutes of the judge who tried the cause merely stated that a non-suit was moved for, that the plaintiff's counsel replied, and that judgment of non-suit was entered, and the judge himself said that he believed the understanding to be that a rule was to be granted. The Supreme Court of Nova Scotia held the judgment of non-suit to be voluntary, and discharged the rule.

On appeal to the Supreme Court of Canada, **Held,** that as there was a doubt as to what took place at the trial, the parties were entitled to the benefit of that doubt, and the rule to set aside the non-suit must be made absolute.

Appeal allowed with costs.

Levy v. Halifax & Cape Breton Ry. & Coal Co.—24th Feb. 1886.

2. In action between adjoining land owners, for allowing water to accumulate in cellar.

See DAMAGES 20.

" NEW TRIAL.

North Shore Railway Company—Right to use streets of city of Quebec.

See CORPORATIONS 21.

Notary—Duty of.

See SUCCESSION.

2. Evidence of, not admissible to contradict deed prepared by him.

See SALE OF LANDS 9.

3. As arbitrator—not disqualified from having acted professionally—44 Vic. ch. 43 Q.

See ARBITRATION AND AWARD 8.

Notice—To member of benefit society.

See BENEFIT SOCIETY.

2. To agent.

See INSURANCE.

3. Required to defeat registered deed.

See TRESPASS 5.

4. Want of.

See ASSESSMENT I, 4.

5. Of action—Fishery officer not entitled to.

See FISHERIES.

6. Purchase for value without.

See MORTGAGE 9.

7. To third arbitrator, necessary.

See ARBITRATION AND AWARD 5.

8. **Notice of action for false arrest—C. S. L. C. ch. 101 sec. 1—Extra judicial to deal with question not directly before the court—C. C. P. 1st. pt. Gen. Provs. sec. 22.**

David Grant, who was the plaintiff in the first instance, was Grand Master of the Orange Order in Montreal during 1877-78. As such he was arrested for disturbing the peace, and brought an action against the Mayor of the city (the respondent) for false arrest. A notice of action was given by appellant's attorney to the respondent, as follows:—

"To the Hon. J. L. Beaudry, Mayor of Montreal.

"Sir.—We give you notice that David Grant of the city of Montreal, salesman and trader, will claim from you personally the sum of ten thousand dollars damages, by him suffered from the abuse made of your authority in causing his arrest illegally and for no cause on the 12th day of July last (1878), and that unless you make proper amend and reparation of such damages within a month, judicial proceedings will be adopted against you. Yours, etc.

"(Signed,) Doutre, Branchaud & McCord,

"Advocates for plaintiff.

Montreal, 19th October, 1878."

The Superior Court (Mackay J.) **Held**, that under the C. C. P. P.Q., Art. 22 and Consol. Stat. L. C. ch. 101 sec. 1, the respondent was entitled to a

Notice—Continued.

notice of action, and that the notice given was insufficient in not stating the place where the alleged arrest was effected, and also in not stating the name and residence of plaintiff's attorney or agent, and he dismissed the action. This judgment was confirmed by the Court of Queen's Bench, but that court went further, and **Held,** that Grant was properly arrested, being a member of an illegal association. (See 2 Dorion's Q. B. R. 197.)

On appeal to the Supreme Court of Canada, **Held,** that the notice of action was insufficient, for the reasons given by the court below, and also because the cause or causes of action, as set out in the declaration, were not sufficiently stated in the notice, and that any expression of opinion as to the legality or illegality of the Orange association would be extra judicial and unwarranted.

Appeal dismissed with costs.

Grant v. Beaudry.—11th January, 1883.

Nova Scotia—Legislative Assembly of—Power to punish for contempt.

See LEGISLATURE 9.

Novus Actus Interveniens.

See CHATTEL MORTGAGE 1.

Nullity—Absolute.

See SHERIFF 5.

Nuisance—**Damages—Possession of wharf built on public property—Right of action for trespass.**

C. *et al.* built a wharf in the bed of the St. Lawrence, which communicated with the shore by means of a gangway, and had enjoyed the possession of this wharf and its approaches for many years, when R., on the ground that the wharf was a public nuisance, destroyed the means of communication which existed from the wharf to the shore. C. *et al.* sued R. in damages, and prayed that the works be restored. After issue joined, R. filed a supplementary plea, alleging, that since the institution of the action, one C. B., through whose property C. *et al.'s* bridge passed to reach the street on shore, had erected buildings which prevented the restoration of the bridge and wharf.

Held, that R. having allowed C. *et al.* to erect the gangway on public property and remain in possession of it for over a year, had debarred himself of the right of destroying what might have been originally a nuisance to him, and that, notwithstanding the subsequent abandonment of this wharf and gangway, C. *et al.* were entitled to substantial damages.

Caverhill v. Robillard.—ii, 575.

2. Obstruction in navigable waters.

See NAVIGATION.

Official arbitrators—Appeal from.

See ARBITRATION AND AWARD 9.

Ontario Judicature Act, 1881, sec. 43——Constitutionality of.

JURISDICTION 25.

Opposition—**To seizure of real estate—Prescription—Renunciation, effect of, under Art. 1379 C. C. L. C.; Art. 2191 C. C. L. C.; Art. 632 C. P. L. C.**

In January, 1856, R. McC. sold certain real estate to J. McC., his sister, by notarial deed, in which she assumed the qualities of a wife duly separated as to property of her husband, J. C. A. After the latter's death, in 1866, J. McC., before a notary, renounced to the *communauté de biens* which subsisted between her and her late husband. E. C. K., a judgment creditor of R. McC., seized the real estate as belonging to the vacant estate of the said R. McC., deceased. J. McC. opposed the sale on the ground that the seizure was made *super non domino et possidente*, and setting up title and possession. She proved some acts of possession, and that the property had stood for some time in the books of the municipality in her name. E. C. K. contested this opposition on the ground that J. McC.'s title was bad in law, and simulated and fraudulent, and that there was no possession.

Held, that by her renunciation to the *communauté de biens* which subsisted between her and her late husband at the date of the deed of January, 1856, J. McC. divested herself of any title or interest in said lands, and could not now claim the legal possession of the lands under that deed or by prescription, or maintain an opposition because the seizure was *super non domino et possidente*.

McCorkill v. Knight.—iii, 233.

2. **Appearance by Attorney without authority—Judgment by default—Action in disavowal—Requête civile—Opposition a fin d'annuler—Arts. 483, 484, 505, C. C. P. P. Q.—Con. S. L. C. ch. 83 sec. 112—Application to stay settlement of minutes and entry and execution of judgment of Supreme Court—Sec. 46 S. C. Act.**

The appellant, jointly with S. J. Dawson, signed a promissory note in favor of the late Angus McDonald, in his lifetime of Becancour in the Province of Quebec, at Three Rivers, on the 20th day of February, 1862, for the sum of $800, payable at the Bank of Upper Canada in Three Rivers, on the 25th of the following month of June, 1862.

On the 1st day of April, 1874, Sevère Damoulin, Esq., Sheriff of the district of Three Rivers, wrote to the appellant that a judgment against him had been placed in his hands for execution, and this letter, the appellant alleged, was the first he had ever heard of the note since the day he had signed it.

The appellant being absent at the time and ignorant of any proceedings against him, on receipt of Sheriff Damoulin's letter filed an opposition *à fin d'annuler* and petition.

Opposition—Continued.

It appeared that a summons had issued out of the Superior Court at Three Rivers on the 10th October, 1866, against the two signers of the note, said appellant and the said S. J. Dawson, which was served at the domicile of the said S. J. Dawson, but of which the bailiff made return that he had served a copy at their domicile (although the appellant alleged he had no domicile in Three Rivers at the time) and on the 26th October, 1866, an appearance was filed for the defendants by Mr. J. B. O. D., advocate, but without any authority from the appellant, who knew nothing of the proceedings.

The next proceeding taken, after this appearance, in prosecution of the suit was by a notice served on the said J. B. O. D., on the 5th January, 1874, without any step having been taken by the plaintiff in all that time.

Proceedings were carried on and services effected on the said J. B. O. D., of which he appears to have taken no notice up to judgment by default on the 2nd day of March following, of all which the appellant alleged he was in utter ignorance, until apprised of the execution in his hands by the Sheriff's letter of 1st April, 1874, as above.

Mr. D., upon oath, stated that he was never employed by the appellant, had never any communication with him upon the subject of this suit and never informed him of the proceedings when served with notices in continuation of the suit in 1874. And further that shortly after the appearance was filed by him in October, 1866, he was informed by the other defendant, who alone had employed him, that the case was settled.

The Superior Court for Lower Canada, (Polette J.) dismissed the appellant's opposition with costs, and this judgment was affirmed by the Court of Queen's Bench.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgments of the courts below, that the opposition could not be taken to have been made under Art. 484 of the Code of Proc., the judgment of the 2nd March, 1874, having been rendered by the court in term, and against such a judgment this opposition does not lie. That under C. S. L. C. ch. 83 sec. 112, the appellant should have proved that the place where the process was served was not his real domicile, and this he had not attempted to do. That if made under Art. 505 of the Code of P., the appearance by attorney covered any defect in the signification or the bailiff's return, or even an entire want of signification, and this would be fatal under Art. 505, as well as Art. 483. That the only way the appellant could get rid of the appearance was by a regular disavowal, according to articles 192 and following of the C. C. P. No such disavowal having been made, he must be taken to

Opposition—Continued.

have waived, by the appearance filed in his name, all the irregularities in the service and even the entire absence of service.

Appeal dismissed with costs.

Dawson v. Macdonald.—10th June, 1880.

2. (a.)

On the 26 November, 1880, an application was made to Taschereau J. in chambers for an order directing the Registrar not to settle the minutes of the judgment rendered by the court on the 10th June, 1880, and not to tax the costs, and to restrain the plaintiffs from entering said judgment, and taxing said costs, the object of the appellant being to stay the execution of such judgment to allow him to disavow the attorney who appeared for him in the court below, and to proceed against the judgment against him by *requête civile*.

Held, that as to the disavowal, it was too late for the defendant to take such a proceeding, the attorney having appeared on the 26th Oct. 1866, and the defendant having been aware of it on the 29th April, 1874, when he filed his first opposition in the cause. That the judgment of the Supreme Court must under sec. 46 of the S. C. Act be entered and sent to the court below before the defendant could have recourse to a proceeding by *requête civile*. The *requête civile* does not stay the execution as a matter of course, an order of the court or a judge being necessary, and the defendant would have to apply to the Superior Court or judge thereof for such an order. That a judge in chambers should not grant an order staying the execution of a judgment of the court, especially when the appellant has had ample opportunity of making his application to the full court.

Application refused with costs fixed at $10.

Dawson v. Macdonald.—26th November, 1880.

2. (b.)

After these decisions against him appellant Dawson took regular proceedings in disavowal against the attorney J. B. O. D.

That disavowal was produced before the Superior Court at Three Rivers, and served upon the said attorney and the other parties in this case on the 14th of December, 1880. Nevertheless, a new writ of execution was issued at the instance of the respondent on the 15th of December, 1880, to enforce the execution of the original judgment against the appellant.

On the 30th December, 1880, the appellant produced an opposition to this last mentioned execution, and also a petition to stay the proceedings in the suit while expecting a decision on the disavowal which had just been produced.

The principal reasons of the opposition and petition were: (1) That the appellant had disavowed the attorney, J. B. O. D., who had appeared for

Opposition—Continued.

him, and that he was prepared to maintain the said disavowal; (2) That the said disavowal had been served upon all the parties in the case; (3) That, on the 15th of December, 1880, an action in revocation of the original judgment in this cause had been issued.

The appellant, moreover, averred in this new opposition and petition reasons founded upon certain facts which had only come to his knowledge since the first opposition which he had produced.

The conclusions were that all the proceedings had and made in virtue of the said writ, and that all proceedings in the present cause be stayed according to law until the decision of the proceedings had and taken by the said opposant in the present cause, as well on the disavowal filed therein as on the action of revocation of the judgment in this cause.

Issue was joined on these several proceedings and the appellant and respondents consented by written agreement that these different issues should be decided upon a common proof.

On the disavowal, the disavowed attorney, J. B. O. D., duly filed an appearance, and the respondents also appeared by their attorneys. The pleas of the disavowed attorney, with exhibits, were filed, and a petition for a Commission Rogatoire was presented by the plaintiff in disavowal, the present appellant, to examine a witness absent from Three Rivers. The decision on that petition was suspended until a decision on a demurrer produced by the diavowed attorney. That demurrer was not decided, and the respondents in the meantime pressed the production of the proof on the opposition.

The Superior Court at Three Rivers dismissed this opposition on the 2nd of October, 1882, on the principle that there was *res judicata*. This last judgment was confirmed by the Court of Queen's Bench of Lower Canada on the same ground, Mr. Justice Tessier dissenting.

The appellant, Dawson, then appealed to the Supreme Court of Canada.

Held, reversing the judgments of the courts below, that there was no *res judicata*, and that all proceedings in the cause and on the writ of *pluries ven. ex de bonis* mentioned in the opposition should be stayed until the decision of the disavowal and of the action in revocation of judgment. (Ritchie C.J. and Strong J. dissenting.)

Appeal allowed with costs.

Dawson v. Macdonald.--12th January, 1885.

2. (c.)

While the proceedings were going on on the opposition of the 30th December, 1880, another writ of execution was issued in the original cause to collect the costs awarded to respondents by the Supreme Court of Canada on the 10th June, 1880. To this writ the appellant Dawson

Opposition—Continued.

filed a second opposition on the 18th January, 1881. This opposition was dismissed by the Superior Court, and the judgment of that court was confirmed by the Court of Queen's Bench. The latter court refused an appeal from the judgment on this second opposition, on the ground that the amount in dispute was not sufficient to authorize an appeal.

Dawson thereupon moved before the Supreme Court of Canada for an order to suspend the proceedings under the execution to which the opposition of the 18th January, 1881, was filed, and for leave to appeal from the judgment on said opposition.

Held, that there was no ground for staying the execution. The court had properly dismissed the appeal on the case presented, and that was a final decision in itself, and it was no ground for staying the execution that there were other proceedings in the court below which might possibly show that the defendant should have succeeded in the original action.

Motion refused with costs.

Dawson v. Macdonald.—15th January, 1884.

3. To seizure for an amount less than $2,000—Appeal from Province of Quebec—Jurisdiction.

See JURISDICTION 27, 31, 36.

4. In nature of Petition in revocation of judgment.

See SHERIFF 5.

Parliament of Canada—Dominion Controverted Elections Act, 1874—*Intra vires*—Dominion Court—Procedure—B. N. A. A., 1867, secs. 18, 41, 91, 92, sub-secs. 13 and 14, secs. 101, 129.

See ELECTION 4.

2. Act establishing Maritime Court of Ontario *intra vires.*

See MARITIME COURT OF ONTARIO 1.

3. Jurisdiction over Harbors—Foreshore in Summerside Harbor.

See HARBOR.

4. Jurisdiction of, over Bay of Chaleurs—The Fisheries Act, 31 Vic. ch. 60—14 & 15 Vic. ch. 63 (Imp.)—Justification, plea of—Fishery Officer, right of, to seize "on view."

Held, under the Imperial Statute, 14 and 15 Vic. ch. 63, regulating the boundary line between old Canada and New Brunswick, the whole of the Bay of Chaleurs is within the present boundaries of the Provinces of Quebec and New Brunswick, and within the Dominion of Canada and the operation of The Fisheries Act, 31 Vic. ch. 60. Therefore the act of drifting for salmon in the Bay of Chaleurs, although that drifting may have been more than three miles from either shore of New Brunswick or of Quebec abutting on the bay, is

Parliament of Canada—Continued.

a drifting in Canadian waters and within the prohibition of the last mentioned Act and of the regulations made in virtue thereof.

2. The term "on view" in sub-sec. 4 of sec. 16 of The Fisheries Act is not to be limited to seeing the net in the water while in the very act of drifting. If the party acting "on view" sees what, if testified to by him, would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act.

Mowat v. McFee.—v, 66.

5. **Canada Temperance Act, 1878—Constitutionality of—Powers of Dominion Parliament—Secs. 91 and 92, B. N. A. Act, 1867—Power to prohibit sale of intoxicating liquors—Distribution of legislative power.**

Held, 1. That the Act of the Parliament of Canada 41 Vic. ch. 16, "An Act respecting the traffic in intoxicating liquors," cited as the "The "Canada Temperance Act, 1878," is within the legislative authority of that body.

2. That by the British North America Act, 1867, plenary powers of legislation are given to the Parliament of Canada over all matters within the scope of its jurisdiction, and that they may be exercised either absolutely or conditionally; in the latter case the legislation may be made to depend upon some subsequent event, and be brought into force in one part of the Dominion and not in the other.

3. That under sub-sec. 2 of sec. 91, B. N. A. Act, 1867, "regulation of "trade and commerce," the Parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, and the court has no right whatever to enquire what motive induced Parliament to exercise its powers. (Henry J. dissenting.)

The Mayor, &c., of Fredericton v. The Queen.—iii, 505.

6. Warehouse receipts—Secs. 46, 47 and 48 of 34 Vic. ch. 5 D., *intra vires.*

See WAREHOUSE RECEIPTS 2.

7. 38 Vic. ch. 47, giving power to police and stipendiary magistrates to try offences in a summary manner, *intra vires.*

See HABEAS CORPUS 2.

8. **Jurisdiction given to Vice-Admiralty Courts to enforce penalties for illegal distilling—31 Vic. ch. 8 sec. 156, Dominion Inland Revenue Act, 1867, intra vires.**

Held, so much of sec. 156 of 31 Vic. ch. 8 (Dominion Inland Revenue Act, 1867,) as gives the Court of Vice-Admiralty jurisdiction in cases for the collection of penalties for illegal distilling is *intra vires.* The judgment of the Supreme Court of Nova Scotia reversed. (See 3 Russ. & Geld. 453.)

Appeal allowed with costs.

Attorney General of Canada v. Flint.—16th January, 1884.

Parliament of Canada—Continued.

9. The Liquor License Act, 1883, and act amending same, *ultra vires*.

See LIQUOR LICENSE ACT 1883.

Parties—Want of—In action to recover monies deposited in bank to credit of succession.

See BANKS AND BANKING 4.

" PRACTICE.

Partition—**Partition and inventory, between coheirs, action to annul—For fraud and concealment—Compromise, deed of—Action to set aside for fraud and coercion.**

Two appeals with titles almost identical, argued together, numbered 123 and 449 respectively.

The former of these cases is an action by one Jane Charlebois, wife of Dosithée Allard, to set aside a *partage* of the intestate succession of her late brother Arsène Charlebois, to which she was a party, and bearing date the 4th of November, 1870.

The action was taken out on the 4th of June, 1879, after the marriage of Jane Charlebois to Allard. It set up that the inventory was made by the appellant Hyacinthe Charlebois, that he had all his late brother's property in his hands, that he and his brother Arsène were co-partners, under a deed of partnership, and that in fact the other members of the family had trusted him entirely in all the matters relating to the estate. That being so trusted he had taken the opportunity to defraud and cheat his co-heirs, and particularly by representing that he had an equal share in the business as partner of his late brother; that he had not accounted for the capital invested by his brother; that he had undervalued the goods, possessed himself of the ready money and debts, and had augmented the liabilities of the partnership. As to the real estate he had fraudulently estimated it at less than half its real value. That he had affected to buy the shares of his two sisters, who had no rights, as they were civilly dead, being nuns of an order which prevented them from holding property, and that he had offered to give up the advantages arising from this transaction in order to induce the rest of the family to agree to the *partage* he was desirous of making. The other members, and particularly respondent, were induced by the false representations to agree to the *partage*.

It was also alleged that this inventory was not regularly made according to law, inasmuch as one of her sisters was a minor, and that there had been no *expertise* or curator appointed, and that therefore the whole proceeding was null, and should be set aside.

The conclusions of the action were that the inventory and the deed of *partage* should be set aside as fraudulent and null, that the defendant should

Partition—Continued.

be condemned to make a new inventory of the effects of the partnership, and that there should be a new inventory of the other property and effects of the succession, and a new *partage* of the whole.

The action was principally directed against Hyacinthe; the other members of the family were made parties to be subject to the new inventory and *partage*.

On the 19th November, 1879, the Superior Court (Mackay J.) set aside the inventory and partition of the estate of the late Arsène Charlebois on the ground of fraud, concealment and *recel*, practiced by Hyacinthe Charlebois. This judgment was appealed to the Court of Queen's Bench. Pending this appeal Hyacinthe Charlebois made with the defendant Allard and plaintiff, on the 5th of May 1880, a deed entitled "Compromise between Dame Jane Charlebois, wife of Dosithée Allard, and Hyacinthe Charlebois," by which in consideration of the sum of $700, paid to the plaintiff, and the costs of plaintiff in said cause until judgment and those of appeal paid to the attornies, the plaintiff desisted from, and renounced to her judgment obtained as aforesaid, and assigned and transferred to the said defendant H. Charlebois all the rights she might have and claim in the estate of the said Arsène Charlebois, her brother, and in the estate of her father, Arsène Charlebois, senior.

The case No. 449 was an action by Jane Charlebois to set aside the deed of compromise for *crainte*, error and fraud. She contended that she was intimidated by her husband, who was on the point of leaving the country with another woman, into passing this deed with the object on his part of procuring for him the money to run off with this other person, and she affirmed that the money was never paid to her but to her husband.

The Superior Court annulled the said deed of compromise of the 5th of May, 1880, and restored the parties to the same position which they occupied previously to the said deed, reserving to defendant Charlebois his recourse to be reimbursed what he paid by virtue of this deed.

In case No. 123 the Court of Queen's Bench for Lower Canada (appeal side) reversed the judgment of the Superior Court and dismissed the action, and in case 449 also it dismissed the action, on the ground that the plaintiff received the consideration money for the deed, which could not be set aside unless she brought back all she received under it.

On appeal to the Supreme Court of Canada, **Held**, that the judgments of the Court of Queen's Bench should be affirmed. The evidence did not establish fraud, or undue influence, or pressure in the execution of the deed of compromise, and the compromise being ineffectually assailed both

Partition—Continued.

appeals must fall together and stand dismissed. Fournier and Henry JJ. dissenting.

Appeals dismissed with costs.

Charlebois v. Charlebois.—12th January, 1885.

Partnership—Articles of—Construction of—Partners, rights of.

The respondents, having on hand large contracts to fulfil entered into partnership with the appellant under the style of J. W. & Co. The respondent A. P. M. subsequently filed a bill in Chancery against W. (the appellant) and his two sons co-partners, asking for a decree declaring him and his two sons entitled to receive credit to the amount of $40,000, the estimated value of certain plant, etc., used in the construction of the works done by the partnership. The article in the deed of partnership executed before a notary public in the Province of Quebec, under which the respondent claimed to be entitled to credit of $40,000, is as follows:—"The stock of the said partnership consists of the whole of the plant, tools, horses and appliances now used for the construction of said works by the said parties of the first part A. P. M. & Sons; also all quarries, steam tugs, scows, and also all the rights in said quarries that are held by the said parties of the first part, or any of them, the whole of which is valued at the sum of $40,000, and is contained in an inventory thereof hereunto annexed for reference after having been signed for identification by the said parties and notary; but whereas the said plant, tools, horses, appliances, steam tugs, scows, quarries and other items have been heretofore sold by the said party of the first part to the firm of M. & W., of the city of Montreal, hardware merchants, to secure them certain claims which they had against the said A. P. M. & Co., for moneys used in the construction of the works referred to, to the extent and sum of about $24,000 and interest; and whereas the said J. W. has paid said amount of $24,000 and redeemed said plant, tools, horses and appliances and quarries, steam tugs and scows, &c., and now stands the proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses and appliances that are or may be put on the said work shall be and continue to be the entire property of the said J. W, until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to reimburse him of the said sum of $24,000 and interest so advanced by him as aforesaid, as also any other sum or advances and interests which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said firm of J. W. & Co., that is to say: That one-half thereof shall revert to and belong to the parties of the first part, and the other half to the said party of the second part, as the said

Partnership—Continued.

J. W. has a full half interest in this contract and all its profits, losses and liabilities, and the said A. P. M., W. E. M. and R. M., parties of the first part, jointly and severally, the other half interest in the same." There was evidence that the plant had cost originally $57,000, and that it was valued in the inventory at $40,000 at the request of the appellant; it was also shown and admitted that the profits of the business were sufficient to reimburse the appellant the sum of $24,000 and other moneys advanced, and that there was still a large balance to the credit of the partnership.

Held, Henry and Gwynne JJ. dissenting, that the plant, &c., furnished by the respondents having been inventoried and valued in the articles of partnership at $40,000, the respondents had thereby become creditors of the partnership for the said sum of $40,000, but as it appeared by the said articles of partnership that the said plant was subject at the time to a lien of $24,000, and that said lien had been paid off with the partnership moneys, the respondents were only entitled to be credited, as creditors of the partnership, with the sum of $16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been estimated by both parties in the articles of partnership.

Worthington v. MacDonald.—Ix, 327.

2. **Joint purchase of debentures—Interest in margin deposited—One partner withdrawing from bank more than his share of margin obliged to reimburse the other partner in the transaction.**

The facts, as stated in the judgments rendered, are as follows:—In, May, 1876, the defendant authorized one McCord, his broker, to bid for city of London debentures, amounting to $220,000, then about to be issued, and in the purchase of which the defendant did not wish his name to appear. McCord, accordingly, bid for them, and his bid of 98⅝ per cent. was accepted. When bidding for them McCord was under the impression that he was doing so for the defendant, although McCord's name was put forward as purchaser. The defendant, however, was only willing to take a half interest in the debentures. In order to secure them it was necessary to raise the sum of $219,486 to pay for them. Negotiations for this purpose took place between McCord and different banks, and at one time it was thought these negotiations would be completed with the bank of Montreal upon the deposit of $13,000 by way of margin, together with the debentures themselves when obtained, and an agreement as to their sale. McCord appears to have had difficulty in raising the one half of the $13,000. The defendant after being written to by McCord and seeing him on the subject, gave him a cheque for $3,250 with a paper containing the following directions: "Please apply $3,250 out of the balance in your hands due to me along

Partnership—Continued.

with cheque for $3,250 on Molson's Bank of this date making in all $6,500 as margin on my half of transaction of city of London debentures." In return he took from McCord his receipt in the terms following: "Received from Major Walker the sum of $6,500, being his proportion of margin on $219,486, city of London debentures, bought on joint account." At this time it was expected that the amount required for margin would be $13,000. It was understood between defendant and McCord that the latter was to do the best he could to obtain the amount necessary to secure the debentures. He accordingly applied to the plaintiff to become the purchaser of a half interest, informing him that the defendant would be interested in the other half, and as the defendant had said he did not wish his name to appear in the transaction, McCord requested the plaintiff to keep to himself the information of the appellant being interested. The plaintiff agreed to become purchaser of the half, leaving the negotiations for raising the loan from one of the banks to McCord. The negotiations with the Bank of Montreal having fallen through, an arrangement was eventually completed with the Canadian Bank of Commerce ($10,000 of a margin to be paid) by a letter to the manager, signed by the plaintiff on his own behalf, and by McCord in his own name, but for the defendant. The $10,000 of margin was paid by plaintiff out of his own moneys, but one-half ($5,000) was reimbursed to him by McCord. Upon the close of the transaction by sale of the debentures there remained in the bank of the margin of $10,000 so paid as above the sum of $6,600. McCord having become insolvent, the defendant succeeded in procuring the bank to pay him 65 per cent. of this balance upon the pretence that he was interested to that amount because of his having McCord's receipt for $6,500 above mentioned.

The Court of Chancery, and subsequently the Court of Appeal of Ontario, held that this payment by the bank to the defendant was not authorized, but the defendant and plaintiff having been interested in the bonds jointly, and, after repayment to the plaintiff of the one-half of the $10,000, having been also interested jointly in the amount in the bank to the credit of the margin, was entitled to be reimbursed by the defendant, the sum required to make up the half of the amount so remaining to the credit of the margin.

On appeal to the Supreme Court of Canada, **Held**, that the judgments of the courts below should be affirmed. Appeal dismissed with costs.

Walker v. Cornell.—12th February, 1881.

3. **Contractors, partnership between—Nature of contract—Interest in subcontract—Rejection of tenders at fraudulent instigation of some of the partners—Damages.**

This action was instituted on the 24th January, 1878, by Robert Kane of Montreal, contractor, against Augustus R. Wright of Geneva, in the State

Partnership—Continued.

of New York, and Edward Moore of Portland, in the State of Maine, contractors, claiming from them $25,000 for breach of contract.

A summary of the complaint contained in the declaration may be stated in brief as follows:—

In January, 1877, the Quebec Harbor Commissioners advertised for tenders for the performance of a large amount of public works at the mouth of the St. Charles River, for the improvement of the harbor of Quebec.

The plaintiff, the defendants, and Angus P. Macdonald, of Montreal, contractor, associated themselves together as partners, under the firm of Moore, Wright & Co., to tender, contract for and execute the said works for the common profit of said partners, share and share alike. It was proposed and agreed by and between them that they should each and all exert themselves to secure the contract for the performance of the whole of said works if possible, but if that were not possible to secure so much thereof as could be obtained either by direct contract with the commissioners, or by sub-contract with the successful tenderer, or in such other manner as the same might be obtainable, more especially the contract for that part of the said works which consisted of dredging. The plaintiff procured the necessary information to enable tenders to be made for said works, by and in the name of said firm of Moore, Wright & Co., exerted himself to promote their success, and kept the defendants informed of the progress of events connected with the letting out of said work by tender. A tender was in consequence made for said work by and in the name of said firm of Moore, Wright & Co., and at the request of said harbor commissioners a supplementary tender was likewise made in their name, but the defendants seeing that the commissioners favored Simon Peters, of Quebec, contractor, and were disposed in case he reduced his prices, to give him the contract for said works, the defendants, in violation of their said partnership agreement with the plaintiff and said Angus P. Macdonald, combined with said Simon Peters, in order to secure part of the works through him, and for that purpose communicated to him the prices at which they were willing to perform the dredging, which were much beneath the prices of the said Simon Peters for said work, which enabled him so to lower his tender, that the work was, through him, awarded and given by contract to a firm composed of the defendants and the said Simon Peters, under the name of Peters, Moore & Wright. To enable this to be done the defendants had actually withdrawn the tenders of the firm of Moore, Wright & Co., and fraudulently secured the contract to the firm of Peters, Moore & Wright, with the understanding that the defendants would have the performance of and the profits resulting from the larger portion of said work, especially the dredging, to

Partnership—Continued.

the exclusion, and in prejudice of the rights of the plaintiff and of the said Angus P. MacDonald.

After the defendant had so secured the greater part of said works they offered participation therein and of the profits thereof to the plaintiff, and to the said Angus P. Macdonald, which they accepted, yet the defendants failed and refused to fulfil their offer. The plaintiff had always been willing, and offered to perform his part of the agreement, and was entitled to one-fourth of the advantages and profit resulting from said contract, and the performance of the works thereunder.

The said contract was for a sum exceeding $500,000, and the prospective profits were presently worth $100,000, whereof the plaintiff was entitled to one-fourth or, $25,000, for which he brought his action.

The defendants by their plea admitted that they made their first, as well as a supplementary, tender, in conjunction with the plaintiff and with said Angus P. McDonald, but denied that said tenders were ever withdrawn, and averred that they were not successful, and that no part of the work was or could be secured thereunder, and they had a perfect right to combine with and secure the work through said Simon Peters, that it was in fact awarded to him, and not to him and the defendants jointly, but Peters agreed to sublet the dredging and concrete work to them, the defendants, but it was nominally arranged that they should be joint contractors with the harbour commissioners, and by agreement with Peters they would divide and separate the part of the work by the dredging and concrete work to be done by them, and this separation was actually effected by notarial contract, that they were in good faith in procuring the work through Peters, and were under no obligation whatever to allow the plaintiff or said A. P. McDonald to participate in their contract; nevertheless, they had offered to do so, but the plaintiff and said McDonald had failed to accept within reasonable time, and they were obliged to act independently for themselves.

The principal contention was whether the partnership obligation of the defendants was limited to the tenders put in by them in conjunction with the plaintiff and Angus P. Macdonald.

The Superior Court adopted the view that the evidence showed they were so limited and that the defendants had not fraudulently or otherwise obtained the rejection of said tenders, and dismissed Kane's action.

On appeal to the Court of Queen's Bench for Lower Canada (appeal side) that court **Held,** on a review of the evidence, that the agreement between plaintiff and defendants was that they should be jointly interested, not only in the profits of the entire work, but in such portion of it as could be secured either directly or by sub-contract; that the defendants in fraud of the plain-

Partnership—Continued.

tiff, procured the contract for the execution of a large proportion of the works in conjunction with Peters; that the defendants afterwards offered a share in the contract to plaintiff and Macdonald, which offer was accepted, but which the defendants refused to carry out; and the court reversed the judgment of the Superior Court and awarded the plaintiff $2,500.

On appeal to the Supreme Court of Canada, **Held,** that the judgment of the Court of Queen's Bench should be affirmed. Taschereau J. dissenting.

Appeal dismissed with costs.

Wright v. Kane.—28th April, 1882.

4. **Partners—Giving time to principal—Blended accounts—Payments.**

Hutton and McGuire (defendants), trading together in partnership, became indebted to Birkett *et al.*, plaintiffs, for goods purchased from them, for which the defendants gave notes of the partnership firm. They dissolved partnership in October, 1876, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging the dissolution.

McGuire continued to carry on the business alone, and the plaintiffs continued to deal with him. In so doing McGuire had several transactions with the plaintiffs, from whom he continued to receive goods on credit, until he became insolvent in the early part of the year 1880, whereupon plaintiffs brought this action on the notes given by the firm. The circumstances attending the dissolution of the firm of McGuire and Hutton, and the subsequent dealings of the plaintiffs with McGuire, appear at length in the report of the case in 31 U. C. C. P. 430 and 7 Ont. App. R. 33.

Held, reversing the judgment of the Court of Appeals, Ritchie C.J. and Strong J. dissenting, that Hutton was entitled to a verdict on the ground that by the course of dealings of the plaintiffs with McGuire subsequently to the dissolution, viz: by plaintiffs blending the two accounts, and taking McGuire's paper on account of the blended accounts, upon which paper McGuire from time to time made sufficient payments to pay any balance remaining due on the paper of McGuire and Hutton which was in existence at the time of the dissolution, it must be held as a matter of fact, as well as of law, arising from the course of the said dealings, that the paper of the firm of McGuire and Hutton had been fully paid.

Appeal allowed with costs.

Birkett et al. v. McGuire (19 C. L. J. 275).—19th June, 1883.

5. Tender for contract by individual member of firm—Right of action.

See CONTRACT 24.

6. **Suretyship—Contract of, with firm—Continuing security to firm and member or members constituting firm for the time being—Death of partner—Liability of surety after.**

S., by indenture under seal, became surety to the firm of C. & Sons for goods to be sold to one Q., and agreed to be a continuing security to the said

Partnership—Continued.

firm or "to the member or members for the time being constituting the said firm of C. & Sons," for sales to be made by the said firm or "any member or members of the said firm of C. & Sons," to the said Q., so long as they should mutually deal together.

P. C., the senior member of the said firm, having died, and by his will appointed his sons, the other members of the firm, his executors, the latter entered into a new agreement of co-partnership and continued to carry on the business under the same firm name of C. & Sons, and subsequently transferred all their interest in the said business to a joint stock company.

An action having been brought against S. for goods sold to Q. after the death of the said P. C., **Held**, reversing the judgment of the Court of Appeal, 11 Ont. App. R. 156, and restoring the judgment of the Common Pleas Division 5 O. R. 189, that the death of P. C. dissolved the said firm of C. & Sons, and put an end to the contract of suretyship.

Appeal allowed with costs.

Starrs v. The Cosgrave Brewing and Malting Co. of Toronto.—9th April, 1886.

Partus Sequitur Ventrem.

See CHATTEL MORTGAGE 1.

Patent—**Dominion Lands Act, 35 Vic. ch. 23, sec. 33, sub-secs. 7 and 8—Homestead Patent, validity of Bill—Equitable or statutory title—Demurrer—39 Vic. ch. 23 sec. 69.**

The plaintiff, in his bill of complaint, alleged in the 6th paragraph as follows:—"Prior to the 1st of May, 1875, the plaintiff made application to homestead the said lands in question herein, and procured proper affidavits, according to the statute, whereby he proved to the satisfaction of the Dominion lands agent in that behalf (and the plaintiff charges the same to be true), that the said defendant Farmer had never settled on or improved the said lands assumed to be homesteaded by him, or the lands herein in question, but had been absent therefrom continuously since his pretended homesteading and pre-emption entries, and thereupon the claim of the defendant Farmer under the said entries became and was forthwith forfeited, and any pretended rights of the defendant Farmer thereunder ceased, and the plaintiff thereunder, on or about the 8th May, 1875, and then and there with the assent and by the direction of the Dominion lands agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit, according to Form A, mentioned in 35 Vic. ch. 23 sec. 33, and did make and swear to an affidavit according to Form B, mentioned in sec. 33 sub-sec. 7 of the same Act, and did pay to the same agent the homestead fee of $10, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do

Patent—Continued.

under the statute and the regulations of the Department, and that the statute said: Upon making this affidavit and filing it, and on payment of an office fee of $10 (for which he shall receive a receipt from the agent), he should be permitted to enter the lands specified in the application; and thereupon and in pursuance thereof, and in good faith, the plaintiff did forthwith enter upon said land and take actual possession thereof, and has ever since remained in actual occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate $1,000. Demurrer for want of equity.

Held, reversing the judgment of the court below, and allowing the demurrer, that the plaintiff had no *locus standi* to attack the validity of the patent issued by the crown to the defendant, as he had not alleged a sufficient interest or right to the lands therein mentioned, within the meaning of sec. 69 or of sub-secs. 7 and 8 of sec. 33 of 35 Vic. ch. 23, there being no allegation that an entry of a homestead right in the lands in question had been made, and that plaintiff had been authorized to take possession of the land by the agent, or by some one having authority to do so on behalf of the crown, or a sufficient allegation that the crown was ignorant of the facts of plaintiff's possession and improvements. (Taschereau and Gwynne JJ. dissenting.)

Per Strong J., that when the crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot set up equities behind the patent.

Farmer v. Livingstone.—viii, 140.

2. Void, as having been improvidently granted.

See TRESPASS 14.

Patent of Invention—**Combination—Novelty—Inventor—Prior patent to person not inventor—Pleading and practice—Section 6 Patent Act, 1872—Use by others in Canada—Use by patentee in foreign countries—Section 28 Patent Act, 1872—Final decision—Judgment in rem—Section 7 Patent Act, 1872—Commencement to manufacture before application in Canada—Section 48—Use by defendant before patent.**

An invention consisted of the combination in a machine of three parts, or elements, A, B and C, each of which was old, and of which A had been previously combined with B in one machine and B and C in another machine, but the united action of which in the patented machine produced new and useful results.

Held, 1. (Strong J. dissenting) to be a patentable invention.

To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the

Patent of Invention—Continued.

true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit.

2. The words in the 6th section of the Patent Act, 1872, "not being in public use or on sale for more than one year previous to his application in Canada," are to be read as meaning "not being in public use or on sale in Canada for more than one year previous to his application."

3. That the Minister of Agriculture, or his Deputy, has exclusive jurisdiction over questions of forfeiture under the 28th section of the Patent Act, 1872, and a defence on the ground that a patent has become forfeited for breach of the conditions in the said 28th section cannot be supported after a decision of the Minister of Agriculture or his Deputy declaring it not void by reason of such breach.

Per Henry J.—The jurisdiction of the Commissioner is administrative rather than judicial, and he may look at the motive and effect of an act of importation, and a single act, such as the importation of a sample tending to introduce the invention, is not necessarily a breach of the spirit of the conditions of the 28th section. Under the 7th and 48th sections of the Patent Act, 1872, persons who had acquired or used one or more of the patented articles before the date of the patent, or who had commenced to manufacture before the date of the application, are not entitled to a general license to make or use the invention after the issue of the patent.

As to the form of order in appeal, see *Practice* 91.

Smith v. Goldie.—ix, 46.

2. **Sale of—Specific performance—Agreement partly executed and partly executory—Construction of—Misrepresentation by vendor—32 and 33 Vic. ch. 11 sec. 17 (patent Act)—Consolidation of suits.**

Powell, being owner of a patent for an improved pump which had only a short time to run, but was renewable for two further terms of five years each, on the 1st June, 1877, made with Peck *et al.* the following agreement: "Said Powell agrees to sell, and the said Peck agrees to buy, the said Powell's right, title and interest in the said Powell's pump manufacturing business, together with the land on which the buildings stand, at or for the sum of four thousand five hundred dollars, payable as follows: Fifteen hundred dollars the 16th day of June, instant, with interest at 10 per cent.; also, the sum of three thousand dollars, to be secured by first mortgage on the property. [Here follow the terms.] Powell to assign his interest in his pump patents to Mr. Peck for the Counties of York, Halton, Peel, Simcoe and Ontario. * * * * * * On the same day the following assignment was executed by Powell:—

Patent of Invention—Continued.

Whereas I, Charles Powell, of the City of Toronto, in the County of York, did obtain letters patent of Canada for certain new and useful improvements in pumps, known as "the cone pump and its connections," which letters patent bear date the 19th of July, 1872.

And whereas O. G. Peck, John Coleman and George Brett are desirous of acquiring an interest therein :

Now this indenture witnesseth, that for and in consideration of the sum of $6,500, to me in hand paid, the receipt of which is hereby acknowledged, I have granted, sold and set over, and do hereby grant, sell and set over unto the said Peck, Coleman and Brett, all the right, title and interest which I have in the said invention, as secured to me by said letters patent, for, to and in the limits of the counties of York, Halton, Peel, Simcoe and Ontario, and in no other place or places, the same to be held and enjoyed by the said Peck, Coleman and Brett for their own use and behoof of their legal representatives, to the full end of the term for which the said letters patent are granted, as fully and entirely as the same would have been held by me, had this grant and sale not been made, save and except such portions of the above territory as may have been sold by the patentee before the 1st day April, 1877.

On or about the 21st of June, 1877, in pursuance of the said agreement, Peck *et al.* gave to Powell a mortgage of the lands and premises upon which the pump manufacturing business was carried on, to secure payment of $3,000 and interest as therein provided. At the same time and to secure the same amount, Peck *et al.* gave to Powell a chattel mortgage of the plant, machinery and chattels belonging to the said business. On the 17th July, 1877, Powell renewed the patent in his own name. In June, 1878, the mortgagors made default in payment of the mortgages and interest, and in consequence thereof Powell put his bailiff in possession of the chattels aforesaid, and instituted proceedings in the Court of Chancery for Ontario in the suit of *Powell* v. *Peck* upon his mortgage of the said land. Almost at the same time Peck *et al.* began the suit of *Peck* v. *Powell* to restrain the sale of the chattels under the respondent's chattel mortgage aforesaid, and the proceedings for the foreclosure of the mortgage on the property.

The defence set up in the suit of *Powell* v. *Peck* is the same as the case which Peck *et al.* sought to make in *Peck* v. *Powell*, namely, that when the agreement of the 1st of June, 1877, was made, Powell falsely represented the letters patent mentioned or referred to in the said agreement for certain new and useful improvements, known as the Cone Pump and its connections, had 10 years to run, whereas, the fact was that unless in the meantime renewed said letters would have expired in a few weeks; and Peck *et al.* claimed in

Patent of Invention—Continued.

consequence of such misrepresentation that they were not bound to pay the mortgage money sued for in *Powell* v. *Peck*, and that Powell's proceedings should be restrained under the chattel mortgage as aforesaid, and that he should be obliged to make good his representations and carry out his contract with respect to said patent.

Powell's answer to this part of the case was that he never intended to sell, and Peck *et al.* did not intend to purchase, any other than the limited interest in the said letters patent conveyed in the assignment, dated the 1st of June, 1877, made in pursuance of the said agreement.

The Court of Chancery pronounced a decree favorable to Peck *et al.* in both suits (26 Grant 322).

The Court of Appeal for Ontario reversed these decrees. In *Powell* v. *Peck* it made a decree for the redemption or foreclosure of the mortgaged premises with costs. And in *Peck* v. *Powell* it dismissed the bill of complaint of the plaintiffs with costs, being of opinion that under the circumstances all that the purchasers could claim was the right under the patent for the remainder of the first term of five years (Patterson J. A. dissenting). 8 Ont. App. R. 498.

On appeal to the Supreme Court of Canada, **Held**, that the decree made by the Court of Chancery in *Peck* v. *Powell* was correct and should be affirmed and the order of the Court of Appeal reversing that decree should reversed. That the decree of the Court of Chancery in *Powell* v. *Peck* should be reversed and the order of the Court of Appeal affirmed.

Per Ritchie C.J.—Powell by his agreement parted with all his interest, so far as the five counties were concerned, and the only substantial interest which existed was the statutory right of extension. The habendum of the deed "to the full end of the term," &c., had not the effect of restricting the previous grant to the term existing at the time so as to exclude the grantee from the right of renewal and extension. On the contrary it makes it more clear that within the limits of the territory described the grantor divests himself of all the title up to the last moment of the current term, and thus affirms the status of the grantee as being, at as well as before the expiration of the term of five years, the holder of the patent and the person entitled under sec. 17, 32 and 33 Vic. ch. 11 (the Patent Act) to the extension, so far as the right had relation to that territory. Powell, having taken the extension in his own name for the whole Dominion, should be decreed to execute such instruments or do whatever acts might be necessary to vest in Peck *et al.* their right and title in such extension.

Per Strong J.—Under the Dominion statute applicable to this patent the extension can be claimed as an absolute right by the holder, just as a

Patent of Invention—Continued.

renewal of a term can be claimed by a lessee where lease contains a covenant to that effect. The appellants could not insist upon a partial renewal confined to the five counties, but so soon as a renewal was obtained by the respondent he became a trustee of the renewed patent for the appellants in respect of those counties, the evidence not showing any mistake in the agreement, which on the ordinary principles applicable to relief by way of specific performance made it improper to carry out the contract. If the case depended upon the considerations with which the Chancellor principally dealt, in this view also he inclined to think the appellants would be entitled to succeed. As to *Powell* v. *Peck*, although the agreement of the 1st June, 1870, was executory, being in terms an agreement to assign, and not a final or completed assignment, the consideration paid and given for it was executed, part of that consideration being the mortgage. A compliance with the equitable obligation to carry that agreement into specific execution was not a condition precedent to the right to enforce the security for the purchase money, more especially after the purchasers had already to some extent had the benefit of the patent. The obligations of the vendor and purchasers were distinct and independent both at law and in equity. According to the principles upon which a court of equity acts in carrying into execution by its decree such contracts and agreements as are properly the subject of its jurisdiction, the court will always execute the whole, or such parts of the agreement as remain executory, but if the parties have thought fit, before the institution of the suit, to carry out any of the terms of the contract, such executed portions will not be disturbed.

Per Henry and Gwynne JJ.—The evidence shows that it was upon the faith of the representation by Powell that the patent was good for ten years that Peck *et al.* signed the agreement. Further, the agreement and assignment were sufficient to pass to Powell's assignees all right and title to renewal of the letters patent, and to make him a trustee for said assignees of any renewal as regards the five counties. As the appellants, by their answer to the respondent's bill, offer to pay the sum for which the mortgage was given, so soon as the respondent should make good the benefit of their purchase of the patent right, the decrees made in the Court of Chancery should be consolidated, and Powell ordered to assign all interest in and to the extension of the patent, and that upon the execution of such assignment an account be taken of what might remain due to Powell upon the mortgage, with the usual decree for sale in default of payment—Powell to pay all costs of consolidated suits, less costs of adjournment of hearing. Subsequent costs and further directions reserved.

Patent of Invention—Continued.

Appeal allowed in *Peck* v. *Powell* and dismissed in *Powell* v. *Peck*. Costs to follow event.

Peck v. Powell } **12th January. 1885.**
Powell v. Peck }

3. **Assignment of interest—Subsequent infringement—Want of novelty.**

C. obtained a patent for The Paragon Black Leaf Check Book, and in his specification claimed as his invention, "in a black leaf check book of double leaves, one half of which are bound together, while the other half fold in as fly leaves torn out: the combination of the black leaf bound into the book next the cover and provided with tape across its ends, the said black leaf having the transferring composition on one of its sides only."

A half interest in this patent was assigned to the defendant, with whom C. was in partnership, and on the dissolution of such partnership said half interest was re-assigned to C., who assigned the whole interest in the patent to plaintiffs.

Prior to the said dissolution the defendant obtained a patent for what he called "Butterfield's Improved Paragon Check Book," claiming as his invention the following improvements on check books previously in use: 1st. A kind of type; 2nd. The membrane hinge for a blank leaf, the whole bound by an elastic band to the ends or sides of the lower cover; and, 3rd. A totalling sheet. And after the dissolution proceeded to manufacture check books under his said patent. Plaintiffs brought suit for an injunction, claiming that their patent was infringed and, on the hearing before the Chancellor, he held the plaintiff's patent to be void for want of novelty.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the Court of Appeal (11 Ont. App. R. 145), that the patent of the plaintiffs under which they claimed was a valid patent, and as there was no doubt that it was infringed by the manufacture and sale of defendant's books, the judgment of the Chancellor should be restored.

Appeal allowed with costs.

Grip Printing & Publishing Co. v. Butterfield (22 C.L.J. 18).—16th Nov. '85.

4. **Infringement—New invention—Combination—Want of novelty.**

A patent was obtained for a baker's oven, the patentee claiming as his invention the following:—

1st. A fire pot, or furnace, placed within a baker's oven, below the sole thereof, and provided with a door situated above the grate.

2nd. A fire pot, or furnace, placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide.

3rd. In a baker's oven, a flue leading from below the grate to the main flue.

Patent of Invention—Continued.

4th. A baker's oven provided with a circular tilting grate, situated above the sole of the oven, and provided with a door.

5th. In a baker's oven, a cinder grate placed beneath the fire grate, in combination with a flue leading from below the grate to the main flue.

And in the specifications the patentee says:—"What I claim as my invention is—in combination with a baker's oven a furnace set within the oven, but below the sole."

Held, affirming the judgment of the Court of Appeal (10 Ont. App. R. 449), Strong and Henry JJ. dissenting, that there was no novelty in the invention justifying the issuing of a patent, and therefore the defendant was not liable for infringement.

Appeal dismissed with costs.

Hunter v. Carrick (22 C.L.J. 25).—**16th November, 1885.**

5. **Combination—Subsequent patent—Scire facias—Infringement—Damages, measure of.**

On the 4th July, 1877, Lasnier, the respondent, obtained from the patent office a patent of invention for new and useful improvements to machines for making candles, under the name of "*machine à fabriquer les cierges de Jean Baptiste Lasnier.*" On the 20th February, 1879, Collette and Ulric (the appellants) obtained a patent of invention "for new and useful improvements in candle making apparatus," the title and name whereof is "Collette and Ulric's Candle Apparatus." The action of the respondent is against the appellants to annul their patent, and for damages resulting from the counterfeiting of the machine patented by the respondent.

The Superior Court for Lower Canada (Jetté J.) by its judgment, declared that the appellants had fraudulently copied and infringed the patent of the respondent, forbade them from making use of their machine and condemned them in $600 damages, reserving to the respondent the ight to proceed by *scire facias* to ask for the nullity of appellants' patent.

The court arrived at the $600 by assuming that the damages sustained by the respondent consisted of the profits made by the appellants. It considered that the respondent had proved that by reason of the infringement of his invention the appellants had made a saving realizing a profit of five cents on each pound of candles, besides the ordinary profits, and that during the period of fourteen months the appellants had made and sold at least 12000 pounds of candles, giving the net profit of $600.

The Court of Appeals confirmed the judgment of the Superior Court.

The appellants appealed to the Supreme Court of Canada. They contended that these two judgments were erroneous, for the following reasons: 1. Because the appellants, having a patent, could not be condemned in

Patent of Invention—Continued.

damages for using their patented machine, so long as their patent had not been annulled by competent authority and in the manner required by law, viz., by *scire facias*; 2. Because the two judgments rendered were not founded on law, nor on facts; 3. Because the damages were excessive.

Held, that, assuming the respondents' patent to be good, as it was by the record admitted to be, there had been an infringement of it by the appellants, but that the court below had proceeded on a wrong principle in assessing the damages; the evidence furnished no means of accurately measuring the plaintiff's damages, but substantial justice would be done by estimating them at $100.

Per Ritchie C. J.—The respondent's machine is substantially the same as the appellant's; the alterations are only in reference to the construction of the machine, not a new invention or new combination.

Per Taschereau J.—The judgment appealed from finds that the appellant's machine is substantially the same as the respondent's, and entirely based on the same principles, and that the few changes or improvements it may contain are entirely unimportant and constitute mere mechanical equivalents, used for the same purpose and producing the same result. In this finding of fact I entirely concur. This being so, the appellant's case has no standing in law.

As to damages, it is settled law that a Court of Appeal will not, as a general rule, entertain an appeal from an order of the court below assessing damages, yet it will do so when it is shewn that the court below has acted on a wrong principle in assessing the quantum of damages—*Ball* v. *Ray*, 30 L. T. N. S. 1, *Bank of U. C.* v. *Bradshaw*, L. R. I. P. C. 479.

By the declaration the respondent alleges no actual loss or damage, but that the appellants by using respondent's patent, or other fraudulent imitation of it, have realized a profit of $13,200 over and above the profits they would or might have realized in making candles without resorting to this machine; there is no allegation that had the appellants not used this machine he would have made all the candles they made; and it is in evidence there are various other modes of making candles, and there was nothing to prevent appellants from doing so by the other various modes, or even with the respondent's own machine, for he could not refuse to sell them one. There is no evidence in the record of the cost or value of the respondent's machine, or of what would be a fair royalty on it, so that it is impossible to assess the damages. My brother judges are disposed to grant $100 damages. I would not have given so much, but will agree to this amount.

Per Gwynne J.—Assuming the respondent's patent to be a good one, as upon this record it is admitted to be, the machine for which the appellants

Patent of Invention—Continued.

have procured a patent is a mere colourable imitation of the respondent's machine, based upon precisely the same principles, composed of the same elements, and differing from it only in the arrangement of those elements and producing no results materially different. The evidence fails to furnish us with any means of accurately measuring the respondent's damages. How he, himself, contemplated making his profit does not appear. It is only where from the peculiar circumstances of the case no other rule can be found that the defendant's profits become the criterion of the plaintiff's loss, and we have no evidence before us to enable us to determine what rule should govern in the present case, whether the profit should consist in the value of a license to make and sell the patented improvement, or, if it should, what is a fair estimate of the value of such license. The plaintiff has not set any value himself on such a license. Moreover, the estimate of the defendant's profits, if that had been shewn to be the proper rule applicable to the case, does not appear to have been made by a comparison of the profit obtainable by use of the plaintiff's improved machine in making tapers with the latest precedent and best known mode of making them, but by a comparison between the use of the plaintiff's improvement and of a very old mode of making tapers, which had, as is said, been improved upon by other modes before the plaintiff obtained a patent. Substantial justice will be done by reducing the damages to $100.

Per Henry J. dissenting—By the law which determines rights under patents of invention, the specification is deemed a part of the patent and the two instruments are to be construed together as one, and if it appears by the patent or specification, that anything is claimed by the patentee as a part of his invention which is not new, the grant of the privilege will be wholly void. The consideration given for a patent is a warranty that all is new which the applicant seeks to protect. The consideration is entire and covers everything in the patent and specification, and if it fails for one or more parts of the alleged invention it fails for all, and the patent is therefore void *at initio*, and no action can be maintained for any infringement of it, even if the part of the invention to which the alleged infringement refers was new. The obtaining of a patent by the appellants subsequent to the patent of the respondent would not authorize the manufacture of the same articles until the second patent was repealed. Such patent would be void because the appellants under the statute obtained the exclusive right, and a second patent for the same object would be void as unauthorized by the statute, and also because not new. But it is alleged by the defence and sustained by the evidence, that every part of the respondent's machine with its several combinations was well known, and used before the date of the

Patent of Invention—Continued.

patent, except the application of a lever to the pullies for raising and lowering the plunger. His claim is not confined to the mere combination of the lever with the other parts of the combined machine. If it had been, it might have been doubtful if the mere addition of such a piece of well known and used mechanical agency as a lever would entitle the applicant to a patent. It would be but the application of a well known and used mechanical power to a combined machine, the right to use which by the public could not be questioned.

Appeal dismissed with costs. Damages reduced to $100.

Collette v. Lasnier.—8th March, 1886.

Payment—Into Bank to credit of Succession.

See BANKS AND BANKING 4.

2. Consignment of goods subject to.

See SALE OF GOODS 7.

3. Effect of.

See CONTRACT 5.

4. By co-obligor.

See MORTGAGE 2.

5. **Appropriation of—Interest.**

By a decree of the Court of Chancery it was directed that an account should be taken of all dealings between St. J., the plaintiff, and R., the defendant. The master found that $453.20 was due to the defendant by the plaintiff. The master disallowed to the plaintiff the amount of a note for $510, and interest thereon as barred by the Statute of Limitations; and reduced the interest on a sum of $3,000 advanced from twenty-four per cent. to six per cent. after judgment had been recovered. The note of $510 was dated 18th November, 1881, and was payable with interest at the rate of $10 per week from the 23rd November, 1861. On the 6th March, 1867, the defendant, who had been sued by the plaintiff for certain other claims, entered into an agreement with him in order to relieve him from the pressure of execution debts, paid him $2,000 on amount of the indebtedness, and got time for the balance. The plaintiff made no demand at the time to be paid this note, and did not instruct his attorney who acted for him to seek payment of it until 1870.

Held, that the evidence showed an appropriation by respondent of the $2,000 on account of the debts for which he was being pressed, and as the note for $510 was not included in such debts, the master was right in treating it as barred by the Statute of Limitations.

St. John v. Rykert.—x, 278.

6. Delegation of in hypothec.

See HYPOTHEC.

Payment—Continued.

7. Into Court—Plea of—Effect.

See SALE OF GOODS 12.

8. Fraudulent and simulated hypothec—Given in payment of goods—Right to sue for price.

See SALE OF GOODS 14.

Penalties—Jurisdiction of Court of Vice-Admiralty to enforce.

See PARLIAMENT OF CANADA 18.

2. Appropriation of, for contravention of Canada Temperance Act, 1878.

See CANADA TEMPERANCE ACT, 1878, 5.

Petition of Right—**Intercolonial railway contract—31 Vic. ch. 13 sec. 18—Certificate of chief engineer—Condition precedent to recovery of money for extra work—Petition of right will not lie against the Crown for tort, or for the fraudulent misconduct of its servants—Forfeiture and penalty—Liquidated damages.**

On the 25th May, 1870, J. and S., contractors, entered into a contract with the Intercolonial Railway Commissioners (authorised by 31 Vic. ch. 13) to construct and complete section No. 7 of the said Intercolonial railway for the Dominion of Canada, for a bulk sum of $557,750. During the progress of the work, changes of various kinds were made. The works were sufficiently completed to admit of rails being laid, and the line opened for traffic on the 11th November, 1870. The total amount paid on the 10th February, 1873, was $557,750, the amount of the contract. The contractors thereupon presented a claim to the commissioners amounting to $116,463.83 for extra work, &c., beyond what was included in their contract. The commissioners, after obtaining a report from the Chief Engineer, recommended that an additional sum of $31,091.85 (less a sum of $8,300 for timber bridging not executed, and $10,354.24 for under drain taken off contractors hands) be paid to the contractors upon receiving a full discharge of all claims of every kind or description under the contract. The balance was tendered to suppliants and refused.

The contractors thereupon, by petition of right, claimed $124,663.33 as due from the Crown to them for extra work done by them outside of and beyond the written contract, alleging that by orders of the Chief Engineer additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra; and alleging further, that they were put to large expense and compelled to do much extra work which they were entitled to be paid for, in consequence of misrepresentations in plans and bill of works exhibited at time of letting.

On the profile plan it was stated that the best information in possession of the Chief Engineer respecting the probable quantities of the several kinds

Petition of Right—Continued.

of work would be found in the schedules accompanying the plan, "but contractors must understand that these quantities are not guaranteed;" and in the bill of works, which purported to be an abstract of all information in possession of the commissioners and Chief Engineer with regard to the quantities, it was stated, "the quantities herein given as ascertained from the best data obtained are, as far as known, approximately accurate, but at the same time they are not warranted as accurate, and and no claim of any kind will be allowed, though they may prove to be inaccurate."

The contract provided *inter alia*, that it should be distinctly understood, intended and agreed that the said price or consideration of $557,750 should be the price of, and be held to be full compensation for all works embraced in, or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans and specification, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act, intituled, "An Act respecting the construction of the Intercolonial Railway," or in the Commissioners or Engineer, by the said contract or by law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alterations in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of the Act first cited in the said contract, intituled, "An Act respecting the construction of the Intercolonial Railway," 31 Vic. ch. 13, and also, in so far as they might be applicable, to the provisions of "The Railway Act of 1868."

The 19th sec. of 32 Vic. ch. 13, enacts "that no money shall be paid to any contractor until the Chief Engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the Commissioners. No certificate was given by the Chief Engineer of the execution of the work.

Held, by the Exchequer Court of Canada, Ritchie J., that the contract requiring that any work done on the road must be certified to by the Chief Engineer, until he so certified and such certificate was approved of by the Commissioners, the contractors were not entitled to be paid anything. That if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work. If such extra work was of a character so peculiar and unexpected as to be considered *dehors* the con-

Petition of Right—Continued.

tract, then there was no such contract with the Commissioners as would give the contractors any legal claim against the Crown; the Commissioners alone being able to bind the Crown, and they only as authorized by statute. That there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them. But even if there had been, a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown fraudulent misconduct of its servants.

In the contract it was also provided that if the contractors failed to perform the works within the time agreed upon in and by the said contract, to wit, 1st July, 1871, the contractors would forfeit all money then due and owing to them under the terms of the contract, and also the further sum of $2,000 per week for all the time during which said works remained incomplete after the said 1st July, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872.

Held, that if the Crown insisted on requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to a sum of $2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages.

The Crown subsequently waiving the forfeiture, judgment was rendered in favor of the suppliants for the sum of $2,436.11, being the amount tendered by the respondent, less the costs of the Crown in the case to be taxed and deducted from the said amount.

Jones v. The Queen, in the Exchequer.—vii, 570.

2. **Contract—Claim for extra work—Certificate of Engineer—Condition precedent—31 Vic. ch. 12 D.**

The suppliant engaged by contract under seal, dated 4th December, 1872, with the Minister of Public Works, to construct, finish and complete, for a lump sum of $78,000, a deep sea wharf at the Richmond station at Halifax, N.S., agreeably to the plans in the engineer's office and specifications, and with such directions as would be given by the engineer in charge during the progress of the work. By the 7th clause of the contract no extra work could be performed, unless "ordered in writing by the engineer in charge before the execution of the work." By letter, dated 26th August, 1873, the Minister of Public Works authorized the suppliant to make an addition to the wharf, by the erection of a superstructure to be used as a coal floor, for the additional sum of $18,400. Further extra work, which amounted to $2,781, was performed under another letter from the Public Works Department. The work was completed, and on the final certificate of the Government's engineer in charge of the works, the sum of $9,681, as the balance due, was paid to the suppliant, who gave the following receipt, dated 30th

Petition of Right—Continued.

April, 1875 : "Received from the Intercolonial Railway, in full, for all amounts against the government for works under contract, as follows: 'Richmond deep water wharf, works for storage of coals, works for bracing wharf, rebuilding two stone cribs the sum of $9,681.'" The suppliant sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875, and also for damages caused to him by deficiency in and irregularity of payments. The petition was dismissed with costs; and a rule *nisi* for a new trial was subsequently moved for and discharged.

Held, affirming judgment of court below, that all the work performed by the suppliant for the government was either contract work within the plans or specifications, or extra work within the meaning of the 7th clause of the contract, and that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that the written authority of the engineer and the estimate of the value of the work are conditions precedent to the right of the suppliant to recover payment for any other extra work. (Henry J. dissenting.)

Per Ritchie C.J.—That neither the engineer, nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada, has any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract.

O'Brien v. The Queen.—iv, 529.

3. **Prescription—9 Vic. ch. 37—Right of the Crown to plead prescription—10 years' prescription—Good faith—Translatory title—Judgment of confirmation—Titre precaire—Inscription en faux—Improvements, claim for by incidental demand—Arts. 2211, 2251, 2206, C. C. L. C.—Art. 473 C. C P. L. C.**

N. C., the suppliant, by his petition of right, claimed, as representing the heirs of P. W., jr., certain parcels of land originally granted by letters patent from the Crown, dated 5th January, 1806, to P. W., sr., together with a sum of $200,000 for the rents, issues and profits derived therefrom by the Government since the illegal detention thereof. As to the merits the defendant pleaded —1st. By peremptory exception, setting up title and possession in Her Majesty under divers deeds of sale and documents; 2nd. Prescription by 30, 20 and 10 years. An exception was also fyled, setting up that these transfers to petitioners by the heirs of P. W., jr., were made without valid consideration, and that the rights alleged to have been acquired were disputable, *droits litigieux*. The general issue and a supplementary plea claiming value of improvements were also fyled. To first of these excep-

Petition of Right—Continued.

tions the petitioner answered that the parties to the deeds of sale relied upon had no right of property in the land sold, and denied the legality and validity of the other documents relied upon, and inscribed *en faux* against a judgment of ratification of title to a part of the property rendered by the Superior Court for the district of Aylmer, P.Q. To the exception of prescription the petitioner answered, denying the allegations thereof, and more particularly the good faith of the defendant. To the supplementary plea, the petitioner alleged bad faith on the part of defendant. There were also general answers to all the pleas. On the issues thus raised, the parties went to proof by an *enquête* had before a commissioner under authority of the court, granted on motion, in accordance with the law of the Province of Quebec. The case was argued in the Exchequer Court before J. T. Taschereau J., and he dismissed the suppliant's petition of right with costs. Whereupon the suppliant appealed to the Supreme Court of Canada.

Held, Fournier and Henry JJ. dissenting—1. That before the Code, and also under the Code (art. 2211), the Crown had under the laws in force in the Province of Quebec, the right to invoke prescription against a subject, which the latter could have interrupted by petition of right.

2. That in this case the Crown had purchased in good faith with translatory titles, and had by ten years peaceable, open and uninterrupted possession, acquired an unimpeachable title.

3. That in relation to the *Inscription en faux*, the Art. 473 of the Code of Procedure is not so imperative as to render the judgment attacked an absolute nullity, it being registered in the register of the court.

4. That the petitioner was bound to have produced the minute, or draft of judgment attacked, but having only produced a certified copy of the judgment, the inscription against the judgment falls to the ground.

5. That even if S. O.'s title was *titre précaire*, the heirs by their own acts ceded and abandoned to L. all their rights and pretensions to the land in dispute, and that the petitioner C. was bound by their acts.

Held, also, that the *impenses* claimed by the incidental demand of the Crown were payable by the petitioner, even if he had succeeded in his action.

Chevrier v. The Queen.—iv. 1,

4. **Fisheries, regulation and protection of—Fisheries act, 31 Vic. ch. 60 D.—British North America Act, 1867, secs. 91, 92 and 109—License to fish in that part of the Mtramicht River above Price's Bend—Rights of riparian proprietors in granted and ungranted lands—Right of passage and right of fishing.**

On January 1st, 1874, the Minister of Marine and Fisheries of Canada, purporting to act under the powers conferred upon him by sec. 2, ch. 60,

Petition of Right—Continued.

31 Vic., executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the South West Miramichi River in New Brunswick, for the purpose of fly-fishing for salmon therein, the *locus in quo* being thus described in the special case agreed to by the parties:— "Price's Bend is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward, is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow."

Certain persons who had received conveyances of a portion of the river, and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in endeavoring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease.

The Supreme Court of New Brunswick having decided adversely to his exclusive right to fish in virtue of said lease, the suppliant presented a petition of right, and claimed compensation from her Majesty for the loss of his fishing privileges and for the expenses he had incurred.

By special case certain questions were submitted for the decision of the court, and the Exchequer Court, **Held**, *inter alia*, that an exclusive right of fishing existed in the parties who had received the conveyances, and that the Minister of Marine and Fisheries consequently had no power to grant a lease or license under sec. 2 of the Fisheries Act of the portion of the river in question, and in answer to the 8th question, viz: "Where the lands (above tide water) through which the said river passes are ungranted by the Crown could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?" **Held**, that the Minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river.

The appellant thereupon appealed to the Supreme Court of Canada on the main question; whether or not an exclusive right of fishing did so exist.

Held, affirming the judgment of the Exchequer Court 1st, that the general power of regulating and protecting the fisheries under the British North America Act, 1867, sec. 91, is in the Parliament of Canada, but that the license granted by the Minister of Marine and Fisheris of the *locus in quo* was void, because said Act only authorizes the granting of leases "where the exclusive right fishing does not already exist by law," and in this case the

Petition of Right—Continued.

exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi River flows.

2nd, that although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down, and a right of passage up and down, wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands *ad medium filum aquæ.*

3rd. That the rights of fishing in a river, such as is that part part of the Miramichi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made, there is no authority given by the B. N. A. Act, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority.

4th. Per Ritchie C.J. and Strong, Fournier and Henry JJ., reversing the judgment of the Excehquer Court on the 8th question submitted, that the ungranted lands in the Province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal.

The Queen v. Robertson—vi, 52.

5. **Counsel fees, action for—Retainer for services before Fishery Commission—Jurisdiction,**

The suppliant, an advocate of the Province of Quebec, and one of Her Majesty's counsel, was retained by the Government of Canada as one of the counsel for Great Britain before the Fishery Commission which sat at Halifax pursuant to the Treaty of Washington. There was contradictory evidence as to the terms of the retainer, but the learned judge in the Exchequer Court found "That each of the counsel engaged was to receive a refresher equal to the retaining fee of $1,000, that they were to be at liberty to draw on a bank at Halifax for $1,000 a month during the sittings of the commision, that the expenses of the suppliant and his family were to be paid, and that the final amount of fees was to remain unsettled until after the award." The amount awarded by the Commissioners was $5,500,000. The suppliant claimed $10,000 as his remuneration, in addition to $8,000 already received by him.

Held, per Fournier, Henry and Taschereau JJ., that the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the amount paid him, and that $8,000 awarded him in the Exchequer Court was a reasonable sum.

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Per Fournier, Henry, Taschereau and Gwynne JJ.—By the law of the Province of Quebec, counsel and advocates can recover for fees stipulated for by an express agreement.

Per Fournier and Henry JJ.—By the law also of the Province of Ontario counsel can recover for such fees.

Per Strong J.—The terms of the agreement, as established by the evidence, shewed, in addition to an express agreement to pay the suppliant's expenses, only an honorary and gratuitous undertaking on the part of the Crown to give additional remuneration for fees beyond the amount of fees paid, which undertaking is not only no foundation for an action but excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered; and the suppliant could therefore recover only his expenses in addition to the amount so paid.

Per Ritchie C.J.—As the agreement between the suppliant and the Minister of Marine and Fisheries, on behalf of Her Majesty, was made at Ottawa, in Ontario, for services to be performed at Halifax, in Nova Scotia, it was not subject to the law of Quebec; that in neither Ontario nor Nova Scotia could a barrister maintain an action for fees, and therefore that the petition would not lie.

Per Gwynne J.—By the Petition of Right Act, sec. 19, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances. By the laws in force there prior to 23 and 24 Vic. ch. 34 (Imp.), counsel could not, at that time, in England, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover.

[This case was appealed to the Privy Council, where it was **Held**, 1. That according to the law of Quebec, a member of the bar is entitled, in the absence of special stipulation, to sue for and recover on a *quantum meruit* in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the bar.

2. That in the absence of stipulation to the contrary, express or implied, Mr. Doutre must be deemed to have been employed upon the usual terms upon which such services are rendered, and that his status in respect both of right and remedy was not affected either by the *lex loci contractus* or the *lex loci solutionis*.

3. That the P. R. A., 1876, sec. 19 sub-sec. 3 does not in such case bar the remedy against the Crown by petition. 9 App. cases 745.]

The Queen v. Doutre.—vi, 343.

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6. **16 Vic. ch. 235—Debentures issued by Trustees of the Quebec Turnpike Roads—Legislative recognition of a debt—Agents, liability of the Crown for acts by.**

Held, Ritchie C.J. and Gwynne J. dissenting, that the Trustees of the Quebec North Shore Turnpike Trust, appointed under ordinance, 4 Vic. ch. 17, when issuing the debentures in suit, under 16 Vic. ch. 235, were acting as agents of the Government of the late province of Canada, and that the said province became liable to provide for the payment of the principal of said debentures when they became due.

Per Henry and Taschereau JJ.—That the Province of Canada had, by its conduct and legislation, recognized its liability to pay the same, and that respondents were entitled to succeed on their cross appeal as to interest from the date of the maturing af the said debentures.

Per Ritchie C.J. and Gwynne J.—That the trustees, being empowered by the ordinance to borrow moneys "on the credit and security of the tolls thereby authorized to be imposed and of other moneys which might come into the possession and be at the disposal of the said trustees, under and by virtue of the ordinance, and not to be paid out of or chargeable against the general revenue of this province," the debentures did not create a liability on the part of this province in respect of either the principal or interest thereof.

[On appeal to the Privy Council, the judgment of the Supreme Court was reversed, and the construction put on the statute by Ritchie C.J. and Gwynne J. was affirmed.]

Belleau v. The Queen.—vii, 53.

7. **Petition of Right Act, 1876, sec. 7—Statute of Limitations—32 Henry VIII. ch. 9—Buying pretended titles—Public Works—Rideau Canal Act, 8 Geo. IV. ch. 1—6 Wm. IV. ch 16—Trustee, Contract by—Compensation for lands taken for Canal purposes—2 Vic. ch. 19—7 Vic. ch. 11 sec. 29—9 Vic. ch. 42.**

Under the provisions of 8 Geo. IV. ch. 1, passed on the 17th February, 1827, by the Provincial Parliament of Upper Canada, and generally known as the Rideau Canal Act, Lt.-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen, as necessary for making and completing said canal, but only some 20 acres were actually necessary and used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, Alexander McQueen released to William McQueen all his interest in the said lands, and on the 6th February, 1832, William Mc-

Petition of Right—Continued.

Queen granted to Col. By all the lands previously granted to his mother, Grace McQueen. Col. By died on the 1st February, 1836.

By 6 William IV. ch. 16, persons who acquired title to lands used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.

By the Ordnance Vesting Act, 7 Vic. ch. 11, Canada, the Rideau Canal and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by sec. 29 it was enacted: "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

By the 9th Vic. ch. 42, Canada, it was recited that the foregoing proviso had given rise to doubt as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, under 8 Geo. IV. ch. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for the re-investing in him and his grantees of the portions of lands taken but not required for such purposes.

By the 19th and 20th Vic. ch. 45, the Ordnance properties became vested in her Majesty for the uses of the late Province of Canada, and by the British North America Act they became vested in her Majesty for the use of the Dominion of Canada.

The suppliants, the legal representatives of Col. By, brought a petition of right, alleging the foregoing facts, and seeking to have her Majesty declared a trustee for them of all the said lands not actually used for the purposes of the said canal, and praying that such portion of said lands might be restored to them, and the rents and profits thereof paid, and as to any parts sold that the value thereof might be paid together with the rents and profits prior to the selling thereof.

By his statement in defence, the Attorney-General contended, among other things, that (par. 5) no interest in the lands set out and ascertained by Col. By passed to William McQueen, but the claim for compensation or damages for taking said lands was personal estate of Grace McQueen, and passed to her personal representative; that (par. 6, 7 and 8) the deeds of the 31st of January and 6th February, 1832, passed no estate or interest, the title and possession of the lands being in his Majesty, but that such deeds were void under 32 Hy. VIII. ch. 9; that (par. 9) Col. By was incapable, by

Petition of Right—Continued.

reason of his position, from acquiring any beneficial interest in said lands as against his Majesty; that (par. 10, 11, 12 and 13) Col. By took proceedings under 8 Geo. IV. ch. 1, to obtain compensation for the lands in question, but the arbitrators, and also a jury summoned under the Act, decided that he was entitled to no compensation by reason of the enhancement of the value of his other land and of other advantages accrued by the building of the canal, and that this award and verdict were a bar to the suppliant's claim; that (par. 14 and 15) the proviso of 9 Vic. ch. 42, was confined to Nicholas Sparks and did not extend to the lands in question; that (par. 16, 17, 18 and 19) by virtue of 2 Vic. ch. 19 (Upper Canada) and a proclamation issued in pursuance thereof, all claims for damages which might have been brought under 8 Geo. IV. ch. 1, by owners of lands taken for the canal, including claims of the said Grace McQueen or Col. By, or their respective representatives, were, on and after the 1st April, 1841, forever barred; that (par. 26, 27 and 28) the suppliants were barred by their own *laches*; and that (par. 27) they were barred by the Statute of Limitations.

On a special case stated on the pleadings for the opinion of the court,

Held, by the Exchequer Court of Canada (Richards C.J.) 1. The Statute of Limitations was properly pleadable under sec. 7 of the Petition of Right Act of 1876.

2. William McQueen took the lands by descent from his mother, if she died before the lands were set out and ascertained for the purposes of the canal. If she died afterwards, he did not, as they were vested in the Crown under 8 Geo. IV. ch. 1 secs. 1 and 3, and her right was converted into a claim for compensation under the 4th section.

3. This right of compensation or damages, if asserted under the 4th sec. of Geo. IV. ch. 1, would go to Grace McQueen's personal representatives, but if the land was obtained by surrender under the 2nd sec. of the statute, then the heir-at-law of Grace McQueen would be the person entitled to receive the damages and execute the surrender.

4. The deeds of the 31st January, 1832, and 6th February, 1832, are void as against the Crown so far as they relate to the acres in dispute, except so far as the same may be considered as a surrender to the Crown under the 2nd sec. of the Rideau Canal Act.

5. The 9th paragraph of the statement in defence is a sufficient answer in law to the petition.

6. The defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement would be sufficient in law, supposing the statements therein to be true.

Petition of Right—Continued.

7. The proviso of 9 Vic. ch. 42 sec. 29 was confined in effect to the lands of Nicholas Sparks only.

8. If the claim is to be made by Grace McQueen's personal representatives under the 4th sec. of the Rideau Canal Act (and any claim by her could only be under that section) the Acts referred to in the 16th, 17th, 18th and 19th paragraphs of the statement in defence have an applicatipn to this case and would constitute a bar against all claims to be made under the Rideau Canal Act. As to the claims to be made by the heirs of Col. By, they have no claims under any of the statutes.

9. If the Ordnance Vesting Act vested the 110 acres in question in the heirs of Col. By, the court was not prepared to say that their claim had been barred by *laches* on the statement set out in the petition. But the statute had not that effect, nor had Col. By or his legal representatives ever had for his or their own use and benefit any title to these 110 acres.

Tylee v. The Queen.—vil. 651.

8. **Tender for work on Intercolonial Railway—Acceptance by commissioners—Contract, liability of Crown for breach of—Extra work, claim for—Damages—31 Vic. ch. 13—37 Vic. ch. 15, effect of—Works completed 1st June, 1874—Certificate of engineer—Condition precedent, waiver of—Demurrer.**

In January, 1872, the Commissioners of the Intercolonial Railway gave public notice that they were prepared to receive tenders for the erection *inter alia* of certain engine houses, according to plans and specifications deposited at the office of the Chief Engineer at Ottawa. J. I. tendered for the erection of an engine house at Matapedia, and in October following he was instructed by the commissioners to proceed in the execution of the work, according to his accepted tender, the price being $21,989. The work was completed and delivered to the Government in October, 1874. The specification provided as follows:—"The commissioners will provide and lay railway iron, and will also provide and fix cast-iron columns, iron girders, and other iron work required for supporting roof." In September, 1873, J. I. was unable to proceed further with the execution of his work, in consequence of the neglect of the commissioners to supply the iron girders, &c., until March following, owing to which delay he suffered loss and damage. During the execution of the work, J. I. was instructed and directed by the commissioners, or their engineers, to perform, and did perform, certain extra works not included in his accepted tender, and not according to the plans, drawings and specifications.

By his petition of right, J. I. claimed $3,795.75 damages, in consequence of the delay on the part of the commissioners to provide the cast-iron columns, &c., and $8,505.10 for extra works.

Petition of Right—Continued.

The Crown demurred, and also traversed the allegation of negligence and delay, and admitted extra work to the amount of $5,056.60, and set up the 18th sec. of 31 Vic. ch. 13, which required the certificate of the Engineer-in-Chief as a condition precedent to the payment of any sum of money for work done on the Intercolonial Railway.

By 38 Vic. ch. 15, on the 1st June, 1874, the Intercolonial Railway was declared to be a public work vested in her Majesty, and under the control and management of the Minister of Public Works, and all the powers and duties of the commissioners were transferred to the Minister of Public Works, and sec. 3 of 31 Vic. ch. 13, was repealed, with so much of any other part of the said Act as might be in any way inconsistent with 37 Vic. ch. 15.

Held, by the Exchequer Court of Canada (Fournier J.): That the tender and its acceptance by the commissioners constituted a valid contract between the Crown and J. I., and that the delay and neglect on the part of the commissioners acting for the Crown to provide and fix the cast-iron columns, &c., which were, by the specifications, to be provided and fixed by them, was a breach of the said contract, and that the Crown was liable for the damages resulting from such breach.

2. That the extra work claimed for, being for a sum less than $10,000, the commissioners had power to order the same under the statute 31 Vic. ch. 13 sec. 16, and J. I. could recover, by petition of right, for such part of the extra work claimed as he had been directed to perform.

3. That the 18th sec. of 31 Vic. ch. 13, not having been embodied in the agreement with J. I., as a condition precedent to the payment of any sum for work executed, the Crown could not now rely on that section of the statute for work done and accepted, and received by the Government.

4. That the effect of 37 Vic. ch. 15, was to abolish the office of Chief Engineer of the Intercolonial Railway, and for work performed and received on or after the 1st June, 1874, to dispense with the necessity of obtaining, as a condition precedent to the payment for the same, the certificate of said Chief Engineer, in accordance with sec. 18 of 31 Vic. ch. 13.

Isbester v. The Queen—vii, 696.

9. **Executory contract—Crown, non-liability on—Recovery of value of work done if expenditure unauthorized by Parliament—31 Vic. ch. 12 secs. 7, 15 and 20.**

By his petition of right W., a sculptor, alleged that he was employed by the Dominion Government to prepare plans, models, specifications and designs, for the laying out, improvement and establishment of the Parliament square, Ottawa; that he had done so, and superintended the work and construction of said improvements for six months. He claimed $50,000 for the value of his work.

Petition of Right—Continued.

31 Vic. ch. 12 sec. 7 provides that, when executory contracts are in writing they shall have certain requisites, such as signing, sealing and countersigning, to be binding; and by sec. 15 provides that before any expenditure is incurred there shall have been a previous sanction of Parliament, except for such repairs and alterations as the public service demands; and by sec. 20 requires that tenders shall be invited for all works, except in cases of emergency, or where from the nature of the work it could be more expeditiously and economically executed by the officers and servants of the department.

Held, by the Exchequer Court of Canada, Richards C.J.—1. That the Crown in this Dominion cannot be held responsible under a petition of right on an executory contract entered into by the Department of Public Works for the performance of certain works placed by law under the control of the department, when the agreement therefor was not made in conformity with the above 7th section of 31 Vic. ch. 12.

2. That under sec. 15 of said Act, if Parliament has not sanctioned the expenditure, a petition of right will not lie for work done for and at the request of the Department of Public Works, unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded.

3. That in this case, if Parliament has made appropriations for these works and so sanctioned the expenditure, and if the work done was of the kind that might properly be executed by the officers and servants of the department under sec. 20 of said Act, then no written contract would be necessary to bind the department, and suppliant should recover for work so done.

Wood v. The Queen.—vii. 634.

10. **Crown—Non-liability of, for negligence of its servants—Not a common carrier—Payment of Statutory Dues.**

Held, 1st. That a petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work.

2nd. That an express or implied contract is not created with the Crown because an individual pays tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides.

3rd. That in such a case Her Majesty cannot be held liable as a common carrier.

The Queen v. McFarlane.—vii, 216.

11. **Non-liability of Crown for non-feasance or mis-feasance of its servants—Public work—Public police—Crown not a common carrier.**

McL., the suppliant, purchased, in 1880, a first-class railway passenger ticket to travel from Charlottetown to Souris on the Prince Edward Island

Petition of Right—Continued.

railway, owned by the Dominion of Canada, and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train.

By petition of right the suppliant alleged that the railway was negligently and unskilfully conducted, managed and maintained by her Majesty; that her Majesty, disregarding her duty in that behalf and her promise, did not carry safely and securely suppliant on said railway and that he was greatly and permanently injured in body and health, and claimed $50,000.

The Attorney General pleaded that her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants.

The learned judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of a contract to carry the suppliant safely and securely, and awarded $36,000.

On appeal to the Supreme Court of Canada, **Held,** Fournier and Henry JJ. dissenting, that the establishment of government railways in Canada, of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the non-feasance or mis-feasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on said railways. That the Crown is not liable as a common carrier for the safety and security of passengers using said railways.

The Queen v. McLeod.--VIII, 1.

12. **Contract—Non-liability of the Crown on Parliamentary Printing Contract.**

H., in his capacity of "clerk of the Joint Committee of both Houses on Printing," advertized for tenders for the printing, furnishing the printing paper and the binding required for the Parliament of the Dominion of Canada. The tender of the suppliants was accepted by the Joint Committee and by both Houses of Parliament by adoption of the committee's report, and a contract was executed between the suppliants and H. in his said capacity. The suppliants, by their petition, contended that the tender and acceptance constituted a contract between them and her Majesty, and that they were entitled to do the whole of the printing required for the Parlia-

Petition of Right—Continued.

ment of Canada, but had not been given the same, and they claimed compensation by way of damages.

Held, reversing the judgment of Henry J. in the Exchequer Court, that the Parliamentary Printing was a matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control; and that the Crown was no party to the contract with the suppliants and could not be held responsible for a breach of it.

The Queen v. MacLean.—viii, 210.

13. **Departmental Printing Contract—Mutualtty—Liabtlity of the Crown.**

Under 32 & 33 Vic. ch. 7, which provides that the printing, binding and other like work required for the several departments of the government shall be done and furnished under contracts to be entered into under authority of the Governor in Council after advertisement for tenders, the Under Secretary of State advertized for tenders for the printing "required by the several departments of the government." The suppliants tendered for such printing, the specifications annexed to the tender, which were supplied by the government, containing various provisions as to the manner of performing the work and giving of security. The tenders were accepted by the Governor in Council, and an indenture was executed between the suppliants and her Majesty, by which the suppliants agreed to perform and execute, &c., "all jobs or lots of printing for the several departments of the Government of Canada, of reports, &c., of every description and kind soever coming within the denomination of Department printing, and all the work and services connected therewith and appertaining thereto, as set forth in the said specification hereunto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of said several respective departments." Part of the Departmental printing having been given to others, the suppliants, by their petition, claimed compensation by way of damages, contending that they were entitled to the whole of said printing.

Held, affirming the judgment of Henry J. in the Exchequer Court, that having regard to the whole scope and nature of the transaction, the statute, the advertisement, the tender, the acceptance and the contract, there was a clear intention shown that the contractors should have all the printing that should be required by the several departments of the government, and that the contract was not a unilateral contract but a binding mutual agreement. (Taschereau and Gwynne JJ. dissenting.)

The Queen v. MacLean.—viii, 210.

Petition of Right—Continued.

14. Contract—Government contract—Clause in—Construction of—Assignment Effect of—Damages.

On the 2nd August, 1878, H. C. & F. entered into a contract with her Majesty to do the excavation, &c , of the Georgian Bay branch of the Canadian Pacific Railway. Shortly after the date of the contract and after the commencement of the work, H. C. & F. associated with themselves several partners in the work, amongst others S. & R. (respondents), and on 30th June, 1879, the whole contract was assigned to S. & R. Subsequently, on the 25th July, 1879, the contract with H. C. & F. was cancelled by Order in Council, on the ground that satisfactory progress had not been made with the work as required by the contract. On the 5th August, 1879, S. & R. notified the Minister of Railways of the transfer made to them of the contract. On the 9th August, the Order in Council of July 25th was sent to H. C. & F. On the 14th August, 1879, an Order in Council was passed stating that as the Government had never assented to the transfer and assignment of the contract to S. & R., the contractors should be notified that the contract was taken out of their hands and annulled. In consequence of this notification S. & R., who were carrying on the works, ceased work, and with the consent of the Minister of Public Works, realized their plant and presented a claim for damages, and finally H. C. & F. and S. & R. filed a petition of right claiming $250,000 damages for breach of contract.

The statement in defence set up *inter alia*, the 17th clause of the contract which provided against the contractors assigning the contract, and in case of assignment without her Majesty's consent, enabled her Majesty to take the works out of the contractors' hands, and employ such means as she might see fit to complete the same; and in such case the contractors should have no claim for any further payment in respect of the works performed, but remain liable for loss by reason of non-completion by the contractor.

At the trial there was evidence that the Minister of Public Works knew that S. & R. were partners, and that he was satisfied that they were connected with the concern. There was also evidence that the department knew S. & R. were carrying on the works, and that S. & R. had been informed by the Deputy Minister of the department that all that was necessary to be officially recognized as contractors was to send a letter to the government from H. C. & F.

In the Exchequer Henry J. awarded the suppliants $171,040.77 damages.

On appeal to the Supreme Court of Canada it was **Held**, reversing the judgment of Henry J., Fournier and Henry JJ. dissenting, that there was no evidence of a binding assent on the part of the Crown to an assignment of the contract to S. & R., who, therefore, were not entitled to recover.

Petition of Right—Continued.

2. That H. C. & F., the original contractors, by assigning their contract put it in the power of the government to rescind the contract absolutely, which was done by the Order in Council of the 14th August, 1871, and the contractors under the 17th clause could not recover either for the value of work actually done, the loss of prospective damages, or the reduced value of the plant.

Queen v. Smith.—x, 1.

15. **Agreement with Government of Canada for continuous possession of railroad—Construction of—Breach of, by Crown in assertion of supposed rights—Damages—Joint misfeasor—Judgment obtained against—Effect of, in reduction of damages—Pleading—37 Vic. ch. 16.**

By an agreement entered into between the Windsor and Annapolis Railway Company and the Government, approved and ratified by the Governor in Council, 22nd September, 1871, the Windsor Branch Railway, N. S., together with certain running powers over the trunk line of the Intercolonial, was leased to the suppliants for the period of 21 years from 1st January, 1872. The suppliants under said agreement went into possession of said Windsor Branch and operated the same thereunder up to the 1st August, 1877, on which date C. J. B., being and acting as Superintendent of Railways, as authorized by the Government (who claimed to have authority under an Act of the Parliament of Canada, 37 Vic. ch. 16, passed with reference to the Windsor Branch, to transfer the same to the Western Counties Railway Company otherwise than subject to the rights of the Windsor and Annapolis Railway Company) ejected suppliants from and prevented them from using said Windsor Branch and from passing over the said trunk line; and four or five weeks afterwards said Government gave over the possession of said Windsor Branch to the Western Counties Railway Company, who took and retained possession thereof.

In a suit brought by the Windsor and Annapolis Railway Company against the Western Counties Railway Company for recovery of possession, &c., the Judicial Committee of the Privy Council held that 37 Vic. ch. 16 did not extinguish the right and interest which the Windsor and Annapolis Railway Company had in the Windsor Branch under the agreement of 22nd September, 1872.

On a petition of right being filed by suppliants, claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the said agreement of 22nd September, 1871, the Exchequer Court of Canada (Gwynne J. presiding) held that the taking possession of the road by an officer of the Crown under the assumed authority of an Act of Parliament was a tortious act for which a petition of right did not lie.

Petition of Right—Continued.

On appeal to the Supreme Court of Canada, **Held,** Strong and Gwynne JJ. dissenting, that the Crown by the answer of the Attorney General did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the Crown and its officers being lawful and not tortious, they were justified. But, as the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence failed. Therefore the Crown, by its officers, having acted on a misconception of or misinformation as to the rights of the Crown, and wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconcious of the wrong, by such breach become possessed of the suppliants' property, the petition of right would lie for the restitution of such property and for damages.

Prior to the filing of the petition of right, the suppliants sued the Western Counties Railway Company for the recovery of the possession of the Windsor Branch, and also by way of damages for monies received by the Western Counties Railway Company for the freight or passengers on said railway since the same came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by the Crown, but was proved on the hearing by the record in the Supreme Court of Canada, to which court an appeal in said cause had been taken, and which affirmed the judgment of the Supreme Court of Nova Scotia.

Held, per Ritchie C. J. and Taschereau J., that the suppliants could not recover against the Crown, as damages, for breach of contract, what they claimed and had judgment for as damages for a tort committed by the Western Counties Railway Company, and in this case there was no necessity to plead the judgment.

Per Fournier and Henry JJ., that the suppliants were entitled to damages for the time they were by the action of the Government deprived of the possession and use of the road to the date of the filing of their petition of right.

[In this case an appeal and cross-appeal are now (1st May, 1886) pending before the Judicial Committee of the Privy Council.]

Windsor and Annapolis Railway Co. v. The Queen and the Western Counties Railway Co.—x, 334.

16. **Petition of right—Condition precedent—Pleading—Contract—31 Vic. ch. 13 sec. 18 D.**

The suppliants by their petition of right alleged that they were contractors for the building of section No. 4 of the Intercolonial Railway, and duly

Petition of Right—Continued.

entered upon and completed their contract, which contract they alleged was under the Act entitled "An Act respecting the construction of the Intercolonial Railway, within the time, and according to the terms, covenants and conditions set forth in said contract. That in following the directions and instructions of the commissioners and the engineers employed and placed in charge of the said works, which directions and instructions were given from time to time as provided by the contract, and the said suppliants were bound to follow, and did follow, they performed a large amount of extra work not comprised in said contract, nor in the data furnished to them at the time the said contract was entered into, nor in the schedules and specifications referred to in said contract and connected therewith, and not intended to be covered by the lump sum, which formed the consideration money of said contract. That they were put to great expense by delays in preparations by the commissioners and engineers, and to great loss and damage by reason of changes and alterations necessitated by the unskilful manner in which the works had been laid out by the engineers. That the suppliants were deceived and misled in making their estimates by insufficient and erroneous data in the schedule of works and quantities prepared and published by the chief engineer. That it had not been the usage, nor was it the intention of the parties, to be held to the strict letter of the contract when the schedule gave erroneous or insufficient information, entailing extra work which could be performed only with ruinous consequences, but they were entitled to be paid for such extra work. The suppliants set out at length the various kinds of extra work done and changes made, and prayed for a settlement of accounts, that they might be allowed their claim for the extra work done, for the materials provided by them, for damages resulting from defects of plans, specifications and surveys, from changes made in location, grade, &c., from the negligence and want of skill of the government engineers, and for breach of the contract in being prevented from proceeding with the work, and that they might be reimbursed sums of money advanced during the progress of the work with interest.

The Attorney General demurred on the following grounds: That it did not appear by the petition that the chief engineer of the I. C. Ry. had certified that the work for or on account of which the suppliants claimed had been duly executed, or that the suppliants were entitled to be paid therefor or for any part thereof, nor that such certificate had been approved of by the commissioners of said railway, as required by sec. 18 of the Act of the Parliament of Canada, entitled "An Act respecting the construction of the I. C. Ry.," passed in the 31st year of H. M. reign; that H. M. was not responsible in a petition of right for the damages and injuries mentioned;

Petition of Right—Continued.

that it did not appear by the terms of the contract the commissioners or their engineers were under any obligation to lay out work or furnish specifications therefor; that it appeared by the petition that the extra work claimed for was done in pursuance of directions given by the engineers as provided by the contract, and it was not alleged any extra payment was to be made therefor; that it was immaterial that the schedules of works were defective or erroneous, because such schedules were not alleged to have been warranted as accurate, but only of probable quantities. And the demurrer denied liability for any of the other matters mentioned in the petition, on the ground that the contract provided for them, or that the work, if done, was not in any way warranted by H. M., or had been done under the directions of the engineers acting within the contract.

In the Exchequer Court Henry J. over-ruled the demurrer with costs.

On appeal to the Supreme Court of Canada by the Attorney General,

Held, that the suppliants' petition was too indefinite in form and was insufficient in not setting out the contract, and a compliance with the requirements of sec. 18 of 31 Vic. ch. 13 (Can.), or satisfactory ground of non-compliance with the condition precedent required by that section.

Appeal allowed. Judgment of the Exchequer Court reversed, with leave to the suppliant (the Crown assenting) to amend his petition, on payment of costs of appeal and demurrer, by setting out the contract and such averments as he might be advised.

The Queen v. Smith.—20th Nov. 1879.

17. Breach of notarial contract—Representations.

On the 14th of July, 1875, the Government of Canada, through one Louis Morin, advertised for tenders for the removal of steel rails from the harbor of Montreal to the rock cut at Lachine. The suppliant tendered for the contract according to the advertisement, and suppliant's tender being accepted, a notarial deed of contract was entered into and executed. The contract provided, *inter alia*, "that the said party of the second part hereby undertakes to remove and carry, for the Government of the Dominion of Canada, all the steel rails that are actually, or that will be landed from sea-going vessels on the wharves of the harbor of Montreal, during this season of navigation, and deliver and lay on the ground the said steel rails, at the place commonly called Rock Cut, on the Lachine Canal, subject to the terms and conditions hereinafter mentioned. By his petition of right, the suppliant alleged a breach of the contract by the Crown, and that Morin, acting for the Crown, represented to the suppliant that some 30,000 tons of rails would have to be removed, and that under such representations the suppliant entered into the contract. The amount claimed was $10,000.

Petition of Right—Continued.

Held, by the Exchequer Court, Taschereau J., that under the terms of the contract, the suppliant was entitled to have the removal of all the rails landed in Montreal during the season of 1875, and the Government, having had 5,000 tons of these rails removed by another party, were answerable in damages for the breach of contract.

Held, also, that the representations made by Morin, as agent of the Crown, as to the probable quantity to be landed, were unauthorized, and having been made previous to the written contract, could not be said to form part of said contract.

Kenny v. The Queen.—(18 C. L. J. 138.) 6th March, 1882.

18. **C. S. C. ch. 28, 31 Vic. ch. 12—Slide and boom dues, regulations as to—Chattel mortgage—Agreement between Crown and mortgagor of lumber, effect of—Lien.**

This was a petition of right, filed by the appellants, praying that a seizure of a quantity of logs, which was made by the government collector for arrears of slide dues, owed by one S. for the logs seized and other logs, be removed, and that the sum of $5,267, which had been paid by the appellants to the Crown, under duress, be refunded to them.

S., being indebted to the appellants in a large sum of money, had given them, as collateral security for the amount of his debt, two chattel mortgages on certain logs and timber. These mortgages were executed, the first on 18th December, 1876, and the second on 11th May, 1877. On 15th May, 1877, S. became insolvent, and in 1878, the equity of redemption of the insolvent in the chattel mortgages was duly released to appellants by S's. assignee. In June, 1877, S., who had been allowed to remain in possession of the property, and to attend to the manufacture and disposal of the lumber in virtue of special provisions in the mortgages, and who owed also a large sum of money to the government for slide dues for several years back, in order to repay this general indebtedness for dues, agreed with the government to pay $2 per 1,000 feet B. M., on all lumber to be shipped by him through the canals. The dues fixed by the regulations of the government for each log were 4 cents, equal to about 26 cents per 1,000 feet B. M. The appellants claimed that this arrangement was unknown to, and had never been ratified by them.

In 1878, when the appellants began to ship the lumber in question on barges, the collector of slide dues refused to allow the barges to pass through the canals until the appellants paid the $2 agreed upon between S. and the government.

The cause was tried before Gwynne J. in the Exchequer, who **Held**, 1. No weight could be given to an objection urged by petitioners that the Crown

Petition of Right—Continued.

can acquire title only by record, and therefore no claim upon behalf of the Dominion Government could be asserted in virtue of the agreement relied upon in the answer of the Attorney General as made with S. The Dominion Government must under sec. 7 of the Petition of Right Act of 1876, be entitled to whatever benefit may accure therefrom equally as any subject of the Crown, if the proceeding were an action against such subject.

2. The provisions and enactments relating to tolls in 31 Vic. ch. 12, (C.) are in substance and effect the same as the provisions in ch. 28 of the Consol. Stats. of C., under which the regulations relating to timber passing through the slides were made, and therefore under the provisions of sec. 71 of 31 Vic. ch. 12, those sections must be read as having been in force since the passing of ch. 28 of the Con. Stats., and therefore the regulations made under that statute are in effect regulations to be construed as made under 31 Vic. ch. 12.

3. If S. were the suppliant asserting a claim against the Government based upon the seizure of the lumber which was seized for the purpose of realizing thereout the arrears of slide dues, to such a claim the defence that what was done was by the leave and license of S., and in pursuance of an agreement to that effect made by him would have been sufficient. *The Attorney General* v. *Coutois,* 25 Grant 346 referred to.

4. Sitting in the Court of Exchequer, not as a Court of Appeal, but in an Ontario case to administer the law of Ontario, the judge was bound by the authority of *McAuley* v. *Allen*, 20 U. C. C. P. 417, followed in *Samuel* v. *Coulter* 28 U. C. C. P. 240, to hold that the suppliants, by the indenture of the 18th December, 1876, by reason of there being no redemise clause or proviso as to grantor retaining possession until default inserted in it, became entitled both to the property and possession of the property granted by the indenture, and being so entitled might, if they had pleased, at any time have exercised their right to sell therein contained. But by the terms of the indenture, the suppliants reserve the right to dictate into what description of lumber the logs should be manufactured, with whom alone contracts for the sale of the lumber might be entered into, and to whom upon sales it should be consigned, and all this was provided for being done through the intervention of S., but for their sole benefit, S. covenanting to act only under the direction of and to the satisfaction of the suppliants. The effect and intent of the indenture, therefore, was to make suppliants principals and S. their agent in carrying on the business in which he had been engaged in future for the benefit of the suppliants, and with their property, until it should be sold or they should be paid their debt. As such agent S. must be considered to have had sufficient authority to bind the suppliants by his agreement with the Government.

Petition of Right—Continued.

5. But whether S. was so authorized or not, the suppliants adopted, ratified and confirmed the agreement by acting under it and advancing moneys to pay the Government, in accordance with its terms, after they must be held to have had full knowlege of the nature and effect of it.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of Gwynne J., that S. had no authority, express or implied, from the bank, after the execution of the mortgages, by any agreement with the Crown, to pledge the property covered by the mortgages for the payment of any arrears of Crown dues, or to impose on such property any lien, charge or burthen other than the law had attached to it for the slidage and boomage of that specific property.

That there was no evidence that the bank had any knowledge of any general lien or charge on that property, or of any arrears other than on the the lumber mentioned in the mortgages, or of any claim by the Crown other than for the slidage and boomage on the logs in dispute.

That if the bank did know there were arrears for slide or boom dues on logs previously brought down and manufactured into lumber, such knowledge would not create a charge or attach a lien for such dues on other lumber than that for the slidage and boomage of which they became due.

That if S. did propose by any arrangement with the Crown to give the Crown a charge or lien for arrears due for other lumber, there was no evidence of any adoption, ratification or confirmation of any such arrangement by the bank.

That there was nothing in the law or regulations giving the Crown any general lien for arrears, or for any general balance which the owner of logs may owe the government, or any lien except on the specific lumber for the amount due for its passage or boomage, viz., 4c. per log, equal to 26c. per 1,000 ft. B.M.

That the transaction was in no sense that of principal and agent, but of debtor and creditor, in which the debtor by mortgage by way of collateral security transferred property to his creditor and agreed to retain possession and so deal with it that its value should be realized in such a manner as to secure to the creditor the proceeds in payment of his debt, the surplus, if any, being for the benefit of the mortgagor. Having transferred the property by way of mortgage, S. was in no position to give by agreement or otherwise a charge to take precedence of such mortgage.

Per Fournier J.—Without giving any decided opinion as to the validity of the regulations by virtue of sec. 71 of 31 Vic. ch. 12, such regulations might be looked at to ascertain the amount of dues which could be claimed under them, because the appellants could not at the same time admit and

Petition of Right—Continued.

deny the validity of such regulations. Admitting they were invalid, the logs in question having passed through the government slides, there would still be due to the government the value of the services rendered, and by tendering $1,500 the suppliants admitted that something was justly due to the government, if not legally due in virtue of the regulations.

Appeal allowed with costs, Strong and Taschereau JJ. dissenting.

The Merchants' Bank of Canada v. The Queen.—22nd June, 1882.

19. In Petition of Right, interest on profits refused.

See INTEREST 6.

20. **Provincial debt, liability of Dominion for—Order in Council—Account stated—Consideration—Right to petition.**

Prior to Confederation, one T. was cutting timber under license from the old Province of Canada on territory in dispute between that province and the Province of New Brunswick. In order to utilize the timber so cut he had to send it down the St. John River, and it was seized by the authorities of New Brunswick and only released upon payment of fines. This continued for two or three years until T. was obliged to abandon the business.

As a result of negotiations between the two provinces, the boundary line was finally fixed, and a commission was appointed to determine the state of accounts between them in respect to the disputed territory. One member of the commission only reported New Brunswick to be indebted to Canada in the sum of $20,000 and upwards, and in 1871 these figures were verified by the Dominion auditor.

Both before and after confederation T. frequently urged the Government of Canada to collect this amount, and indemnify the licensees who had suffered owing to the said dispute; and finally, by an Order in Council of the Dominion Government (to whom it was claimed the debt was transferred by the B. N. A. Act) it was declared that a certain amount was due to T. which would be paid on his obtaining the consent of the Governments of Ontario and Quebec. Such consent was obtained, and payments were made by the Dominion Government to T. and to the suppliant to whom the claim was assigned, and the suppliant proceeded by petition of right to recover the balance; the government demurred on the ground that the claim was not founded upon a contract and that the petition would not lie.

Judge Fournier in the Exchequer Court over-ruled the demurrer, and on appeal to the Supreme Court of Canada, **Held**, reversing the judgment of Fournier J., Fournier and Henry JJ, dissenting, that there being no previous indebtedness from New Brunswick, Canada or the Dominion to T. shown, the Order in Council did not create a debt, and petition would not lie.

Appeal allowed with costs.

The Queen v. Dunn. 22 C. L. J, 14.—16th November, 1885.

Petition of Right—Continued.

21. Assessment for sidewalks—Non-liability of Crown.

The suppliants by their petition of right set out:—

"That there is due to the said corporation, by the Government of the Dominion of Canada, the sum of one thousand five hundred and eighty dollars and fifty cents for divers works done, materials furnished, and money disbursed, for sidewalks (trottoirs) in front of the different immoveable properties belonging to the said government in the said City of Quebec, and other works, as detailed in the bill of particulars hereunto annexed."

"Wherefore your suppliant humbly prays that it may be ordered and adjudged by the said court, that her Majesty the Queen, and the said government of the Dominion are indebted unto the said corporation of the City of Quebec in the said sum of one thousand five hundred and eighty dollars and fifty cents, and that an order and judgment to the effect thereof be given for the payment of the said sum."

The statement in defence was as follows:—

"Her Majesty's Attorney General admits that the suppliants performed certain works, furnished materials and expended money for sidewalks in front of the different immoveable properties belonging to the Government of Canada, in the City of Quebec, and for other works, as alleged in the suppliants' petition of right."

"Her Majesty's Attorney General alleges, as the fact is, that the said works performed, materials furnished and money expended in the said petition mentioned were not so done, furnished and expended by the suppliants at the request of her Majesty, but were so done, furnished and expended by the suppliants in pursuance of and by virtue of certain powers vested in them by the Act of the Province of Canada, passed in the 29th year of her Majesty's reign, chaptered 57, intituled an 'Act to amend and consolidate the provisions contained in the Acts and ordinances relating to the incorporation of, and the supply of water to, the City of Quebec,' and the several Acts in amendment thereof, and for which the suppliants might make assessments as therein provided; and that the suppliants claim is for the recovery of the taxes so assessed upon the said lands and immoveable properties of her Majesty in the City of Quebec; but the said attorney general submits that the said lands and immoveable properties are not liable to taxation, and that no action lies against her Majesty for the recovery of taxes; and her Majesty's Attorney General claims the same benefit from this objection as if he had demurred to the said petition."

Issue was joined on these pleadings; and the case was argued before the Exchequer Court, Fournier J. presiding, on the facts set out, without any evidence being taken.

Petition of Right—Continued.

Held, that the Crown was not liable, and that the petition must be dismissed with costs.

The Corporation of the City of Quebec v. The Queen.—30th April, 1886.

Petitory Action—To recover church property—Denial of quality by defendant sued as trustee.

The facts of the case, as stated by the plaintiff in his factum, are that by deed of sale passed before notary public on the 23rd November, 1871, and duly registered, the plaintiff, John Morrison, the defendant, and two others as trustees of the Presbyterian Church of Cotê St. George, in connection with the Church of Scotland, became purchasers of the ground upon which subsequently a church was erected.

When this action was brought, the whole of the trustees, with the exception of the plaintiff and defendant, were dead.

A union of Presbyterian Churches in Canada took place in June, 1875.

To further this union and remove any obstructions which might arise out of the trusts by which the property of any of the churches was held, the "Union Act," 38 Vic. ch. 72 (1875) (Q.) was passed.

This Act, sec. 2, provided "that if any congregation in connection or "communion with any of the said churches decide, at any meeting of the "said congregation regularly convened, according to the rules of the said "congregation, or the custom of the church with which it is in connection, "and held in the two years after such union, by the majority of the votes of "those who, according to the rules of the said congregation, or the custom of "the church with which it is in connection, are entitled to vote at such "meeting, not to form part of the said union, but on the contrary to separate "itself therefrom, then and in such case, the property of the said con-"gregation shall not be affected by this Act, nor by any of the provisions "thereof."

Plaintiff claimed that no meeting of the above congregation had been regularly convened, or conducted according to its rules, or the custom of the church, and that consequently the property was affected by the above statute, and should be held and administered for the benefit of the said congregation in connection with the united church, to wit, "The Presbyterian Church in Canada."

Plaintiff also alleged that the defendant had ceased to be a trustee, and, acting with a minority of the congregation who refused to enter into the united church, had taken forcible possession of the church property and excluded therefrom the plaintiff and the congregation, for which he was trustee.

And plaintiff as sole surviving and acting trustee, sueing for himself in his said quality, and for the congregation, claimed the property and that

Petitory Action—Continued.

defendant be ordered to quit and abandon the same, and be declared not to be a trustee of said property.

Defendant admitted that he was not a trustee, but, while saying that he had no quality to defend the action, proceeded to allege that three regular convened meetings had been held, within the two years, the effect of which was to take the church and the property out of the union.

He also alleged that at these regularly convened meetings trustees were legally appointed to replace those deceased.

The Superior Court, Johnson J. presiding, dismissed appellant's action on the sole ground that because the trust deed said nothing about survivors, but provided for a succession, there could be no action unless the succession was first filled up.

The judgment of the Court of Queen's Bench confirmed this judgment, the majority presumably on the ground taken by Mr. Justice Johnson, Mr. Justice Cross alone giving as his reason that the meetings referred to were sufficient compliance with the law to take the property out of the Union.

On appeal to the Supreme Court of Canada, Held, affirming the judgment of the courts below, that the action being a petitory action, and the defendant having pleaded and proved that he was not and had never pretended to be in possession of the immoveable claimed, the plaintiff must fail; and that the plaintiff was not entitled to a judgment declaring one not a trustee who did not pretend to be and admitted that he was not a trustee. Henry J. dissenting.

Appeal dismissed with costs.

Morrison v. McCuaig. 19th June, 1883.

2. By trustees of Quebec North Shore turnpike roads—No title to support.

See ROAD.

3. Right to bring, reserved to defendant in possessory action.

See POSSESSORY ACTION.

Pew-holder—**Rights of, in St. Andrew's Church, Montreal—Damages.**

J., an elder and member of the congregation of St. Andrew's Church, Montreal, had been a pew-holder in St. Andrew's Church continuously from 1867 to 1872, inclusive. In 1869 and 1872 he occupied pew No. 68, and received for the rental of 1872 a receipt in the following words:

"66.50 MONTREAL, January 9th, 1872.

"Received from James Johnston the sum of sixty-six dollars and fifty cents, being rent of first-class pew No. 68, in St. Andrew's Church, Beaver Hall, for the year 1872.

"For the Trustees, J. CLEMENTS."

Pew-holder—Continued.

On the 7th December, 1872, the Trustees notified J. that they would not let him a pew for the following year. J. thereupon tendered them the rental for the next year, in advance. On several occasions in 1873, and while still an elder and member of the congregation, he was disturbed in the possession of pew No. 68, by the respondents, the pew having been placarded "For Strangers," strangers seated in it, his books and cushions removed, &c. For these torts he brought an action against respondents, claiming $10,000 damages.

Held, that J., being an elder and member of the congregation of St. Andrew's Church, Montreal, as such lessee, having tendered the rent in advance, was, under the by-laws, custom and usage, and constitution of St. Andrew's Church, entitled to a continuance of his lease of the pew for the year 1873, and that reasonable, but not vindictive, damages should be allowed, viz, $300. (The Chief Justice and Strong J. dissenting).

Johnston v. the Minister and Trustees of St. Andrew's Church.—i, 235.

Plan—Description by reference to.

See BOUNDARY.

" EASEMENTS.

3. Signed by adjoining proprietors.

See BOUNDARY 2.

4. Sale of lands according to—Registration of a different plan—Acceptance of conveyance.

See SALE OF LANDS 16.

Pleading—**Additional plea—Supreme Court no power to allow.**

D. McM., the respondent, sued S. W. B. Co., the appellants, to recover damages alleged to have been sustained by reason of the obstruction of the river Miramichi by appellant's booms. The pleas were not guilty, and leave and license. On the trial counsel proposed to add a plea, that the wrong complained of was occasioned by extraordinary freshet. The counsel for the respondent objected on the ground that such plea might have been demurred to. The learned judge refused the application, because he intended to admit the evidence under the plea of not guilty. On appeal, counsel for the appellant contended that the obstruction complained of was justified under the statute 17 Vic. ch. 10, N.B., incorporating the South-West Boom Company.

Held, that the appellants, not having put in a plea of justification under the statute, or applied to the Supreme Court of New Brunswick in Banco for leave to amend their pleas, could not rely on that ground before this court to reverse the decision of the court below.

[But see now S. C. A. Act, 1880.]

The South-West Boom Co. v. McMillan.—iii, 700.

Police Regulations.

See LEGISLATURE 10.

Policy.

See INSURANCE, FIRE, LIFE, MARINE.

Possession—Title by.

See LIMITATIONS 2.

2. As caretaker.

See TENANCY AT WILL.

3. As against wrong-doers—Mixture of logs.

See REPLEVIN 2.

4. By road trustees.

See ROAD.

5. **Possession fraudulently obtained by defendant—Plaintiff not put on proof of title—Tax sale—Assessment—Sheriff's deed—Court of Chancery, powers of in action of ejectment—Rev. Stats. Ont. ch. 40 sec. 87; 33 Vic. ch. 23.**

This suit was commenced on the 23rd day of December, 1880, in the Court of Chancery for Ontario, by the respondent, Nelles, against the appellants, White and O'Neill, to recover possession of the north 100 acres and the south 30 acres of lot No. 1, in the 10th concession of the township of Colchester.

The respondent, by his bill, set up that he claimed title from one John Hargreaves, an insolvent; that Hargreaves held possession of the lands from the time of his acquiring the same, in the year 1876, down to the month of October, 1880, when, as alleged in the 4th paragraph of the bill of complaint, the respondent contended that the said land becoming unoccupied, the appellant, Solomon White, wrongfully and without any color of right, put the appellant, James O'Neil, into possession of the lot.

The respondent, by the said bill, also alleged that the appellant, O'Neil, resided upon the land and held possession of it as tenant or agent to the appellant White, and that he refused to deliver up possession to the respondent.

In the 5th paragraph of the said bill the respondent alleged that the appellant White claimed to have some interest in a part of the land, but denied the appellant White's title, and alleged that if he ever had any title it had been barred by the Statute of Limitations.

The bill also alleged that the title of Hargreaves was founded upon a sale of the land for taxes, and that the appellant contended that the sale was invalid for the reasons alleged in the answer.

The respondent, by the said bill, set up that all the proper proceedings had been taken under the statutes respecting the sale of lands for taxes, and that the tax sale was valid. The respondent also alleged that the pur-

Possession—Continued.

chaser at the said sale, and his assignees and Hargreaves, had paid taxes and made large, valuable and lasting improvements upon the lands.

The prayer of the bill was that the appellants might be restrained from committing any acts of waste; ordered to account for the value of timber and other trees cut down and removed; to deliver up possession of the lands; and that, in the event of the respondent's title being defective, the respondent might be declared entitled to a lien upon the lands and premises for the improvements, taxes and interest.

The appellants answered the said bill, disclaiming the title to that part of the land described as the south 30 acres of lot No. 1; but the appellant White claimed to be entitled as owner in fee simple in possession of the north 100 acres of the said lot. And the appellant O'Neil claimed title as his tenant. The appellants also set up as a defence that the said alleged tax sale under which the said respondent claimed title was invalid and void, for the reasons in the said answer referred to.

The case was heard before Spragge, Chancellor of Ontario, on the 26th day of April, 1881.

His Lordship held (See 29 Grant, 338, where the facts will be found more fully reported,) that the respondent was entitled to succeed on this point, namely, that Hargreaves, claiming to be entitled under the tax sale, had in 1872 put one Thompson into possession of the land; that afterwards, in 1878, he gave him a lease for four years from the 1st April, 1878; that the defendant O'Neil went to Thompson while he was still in possession, and by fraudulent representations had induced Thompson to leave the place, and that O'Neil had entered under White, and that upon the authority of *Doe Johnston* v. *Baytup*, 3 A. & D. 188, the appellants were obliged to yield up possession to the respondent before asserting any title in themselves.

A decree was then drawn up ordering a perpetual injunction as against the appellants, and ordering the appellants forthwith to deliver up possession of the land to the respondent, and to account for the timber and other trees cut upon the same.

The appellants then appealed to the Court of Appeal of Ontario, which dismissed the said appeal with costs, but varied the decree complained of by declaring that the said decree was to be without prejudice to any proceedings which the appellant White might be advised to take to establish his title to the lands and premises in question within two months from the date thereof, and also declaring that in the event of the appellant White paying such costs, and taking any proceedings to establish his title to the lands, he should have liberty to bring any action for that purpose within the time thereinbefore limited as of the 27th day of April, 1882.

Possession—Continued.

On appeal to the Supreme Court of Canada, **Held**, that the judgment of the courts below should be affirmed on the ground relied upon by the Chancellor (Gwynne J. dissenting). The respondent's counsel assenting, the time given respondent White to bring any action he might be advised to establish his title was extended for two months from the date of the judgment of the Supreme Court.

Per Gwynne J.—The case should have been disposed of upon the issue as to the validity of the title upon which the plaintiff had by his bill rested his case. The evidence offered by defendant in support of the contention that the taxes for arrears of which the land was sold were paid before the sale, was wholly insufficient to cast a doubt on the validity of the sale upon the ground that it took place when there were no taxes in arrears to justify a sale. The defendants having failed to prove that the taxes had been paid before the sale, the Ont. Statutes 33 Vic. ch. 23 removed all errors which would have enabled the true owner at the time of the sale to have avoided it. The plaintiff, under the 87th sec. of ch. 40 of the Revised Statutes of Ont., was entitled to a judgment in his favour for the delivery up of possession of the land by the defendant, but there should be no order for injunction, nor any direction for the taking of accounts. The decree of the Court of Chancery should be changed into a simple judgment for possession, the Ontario Statute authorizing title to real property to be tried in a Court of Chancery not contemplating the application of different principles in trying the title or the pronouncing a judgment of a more extensive character than would have been applied and pronounced in a court of common law.

Appeal dismissed with costs.

White v. Nelles.—23rd June, 1884.

6. Of marsh lands—Accretion.

See TRESPASS 10.

7. **Title by—Limitations—38 Vic. ch. 16 O.**

This is an action brought to recover possession of the north half of lot No. 34, in the ninth concession of the township of North Dumfries, in the county of Waterloo, in the Province of Ontario. The respondent is the plaintiff in the action, and claims title to the land as residuary devisee under the last will and testament of Madeline Ross deceased. The respondent's case is that one Charles Ross was at the time of his death in 1864 the owner in fee of the above lands. He died intestate leaving him surviving his widow Madeline Ross, but no issue. After the death of Charles his widow remained in possession and occupation, by herself, or her tenants, of the whole premises up to the time of her death on the 6th of October, 1881. By an indenture of lease dated the 3rd day of May, 1881, she demised the premises to the defendant Oliver for the period of five years to be computed from the first

Possession—Continued.

day of April, 1881, and at the time of her death Oliver was in possession of the premises as tenant under such lease.

The plaintiff had for some years resided with Mrs. Ross in the house on the premises, and continued to reside there some time after Mrs. Ross's death. She subsequently left the premises, leaving the tenant Oliver in possession.

The defendant Ross, pretending to be one of the heirs-at-law of the late Charles Ross, shortly after the death of Mrs. Ross, procured through a solicitor the defendant Oliver to accept from him a lease of the premises for the period of one year, and to attorn to him as landlord.

The respondent on the 24th of October, 1882, commenced this action against the defendant Oliver (who was then in possession of the said land) claiming title thereto as residuary devisee under the last will and testament of Madeline Ross, who had acquired a title by length of possession subsequent to the death of her husband the said Charles Ross. The defendant Ross, having obtained an order allowing him to defend as landlord, was made a defendant in the action. In his statement of defence he claimed title to the premises as one of the heirs-at-law of the late Charles Ross, and alleged an agreement made by Madeline Ross with the heirs-at-law by which Madeline Ross had been permitted to occupy the land by way of an assignment of dower, for her life, and that she had occupied as caretaker, and by virtue of such agreement, and that her occupation was not adverse to his title, or that of the other heirs-at-law.

At the trial the Judge entered a verdict for the defendant. The plaintiff then moved before the full Court of the Queen's Bench Division to set aside this verdict, and to enter judgment for the plaintiff; upon which motion, after hearing argument, the Court unanimously set aside the verdict for the defendants, and directed judgment to be entered for the plaintiff.

From this judgment the appellant Ross appealed to the Court of Appeal for Ontario, which Court, after hearing, and at the close of the argument, unanimously dismissed the appeal and affirmed the judgment of the Court below.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgments of the Courts below, that there was no evidence of an agreement between the heirs-at-law of Charles Ross and his widow that she should occupy the land during her life in lieu of dower, and nothing to show that the heirs could not have brought an action and recovered the land at any time between the death of Charles Ross and the 1st day of July, 1877, when their right and title were extinguished or ceased by virtue of the Statute of Ontario, 38 Vic. ch. 16. Appeal dismissed with costs.

Oliver v. Johnston.—9th April, 1886.

Possession—Continued.

8. Title by—Failure to establish—Insolvent Act of 1875, secs. 68. 75—Fraudulent conveyance.

In an action of ejectment the plaintiff claimed title under F., a grantee of S., the assignee in insolvency of P. D., who formerly owned the land, and who some years before his insolvency had conveyed the land to his brother L. D. S., under the advice of the inspectors of the estate, refused to take proceedings to set aside the conveyance to L. D. as fraudulent, and two of the creditors, under the provisions of sec. 68 of the Act, having obtained leave from the insolvency judge, instituted a suit in the name of S., and procured a decree declaring the conveyance to L. D. fraudulent, and, as against S., void. The decree did not direct a sale of the land, as was prayed. The land was, however, advertized for sale, the period of advertisement being shortened by the judge, and was sold to F. S., under instructions from the general body of creditors at first refused to convey to F., but subsequently conveyed upon an order being obtained from the judge directing him to do so.

It was held by the Court of Appeal for Ontario (12 Ont. App. R. 298) affirming the decision of the C. P. Div., (9 Ont. R. 89), that the sale was not one subject to the control of the general body of creditors, and therefore the restrictions of sec. 75 of the Act were inapplicable and the sale was valid. Further, that the defendant failed to establish his claim of title by possession.

On appeal the Supreme Court of Canada, **Held,** that the judgment of the court below should be affirmed.

Appeal dismissed with costs.

Herbert v. Donovan.—9th April, 1886.

9. Title by—Statute of Limitations—Possession of tenant of owner of life estate as against remainderman.

By a deed to trustees in 1837, two lots of land were conveyed in trust for E. A. for her life, with the remainder as follows:—Lot No. 2 to G. A., and lot No. 1 to A. A., to the use of them, their heirs and assigns, as joint-tenants and not as tenants in common. E. A., the tenant for life, entered into possession of lot No. 2, and in 1862 put her son, the husband of the defendant, into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died. In 1878, A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before) and brought an action against the defendant for the recovery of the said lot No. 2.

Held, affirming the judgment of the court below (7 Ont. App. R. 592; 2 C. L. T. 544,) that as there was no time prior to the death of the tenant for life when either the trustees or those entitled in remainder could have interfered

Possession—Continued.

with the possession of the lot, the Statute of Limitations did not begin to run against the remainder-man until the death of the tenant for life in 1875, and he was therefore entitled to recover.

Held, also, that for the purposes of the action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the joint tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs.

Appeal dismissed with costs.

Adamson v. Adamson.—22 C.L.J. 162; 6 C.L.T. 245, 8th March, 1886.

Possessory Action—**Equivocal possession—Right of way.**

In a possessory action brought by P. against H., the latter denied H.'s possession and pleaded *inter alia* that he was proprietor and had exercised a right of way over the lands in dispute for a number of years. The land in dispute consisted of a roadway situated between the adjoining properties of the plaintiff and defendant.

At the trial P. (the defendant) put in his title. H. (plaintiff) proved that he had had possession for a year by closing up the roadway with a fence and putting his cattle there, and that at times he allowed the defendant and others to use the roadway to get to the river, but that when defendant took down the fence he immediately restored it, and that defendant then asked him to let him use it. That it was after the defendant had again taken forcible possession of the land that he instituted against him the present action. The courts below held that both parties had only proved an equivocal possession and dismissed the plaintiff's action, ordering that their rights should be tried by an action *au petitoire.*

On appeal to the Supreme Court of Canada, **Held,** Fournier J. dissenting, that as P. had proved a possession *animo domini* for a year and a day, he should be reinstated and maintained in peaceable possession of the land, and H. be forbidden to trouble him by exercising a right of way over the land in question, reserving to the latter his recourse to revendicate *au petitoire* any right he might have.

Appeal allowed with costs.

Pinsonneault v. Hebert.—8th March, 1886.

Power of Attorney—To sell land.

See SALE OF LANDS 5.

Power of Sale—In mortgage, exercised after foreclosure.

See MORTGAGE 15.

Practice.

1. **Agents—Appointing.**

Conducting business with the Registrar's office by correspondence is an irregular practice. A solicitor should appoint an agent as required by the Supreme and Exchequer Court rules.

Wallace v. Burkner.—2nd May. 1883.

2. **Agents—Authority to enter name of.**

A written authority should be filed with the Registrar authorizing either him or a solicitor to enter the name of the agent in the agent's book, when the principal does not enter the name himself.

Per Ritchie C.J. in chambers.

3. Amendment, generally.

See AMENDMENT.

Practice—Continued.

4. **Appeal direct from court of original jurisdiction—S. C. A. A, 1879, sec. 6.**

The Chief Justice of the Supreme Court, under sec. 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of Canada, it being known that there were then only two judges on the bench in Manitoba, the Chief Justice who was plaintiff in the cause, and Dubuc J., from whose decree the appeal was brought.

Schultz v. Wood.—vi, 585.

5. **Appeal direct from court of original jurisdiction—S.C.A.A. 1879, secs. 6 and 14—S. & E.C.A. secs. 25 and 26—Security.**

An appeal from the court of original jurisdiction may be allowed by the Supreme Court or a judge thereof, under sec. 6 of the S. C. A. Act, 1879, although the judgment appealed from has been pronounced, entered or signed more than thirty days before the date of the application.

Bank B. N. America v. Walker.—22nd June, 1882.

6. But, semble, an application to the Supreme Court or a judge thereof, to be allowed to give security under sec. 31 S. and E. C. A., as amended by sec. 14 S.C.A.A., 1879, should be within the time limited by sec. 25 of the S. & E.C.A. or further time allowed by a judge of the court below under sec. 26 S. & E. C. A.

Walmsley v. Griffiths.—Per Ritchie C.J. in chambers, 14th January, 1885.

7. **Appeal direct from court of original jurisdiction—S.C.A.A. 1879, sec. 6—Court of final resort in B.C.**

Application for leave to appeal direct from the judgment of Sir M. B. Begbie, C.J. of British Columbia, pronounced on the 11th July, 1881, without any intermediate appeal to any court in the Province.

The affidavit of the solicitor of the appellant, after stating the nature of the case, set out that the Supreme Court of British Columbia, being the court of final resort in the Province, consisted of five judges, the Chief Justice and four puisné judges; that two of the judges had been engaged as counsel in the cause prior to their elevation to the bench, and refused to exercise judicial functions in such cause; that another judge was absent from the Province and had been so for several months, there was no news of his return, and the deponent was unable to say when, if ever, he would again resume judicial functions in the Province; that the Administration of Justice Act, 1881, came into operation in British Columbia on the 28th June, 1881, but no rules of court had been published or made under said Act.

Sec. 28 of said Act provides as follows:—

"The judges of the Supreme Court shall have power to sit together in the city of Victoria, as a full court, and any three shall constitute a quorum, and such full court shall be held only once in each year, at such time as may be fixed by rules of court, and such court shall constitute a Supreme Court."

Practice—Continued.

On the 3rd October, 1881, the application came before Mr. Justice Fournier, in Chambers, who referred it to the full court.

Held, that the circumstances disclosed by the affidavit did not warrant the court in granting the application. Motion refused with $20 costs.

Sewell v. B. C. Towing Co.—25th October, 1881.

8. **Appeal direct from court of original jurisdiction -S. C. A. A. 1879, sec. 6.**

Appeal allowed without any intermediate appeal to any court in the Province of British Columbia. For the facts see *Damages* 25, page 123.

Bank of B. N. A. v. Walker.—22nd June. 1882.

9. **Appeal direct from court of original jurisdiction—S. C. A. A. 1879, sec. 6.**

Leave to appeal direct to the Supreme Court of Canada without any intermediate appeal being first had to the Court of Appeal for Ontario, given by Gwynne J., under sec. 6 of the Supreme Court Amendment Act of 1879, on the ground that the Court of Appeal for Ontario would be bound by the case of *Cameron* v. *Kerr* (3 Ont. App. R. 30) whereas the appellant sought to avoid the effect of that decision in this action.

Moffatt v. The Merchants Bank of Canada--xi, 46.

10. **Appeal direct from court of original jurisdiction—S C. A. A .1879, sec. 6—When court below has expressed an opinion on the merits—Church lands—Rector and wardens—Interest of latter to appeal in name of rector (plaintiff)—Indemnity.**

In a suit brought against D. as rector of St. James cathedral, Toronto, to have certain lands declared to be held by him not only for himself as such rector, but also for the benefit of the other rectories in the City of Toronto, Ferguson J. decided in favor of the plaintiff, a decision which on appeal to the Chancery Division of the H. C. J. was upheld. Up to the time of the judgment rendered by the latter court, the proceedings had been carried on in the name of D. by arrangement between him and the church-wardens of St. James cathedral, who contended that they had an interest separate from that of D. in the disposition of the lands, and the revenues therefrom, and who had indemnified D. against costs. But upon the church-wardens proposing to appeal to the Court of Appeal D. refused to allow his name to be further used in the proceedings. The Court of Appeal, upon an application being made by the church-wardens for leave to appeal, refused to grant such leave, holding that the church-wardens had no interest in the lands or revenues. The church-wardens thereupon appealed to Strong J. in chambers for leave to appeal per saltem to the Supreme Court of Canada under sec. 6 of the S. C. A. A. 1879 from the judgment of the Chancery Division. The judge **Held,** that the church-wardens had an interest at least which justified them in appealing; he would not, however, as a

Practice—Continued.

judge in chambers over-rule the decision of the Court of Appeal, but grant leave to renew the application to the full court.

On the motion coming before the full court it was **Held**, that the appeal should be allowed, upon a proper indemnity being given by the church-wardens to D. against all possible costs; the court expressing no opinion on the merits of the case itself. Henry J. dissenting, on the ground that it was impossible to decide the right to appeal without entering into the merits, and on the merits the church-wardens had no interest in the lands or revenues.

Langtry v. Dumoulin.—November 16th, 1885.

11. **Case, adding formal judgment of court below to.**

Hearing of appeal allowed to stand over till case perfected by the addition of the formal judgment of the court below.

Kearney v. Kean.—4th Feby. 1878.

12. **Case, adding formal rule of court below to.**

Appeal placed at foot of list for hearing to permit the rule of court below appealed from to be added; counsel for respondent consenting.

Wallace v. Souther.—5th Feby. 1878.

13. Case—Defective in not stating that judgment had been entered up on demurrers.

See JURISDICTION 21.

14. **Case—Incomplete, not having formal order over-ruling demurrers—Order giving leave to add same.**

An original case, purporting to be in appeal from a judgment of the Supreme Court of British Columbia over-ruling the demurrers of the defendants to certain counts of the declaration, contained no formal order or judgment of the court over-ruling demurrers. Upon application of the agent for appellants' solicitors, the agent of the respondents' solictors consenting, it was ordered that the Registrar be at liberty to file the case as received without the formal order, and that the appellants might attach within six weeks from that date the said formal order to the case and copies.

Per Ritchie C. J. in chambers.

Bank of British North America v. Walker.—24th Dec. 1881.

15. **Case, adding evidence of plaintiff to—Not properly part of—Chamber application.**

Counsel for respondent (plaintiff) moves to have evidence given by respondent when examined as a witness on behalf of appellants (defendants) added to case. Counsel for appellants contend that under the code of C. P. the evidence cannot be considered, a declaration having been filed excluding it from the record.

Practice—Continued.

Held, the application should have been made in Chambers, but in any event the evidence could not properly be made part of the case.

Ætna Ins, Co. v. Brodie.--5th November, 1879.

16. **Case—Amending—Remitting to court below.**

The judge of the court below having certified that the examination of one D. was made part of the case *quantum valeat,* **Held,** that the case must be remitted to the court below to be settled in accordance with the statute and and practice of the court. It should appear clearly, whether the examination did or did not properly form a part of the case.

McCall v. Wolff.--21st May, 1884.

17. **Case—Defective—Undertaking by Counsel to have decree of Court of first instance added.**

During hearing of appeal, the attention of appellant's counsel is called to the fact that the case is defective in not having in it the decree of the Court of Chancery. Argument allowed to proceed, on counsel undertaking to have decree added to case before judgment given.

Wright v. Huron.--3rd December, 1884.

18. **Case—Extending time for printing and filing.**

Under sec. 79 of the S. and E. C. A. and Rules 42 and 70 S. C., a judge in chambers of the Supreme Court has power to extend the time for printing and filing case.

Per Ritchie C.J. in chambers.

Bickford v. Lloyd.--5th March, 1880.

Per Fournier J. in chambers.

Canada Southern Ry. Co. v. Norvell.--17th March, 1880.

[This practice has been followed in many cases and may be considered the established practice of the court. After the security is allowed any application to extend time for printing or filing case should be made to a judge of the Supreme Court in chambers, and not to the court below or a judge thereof.]

19. **Case—Application as to printing.**

No application should be made with respect to the contents of the "case," or to dispense with printing any part of it, until it has been settled by agreement between the parties, or by a judge of the court below, pursuant to the statute.

Per Gwynne J. in chambers.

Cariere v. Bender.--11th March, 1886.

20. **Case—Printing—Substantial compliance with rules.**

Certain portions of the case had been italicized in the printing. The prothonotary certified that the printed case was the case agreed upon and

Practice—Continued.

settled by the parties. No affidavit was produced to contradict this certificate or to show that the italics had been improperly used.

Objection to case over-ruled.

The case is to be printed so as to procure a certain degree of uniformity, and all that is required is a substantial compliance with rule 8.

Ritchie C. J. in Chambers.

May v. McArthur.—3rd April, 1884.

21. Case—Amendment of—Remitting to court below.

Where it appeared that certain papers which a judge of the court below had directed should form part of the case had been incorrectly printed, especially the factum of the respondent in said court, which had been translated and in which interpolations had been made, the Registrar was directed to remit the case to the court below to be corrected.

Fournier J. in Chambers.

Parker v. Montreal City Pass. Ry. Co.—19th February, 1885.

22. Certiorari—Application for.

Writ of certiorari moved for to bring up papers from the Supreme Court of British Columbia, the Chief Justice of that court having made an order staying execution on the judgment of the Supreme Court of Canada, certified to the court below in the usual way, on the ground that an appeal was being proceeded with to the Privy Council. Motion refused.

Sewell v. British Columbia Towing Co.—7th May, 1884.

23. Certiorari—In habeas corpus matter.

Neither the Supreme Court, nor a judge thereof, has power to issue a writ of certiorari in a habeas corpus matter.

See HABEAS CORPUS 3.

24. Costs—Quashing appeal.

Where an appeal is quashed for want of jurisdiction, it will be quashed without costs, if the objection has been taken by the court itself.

See JURISDICTION 26, 31, 36, 40.

25. Nor will costs be given where the appeal has been inscribed for hearing *exparte*, the respondent not appearing.

See JURISDICTION 23.

26. But costs will be given if the objection has been taken by the respondent in his factum, or by motion at the earliest opportunity.

See JURISDICTION 11, 21, 22, 43.

27. And in an appeal where the court may think it right to exercise its power of giving costs, even where the objection to the jurisdiction has been taken by the court itself, the respondent will be allowed the costs of the appeal.

See JURISDICTION 33.

Practice—Continued.

27. (a.) **Costs—Where objection first taken in appeal.**

Where an appeal is disposed of on an objection taken for the first time at the hearing, no costs given.

See ARBITRATION AND AWARD 5.
" PRESCRIPTION 12.

28. **Costs—When court equally divided.**

The judges of the Supreme Court being equally divided in opinion, and the decision of the court below affirmed, the successful party was refused the costs of the appeal. But (per Richards C. J.) by 38th Vic. ch. 11, sec. 38, the Supreme Court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion amongst the judges.

The L. and L. and Globe In. Co. v. Wyld.---i, 605.

29. But the uniform practice of the court has been not to give costs when the court has been equally divided.

Curry v. Curry.--13th March, 1880.
McLeod v. N. B. Ry. Co.---v, 283.
Cotè v. Morgan.---vii. 1.
McCallum v. Odette.---vii, 36.
Shields v. Peak.---viii, 579.
Milloy v. Kerr.--viii, 474.
Megantic Election Case.---viii. 169.
Trust and Loan v. Laurason.---x, 679.

30. **Costs—Election appeal—Motion to amend judgment.**

Counsel for appellant moved to amend final order of Supreme Court as to costs, such order declaring that the respondent should pay the costs in the court below, but the trial judge having refused to tax to appellant the costs of certain witnesses examined on cases not appealed to the Supreme Court. **Held,** that the judge was right. Motion refused with $25 costs.

Soulanges Election Case.--28th March, 1885.

31. **Costs—Not given in habeas corpus matters.**

No costs are given in *habeas corpus* appeals, as a general rule, in *favorem libertatis.*

In re G. R. Johnson.---20th February, 1886.

32. But where an appeal in a *habeas corpus* matter had been proceeded with after the discharge of the prisoner and for the mere purpose of deciding the question of costs, the appeal was dismissed with costs.

See JURISDICTION 24.

Practice—Continued.

33. Costs—Counsel fee—Respondent arguing appeal in person.

Counsel for respondent moves for order to review taxation and to have counsel fee allowed to respondent, an advocate, who argued appeal in person. Refused, Fournier and Henry JJ. dissenting.

Charlevoix Election Case (Valin v. Langlois.)—10th June, 1880.

34. Costs—Increased counsel fee—Quashing appeal.

An application for increased counsel fee is not one for the full court, but should be made to a judge in chambers.

When an appeal is quashed for want of jurisdiction, the court may order the taxation and payment of costs.

Beamish v. Kaulbach.—5th June, 1879.

35. Costs—Between Solicitor and Client.

Application for an order directing Registrar to tax costs between solicitor and client, refused. The Chief Justice states that the question was duly considered by the judges at the organization of the court, and it was not thought advisable to regulate costs between solicitor and client.

Boak v. Merchants Mar. Ins. Co.—3rd June, 1879.

36. Costs—Distraction of—Motion for.

Held, that, in appeal, where distraction of costs has not been asked for by the pleadings, or by the factum, it should be asked for when judgment is rendered. If not then asked for, any subsequent application must be made to the court upon notice to the other side.

See *Converse* v. *Clarke*, 12 L. C. R. 402; *The Water Works Co. of Three Rivers* v. *Dostaler*, 18 L. C. Jur. 196; *Lator* v. *Campbell*, 7 Legal News 163.

Letourneux v. Bansereau.—27th May, 1886.

37. Costs—Construction of will.

Costs ordered to be paid by the respondents (executors and trustees of the will) out of the general residue of the estate of the deceased, but if the said residue should have been distributed then the said costs should be contributed by the persons who should have received portions of the said residue ratably according to the amounts of the respective sums received by them.

Fisher v. Anderson.—iv, 406.

See WILL 4.

38. Costs—Tender of.

Appellants, not having tendered with their plea costs accrued up to and inclusive of its production, ordered to pay to the respondent the costs incurred in the court of first instance.

The Ætna Life Insurance Co. v. Brodie.—v, 1.

Practice—Continued.

39. Counsel—Attorney General of province—Jurisdiction of Provincial Legislature.

In an appeal between private suitors in which the validity of an Act of the Legislature of Ontario is questioned, the attorney general of the province is heard in support of the jurisdiction of the provincial legislature.

Citizens Ins. Co. v. Johnston.—9th April, 1880.

40. Counsel—Third counsel heard.

The court hears a third counsel for appellants, notwithstanding rule 32, as the laws of two provinces are in question, and there is a cross-appeal; the so doing not to be considered a precedent.

Coleman v. Miller.—25th February, 1882.

41. Third counsel heard, intricate questions of law having to be argued, there being a cross-appeal, and counsel stating that the Court of Queen's Bench for Lower Canada had also relaxed its rule which forbids the hearing of more than two counsel on each side.

The court states that the fact of there being a cross-appeal is not of itself sufficient ground to cause the court to depart from its rule.

Jones v. Fraser.—9th March, 1886.

42. Where one counsel from Quebec and one from Ontario had been heard for respondent, a third counsel (from Quebec) was heard on French authorities applicable.

Russell v. Lefrancois.—6th May, 1882.

43. Counsel—Right to begin—In re case referred by O. C. respecting Supreme Court of British Columbia—"The Trasher case."

Held, that inasmuch as all statutes should *primâ facie* be considered within the jurisdiction of the legislature passing them, any one attacking a statute should begin. Therefore Counsel for Dominion Government first heard.

16th May, 1883.

See LEGISLATURE 12.

44. Counsel—Right to begin—Reply.

Question respecting validity of "The Liquor License Act, 1883." (*See* Liquor License Act, 1883.)

Held, those attacking the validity of an Act should begin. Therefore counsel for the Provinces first heard. Only one counsel heard in reply for all the Provinces.

In re "The Liquor License Act, 1883."—23rd Sept. 1884.

45. Counsel—Right to begin.

Question whether the Canada Temperance Act, 1878, sec. 6, had been complied with, and whether proclamation should issue under sec. 7. (*See* "Canada Temperance Act, 1878," 3.)

Practice—Continued.

The court directs the parties seeking to sustain the affirmative, and wishing to shew that the proclamation should issue, to begin.

In re Canada Temperance Act, 1878, In the County of Perth.—28th Oct. 1884.

46. Counsel—President of Ry. Co., appellants, not entitled to be heard.

The appellants do not appear by counsel at the hearing, but Mr. O'B. appears and states that he is the president and proprietor of the railway company, appellants, and wishes to be heard on their behalf. Refused. Appeal ordered to stand over till next session.

Halifax City Ry. Co. v. The Queen.—23rd May, 1884.

47. Counsel—Foreign—Not heard.

Counsel residing in the State of New York wishes to be heard on behalf of appellants in an appeal pending before the Supreme Court of Canada. Refused.

Halifax City Ry. Co. v. The Queen.—9th May, 1884.

48. Cross Appeal—Application to hear although principal appeal not filed.

Counsel for respondents, who have given notice of cross appeal, moves for leave to proceed with cross appeal, notwithstanding original case not filed until that day by appellants, and the appeal has not been inscribed.

Counsel for appellants also moves to have principal appeal heard, the delay in inscribing and in filing factums having been an oversight.

Held, that if the cross-appellant desired to proceed with his cross-appeal he should have himself filed the original case. Both principal appeal and cross appeal to stand over.

Mayor, &c., of Montreal v. Hall.—17th Nov. 1883.

49. Cross appeal—Motion to quash appeal—Costs.

Motion made to quash appeal on the ground that it should not have been brought as a substantive appeal, but as a cross appeal in the case of *Pilon* v. *Brunet.*

Motion to quash dismissed, but the respondent in *Pilon* v. *Brunet* succeeding in getting the judgment of the court below reversed on one point and confirmed on another, was allowed costs as of a cross appeal taken under rule 61.

Brunet v. Pilon.—v, 319.

50. Dismissing appeal.

Where no one appears on behalf of the appellant when an appeal is called for hearing, and counsel for respondent asks for the dismissal of the appeal, it will be dismissed with costs.

Burnham v. Watson.—7th Dec. 1881.

Scott v. The Queen.—27th March, 1886.

Western Ass. Co. v. Scanlon.—27th March, 1886.

Practice—Continued.

51. Dismissing appeal for want of prosecution—Undue delay in filing factum—Inscription.

The case was filed on the 22nd October, 1884, the respondent's factums on the 18th November, 1884. The last day for filing factums in appeals to be heard the following session was the 30th of January, 1885, and for inscribing, the 2nd February following. The appeal not being inscribed, the respondent's counsel gave notice of motion on the 9th February to dismiss appeal for want of prosecution. On the 14th the motion was heard. Appellants agent stated that on the 2nd February he had made a search in the Registrar's office for the respondent's factum, and had been informed it had not been filed. He was therefore under the impression the respondent could not take advantage of the delay of the appellant.

Held, that the undue delay in filing appellant's factum and inscribing appeal had not been satisfactorily accounted for, and the appeal should be dismissed.

Per Fournier J. in chambers, 16th February, 1885.

An application was made to the court to rescind or vary the order of Fournier J., and to allow the appellant to file his factum and inscribe appeal. Affidavits were filed, but merely to the effect: 1. That appellants counsel thought that while the respondent was in default with regard to his factum, it could not be considered that there was any undue delay in the prosecution by appellant of his appeal; and 2. That the appeal was *bonâ fide* and serious.

Held, that the court would not interfere with the order of the judge in chambers.

Whitfield v. The Merchants Bank.—4th March, 1885.

52. Dismissing appeal for want of prosecution.

Counsel for respondent moves to dismiss appeal for want of prosecution. Refused, but appellant directed to have appeal brought on for hearing next session, otherwise to stand dismissed; appellant to pay costs of the application.

Coté v. Stadacona Ass. Co.—10th March, 1881.

53. Dismissing appeal.

Motion to dismiss appeal referred by court to Chief Justice in chambers.

Martin v. Roy.—28th January, 1879.

54. Dismissing appeal in controverted election case—Discontinuance filed.

Counsel for appellant moves to dismiss appeal, not wishing to proceed with it, and having filed a discontinuance.

Counsel for respondent consents, on payment of costs. Appeal dismissed with costs.

Soulanges Election Case, Filiatrault v. De Beaujeu.—27th November, 1883.

Practice—Continued.

55. Dismissing appeal — Controverted election case — Order obtained in chambers by consent—Application to full court.

Counsel for respondent moves for an order dismissing appeal in a controverted election case. An order had been obtained in chambers, on consent, but doubts had been raised as to whether the order should not have been an order of the court. Granted.

North York Election Case, Patterson v. Mulock.—12th May, 1883.

56. Factum.

Irrelevant matter in factum, reflecting on the conduct of one of the judges of the court below, ordered to be struck out.

Wallace v. Souther.—5th February, 1878.

57. Factum—Scandalous and impertinent.

The plaintiff's factum containing reflections on the conduct of the judges of the court below, was ordered to be taken off the files as scandalous and impertinent.

Vernon v. Oliver—xi, 156.

58. Factum—Point not raised by—Postponement of hearing.

A point is raised at the hearing not in factum, and counsel for respondent therefore objects that he is not prepared to argue it. The court adjourns hearing for a week.

Western Counties Ry. Co. v. Windsor & Annapolis Ry. Co.—6th Feb. 1879.

59. Factum, further time required to file—Motion to dismiss appeal—Costs.

Motion to dismiss appeal refused, but appellant requiring further indulgence to file factum ordered to pay costs of motion.

Dawson v. McDonald.—13th December, 1879.

60. Factum—Default in filing—Inscription, motion for.

Motion for leave to inscribe case which had not been put on inscription list because factum of appellant not filed in time. The appellant had been directed to bring appeal on for hearing at the session then being held, otherwise appeal to stand dismissed. Counsel stated that delay in filing factum had occurred because both parties had consented to delay being accorded for so doing. Counsel for respondent consented.

Held, that the rule requiring factums to be deposited within a limited time had been passed for the convenience of the court and judges and could not be waived by consent of parties, but under the peculiar circumstances, and in view of the consequences of refusing the motion, liberty to inscribe might be given.

Coté v. Stadacona Assurance Company.—4th May, 1881.

61. Factum—Motion to strike out unnecessary matter from.

Objections to a factum as containing unnecessary matter may be urged at the hearing.

Coleman v. Miller.—23rd February, 1882.

Practice—Continued.

62. Factum—Leave to deposit—Inscription ex parte.

When appeal inscribed for hearing *ex parte* is called, Counsel for respondents asks leave to be heard and to be allowed to deposit factum. Counsel for appellant consents. Granted.

Parker v. Montreal City Passenger Ry. Co.—9th March, 1885.

63. Factum—Leave to deposit—Inscription ex parte.

When appeal inscribed for hearing *ex parte* is called, counsel for respondent asks leave to be heard, although his factum had not been deposited within the time provided by the Rules. Counsel for appellant consents.

Held, that the rules respecting factums must be strictly complied with, and the Registrar should not receive factums tendered after the delay specified in the Rule. Counsel for respondent allowed to be heard, but the case not to be considered a precedent.

Lord v. Davidson.—3rd November, 1885.

64. Factums—Submitting appeal on.

Counsel states he has consent of solicitors on both sides to submit appeal on factums and reporters notes of a former argument before the court. Allowed.

Lawless v. Sullivan.—22nd January, 1879.

65. Factums—Submitting appeal on.

Court refuses to allow appeal to be submitted on the factums, but decides it must be orally argued.

Charlevoix Election Case (Valin v. Langlois).—7th June, 1879.

66. Factum—Submitting appeal on.

Where a rehearing became necessary owing to a change in the *personnel* of the court, the judge who had not heard the appeal consenting, and counsel for all parties desiring it, the court assented to the appeal being submitted on the factums.

McKenzie v. Kittridge.—18th June, 1879.

67. Factums—Submitting appeal on.

On application for counsel for appellants, counsel for respondent assenting, the court consent to have appeal submitted on factums without oral argument.

Muirhead v. Sheriff. 2nd June, 1886.

68. Fees—In criminal appeals—None payable to Registrar.

No fees are payable to the Registrar in criminal appeals, the tariff of fees in schedule X not being intended to be applied to such appeals.

Ruling by Richards C.J.

[This has been the established practice of the court since its organization.]

Practice—Continued.

69. Hearing, notice of—Affidavit of service.

When appeal heard *ex parte*, the court requires an affidavit proving service of notice of hearing.

Kearney v. Kean.—31st January, 1879.
Domville v. Cameron.—30th October, 1879.

70. Hearing—Setting down Exchequer Appeal—Exchequer Court Rules 138, 231, 263—Supreme Court Rule 44—Sec. 68 S. and Ex. Ct. Act, 1875.

Application for a direction to the Registrar to set down for hearing an appeal from a judgment of the Exchequer Court on a Petition of Right pronounced at Quebec on the 17th October, 1877, by J. T. Taschereau J. The contract on which the petition was brought was signed at Quebec, the work was done on a section of the I. C. R. in the Province of New Brunswick. On the 9th November, 1877, the deposit of $50 required by section 68 of the S. & Ex. Ct. Act, 1875, as security for costs, was made with the Registrar.

Rule 231 Exchequer Court, since repealed by rule 265, provided that no decision or ruling at the trial or hearing of a cause should be appealed from directly to the Supreme Court, but the party dissatisfied should first seek relief by moving before the Exchequer Court "as hereinbefore provided," and the appeal should be from the refusal to grant an order *nisi*, or if an order should have been granted, from the decision of the court on the motion to make the same absolute.

Rule 138 E. C. deals with applications for new trial and provides that "a party desirous of obtaining a new trial * * * must apply to the court by motion for an order calling on the opposite party to show cause, at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within ten days after the trial, or within such extended time as the court or a judge may allow."

By rule 261 Ex. Ct. rule 231 of the Ex. Ct. had been made applicable to cases in which the cause of action had arisen in the Province of Quebec. But rule 138 had not been expressly declared applicable to such cases.

On the 12th February, 1878, rules 138 to 142, both inclusive, were ordered and declared to be and to have been applicable to actions in which the cause of action shall have arisen in the Province of Quebec.

On the 7th January, 1878, an application for a rule *nisi* to set aside the judgment was made to Taschereau J. On the 7th February, 1878, he pronounced judgment refusing it. Subsequently proceedings were taken in the Exchequer Court relating to a change of attorney by the suppliant and the taxation of costs between the suppliant's solicitor and his clients, and an

Practice—Continued.

order was obtained from a judge of the Exchequer Court directing all the papers to be transmitted to the acting Registrar at Quebec for the purposes of that taxation. The Registrar did not set the appeal down for hearing, and no steps were taken relating to the appeal, nor were any proceedings taken to have the judgment entered, nor had the Registrar been applied to set the appeal down for hearing until shortly before the date of the application, the 22nd February, 1883.

Held, that no *ex post facto* effect ought to be given to order 263, which was not intended to apply so as to affect retroactively proceedings had in pending causes, and that the Registrar not having set the appeal down for hearing as required by section 68, and not having entered the judgment, the appeal was not out of court by the operation of rule 44 Supreme Court, which provides that unless an appeal shall be brought on for hearing within one year after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the court or a judge shall otherwise order.

Motion granted, (Ritchie C.J. dissenting), bnt without costs, the point of practice involved being a new one.

Berlinquet v. The Queen.--1st May, 1883.

71. **Hearing—Election case—Expediting proceedings in—Sec. 14 S. & E C. A.**

When an election appeal is properly in court and in a position to be set down by the Registrar, an application can be made to the Chief Justice (under sec. 14 S. & E. C. A.) to expedite the proceedings.

Bothwell Election Case (Smith v. Hawkins).—22nd January, 1884.

72. **Hearing ex parte—Factum not filed—Appellant irregularly before court.**

When appeal called, counsel for appellants appears. No one appears on behalf of respondent.

The appellants factum not having been filed till the morning the appeal is called on for hearing, instead of three clear days before the first day of the session, as required by Rule 54, the court refuse to hear him *ex parte* while thus irregularly before the court.

Levis Election Case (Belleau v. Dussault).--30th October, 1884.

73. **Hearing, postponement of—Illness of counsel.**

Motion to postpone hearing till the following sesssion on the ground of unexpected illness of counsel retained. Granted.

Adamson v. Adamson.—5th December, 1884.

74. **Hearing—Motion to strike appeal off list—Notice.**

A motion to strike an appeal off the list of appeals inscribed for hearing must be on notice.

Parker v. Montreal City Passenger Ry. Co.--7th March, 1885.

Practice—Continued.

75. Hearing—Factums not filed.

Motion to have appeal heard at the then present session, notwithstanding case and factum of appellant not filed 30 days before first day of session, and factum not yet filed on behalf of the Crown. Counsel for Crown consenting. Refused.

O'Brien v. The Queen.—10th June, 1878.

76. Hearing—In habeas corpus appeal.

An application to be allowed to bring a *habeas corpus* appeal on for hearing after short notice, must not be *ex parte*.

See HABEAS CORPUS 2.

77. Hearing—Motion to re-open.

In this case, the Supreme Court had refused by their judgment to give a writ of prohibition to prevent the taxation of respondent's costs by the county judge, such taxation having been made before the judgment of the Supreme Court was given; but the court stated that the respondent was not entitled to costs. (See *Costs* 3.)

Counsel for appellants moved to re-open argument of that part of the appeal as to the right to the prohibition, and for a reconsideration thereof, on the ground that the amount taxed to respondent had been paid into the County Court, and that the county judge might make an order directing the money so paid into his court to be paid out to respondent unless prohibited.

Held, that the application which was really for a rehearing of the appeal, which had been duly considered and adjudicated upon by the court, could not be entertained; that the court could not assume that the County Court judge would act illegally, and in defiance of the judgment of the court, to the effect that the respondent was not entitled to costs; but that if the County Court judge should propose so to act, the appellants would have their remedy against him, and might apply to one of the superior courts for a writ of prohibition.

Counsel for appellants not called upon.

Motion refused with $25 costs.

Ontario and Quebec Ry. Co. v. Philbrick.—May 18th, 1886.

78. Inscription—Case filed after time for.

Counsel for appellant moves for leave to inscribe appeal for hearing, though case filed after time for inscribing, all parties being desirous of having appeal heard and consenting. Motion refused.

Grip Printing and Publishing Company v. Butterfield.—20th Nov. 1884.

79. Inscription—Appeal perfected after day for—Consent by counsel.

In an appeal perfected after day for inscribing, an application is made by counsel for appellant, counsel for respondent consenting, to have appeal heard at the session of the court then proceeding.

Practice—Continued.

Held, that the appeal must come on in the regular way the following session, there being no circumstances shown to induce the court to interfere to expedite the hearing.

Bank of Toronto v. The Curé, &c. La Ste. Vierge.—27th Feb. 1885.

80. **Interest—Application for.**

An application to vary judgment by inserting direction that interest be allowed for the period during which the appeal has been pending, must be on notice.

Trust and Loan v. Ruttan.—5th Feb. 1878.

81. **Motion, to be allowed interest.**

Counsel for appellant moves for interest for time judgment has been stayed, pursuant to sec. 36 S. & E. C. A. Question referred to full court by Fournier J.

Held, a question the court should dispose of on its own motion.

McQueen v. The Phœnix Mutual Fire Insurance Co.—9th April, 1880.

82. **Interest—Motion to be allowed—On Allowance of appeal.**

Motion for allowance of interest on verdict from date thereof in appeal from N.B.

Held, that it be allowed on principal sum from last day of next term after verdict.

Clark v. Scottish Imperial Insurance Company.—19th February, 1880.

83. **Judgment—Application to stay execution of—Requête civile.**

The judgment of the Supreme Court must, under sec. 46 S. & E. C. A., be entered and sent to the court below before defendant can have recourse to a proceeding by requête civile. A requête civile does not stay execution as a matter of course. The defendant would have to apply to a judge of the Superior Court or a judge thereof for an order. A judge in chambers should not grant an order staying execution of a judgment, especially when defendant has had ample time to apply to the full court. Per Taschereau J.

See OPPOSITION 2 (*a*).

84. **Judgment—Nunc pro tunc.**

The respondent, the assignee of an insolvent estate, having died between the day of hearing of the appeal and the day of rendering judgment, on motion of counsel for appellant the court orders the order in appeal to be entered *nunc pro tunc* as of the date of hearing.

Merchants' Bank v. Smith.—23rd May, 1884.

85. **Judgment—Nunc pro tunc.**

On motion of appellant's counsel, judgment is directed to be entered *nunc pro tunc* as of the day of argument, one of the parties having died in the interval.

Merchants Bank of Canada v. Keefer.—12th January, 1885.

Practice—Continued.

86. Judgment, nunc pro tunc.

On motion of counsel for respondent, supported by affidavit shewing that respondent had died between the date of hearing and the date upon which judgment delivered, the court directs judgment to be entered *nunc pro tunc* as of the day of hearing.

Ontario and Quebec Ry. Co. v. Philbrick.—26th May, 1886.

87. Judgment, nunc pro tunc.

Where the judgment of the court was amended to conform to the intention of the court, the order amending declared that the judgment should read *nunc pro tunc.*

See PRACTICE 91.

88. Judgment—Motion for leave to address court with reference to questions disposed of by—Reference to Judge in Chambers.

Counsel for respondent moves for leave to address court on question of appointment of valuators and question of costs, disposed of by final judgment of court. Referred to Taschereau J. in Chambers, who stating to the court that the respondent seeks to practically reverse the judgment of the court, the motion is dismissed with costs.

Reeves v. Gerriken.—10th April, 1880.

89. Judgment—Application to vary.

Motion to vary minutes, referred to Strong J. in Chambers, to be subsequently heard *pro formâ* before the court.

Bickford v. Grand Junction.—8th June, 1878.

90. Judgment—Application to amend—"Next friend"—Costs.

The judgment of the Supreme Court, as settled and entered, having directed that the costs should be paid by the appellant to the respondent, on application of respondent the order was amended by directing that the costs should be paid by the appellant's "next friend" to the respondent, the appellant having sued and prosecuted the appeal by his next friend.

Ritchie C. J. in Chambers.

Penrose v. Knight.—25th June, 1879.

91. Judgment—Amending—Form of, in patent suit.

In a suit for the infringement of a patent (See *Patent of Invention* 1) the final judgment in appeal was sent to the Registrar of the Chancery Division of the High Court of Justice for Ontario pursuant to section 46 S. & E. C. Act. The order directed a reference to the master. Upon proceeding to take the accounts the master ruled that, "having regard to the allegations in the said plaintiffs' bill of complaint, and the provisions of section 28 of the Patent Act, the measure of damages and account of profits to which the said plaintiffs are entitled as against the defendants, under the said judgment, should be based upon the reasonable price per machine heretofore charged

Practice—Continued.

by the said plaintiffs as and for a royalty, and the average profit per machine heretofore made by the said plaintiffs on sales of their patented invention, subject, however, to any right the said plaintiffs may have (1) to negative their said pleading, and (2) to show by evidence or otherwise that my said ruling as to the measure of damages and account of profits is not applicable to the case of their patented machine."

This ruling was appealed from to Proudfoot J. who sustained the appeal, on the ground that the order directed a reference as to profits as well as damages, including damages by the use of infringing machines by persons who had bought them from defendants, and that the order being clear the pleadings could not be looked at to assist in construing it.

The defendants thereupon appealed to the Divisional Court, and also made an application to the Supreme Court, for an amendment of the judgment of that court, to make it conform to the judgments pronounced.

Held, that the judgment should be amended, and the inquiry as to damages limited to an "inquiry whether any, and what damages have been sustained or incurred by the plaintiff, and to what amount, by reason of the defendants infringment of the said patent."

The order settled by the Registrar on the application was as follows:—

"In the Supreme Court of Canada."

[Judges present.] [Date.]

[Style of cause.]

"Upon the petition of the above named respondents, John Goldie and "Hugh McCullogh presented unto this court this day, in presence of coun- "sel for the above named plaintiffs (the appellants in this court) upon hear- "ing read the petition and the affidavits filed in support of and in opposition "thereto, and upon hearing what was alleged by counsel for all parties, this "court, for the purpose of removing doubts which it is alleged have arisen "as to the construction of the order of this court, dated the 19th day of "June, A.D., 1883, made in the said cause, doth order that the said order of "the 19th day of June, A.D, 1883, be and the same is hereby varied and "amended to read *nunc pro tunc*, as follows, namely:—

"In the Supreme Court of Canada."

[Judges present.] [Date.]

[Style of cause.]

"The appeal of the above named appellants (plaintiffs) from the order of "the Court of Appeal for Ontario) made in this cause on the 30th day of "June, 1882, and dismissing the appeal of the said appellants from the "decree of the Court of Chancery made on the 23rd day of June, 1880, com- "ing on to be heard before this court on the 28th, 29th and 30th days of

Practice—Continued.

" November last, in the presence of counsel as well for the appellants as for " the respondents, whereupon and upon hearing what was alleged by coun- " sel aforesaid, this court was pleased to direct that the said appeal should " stand over for judgment, and the same coming on this day for judgment, " this court did declare, order and adjudge that the said appeal should be " and the same was allowed.

" And this court did further declare, order and adjudge, that the appel- " lant (plaintiff) George Thomas Smith, was the first and true inventor of " the invention described and claimed in the letters patent No. 2257, men- " tioned in the first paragraph of the appellant's (plaintiff's) re-amended " bill of complaint; that the said letters patent are good, valid and in full " force and effect, and that the appellant (plaintiff) George Thomas Smith " has been from the date thereof and still is entitled thereunder to the " exclusive right, privilege and liberty of making, constructing and using, " and vending to others to be used, the invention in the first paragraph of " the said plaintiff's re-amended bill of complaint, described as follows:—

" 'In combination with the bolting surface of a flour bolt, through which " a current of air is made to pass by means of an air chamber and a fan, or " its equivalent, a brush or series of brushes arranged to traverse the under " surface of said bolt substantially for the purpose set forth in the said let- " ters patent and the specifications thereto, of cleaning the belt of particles " of flour adhering thereto,' subject to such right as his co-plaintiffs now have " under the assignments and licenses in the said bill of complaint set forth; " that the patents 1739 and 1793 in the respondents' (defendants') answer " mentioned were never valid and form no defence to the appellant's (plain- " tiff's) said patent, and that the machines constructed by the respondents " (defendants) in the pleadings mentioned are infringements of the said let- " ters patent of the said George Thomas Smith, and that the appellants " (plaintiffs) are entitled to an injunction restraining the said respondents " (defendants) and each of them and their and each of their servants, work- " men and agents, during the continuance of the said letters patent, or any " extension of them, from making, constructing, using, or vending to others " to be used, any machine containing the same combination as the said " machines in the pleadings mentioned, or only colourably differing there- " from, or any other machine constructed according to or involving the " appellants' (plaintiff's) said patented invention, or only colourably differ- " ing therefrom, or being an infringement of the appellants' (plaintiffs') said " patent, or causing or procuring the same to be infringed.

" And that the appellants (plaintiffs) are entitled to have respondents " (defendants) discover upon oath all the machines in their possession or

Practice—Continued.

" made, used or sold by or for them, or either of them, containing the com-
" bination hereinbefore set forth, and of the names of the purchasers thereof,
" and that the appellants (plaintiffs) are entitled to an inquiry whether any
" and what damages have been sustained by the appellants (plaintiffs) and
" to what amount, by reason of the respondents' (defendants') infringement
" of said patent, such damages to be limited to six years previous to the
" date of the filing of the bill of complaint, and that the appellants (plain-
" tiffs) are entitled to be paid by the defendants such sum of money as upon
" such inquiry shall be found fit to be awarded to the appellants (plaintiffs)
" for such damages as aforesaid, within one month after the filing of the
" master's report; and the said appellants (plaintiffs) are entitled to be paid
" the costs of this suit including costs incurred by them in the Court of
" Chancery or Chancery Division of the High Court of Justice for Ontario,
" and also in this court, forthwith after taxation thereof, and for the purposes
" aforesaid this cause is referred back to the Chancery Division of the High
" Court of Justice for Ontario, to make such orders and directions as may be
" necessary; and this court did further order that the Registrar of this court
" do deliver up to the appellants and respondents the exhibits filed or
" deposited herein by them respectively.

Smith v. Goldie.—9th December, 1885.

92. **Judgment—Amending—Power of court over its own judgments.**

Motion to amend the final judgment in appeal. The court when delivering judgment stated that a sum of $2,399 should be awarded to plaintiff. The order in appeal providing for the payment of that sum was settled and sent to the court below. Counsel for appellant contended that it clearly appeared there had been an error in the calculation, and that in arriving at the sum awarded certain sums had been twice deducted, depriving the plaintiff of a sum of $3,218.98. Counsel for respondent contended that it did not appear upon the face of the reasons for judgment that an error had been made, and therefore the application was in the nature of a re-hearing. Under the practice of the Privy Council this could not be allowed.

Held, that it being clear that by oversight or mistake an error had occurred, the court had power of its own motion to amend its judgment to make it conform to the intention of the court and the principles upon which its judgment was based. Order to be made directing the Registrar to call upon the proper officer of the court below to have the judgment of the court returned to be amended. (See *Montreal Ass. Co.* v. *McGillivray*, 11 L. C. R. 325.)

Rattray v. Young.—18th March, 1886.

Practice—Continued.

93. Judgment—Motion to reverse in accordance with judgment of Privy Council.

Counsel for appellants moves to reverse the judgment of the Supreme Court in pursuance of judgment of Privy Council.

Held, that the court has no power to entertain such an application.

Citizens Ins. Co. v. Parsons.--13th January, 1882.

94. Judgment—Appeal from settlement of minutes of.

In this case (See *Banks and Banking* 12) the respondent appealed to a Judge in chambers from the settlement of the minutes of the judgment, on the ground of material error as to the amount ordered to be paid to the appellant ($8,655.13), which amount he contended ought to be only $3,200.60, according to the judgment of the court, and also on the ground that the appellant should be condemned to pay the costs of his own appeal before the Court of Queen's Bench.

Held, that the application should be dismissed.

Per Fournier J.—The respondents by their motion of the 6th of April last appealed from the settling of the minutes of the judgment pronounced by this court on the 8th March, 1886, on the ground that there was an error in the figures of the draft minutes settled by the Registrar, which brought the amount of the judgment in question up to $8,656.13, whereas it ought only to have been $3,200.60, alleging that the difference between the said two sums, namely, $5,455.53, is not put in question by the pleadings of the parties, and that in consequence, that part of the judgment is null, because it goes further than the demand (*ultra petita.*)

This reason is without foundation, because the said sum of $5,455.53, paid by the fault and negligence of Louis Molleur, jr., to the assignee Auger, as dividends on contested claims by Lamoureux, formed part of the $25,251.55 advanced by Molleur and the Bank of St. John to Lamoureux by the deed of 16th May, 1876. And the said sum is put in question by the last part of the conclusions of the action formally demanding an account of sums received by virtue of the deed of the 16th May, 1876, in the terms, "and of "the money by him paid or received for him or on his account since the "execution of the deed (16th May, 1876) in discharge of the advances made "or promised by the defendant as representing the said party impleaded (the bank)."

But the said sum not only formed part of the matter in dispute in this case, but was also the object of a special provision in favor of the respondents in the judgment of the Superior Court sitting at St. John's, P. Q., dated 29 January, 1883, declaring that no sum should be deducted from that of $25,251.55, mentioned in the deed of assignment (16th May, 1876), as repre-

Practice—Continued.

senting the amount of any contested claim, although the defendant Molleur for the said bank, paid to the assignee the whole of the said sum of $25,-251.55. This court by its judgment over-ruled that part of the judgment of the said Superior Court, and has adjudged and decided on the contrary, that the said sum as representing the amount of contested claims ought to be deducted from the $25,251.55 for the reasons specified in its judgment. Consequently I hold that there is no error in the amount of the judgment, and that the draft minutes settled by the Registrar is in accordance with the judgment pronounced by the court. Motion dismissed with costs fixed at $20.

Lamoureux v. Molleur.—31st May, 1886.

95. Matter in dispute—Affidavit as to value of.

Upon counsel undertaking to file an affidavit shewing matter in dispute to be over $2,000, the hearing of the appeal is proceeded with.

McCorkill v. Knight.—31st January, 1879.

96. Parties—Amending record.

Under the practice in Nova Scotia, where the wife is improperly joined as co-plaintiff with the husband, the suit does not abate, but the wife's name must be struck out of the record.

Caldwell v. Stadacona F. & L. Ins. Co.—12th January, 1883.

97. Parties—Application to add a party as co-respondent—Rule 36 S. C.—Art. 154 C. C. P.—Rule 38 S. C.

Motion under rule 36 S. C. to add E. B. as a co-respondent, on the ground that he had obtained a notarial assignment from the respondents of all their interest in the suit. The suit had been instituted by the plaintiff *in formâ pauperis*, and judgment given by the Superior Court condemning the defendants (appellants) to pay $1,200. This judgment had been affirmed by the Court of Queen's Bench. The alleged assignment had been made after the judgment rendered by the Superior Court and before the appeal to the Queen's Bench, but no application had been made to the latter court to make E. B. a party.

The contention on behalf of appellants was that under Art. 154 C. C. P. an intervention could be had or forced at any time before final judgment; and if any question as to liability of the person sought to be added should arise, the court could remit the case under rule 38 S. C. to the Superior Court to have such question decided.

It was admitted that the object of the application was to have a party who would be answerable for the costs of the appeal.

Held, that the application should have been made at the earliest opportunity to the Court of Queen's Bench, the assignment to E. B. having been

Practice—Continued.

made before the appeal to that court. The question as to the liability of E. B. to be forced into the cause as a party was not one which, under the circumstances, the Supreme Court should be called upon to decide. The appeal should be heard on the case as settled in and transmitted by the court below. (Henry J. dissenting.) Motion dismissed with costs fixed at $25.

Dorion v. Crowley.--19th March, 1886.

98. **Privy Council, application for leave to appeal to.**

The court has no jurisdiction either to refuse or grant an application for leave to appeal to the Privy Council.

Kelly v. Sulivan.—21st January, 1877.
Moore v. Connecticut Mutual Ins. Co.—9th April, 1880.
Queen Ins. Co. Parsons.—21st June, 1880.

Notice of intention to make such an application should not be put on the motion paper.

Nasmith v. Manning.—4th March, 1881.

99. **Quashing appeal.**

Motion to quash an election appeal directed to stand over till hearing of the appeal, as too important to be disposed of on summary application.

Charlevoix Election Case.—18th February, 1879.

100. **Security—No power to dispense with—Appeal in forma pauperis—Petition for—Allowance of appeal—Secs. 24 and 79 S. C. Act.**

The Supreme Court, or a judge thereof, has no power to allow an appeal in *formâ pauperis*, or to dispense with the giving of the security required by the statute. Approving of the security is a mode of allowing the appeal.

Section 24 of the S. & E. C. Act does not give the court power to allow appeals, because her Majesty may be recommended to allow appeals by the Judicial Committee of the Privy Council, nor is it in the power of the judges of the court to make rules or orders for the allowance of appeals. Nor does sec. 79 of the S. & E. C. Act give the court or a judge any power to grant or to make rules for granting the prayer of a petition to be allowed to have or prosecute an appeal in *formâ pauperis*.

Fournier J. in chambers. **Fraser v. Abbott.—22nd February, 1878.**
Richards C.J. in chambers. " **16th March, 1878.**

101. **Security for costs—Application for, when to be made—Petition of right.**

Where, by a letter addressed to the suppliant, the Secretary of the Public Works Department stated, that he was desired by the Minister of Public Works to offer the sum of $3,950 in full settlement of the suppliant's claim against the department, an application on behalf of the Crown for security for costs was refused, on the ground that the power of ordering a party to give security for costs, being a matter of discretion and not of abso-

Practice—Continued.

lute right, the Crown in this case could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application. Application for security for costs in the Exchequer Court must be made within the time allowed for filing statement in defence, except under special circumstances. By Richards C.J. in the Exchequer Court of Canada.

Wood v. The Queen.—vii, 63.

102. Costs—Security for costs of appeal—Supreme and Exchequer Court Act sec. 31—Supreme Court Rule 6—Court of Review P. Q., no appeal direct from.

The following certificate was fyled with the printed case, as complying with Rule 6 of the Supreme Court Rules: "We, the undersigned, joint prothonotary for the Superior Court of Lower Canada, now the Province of Quebec, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section (31) thirty-first of the Supreme Court Act, passed in the thirty-eighth year of her Majesty, chapter second. Montreal, 17th January, 1878. Signed, Hubert, Honey & Gendron, P.S.C." **Held**, on motion to quash appeal, that the deposit of the sum of $500, in the hands of the prothonotary of the court below, made by appellant, without a certificate that it was made to the satisfaction of the court appealed from, or any of its judges, was nugatory and ineffectual as security for the costs of the appeal.

Per Taschereau J.—The case should be sent back to the court below in order that a proper certificate might be obtained.

Per Strong and Taschereau JJ.—That an appeal does not lie from the Court of Review (P.Q.) to the Supreme Court of Canada. Henry J. *contra.*

The appeal was quashed with costs, which included the general costs of respondent up to time motion made. The full fee of $25 was taxed by the Registrar on hearing of motion. This was increased by fiat of Fournier J. to $100.

Mcdonald v. Abbott.—iii, 278.

103. Security, allowance of—Orders made by court below after.

Orders made in a cause by the court below after the allowance of the appeal and giving of the security disregarded by the Supreme Court.

Lakin v. Nuttall.—iii, 691.

104. Security—Allowance of—Judge of court below functus officio.

When a judge of the court below has made an order allowing the security, he is *functus officio*, and the appeal is then subject to the jurisdiction of the Supreme Court. No application can be made to the judge or the full court below to rescind the order. Any application must be thereafter made to the Supreme Court or a judge thereof.

Walmesly v. Griffiths.—7th December, 1885.

Practice—Continued.

105. Security—Allowance of—A stay of proceedings in court below—Costs.

The Supreme Court allowed an appeal from a judgment of the Court of Appeal directing a reference which had been partly proceeded with after the allowance of the security.

The solicitor for the appellant desired the Registrar to insert a provision in the order in appeal of the Supreme Court specially "including the costs of and attending the reference." The Registrar referred the point to the Chief Justice in chambers and his lordship stated his opinion to be that the Snpreme Court could not recognize any proceedings taken in the court below after the allowance of the security, which acted as a stay of all proceedings, except of execution in cases provided for by sec. 32 of the S. & E. C. Act. If proceedings had been taken in the court below which should not have been taken, application should be made to that court with reference to such proceedings. The order of the Supreme Court should provide generally for the payment of all costs incurred by the appellant. See *Partnership* 6.

Starrs v. Cosgrave Brewing & Malting Co.—17th April, 1886.

106. Security for costs of appeal allowed to be given by Judge of S. Ct. under sec. 31 S. & E. C. Act, as amended by sec. 14 S. C. A. Act, 1879—Vacation.

The following facts appeared by affidavit:—On the 27th June, 1881, judgment was rendered by the Supreme Court of British Columbia (Begbie C.J. and Crease J. present,) on motion for judgment on demurrers of defendants to plaintiff's declaration, over-ruling demurrers, and judgment was rendered on motion for judgment on verdict previously rendered by a jury on the trial of issues of fact, allowing plaintiff to enter judgment for $5,000 the amount of said verdict. On the 4th July following defendants' solicitor served a notice of appeal to the Supreme Court of Canada on plaintiff's solicitor and of his intention to apply to the Chief Justice of the S. Ct. of B. C. next day for allowance of such appeal upon giving of such security as might be lawfully required. On the 5th July defendants' solicitor attended before the Ch. J. who refused to allow an appeal, on the ground that the judgment on the demurrers was the judgment of the full court, but judgment on motion for judgment on verdict was his own judgment from which no appeal would lie until re-heard before the full court, and that under the Local Administration of Justice Act, 1881, a full court could not be held until the lapse of about a year from that date. The defendants' solicitor then and several times afterwards tendered to the Ch. J. and to the Registrar of said court the sum of $6,500, $6,000 having been asked by plaintiff's solicitor as security under sec. 32 sub-sec. 5 of the S. & E. Ct. Act, and $500 being as security for the costs of appeal, but the Ch. J. refused to allow it to be paid into court.

Practice—Continued.

On the 11th July, 1881, the Ch. J. of B. C. ordered that upon paying to the plaintiff $1,000 and his taxed costs of suit, execution should be stayed and defendants have leave within four days after next sitting of full court to move such court for a re-hearing of the argument on the demurrers, and to move for a new trial, or to enter judgment for defendants.

On the 23rd August, 1881, the agent of defendants applied to Strong J. in chambers for leave to give security. The application was refused because made in vacation and not on notice.

On the 13th September following the agent for defendants' solicitor renewed his application to a judge of the Supreme Court of Canada.

An order was made allowing defendants to pay into the Sup. Ct. of Can. $500 as security for the costs of appeal.

Per Fournier J. in chambers.

Bank of B. N. A. v. Walker.—13th September, 1881.

107. Security—Appeal—The constitutionality of sec. 43 Ontario Judicature Act doubted—Security for costs allowed to be given under sec. 31 S. & E. Ct. Act as amended by sec. 14 S. C. Am. Act, 1879.

On the 15th day of September, 1882, an appeal to the Court of Appeal for Ontario, in which the defendants were appellants and the plaintiff was respondent, was dismissed. The matter in controversy in the action amounted to the sum of $576.30, exclusive of costs. The defendants, on said 15th day of September, applied to the Court of Appeal, under section 43 of the Judicature Act of Ontario, for special leave to appeal from judgment of said Court of Appeal to the Supreme Court of Canada, and the Court of Appeal refused to grant such special leave. The defendants thereupon made an application to Mr. Justice Fournier in Chambers for leave to appeal from said judgment of the Court of Appeal, or for an order that defendants be at liberty to give proper security to the satisfaction of the Supreme Court or a judge thereof, that they would effectually prosecute their appeal, or for such further or other order as the judge or court might direct. This application was made on the 4th day of October, 1882, being within thirty days after the said judgment was pronounced. Mr. Justice Fournier, finding that the point as to the validity of the section in question of the Judicature Act of Ontario had been raised by the application, referred it to the full court.

In the course of the argument the court expressed great doubts as to the constitutionality of the 43rd section of the Ontario Statute, but as the appellant's counsel abandoned the first alternative of his motion the court, exercising the powers conferred by the 31st section of the Supreme and Exchequer Court Act, 1875, as amended by the 14th section of the Supreme Court Amendment Act of 1879, **Ordered** that the second alternative of the

Practice—Continued.

said motion should be granted, and that the said appellant should be at liberty to pay the sum of $500 into the Supreme Court to the credit of the Registrar thereof as security for the costs of the appeal.

Forristal v. McDonald (18 C.L.J. 421).—7th November, 1882.

108. Security—Application for allowance of.

Motion on behalf of defendant for approval of security and allowance of appeal.

Held, that a similar application having been made to Gwynne J., in chambers, and refused, and the application being in any event one which should be made in chambers, the application could not be entertained.

MacNab v. Wagler.—22nd February, 1884.

109. Security—Application for leave to give—S. & E. C. A. secs. 25 and 26—S.C. A.A. 1879, sec. 14.

Appellant had applied to a Judge of the Court of Appeal for Ontario, under sec. 26 of the S. & E. C. A., for further time to appeal. After considering all the circumstances, the Judge refused the application. The appellant then applied to Ritchie C. J., S. C., in chambers, for leave to give security under sec. 31, S. & E. C. A., as amended by sec. 14, S. C. A. A. 1879.

Held, that the application must be refused with costs.

The Chief Justice was of opinion that the parties having applied to a Judge of the Court below, who was familiar with and had considered all the facts, the decision of such Judge ought not to be interfered with, even if a Judge of the Supreme Court were not bound as to time by sec. 25, S. & E. C. A. He was inclined to hold, however, that an application to the Supreme Court, or a Judge thereof, for leave to give security pursuant to sec. 31, S. & E. C. A., as amended, should be made within the time limited by sec. 25, or such further time as a Judge of the Court below may have allowed under sec. 26.

Per Ritchie C.J., in chambers.

Walmsley v. Griffiths—14th January, 1885.

[The Court of Appeal for Ontario has held that no appeal lies to that Court from a judgment of a Judge of that Court extending time for appealing, under sec. 26, S. and E. C. A. *Neill* v. *Travellers Insurance Co.* 9 Ont. App. R. 54.]

110. Technical objection.

Technical objection not taken in the court below, cannot be allowed to prevail in appeal, following the rule of the Privy Council.

Per Taschereau J.

See CONTRACT 10.

111. Time—application for further time in appeal from B.C.

On the 12th October, 1881, the agent for defendants' solicitor applied for three months further time to file the case and factums, showing by affi-

Practice—Continued.

davit that the day the order had been made by a judge of Supreme Court, allowing $500 to be paid into the Supreme Court of Canada, as security for the costs of appeal, the 13th September, 1882, the $500 had been paid in; that the next day the papers had been mailed to the defendants' solicitor at Victoria, B. C., to enable him to prosecute his appeal; that a letter took about three weeks to reach Victoria from Ottawa; that he had on the 7th October received a telegram (produced) from defendants' solicitor, saying: "Papers just received; get time extended," and that he verily believed unless three months further time was granted to prepare and print case and factums and transmit them, grave injustice would be done.

An order was thereupon made giving until 1st December then next to have case printed and filed with the Registrar of the Supreme Court of of Canada.

Per Ritchie C.J. in chambers.

Bank of B.N.A. v. Walker.—12th October, 1881.

112. Time, application to extend—When limit fixed by order of full court within which case to be filed—Case, not settled through delay of respondent—Further time given and respondent ordered to pay the costs.

On the 12th September, 1882, the agents of the defendants' solicitor moved before the Chief Justice of the Supreme Court of Canada (in chambers), for an order to extend the time mentioned in the order of the court of the 22nd June, 1882, for filing the case (see *Damages* 25, at page 123,) until the 1st January, 1883, or for an order that a writ of *certiorari* should issue to the Supreme Court of B. C. or to the Chief Justice, or the Registrar thereof, to bring up all the papers in said cause, or for a stay of proceedings under the order of the 22nd June, 1882, until application could be made to the full court at its next session for such relief as the appellants might be entitled to, or for an order allowing defendants to file a printed copy of "case" then produced as the "case" required by sec. 29 of the S. & E. C. Act, 1875, notwithstanding the same had not been transmitted by the Registrar of the Sup. Ct. of B. C., nor certified under the seal of that court, or for such other order as the parties might be deemed entitled to.

Upon hearing the parties and reading the affidavits in support of the application, his lordship the Chief Justice enlarged the motion to be heard before the full court on the first day of the next session, gave permission to the parties to file further affidavits to be used upon said motion, the same being first served upon the solicitors of the respective opposite parties in B. C., and stayed all proceedings under the order of the 22nd June, 1882, until the hearing of the motion before the full court and the final disposition thereof.

Practice—Continued.

On the 25th October 1882, the motion was heard before the full court. In support of it affidavits were read by counsel for the defendants to the effect: that the order of the 22nd June, 1882, reached the defendants' solicitor on the 12th July following. On the 18th July he left a draft copy of the "case" with the Chief Justice of Sup. Ct. of B. C., and obtained from him and served upon the solicitor for the plaintiff an appointment to settle the "case" on the 25th July; that on the 25th July the draft copy of the "case" was handed to the counsel for plaintiff for his persual, and the Chief Justice appointed the 27th July to settle it; that on the 27th July the Chief Justice settled the "case" and handed it to defendants' solicitor, who immediately put it in the hands of the printer, and who corrected the proof and handed the printed sheets as t ey were ready to respondents' counsel; that on the 16th August all the printed sheets, with the exception of the last two or three pages, were handed to the Registrar of the Sup. Ct. of B. C., who said the Chief Justice wished to see all the sheets, and they were all handed to the Registrar next day with the original as settled, and the solicitor made an appointment to apply for his certificate on the following day; that he attended the Chief Justice by request, who proposed to revise and alter the printed copy of his charge and judgment, and who said he would hand to the Registrar a page of corrections and additions to be printed; that upon requesting the Registrar to certify the "case," he refused to do so, after consulting the Chief Justice, on the ground that the Chief Justice instructed him it was not properly corrected; that the "case" so handed to the Registrar for his certificate was a true and complete copy of the "case" as settled by the Chief Justice, and contained every document handed in at the trial as evidence; that the utmost diligence had been used, and that it would be impossible to alter or reprint the "case" in whole or in part and file it within the time limited by the Order of the 22nd June, '82; that upon refusal of the Registrar to certify he had on the 21st August, 1882, taken out a summons calling upon the plaintiff and Registrar of the Sup. Ct. of B. C. to shew cause why the Registrar should not be directed to transmit the "case" settled on the 27th July, 1882, to the Registrar of the Supreme Court of Canada; that no evidence was offered in opposition to such application; that the Chief Justice stated that he had settled the MSS. "case," but had not compared the printed copy with the MSS., and he ought to have had the opportunity of revising the proof sheets, and until he had done so he did not consider that the "case" was settled; that counsel had thereupon suggested that the MSS. copy might be transmitted, but the Chief Justice refused to make any order upon the said application; and that the Registrar of the court below had been requested either to return the original "case" to the defendants' solicitor,

Practice—Continued.

or send it to the Registrar of the Sup. Ct. of C., but had replied that the Chief Justice was using it.

On behalf of the plaintiff was read an affidavit of the Registrar of the Sup. Ct. of B.C. to the effect that no draft MSS. "case" settled by the C.J. of the Sup. Ct. of B. C. had been filed with him; that there had been a reference to the C. J. by counsel for the defendants on the 27th July then last (1882) to settle some points of disputed evidence, and the points so referred were settled by the C. J., but that he was informed by the C. J. that except as aforesaid no "case" was settled by him, and no completed "case" was ever submitted to him for revision until a bound "case" was handed to him.

An affidavit of the counsel who had appeared for plaintiff before the C.J. of the Sup. Ct. of B.C. on the 27th July, 1882, stated that he attended to settle the MSS. "case" as far as prepared; that none of the exhibits or documents which were produced at the trial, or the judgments, were then printed or submitted to him, and he (the defendant) never settled the "case" as printed; that certain parts of the evidence were greatly incorrect and not in accordance with the notes of the C. J. who tried the case; and that several documents which were produced in evidence were omitted from the "case," and that he had requested them to be inserted, without effect.

And an affidavit of the plaintiff's solicitor stated that on the application made on the return of the summons of the 21st August, 1882, he had found the "case" incorrect in certain particulars, and had consented to the "case" going forward if these were corrected.

Counsel for both parties were heard, and counsel for defendants stated that if any part of the record had been omitted from the "case" they were and had been ready to have it added.

The Supreme Court of Canada was of opinion that whether the "case" had been settled or not by the C. J., it certainly was not through the fault or laches of the defendants that it had not been settled, but from the delays and laches of the plaintiff, and it ought to have been settled; and the court ordered that notwithstanding the order of the 22nd June, 1882, the time for filing the "case" and depositing the factum of the appellants should be extended to the 1st of January, 1883, and the appellants should be at liberty to bring the appeal on for hearing at the next sessions thereafter; that the appellants should be at liberty to apply to a judge of the Sup. Ct. of C. in chambers to extend any time thereby limited until the first day of the next sessions of the court, or until an order upon any such application could be heard and disposed of by the court; that the appellants might then apply to the court for any further or other relief as might seem just; and that the

Practice—Continued.

respondent (plaintiff) should pay to the appellants the sum of $20 as the costs of the motion before the Chief Justice, and the further sum of $50 as the costs of the motion before the full court.

The court intimated also that if any further obstacles were placed in the way of the appellants the court would take the necessary means to have a speedy hearing of the appeal.

Bank of B.N A. v. Walker.—26th October, 1882.

113. Time for appealing under S. and E. C. A. sec. 25—Security under sec. 31, as amended by sec. 14 of the S. C. A. A., 1879.

Judgment was pronounced in the Court of Appeal for Ontario on the 30th June, 1884. Vacation begins in that Court on the 1st of July and ends on the 30th August. On the 13th September the respondent (the appeal having been allowed) deposited $500 as security for the costs of an appeal to the Supreme Court of Canada, and applied for leave to appeal. The Court of Appeal was of opinion that the security, not having been deposited within thirty days of the pronouncing of the judgment, was given too late, as the vacation did not interrupt the running of the time allowed by the Statute (S. and E. C. A., sec. 25), for appealing.

The judgment of the Court of Appeal was not entered until November 14th, 1884, the delay having been occasioned by a substantial question affecting the rights of the parties having arisen on the settlement of the minutes. Such question was discussed before one of the judges, and subsequently before the full court before being finally determined.

On November 27th, 1884, the respondent in the Court of Appeal applied to a Judge in chambers of the Supreme Court of Canada, for leave to give security under sec. 31 of the Supreme Court Act, as amended by sec. 14 of the Supreme Court Amendment Act of 1879. This application was referred to the full court.

Held, that the time for bringing the appeal, in this case, under sec. 25 of the Supreme Court Act, began to run from the 14th November, 1884, the date of entry of the judgment of the Court of Appeal.

In appeals coming from the Province of Quebec, the time for appealing runs in every case from the pronouncing of the judgment, owing to the peculiar form of procedure in that Province.

Where any substantial matter remains to be determined before the judgment can be entered, the time for appealing runs from the entry of the judgment. Where nothing remains to be settled, as, for instance, in the case of the simple dismissal of a bill, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment.

Per Ritchie C.J.—This was a motion made in chambers for an order allowing an appeal to this court from the judgment of the Court of Appeal

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for Ontario, or for an order that the appellant may be at liberty to give proper security.

I have been a good deal embarassed as to what should be done in this case. It is claimed that in Ontario the time for appealing should run from the time the judgment was pronounced, and that as the judgment in this case was pronounced before vacation, the application should have been made during vacation. I was of opinion at first that the party was not obliged to apply during vacation, but this application need not be decided on this point. The decision was pronounced in June, but the minutes were not settled and entered until some time in the autumn. The question is whether the time runs from the date of the pronouncing of the judgment, or from the entry of the certificate. I understand the practice in Quebec to be that the judgment is always entered as of the date on which it was pronounced, and therefore no question can arise as to appeals coming from the Province of Quebec; and also in Ontario where there is simply a judgment declaring that the appeal is dismissed or allowed, as the case may be, and there is nothing more to be done; but when the decision requires something more to be done at the settlement of the minutes, as in this case, whether the plaintiff should be held personally liable for the costs, then I think until the settlement of the minutes and entry of the certificate, a party should not be compelled to take his appeal. I am therefore inclined to think the time ought to run in this case from the date of the entry of the certificate, which was entered on the 14th of November last.

Per Strong J.—I reserved this case for the opinion of the full court because there seemed to exist a diversity of opinion as to what is the proper construction of the 25 sec. of the S. and E. C. A., and as I entertain a different view from that of the judges of the Court of Appeal, I thought it better not to dispose of the application, but to reserve it for the opinion of the full court. I quite agree with the Chief Justice that the time for appealing in this case did not commence to run before the date of the final settlement of the minutes, and I also agree with Mr. Justice Taschereau, that this practice should not apply to the Province of Quebec. There the judgment is always pronounced from the bench, and there can be no doubt what the effect of the judgment is; there remains nothing to be settled.

In equity cases, however, most important controversies very frequently arise, and are decided on the settlement of minutes.

Therefore my view of the words of the 25th section of the Supreme and Exchequer Court Act, "every appeal shall be brought within thirty days from the signing, or entry, or pronouncing, of the judgment appealed from,"

Practice—Continued.

is that it is to be brought in a case like the present, not from the day the judgment was pronounced in court, but from the day the order was entered. The order in this case was pronounced immediately before the vacation, but owing to disputes as to minutes could not be drawn up until after the vacation, when it was found necessary to discuss important points and have an argument first before a judge in chambers, and subsequently before the court, in order to dispose of the contentions of the parties; and it was not until the 14th of November inst. that the court finally gave judgment, and the order was not of course entered until after that date. I am therefore of opinion that the time ran from the actual entry of the order, and consequently that the applicant is in time, and that leave should be given to him to appeal, upon his giving the proper security.

Motion granted.

O'Sullivan v. Harty.—16th March, 1885.

114. **Time for appealing under S. and E. C. Act sec. 25 to run from pronouncing of judgment—Security—Sec. 31 S. and E. C. Act—Sec. 14 S. C. Am Act 1879.**

Suit by Walmsley against the defendants the Griffiths and the other defendants (the Oddfellows) alleging that plaintiff had entered into an agreement with the Griffiths for the purchase of certain lands for $19,500, and subsequently with the other defendants, the Oddfellows, for the sale to them of the same lands for $25,000; that the defendants were colluding together to deprive plaintiff of the benefit of his agreement with the Oddfellows, and that the Griffiths refused to carry out their agreement, in order that the other defendants might obtain a recission of the contract with them. Prayer for specific performance of the agreement of plaintiff with the Oddfellows, and that the Griffiths be ordered to convey the legal estate to plaintiff or the defendants the Oddfellows, &c., &c.

The Griffiths by their statement in defence alleged that the plaintiff had been their agent to effect a sale of the property to the other defendants the Oddfellows, but by fraudulently representing that he could not effect a sale induced them (the Griffiths) to sell to himself, &c. They denied any collusion between them and the other defendants, the contract with whom they asked to be carried out.

The Oddfellows also denied any collusion, alleged they had been seriously damaged by the difficulties which had arisen between the plaintiff and the other defendants, and they claimed, by way of cross relief, that their contract with plaintiff should be recinded, and a sum of $500 paid thereon repaid.

V. C. Proudfoot found, that the plaintiff held no fiduciary position towards, and was not the agent of, the defendants the Griffiths; that the

Practice—Continued.

two contracts were independent contracts, and that the plaintiff was entitled to a decree for specific performance with costs.

The defendants the Griffiths appealed from this judgment, and the defendants other than the Griffiths also appealed.

The Court of Appeal reversed the judgment.

Hagarty C.J. and Patterson J.A., while admitting that the plaintiff was not a trustee or agent of the Griffiths, were of opinion that he had been guilty of such a concealment, or false representation to the Griffiths as raised an equity against him sufficient to prevent the court from awarding specific performance.

Burton J.A. dissented.

The judgment of the Court of Appeal was rendered on the 15th October, 1884. On the 21st of October, 1884, notice of appeal was served.

On the 19th November, notice of filing bond for security, and of an application for its allowance was served. The application was made to Osler J.A. and objection was taken, that the thirty days limited for bringing the appeal by section 25 of the S. and E. Ct. Act had expired.

On the 26th November, notice of motion to extend time for appealing under sec. 26 of the S. and E. Ct. Act was served. This motion was heard by Patterson J.A. On the 3rd December, 1884, the motion was dismissed with costs.

On the 16th day of December, 1884, the certificates of the judgment of the Court of Appeal were settled and entered.

In the appeal of the Griffiths the certificate of the judgment was to the effect that it was ordered and adjudged that the appeal should be allowed with the sum of $601.06 costs, to be paid by the respondent, Walmsley, to the appellants, the Griffiths, and that the action in the court below be dismissed with costs.

In the appeal of the defendants, other than the Griffiths, the certificate was to the effect that it was ordered and adjudged that the appeal should be allowed with $507.26 costs, to be paid by Walmsley to said defendants, and the action dismissed with costs, and that Walmsley should repay to the said defendants the sum of $500, the amount of deposit paid by defendants to Walmsley, together with interest at six per cent., from the 17th February, 1882, making the sum of $580.

On the 19th December, 1884, application for leave to give security pursuant to sec. 31 S. and E. C. A., as amended by sec. 14 of the S. C. A. A., 1879, was made to Mr. Justice Henry in chambers, who enlarged the application to the 14th January, 1885.

On the 14th January, 1885, the application was heard by the Chief Justice of the Supreme Court in chambers, who dismissed the appli-

Practice—Continued.

cation with costs, being of opinion that where an application has been made under sec. 26 of the S. and E. C. A. for an extension of time for appealing, alleging "special circumstances," to a judge of the court below who had a full knowledge of all the facts of the case and who had thought proper to dismiss the application made to him, a judge of the Supreme Court of Canada ought not to interfere.

His lordship also expressed a doubt as to whether an application could be made at all to a judge of the Supreme Court of Canada under sec. 31, as amended, after the expiration of the time limited for appealing by sec. 25.

On the 15th January, 1885, the plaintiff made an application to Mr. Justice Burton for leave to pay into court to the credit of the cause, the sum of $1,000 as security for the defendant's costs of appeal to the Supreme Court; $500 as security to the Griffiths, and $500 as security to the defendants other than the Griffiths.

Judgment was reserved by Mr. Justice Burton till the 4th November, 1885, when he allowed the application, being of opinion that the Supreme Court had decided in *O'Sullivan* v. *Harty* (on the 16th March, 1885) that in all cases the time for appealing would run from the entry of the certificate of the judgment.

The defendants appealed from the order of Mr. Justice Burton to the full Court of Appeal, which court, on the 24th November, 1885, sustained the order. On the 3rd December, 1885, the case was filed in the Supreme Court of Canada.

On the 7th December, 1885, the respondents moved to dismiss the appeal.

The question to be decided was whether the time for appealing ran from the date of the pronouncing of the judgment of the Court of Appeal—the 15th October, 1884—or from the date of the entry of the certificates of such judgment—the 16th December, 1884.

Held, that the time for appealing ran from the day the judgment was pronounced—the 15th October, 1884.

Sir W. J. Ritchie C.J.—The proceedings in this case which gave rise to the present application were caused by a misunderstanding in the Court of Appeal as to the decision in this court in the case of *O'Sullivan* v. *Harty*. In that case the judgment of the Court of Appeal was not entered until 14th November, 1884, although judgment had been pronounced on the 30th June, 1884, the delay having been occasioned by a substantial question affecting the rights of the parties having arisen on the settlement of the minutes. Such question was discussed before one of the judges and subsequently before the full court before being finally determined.

Practice—Continued.

On November 27th, 1884, the respondent in the Court of Appeal applied to a judge in chambers of the Supreme Court of Canada for leave to give security under sec. 31 of the Supreme Court Act as amended by sec. 14 of the Supreme Court Amendment Act of 1879. This application was referred to the full bench, which held that the time for appealing in that case under sec. 25 of the Supreme Court Act began to run from the 14th of November, 1884, the date of entry of the judgment of the Court of Appeal. What we decided in that case was:

That where any substantial matter remains to be determined before the judgment can be entered the time for appealing runs from the entry of the judgment. Where nothing remains to be settled, as for instance in the case of the simple dismissal of a bill, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment.

The Court of Appeal, however, appear to have been under the impression that this court had laid down a cast-iron rule that the time should run in every case from the entry of the judgment.

In this case I should have less hesitation in re-affirming the rule, because application was made to extend the time for appealing by the appellants to one of the judges who had heard the case in the Court of Appeal, who refused the application after considering all the circumstances of the case, and came to the conclusion that it was not a case in which the indulgence should be granted, and that the time should not be extended. The appellants then applied to me, and I came to the conclusion that I ought not to interfere with the decision of the judge of the court below, and I refused the application for an extension of time.

There being nothing to bring this case within the exception, as is the case of *O'Sullivan* v. *Harty*, I think we must act on that decision until some other rule is established. The present appeal comes within the rule heretofore acted on; we must, I think, therefore grant the motions and dismiss the appeal.

Fournier, Henry, Taschereau and Gwynne JJ. concurred.

Motions granted and appeal dismissed with costs.

Walmsley v. Griffiths.—9th April, 1886.

115. Time—Entry of Judgment—S. and E. C. Act, sec. 25.

Appeal from the Supreme Court of British Columbia, in an action respecting water rights brought by one Carson and one Eholt, against one Martley and one Clark.

Judgment was pronounced 20th August, 1885. On the 28th August the defendant gave notice of appeal and security, and obtained from the plaintiffs (respondents) a consent to three months' further time being given to

Practice—Continued.

file the case. The three months having expired without the case being ready, the appellants applied in chambers to Ritchie C.J. of the Supreme Court of Canada, for further time to appeal. This application was refused on the ground that the appellants had not satisfactorily accounted for the delay. On the 8th January, 1886, the minutes of the judgment were settled. On the 9th January the plaintiffs (respondents) moved before the full court of British Columbia to vary the minutes. The minutes were varied by striking out certain declarations respecting the rights of the plaintiff Carson and the defendant Martley respectively, and also with respect to the costs payable by the plaintiff Eholt. On the 26th of January, 1886, the judgment of the court below was entered. The appellants next day gave fresh notice of appeal, and applied to a judge for an allowance of the appeal on the notice of the 27th January, and for a continuation of the existing securities for appeal, and for an order settling the case. The judge refused to entertain the application, so far as it referred to the allowance of the appeal on the notice of the 27th January, and to the continuation of the existing securities, pending the appeal then existing to the Supreme Court of Canada.

Counsel for respondent argued that the time ran from the pronouncing of the judgment, the 20th August, 1885; that there was nothing to settle by the minutes, and they could have been settled and ought to have been settled without any necessity for any application to vary, and the case did not come within the exception laid down in *O'Sullivan* v. *Harty*, in which it was held that the time for appealing would run from the date of the pronouncing of the judgment, unless something substantial remained to be settled and entered. That it was open to either party to have the judgment drawn up.

Counsel for appellant contended that the bond given as security was a continuing security; that the time for appealing in every case ran from the entry of the judgment, but in any event it did so in this case, there having been something substantial to settle, and the court below did vary the minutes of the order. The appellants could not complete their case until the judgment of the court below was settled. The appeal had been delayed only one session.

Held, that the case came fairly within the exception mentioned in *O'Sullivan* v. *Harty*, and the appeal should be heard.

The respondents had not filed their factum, supposing it was unnecessary to do so, while the motion to dismiss was pending. The appellants had, therefore, inscribed *ex parte*. The court was of opinion much of the delay was owing to the fault of the appellants. The motion was refused, and the appeal ordered to stand over till the next session of the court, the respondents to file factum in the meantime.

Martley v. Carson.—17th May, 1886.

Practice—Continued.

116. Vacation.

On the 23rd August, 1881, (in vacation) the agent of the defendants' solicitor applied to a judge of the Supreme Court (Strong J.) for leave to give security under sec. 31 S. & E. C. Act as amended by sec. 14 of S. C. Am. Act, 1879.

The judge refused to make any order on two grounds:—1. Because it did not appear to him a proper application for vacation, not being urgent; and 2. Because the application ought to be made on notice and not *ex parte*.

Bank of B. N. A. v. Walker.—23rd August, 1881.

117. Vacation—Time, extending.

Motion on behalf of respondent to dismiss appeal for want of prosecution. The judgment of the Court of Appeal was pronounced on the 30th day of June, 1885. On the 3rd July following the appellant put in his bond for security for costs, which was allowed, but being under the impression that the time of vacation did not count, he took no steps to further prosecute his appeal. Notice of motion to dismiss was given on the 17th September, 1885, and was shortly afterwards heard before Henry J., in chambers, who **Held**, that under the circumstances, the time for filing the case should be extended to the 10th of October then instant.

Motion dismissed without costs.

Herbert v. Donovan.—3rd October, 1885.

Preference, Fraudulent.

See FRAUDULENT PREFERENCE.
" INSOLVENCY 1, 6.

Prerogatives of the Crown.

See CROWN.
" PETITION OF RIGHT.

Prescription—Loan—By a non-trader to a trader—Arrears of interest—Acknowledgment of debt, what sufficient—Evidence.

In 1858, W. D., sr., opened a credit of $584, in favor of his daughter I. D., with W. D. & Co., a commercial firm in Montreal consisting of the appellant and one T. D., W. D. & Co. charging W. D. sr., and crediting I. D. with that amount. In 1860, W. D., as sole executor of the will of D. D., credited I. D. in the books of W. D. & Co., (appellant at that time being the only member of the firm) with a further sum of $800, the amount of a legacy bequeathed by such will. These entries in the books of W. D. & Co., together with entries of interest in connection with the said items, were continued from year to year. An account current was rendered to I. D. exhibiting details of the indebtedness up to the 31st December, 1861. After 31st December, 1864, the firm of W. D. & Co. consisted of the appellant and

Prescription—Continued.

his brother T. D. In December, 1865, another account was rendered to I. D., which showed a balance due her at that time of $1,912.08. The accounts rendered were unsigned, but the second account current was accompanied by a letter, referring to it, written and signed by the appellant. I. D. died, and in a suit brought by G. T., her husband and universal legatee, to recover the $1,912.08 with interest from 31st December, 1865,

Held, 1. That a loan of moneys, as in this case, by a non-trader to a commercial firm is not a "commercial matter" or a debt of a "commercial nature;" that, therefore, the debt could be prescribed, neither by the lapse of six years under Consolidated Statutes of Lower Canada, ch. 67, nor by the lapse of 5 years under the Civil Code of Lower Canada, but only by the prescription of 30 years. *Whishaw* v. *Gilmour*, 15 L. C. R. 177, approved.

2. That, even if the debt were of a commercial nature, the sending of the account current accompanied by the letter referring to it signed by the appellant would take the case out of the statute.

3. That the prescription of five years against arrears of interest, under Art. 2,250 of the Civil Code of Lower Canada, does not apply to a debt, the prescription of which was commenced before the code came into force.

4. That entries in a merchant's books make complete proof against him.

Darling v. Brown—i, 360.

2. In action against Executor for an account.
See EXECUTORS 1.

3. Renunciation to communauté—Title to Real Estate belonging to.
See OPPOSITION 1.

4. Crown can plead.
See PETITION OF RIGHT 3.

5. Action by substitute—Art. 2268 C. C.
See WILL 10.

6. Light and Air, interfering with.
See EASEMENT 3.

7. Interruption of—C. C. P. 345, 346.
See CONTRACT 10.

8. In action for Malicious Prosecution—Arts. 2262, 2267 C. C.
See MALICIOUS PROSECUTION.

9. Continuance of cause, so as to suspend prescription under 37 Vic. ch. 15, Q.
See AGREEMENT 10.

Prescription—Continued.

10. Action for compensation for use and occupation of Land—Quasi-délit—Prescription of two years under Arts. 2261, 2267 C. C.—Prescription of five years under Art. 2250 C. C.—Tribunal bound to give effect to, though not pleaded—Art. 2188 C. C.

See LAND 3.

" PRESCRIPTION 12.

11. Yearly salary—Arts. 2260, 2261 C. C.—Moneys expended for estate—Executor, power to hire Clerks—Art. 914 C. C.

See CONTRACT 26.

12. **Objection taken in appeal.**

Held, that although the objection that the right of action has been prescribed is taken for the first time on the argument in appeal, the court is bound to entertain it and give effect to it if properly raised.

Appeal allowed but without costs in any of the courts.

(See *Land* 3.)

Dorion v. Crowley.—17th May, 1886.

Principal and Agent.

See AGENT.

Priority of Registration.

See MORTGAGE 1.

Privileged Communication—By public officer.

See SLANDER 1.

Privy Council—No application for leave to appeal to can be entertained by the Supreme Court of Canada.

See PRACTICE 98.

2. Nor will the Supreme Court entertain an application to reverse its own judgment in pursuance of the judgment of the Privy Council.

See PRACTICE 93.

3. Cases in which the Judicial Committee have granted or refused leave to appeal from the Supreme Court of Canada.

See APPENDIX A.

Procedure—Power of Legislature of British Columbia to legislate respecting.

See LEGISLATURE 12.

2. When the court below has adjudicated upon a mere matter of procedure the Supreme Court will not interfere.

See JURISDICTION 32, 35.

" PRACTICE.

Proces Verbal—Of seizure by sheriff—What it should contain—Art. 638 C. C. P.

See SHERIFF 3.

Prohibition—**Writ of prohibition to municipal corporation—Assessment roll, amendment of—Arts. 716 and 746a, municipal code, P.Q.**

The municipal corporation of the county of H., in the Province of Quebec, made an assessment roll according to law in 1872. In 1875 a triennial assessment roll was made, and the property subject to assessment was assessed at $1,745,588.58. In 1876, without declaring that it was an amendment of the roll of 1875, the corporation made another assessment in which the property was assessed at $3,138,550. Among the properties that contributed towards this augmentation were those of appellants, who, by their petition, or *requête libellée*, addressed to the Superior Court, P.Q., alleged that the secretary-treasurer of the county of H. was about selling their real estate for taxes under the provisions of the municipal code for the Province of Quebec, 34 Vic. ch. 68 sec. 998 *et seq.*, and prayed to have the assessment roll of 1876, in virtue of which the officer of the municipality was proceeding to sell, declared invalid and null and void, and that a writ of prohibition should issue to prevent the respondents from proceeding to sell. The Superior Court directed the issue of the writ restraining the defendants as prayed, but upon the merits held the roll of 1876 valid as an amendment of the roll of 1875. The Court of Queen's Bench reversed this judgment on the merits, and held the roll of 1876 to be substantially a new roll, and therefore null and void.

Held, per Henry, Taschereau and Gwynne JJ., affirming the judgment of the Court of Queen's Bench, that the roll of 1876, not being a triennial assessment roll, or an amendment of such a roll, was illegal and null, and that respondents were entitled to an order from the Superior Court as prayed for, to restrain the municipal corporation from selling their property, and the writ which issued, whether correctly styled "writ of prohibition" or not, was properly issued and should be maintained.

Per Ritchie C. J. and Strong and Fournier JJ., that a writ of prohibition issued under art. 1031, as was the writ issued in this case, will only lie to an inferior tribunal, and not to a municipal officer.

The court being equally divided, the judgment appealed from was confirmed, but without costs.

Coté v. Morgan.—vii. 1.

2. To revise conviction of recorder—Police regulations for sale of liquors —42 and 43 Vic. ch. 4 P.Q.

See LEGISLATURE 10.

Prohibition—Continued.

3. To prohibit proceedings for recovery of balance of mortgage debt after foreclosure.

See MORTGAGE 12.

4. **County court—Jurisdiction of—Proceedings after plea to jurisdiction sustained on demurrer—Prohibition, writ of.**

An action of trover was brought against defendants in the County Court, at Halifax, N. S., to which they pleaded a number of pleas including one to the jurisdiction of the court. This plea was based on an allegation that the goods for which the action was brought, were of the value of $600, the jurisdiction of the court in actions of tort being limited to $200. The plaintiff demurred to the plea of want of jurisdiction, and after argument the demurrer was over-ruled. No appeal was taken from the judgment over-ruling the demurrer, but the plaintiff gave notice of trial, and entered the cause for trial at chambers before the County Court judge, who announced his intention of trying the same on the remaining pleas. The defendants obtained a rule *nisi* for a writ of prohibition to restrain the judge from trying the cause, on the ground that the judgment on the demurrer disposed of the whole case, and on argument of the said rule *nisi* it was discharged.

On appeal to the Supreme Court of Canada, **Held,** Strong J. dissenting, that the effect of the judgment on the demurrer was to quash the writ, and the rule *nisi* for a writ of prohibition should be made absolute.

Per Strong J. dissenting, that the judgment of the County Court judge on the demurrer did not dispose of the case, but he had a right to reconsider the same on the trial of the issues raised by the other pleas; that the plea to the jurisdiction by attorney was null and void and if judgment had been entered of record on the demurrer such judgment would have been likewise null and void; and that the amount claimed by the plaintiff's declaration being over $200 the court had jurisdiction.

Appeal allowed with costs.

Wallace v. O'Toole.—16th February, 1885.

Promise of Sale.

See SALE OF LANDS 2.

Promoters—Of company—Action against for fraudulent misrepresentations—Alleged false statements in prospectus issued by.

See CORPORATIONS 24.

Prospectus—Alleged false statements in—Liability of promoters.

See CORPORATIONS 24.

Protutor—Liability of for negligence.

See EXECUTORS 4.

Quebec Turnpike Trust—Debentures issued by—Liability of Crown for.

See PETITION OF RIGHT 6.

Railways and Railway Companies—**Mortgage by Railway Company—Contract of sale—Power of Company to mortgage their road—Doctrine of ultra vires.**

The Grand Junction Railway Company, a corporate body, having the statutory power to borrow money, issue debentures, bonds, or other securities for the sum so borrowed, to sell, to hypothecate or pledge the lands, tolls, revenues and other property of the company, and also power to purchase, hold and take any land or other property for the construction, maintenance, accommodation and use of the railway, and to alienate, sell or dispose of the same, entered into a contract with one Brooks for the construction of their road. When Brooks required the iron necessary for the undertaking, he was unable to purchase it without the assistance of the company, and he thereupon authorized the officers of the company to negotiate for its purchase. In consequence, a Mr. Bell, solicitor of the company, as agent of Brooks, and with the approval, in writing, of Kelso, the president of the company, entered into a written agreement, dated Toronto, 9 th June, 1874, with the defendants (Bickford and Cameron) for the purchase of the iron, which was to be paid for as delivered on the wharf at Belleville by the promissory notes of Brooks, and a credit of six months was to be given from the time of the several deliveries of the iron. By that agreement also, Brooks agreed to obtain from the railway company an irrevocable power of attorney enabling the Bank of Montreal, who advanced to Bickford the money necessary for the purpose of buying the iron, to receive the government and municipal bonuses, and to procure from the company a mortgage for $200,000 on that portion of their road (44 miles) on which the iron was to be laid—the mortgage to be sufficient in law to create a lien on the 44 miles of railroad, as security for the due payment of the notes of the said Brooks, but not to contain a covenant for payment by the company. On the 30th of June, 1874, a more formal agreement, under seal, was executed, which did not vary in any material respect the terms of the preceding agreement. On the same day, a power of attorney (upon which was endorsed by Brooks a written request to the company to give the said power of attorney), and a mortgage (upon which also was endorsed by Brooks a request to grant the said mortgage), were executed by the company under their corporate seal to one Buchanan, then manager of the Bank of Montreal, in Toronto, as a trustee. The Bank of Montreal having made advances to Bickford in the ordinary course of their business dealings to enable him to purchase the iron, it was all consigned to their order by the bills of lading, and, when delivered on the wharf at Belleville, was

Railways and Railway Companies—Continued.

held by the wharfingers subject to the order of the bank, the whole quantity stipulated for by the contract being so delivered ready for laying on the track as required. The Bank of Montreal and Bickford caused to be delivered from time to time to Brooks, by the wharfingers at Belleville, all the iron he required to lay on the track, being about 2,000 tons, and about an equal quantity remained on the wharf unused. Brooks having failed to meet his promissory notes for the price of the iron, Bickford recovered judgment at law against him to the amount of $164,852.96. The bank then sold the iron remaining on the wharf for the purpose of realizing their lien, when Bickford became the purchaser thereof at $33.50 for the rails and $50.50 for track supplies. Bickford was removing the said iron when the company filed a bill in chancery asking for an injunction to restrain the removal of iron. A motion to continue the injunction was refused on the 11th October, 1875. The defendants (Bickford, Cameron and Buchanan) then answered the bill, and on the 18th January, 1876, by consent, a decree was made referring it to the master to take the mortgage account, to ascertain and state the amount due to Bickford and Cameron for iron laid or delivered to or for plaintiff's use on the track, and also the amount due (if anything) in respect of iron delivered at Belleville, but since removed, and to report special circumstances, if requisite. The master found due upon the mortgage $46,841.10, the price of iron actually laid on the track, and interest; and that nothing was due in respect of the iron delivered at Belleville but subsequently removed. On appeal to Vice-Chancellor Proudfoot the master's report was affirmed, and on an appeal to the Court of Appeal for Ontario, it was held that the mortgage was *ultra vires*, and the master's report was affirmed.

Held, on appeal, reversing the judgment of the Court of Chancery, that the proviso in the mortgage was in its terms wide enough to sustain the contention of the mortgagee to claim the price of all the iron delivered on the wharf at Belleville, and that the memorandum endorsed by Brooks on the mortgage should not be construed as cutting down the terms of the proviso, but was intended as written evidence of Brooks' consent to the mortgage and to the loss of priority in respect of the mortgage bonds to be delivered to him under the contract.

Held, also, reversing the judgment of the Court of Appeal for Ontario, that the statutory power to borrow money and secure loans cannot be considered as implying that the company's powers to mortgage are to be limited to that object; and, therefore, that the mortgage executed by the company on a portion of their road in favor of the trustee Buchanan, being given within the scope of the powers conferred upon the company to "alienate, sell, or dispose" of lands for the purpose of constructing and working a railway, was not *ultra vires*.

Railways and Railway Companies—Continued.

Query—Whether the rights of a corportion to take lands, operating the railway, taking tolls, &c., are susceptible of alienation by mortgage in this country?

Held, also, that under the pleadings and decree in the cause, the objection that the mortgage was *ultra vires* was not open to the company in the master's office, or on appeal from the master's report.

Bickford v. Grand Junction Railway Co.—i, 696.

2. **Railway Crossing—Collision—Air-brakes—Failure to comply with Consolidated Statutes, ch. 166, secs. 142, 143—Negligence—Damage.**

The Grand Trunk Railway crosses the Great Western Railway, about a mile east of the city of London, on a level crossing. On the 19th June, 1876, a Grand Trunk train, on which plaintiff was on board as a conductor, before crossing, was brought to a stand. The signal-man who was in charge of the crossing, and in the employment of the Great Western Railway Company, dropped the semaphore, and thus authorized the Grand Trunk train to proceed, which it did. While crossing the track, appellants' train, which had not been stopped, owing to the accidental bursting of a tube in air-brakes, ran into the Grand Trunk train and injured plaintiff. It was shown that these air-brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand-brakes, in case of the air-brakes giving way. C. S. C., ch. 66. sec. 142 (Rev. Stats. Ont., ch. 165, sec. 90) enacts that "every railway company shall station an officer at every point on their line crossed on the level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof, that the way is clear." Sec. 143 enacts that "every locomotive * * * or train of cars on any railway shall, before crossing the track of any other railway, on a level, be stopped for at least the space of three minutes."

Held, that the appellants were guilty of negligence in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by hand-brakes in case of the air-brakes giving way. That there was no evidence of contributory negligence on the part of the Grand Trunk Railway, as they had brought their train to a full stop, and only proceeded to cross appellant's track when authorized to do so by the officer in charge of the semaphore, who was a servant of the Great Western Railway Company.

Great Western Railway v. Brown.—iii, 159.

3. Action by judgment creditor against holder of shares in.

See CORPORATIONS 8.

Railways and Railway Companies—Continued.

4. Railway pass to voter.

See ELECTION 17.

5. **Shipping note—Fraudulent receipt of Agent—Liability of Company.**

C., freight agent of respondents at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes in the form commonly used by the railway company to be signed by his name as the company's agent, in favor of B. & Co., for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the appellants, and were attached to drafts drawn by B. & Co., and accepted by appellants. C. received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts,

Held, Fournier and Henry JJ. dissenting, that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the company, was not an act done within the scope of his authority as the company's agent, and the company was therefore not liable.

Erb v. The Great Western Railway Co.—v, 179.

6. **Carriers—Railway Company, liability of as—Agreement—Additional parol term—Conditions—Wilful negligence—"At owner's risk."**

The respondents sued the appellants' railway company for breach of contract to carry petroleum in covered cars from L. to H., alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial a verbal contract between plaintiffs and defendants' agent at L. was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars and delayed in different places, and in consequence a large quantity was lost. On the shipment of the oil a receipt note was given which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, one of which was "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk."

Held, per Ritchie C. J. and Fournier and Henry JJ., that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers.

Per Strong, Fournier, Henry and Gwynne JJ.—The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at L. was authorized to enter into, and which must be incorporated with the writing so as to make the whole contract one for carriage in

Railways and Railway Companies—Continued.

covered cars, and that non-compliance with the provision as to carriage in covered cars prevented the appellants setting up the condition that "oil was carried at the owner's risk" as exempting them from liability.

The Grand Trunk Railway Company of Canada v. Fitzgerald.—v. 204.

7. **Failure to sound whistle—Accident from horse taking fright—C.S.C. ch. 66 sec. 104—Finding of jury—Evidence.**

Held, affirming the judgment of the Court of Appeal for Ontario, that Consolidated Statutes of Canada, ch. 63 sec. 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision, or, as in this case, by a horse being brought over near the crossing and taking fright at the appearance or noise of the train. The jury, in answer to the question, "If the plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did?" said "Yes."

Held, though the question was indefinite, the answers to the questions as a whole, viewed in connection with the judge's charge and the evidence, warranted the verdict.

Grand Trunk Railway v. Rosenberger.—Ix. 311.

8. Agreement with Government—Breach of—Possession taken of road by Government.

See PETITION OF RIGHT 15.

9. **Railway bonds—39 Vic. ch. 57 (P. Q.), construction of—Condition precedent—Certificate of Engineer, contents of—Parol evidence inadmissible—Onus probandi.**

The L. & K. Ry. Co. was incorporated in 1869 (32 Vic. ch. 54 P. Q.), to construct a railway from Lévis to the frontier of the state of Maine, a distance of 90 miles. The company was authorized by that Act to issue bonds or debentures to provide funds for the construction of the railway. In 1872, by 36 Vic. ch. 45, P.Q., power was given to issue bonds to the amount of three million dollars without limitation of time, and without restriction as to the length of the railway constructed. In 1874, a statute of the Legislature of Quebec (37 Vic. ch. 23), declared that debentures to the amount of $280,000 had already been issued, and limited for the future the issuing of bonds to the amount of £300,000 stg., to be issued as follows:—The first issue of £100,000 at once; the second issue of £100,000 when 45 miles of the road should have been completed and in running order, as certified by the government inspecting engineer, and the third issue of £100,000 as soon as 30 additional miles—making in all 75 miles—

Railways and Railway Companies—Continued.

should have been completed, with the same privilege for the three issues. In 1875, by the Act 39 Vic. ch. 57, the Legislature amended the former Acts so as to modify the condition to be fulfilled by the L. & K. Ry. Co before the third issue of £100,000 could be by them made. This condition was as enacted by the said Act (39 Vic. ch. 57) "so soon as the rails and fastenings "required for the completion of the remaining forty-five miles or thereabouts "of the company's line shall have been provided, then the remaining one "thousand bonds, of one hundred pounds each, to be termed the third issue, "may be issued by the company." In that Act lastly cited, the preamble declared: "Whereas it appears that a total length of forty-five miles of the "company's line having been completed, a first and second issue each of one "hundred thousand pounds of the company's debentures have been made."

In March, 1881, the L. and K. railway was sold by the sheriff at the suit of the plaintiffs the W. M. Co., and bought by the Q. C. R. Co., respondents, for $195,000. In April, 1881, the corporation of the city of Quebec (appellants), filed an opposition *afin de conserver* for $218,099, being the amount of 300 debentures of £100 sterling and interest of the second issue issued on the 25th January, 1875, numbered 1020 and upwards, payable on the 1st January, 1894, and for the payment of which the opposants alleged that the said railroad was hypothecated. The Q. C. Ry. Co., also opposants in the case, contested the opposition of the corporation of the city of Quebec, and claimed the issue of the bonds of the second issue held by the appellants was illegal. At the trial no certificate was produced, but the Government engineer stated that he had reported to the Minister of Railways that there were only 43½ miles of the road completed, and the secretary of the company testified that the total length of railway certified by the Government engineer as being completed and in running order had never exceeded 43½ miles. The learned judge, at the trial, found as a fact that there were only 43½ miles completed, and held the bonds of the second issue invalid. This judgment was affirmed by the Court of Queen's Bench (appeal side).

On appeal to the Supreme Court, it was **Held**, reversing the judgment of the court below, that the effect of the statute 39 Vic. ch. 57, is to make the bonds therein mentioned good, valid and binding upon the company, although the conditions precedent specified in 37 Vic. ch. 23, might not have been fulfilled when they were issued. (Ritchie C.J. and Strong J. dissenting).

Per Fournier and Henry JJ., that as there was evidence that a certificate or report had been given, oral evidence of the contents of the certificate

Railways and Railway Companies—Continued.

or report was inadmissible, and therefore respondents had failed to prove the illegality of the second issue. (See *Appendix* A.)

Corporation of the City of Quebec v. Quebec Central Railway Co.—x, 563.

10. Intercolonial Railway.

See PETITION OF RIGHT 1, 8.

11. Canadian Pacific Railway—Contract for Georgian Bay Branch of.

See PETITION OF RIGHT 12.

12. Municipal By-law granting bonus to.

See BY-LAW 3.

13. Appraisement of lands taken for railway—Order to set aside proceeding not appealable—Estoppel—Chs. 66 and 70 Act of 1869, N.S.

See JURISDICTION 28.

14. Negligence—Verdict—Motion for judgment on verdict and motion for new trial—Right of Court of Review as to—34 Vic. ch. 4 sec. 10 and 35 Vic. ch. 6 sec. 13 (P.Q.)

The respondent (Wilson) obtained a verdict from a jury in the Superior Court District of Iberville, for injuries sustained by being run over on the 21st November, 1876, by a locomotive engine of the appellants, the G. T. R. Co., while he was crossing their railway track, on a public highway at St. Johns, P. Q. The motion for judgment on the verdict was not made before the Superior Court district of Iberville, but was drawn up and placed on the record while the case was pending before the Court of Review at Montreal. That court, on motion, directed a new trial, but the Court of Queen's Bench, on appeal, held that from the evidence in the record it appeared that the accident occurred through the gross negligence of the employees of the appellants in not ringing the bell and sounding the whistle, as they were bound to do, when approaching the crossing, and that the verdict rendered by the jury ought, therefore, to be maintained and the motion for a new trial rejected. (*See* 2 Dorion's Q. B. R. 131.)

On appeal to the Supreme Court of Canada, **Held,** Taschereau and Gwynne JJ. dissenting, that the judgment of the Court of Queen's Bench should be affirmed.

Per Taschereau and Gwynne JJ. dissenting.—The Superior Court, sitting in review at Montreal, has no jurisdiction either under 34 Vic. ch. 4 sec. 10, or 35 Vic. ch. 6 sec. 13 (P.Q.) to determine a motion for judgment upon the verdict in a case tried in one of the rural judicial districts, and therefore the Court of Queen's Bench had no power to enter judgment for the respondents upon the verdict.

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2. The Court of Review, on a motion for new trial in the first instance, having in its discretion granted same, judgment should not have been reversed on appeal.

Grand Trunk Railway Company v. Wilson.--30th April, 1883.

15. **Intercolonial Railway -Negligence of conductor—Accident to passenger Right of action—Contributory negligence.**

Plaintiff, having a first-class ticket from Sussex to Penobsquis by the Intercolonial Railway, intended going to Penobsquis (her home) by the mixed freight and passenger train, which was due to leave Sussex at 1:47 p.m. The train on that day was an unusually long one, and when the passenger cars were brought to the platform the engine was across the public highway. When the train came in it was brought up so that the forward part of the first-class car was opposite the platform. It was then about ten minutes after the advertised time of departure. Plaintiff was standing on the platform when the train came in, but did not then get aboard. The conductor of the train (the defendant) got off the train and went to a hotel for dinner. While he was absent the train was, without his knowledge, backed down, so that only the second-class car remained opposite the platform. The jury found that the first-class car did not remain at the platform long enough to enable plaintiff to get on board. The defendant, after finishing his dinner, came over hastily (being behind time and therefore in somewhat of a hurry), called "all aboard," glanced down the platform, saw no person attempting to get on board, crossed the train between two box cars to signal the driver to start (it being necessary to cross the train in order to be seen by the driver, owing to a curve in the track,) and almost immediately the train started.

The 124th regulation for government of the Intercolonial Railway prescribes that conductors must not start the train while passengers are getting on board, and that they should stand at the front end of the first passenger car when giving the signal to the driver to start, which was not done in this instance. Plaintiff and a lady friend F. who was going by the same train were standing on the platform, and when they heard the call "all aboard," they went towards the cars as quickly as they could. F. got on all right, but plaintiff, who had a paper box in her hands, in attempting to get on board caught the hand rail of the car, when she slipped owing to the motion of the train and was seriously injured. The jury found that the call "all aboard" was a notice to passengers to get on board.

The Supreme Court of New Brunswick held, that although the plaintiff's contract was with the crown, the defendant owed to her as a passenger a duty to exercise reasonable care, and that there was ample evidence of negligence for the jury.

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The facts will be found fully reported in 19 New Bruns. R. (3 Pugs. & Bur.) 340, and 21 New Bruns. R. 586.

On appeal to the Supreme Court of Canada, **Held**, that the judgment of the court below should be affirmed. (Taschereau and Gwynne JJ. dissenting.)

Per Ritchie C. J.—There was no obligation on the part of the passengers to go on board the train until it was ready to start, or until invited to do so by the intimation from the conductor "all aboard." It was the duty of the conductor to have had his first-class car up in front of the platform. Should circumstances have prevented this, it was his duty to be careful before starting his train to see that sufficient time and opportunity were afforded passengers to board the car in the inconvenient position in which it was placed, and the evidence showed the defendant exercised no care in this respect.

Per Henry J.—There was no satisfactory proof of contributory negligence on the part of the plaintiff. The package she carried was a light one, and such as is often carried by passengers with the knowledge and sanction of railway conductors and managers, and a tacit license is therefore given to passengers to carry such with them in the cars.

The plaintiff violated one of the regulations in attempting to get on the car while in motion. But the defendant could not shelter himself under those regulations, for when he gave the order "all aboard" he knew, or ought to have known, that the first-class car was away from the platform, and he ought to have advanced the train and stopped it, so that the plaintiff could have entered such car. The conductor was estopped from complaining that the plaintiff did what by calling "all aboard" he invited her to do. After the notification "all aboard" is given by a conductor, it is his duty to wait a reasonable time for passengers to get to their places.

Per Taschereau and Gwynne JJ. dissenting.—Whether the omission to stop the first-class car at the platform, or the not waiting a reasonable time after calling "all aboard" were or were not breaches of the defendant's duty, such breaches could not be said to have caused the accident if the plaintiff had not voluntarily attempted to get on the train while in motion, which she was not justified in doing.

Appeal dismissed with costs.

Hall v. McFadden.—1st May, 1883.

16. **Negligence—Damages—Fire communicated from premises of Company—14 Geo. 3 ch. 78 sec. 86 not applicable in cases of negligence.**

This was an action commenced by the respondent against the appellants for negligence on the part of the appellants in causing the destruction of the respondent's house and outbuildings by fire from one of their locomo-

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tives. The freight shed of the company was first ignited by sparks from one of the company's engines passing Chippawa station, and the fire extended to respondent's premises. The following questions, *inter alia*, were submitted to the jury, and the following answers given :—

Q. Was the fire occasioned by sparks from the locomotive? A. Yes.

Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes.

Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train and on Sundays, when employees were not on duty, there should have been an extra hand on duty.

Q. Was the smoke stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order? A. Out of order.

Verdict for plaintiff $800.

On motion to set aside verdict, the Queen's Bench Division unanimously sustained the verdict.

On appeal to the Supreme Court, **Held**, affirming the judgment of the court below, Henry J. dissenting, 1. That the questions were proper questions to put the jury, and that there was sufficient evidence of negligence on the part of the appellants' servant to sustain the finding.

2. If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by fire communicating thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith.

3. The statute 14 Geo. 3 ch. 78 sec. 86, which is an extension of 6 Anne ch. 31 secs. 6 and 7, is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act 31 Geo. 3 ch. 31, but has no application to protect a party from legal liability as a consequence of negligence.

Appeal dismissed with costs.

Canada Southern Railway v. Phelps.—23rd June, 1884.

17. **Railway Company—Sparks from engine—Proper care to prevent emission of—Use of wood or coal for fuel—Contributory negligence.**

R. owned a barn situated about two hundred feet from the New Brunswick Railway Company's line, and such barn was destroyed by fire, caused,

Railways and Railway Companies—Continued.

as was alleged, by sparks from the defendants' engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial, it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted, did not appear by their finding.

Held, reversing the judgment of the Supreme Court of the Province of New Brunswick, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial.

Appeal allowed with costs.

The New Brunswick Railway Co. v. Robinson.--23rd June, 1884.

18. **Expropriation—Right of Way—Cost of—Guarantee—By-law—Ultra vires—Injunction—44 and 45 Vic. ch. 40 sec. 2—Construction of.**

Under 44 and 45 Vic. ch. 40 sec. 2 (P.Q.) passed on a petition of the Quebec Central Railway Company, after notice given by them, asking for an amendment of their charter, the town of Lévis passed a by-law guaranteeing to pay to the Quebec Central Railway Company the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the St. Lawrence River, over and above $30,000. Appellants, being ratepayers of the town of Lévis, applied for and obtained an injunction to stay further proceedings on this by-law, on the ground of its illegality. The proviso in sec. 2 of the Act, under which the corporation of the town of Lévis contended that the by-law was authorized, is as follows: "Provided that within thirty days from the sanction of the present Act, the corporation of the town of Lévis furnishes the said company with its valid guarantee and obligation to pay all excess over $30,000 of the cost of expropriation for the right of way." By the Act of incorporation of the town of Lévis, no power or authority is given to the corporation to give such guarantee. The statute 44 and 45 Vic. ch. 40 was passed on the 30th June, 1881; and the by-law forming the guarantee was passed on the 27th July following.

Held, reversing the judgment of the Court of Queen's Bench, L. C., appeal side, and restoring the judgment of the Superior Court, that the statute in question did not authorize the corporation of Lévis to impose burdens upon the municipality which were not authorized either by their

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acts of incorporation or other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained.

Appeal allowed with costs.

Quebec Warehouse Co. v. Lévis. (21 C.L.J. 51; 5 C.L.T. 72.)—12th Jan. 1885.

19. **Contract for construction of railway—Agreement by company to deliver bonds—Assignment of right to receive bonds.**

On the 31st October, 1876, one A. entered into a contract with the Government of Nova Scotia for the construction of a railway from New Glasgow, N.S., to a point on the Strait of Canso, known as the Eastern Extension Railway. On the 20th of December, in the same year, A. assigned all his right to said contract to the appellants, and on the same day an agreement was entered into between the appellants and the Canada Improvement Company, whereby the latter undertook to build and equip the said Eastern Extension Railway. On 22nd December the respondent agreed with the Canada Improvement Company to do the necessary work on the said road, for which the company agreed to pay per mile the sum of $4,800 in cash, and $3,750 in first mortgage bonds of the respondent company. As security for his performance of the agreement, the respondent gave to the Canada Improvement Company a bond, with two sureties, in the penal sum of $100,000, which bond was afterwards assigned to the Government of Nova Scotia.

The respondent proceeded with the work according to the said agreement, but the said bonds were not delivered as the work progressed, and the said Canada Improvement Company represented that they could not be issued at that time. The respondent, therefore, suspended the work and took proceedings against the Canada Improvement Company for breach of the said contract. These proceedings were settled by a payment to the respondent of a certain sum in cash and notes, and an agreement was entered into between the appellants of the first part, the Canada Improvement Company of the second part, and the respondent, of the third part, which agreement, after reciting the above facts, provided *inter alia*, as follows:—

That the Canada Improvement Company would deliver to respondent $80,000 of first mortgage bonds of appellant's company as soon as the same could be legally issued, and use every diligence to have them issued, and they should, so far as the parties of the first and second parts could make them, be a lien on the Truro and Pictou Branch Railway, which the Government of the Dominion were to hand over to the appellants, upon the Eastern Railway Extension and upon the appellant company and its property rights and privileges set forth in section 32 of its Act of Incorporation.

That such bonds or other conveyances, or lien by which they might be secured, should be free from any clauses restraining a sale of the property to

which such lien attached, or in any way impairing the remedy of the holders thereof in default of payment.

That the whole issue of the first mortgage bonds should not exceed $1,250,000 and should bear interest at 6 per cent., and that no other security should take precedence of the bonds to be given to the respondent. But provision might be made for giving clear titles of the company's bonds in the event of their being sold, the proceeds to be secured for the benefit of the bondholders.

That the appellants covenanted and guaranteed that the bonds would be delivered to respondent as above set out, and that they would, if necessary, endeavour to procure such legislation as would remedy any defects now existing in their organization.

That the Government of Nova Scotia would use all means within its power to enforce the delivery of such bonds and might refuse government aid to said companies, until satisfied that respondent's right to receive the said bonds was protected and assured.

That the contract between the Canada Improvement Company and the respondent should be cancelled, and the bond given by respondent delivered up to him

On or about the first day of February, 1879, the appellants entered into an agreement with the Governments of the Dominion and of Nova Scotia relinquishing their rights to the "Pictou Branch Railway," mentioned in said agreement, and agreed to the repeal of the Act providing for the transfer of the same to the appellants, and that it should be retained by the Dominion until the Eastern Extension Railway to the Strait of Canso and the steam ferry across the strait should be completed, and then transferred to the appellants on certain conditions.

This the respondent claimed to be a breach of the above agreement, and brought an action against the appellants and the Canada Improvement Company, the latter, however, not being served with the writ issued in the cause.

The defendants pleaded, *inter alia*, that as to $40,000 of the said bonds the plaintiff had given an order on the Canada Improvement Company for the delivery of the same to the Hon. P. C. Hill, Provincial Secretary of Nova Scotia, which order had been accepted by the company, and was, in effect, an assignment of that portion of the said bonds. The evidence of the plaintiff on the trial, in regard to such order, was that it was given on the condition that an order in council should be passed by the Nova Scotia Government protecting the right of the said plaintiff to have the said bonds delivered to him, and the bonds given

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to the Canada Improvement Company, as security for the due performance by the plaintiff of the work on the Eastern Extension Railway, delivered up to the plaintiff; and on these conditions being fulfilled the plaintiff was to give to the Government a formal assignment of the said mortgage bonds to the extent of $40,000, but that such conditions were never carried out.

The plaintiff recovered in the action, and the verdict in his favour was affirmed by the Supreme Court of Nova Scotia, whereupon the defendants in the action appealed to the Supreme Court of Canada, and, on the argument of the last mentioned appeal an agreement was entered into between the parties, to which agreement the Government of Nova Scotia became a party, empowering the court to decide the case on the merits irrespective of the pleadings or any technical defence raised thereon, and limiting the amount in question to the sum of $40,000, the balance being satisfied by a judgment recovered by the respondent against the Canada Improvement Company, in the Province of Quebec.

Held, affiirming the judgment of the Supreme Court of Nova Scotia, that the agreement entered into by the appellants with the governments of the Dominion and the Province of Nova Scotia, was a breach of the agreement made between the appellants, the Canada Improvement Company, and the respondent, above in part recited.

Held, also, that the order given to the Honorable P. C. Hill, was given on certain conditions which were never carried out, and was not an assignment of the bonds therein mentioned, and therefore the respondent was entitled to recover the said sum of $40,000, with interest from the date of the breach of the said agreement.

Appeal dismissed with costs.

[An application was made in this case to the Judicial Committee of the Privy Council for leave to appeal. The application was refused with costs. Their lordships considered that in deciding the case under the agreement entered into at the hearing of the appeal, the Supreme Court was not acting in its ordinary jurisdiction as a court of appeal, but was acting under the special reference made to it under this agreement. Further, their lordships thought that even if it were open to them to give leave to appeal, the questions raised were not of sufficient public interest to induce them to depart from the ordinary rule that persons who have gone to the Supreme Court of Canada, and have there failed, shall not proceed any further to her Majesty in Council.—3rd April, 1886.]

The Halifax & Cape Breton Coal & Ry. Co. v. Gregory.—16th February, 1885.

20. Arbitration under 44 Vic. ch. 43 Q.

See ARBITRATION AND AWARD 8.

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21. **Negligence—Post with notice to engine drivers to stop before approaching bridge—"Res ipsa loquitur"—Damages—New trial—Non-suit.**

An action by plaintiff to recover damages for personal injuries sustained by being thrown out of his waggon, on a highway, in the city of Winnipeg, called Bridge Street, at that part where it approaches the Louise Bridge, owing to his horses becoming frightened at an engine and train which had advanced to the bridge, and immediately alongside the public highway approach to the bridge. After taking fright, the horses became unmanageable and ran away, throwing the respondent out, and on to a pile of stones on the highway.

The declaration alleged that there was a post some distance from the bridge and down the railway track, having the sign "stop" painted on it, and that it was the duty of the defendants to stop the engine at this sign, unless the bridge caretaker signalled that the line was clear. That on the occasion complained of, the engine came down to the bridge before stopping.

The declaration then charged the defendants with neglecting and refusing to stop at the said sign, and with neglecting and refusing to obey the flag signals of the bridge caretaker; and that the defendants "so negli- "gently, unskilfully and improperly managed the said engine and train that "they allowed the same to proceed towards and up to the said bridge, and "immediately alongside the aforesaid public highway approach thereto, and "caused and permitted steam to escape from the said engine with a loud "noise, whereby, and by reason of the said negligent, unskilful and impro- "per conduct of the said servants of the defendants, and by reason of the "close approach of the said engine and train, and by reason of the escape "of the said steam;" the horses, &c., became frightened, while turning out of the said bridge into the highway, and while upon the highway approach to the bridge the horses ran away, and the plaintiff was unable to control or manage them, and he was thrown from the waggon, &c., &c.

A demurrer was filed to this declaration on the ground that it contained an allegation of duty which was a conclusion of law, and the declaration did not show a violation on the part of the defendants of any common law duty, or statutory obligation.

The cause was tried before Wallbridge C.J., Manitoba.

After the plaintiffs case was closed, a motion for non-suit was made.

His Lordship declined to non-suit, but gave leave to defendants to move on the whole case.

Witnesses were then called for the defence, and the jury gave a verdict for plaintiff for $750.

In Easter term, 1883, a rule *nisi* was taken out, to set aside the verdict and enter a non-suit, or for a new trial.

The demurrer was over-ruled, on the ground that the allegations pointed to in the demurrer did not stand alone, but other and sufficient causes were shown to impose upon the defendants that care and regard for the safety of the public from injury by their acts, the absence of which care and regard, constituted with the wrongful acts charged, the cause of action of which the plaintiff complained.

The rule *nisi* was discharged, so far as it asked for a non-suit, but was made absolute for a new trial.

On appeal to the Supreme Court of Canada, **Held**, that the plaintiff was entitled to recover, but not having appealed from the rule ordering a new trial, that rule should be affirmed and the appeal dismissed with costs.

Per Ritchie C. J.—The evidence showed that there was a man employed to watch the bridge, whose duty it was to signal trains crossing, and that he was there and discharged his duty. It was also shewn that the company had posts erected on the line approaching the bridge, put there for the purpose of indicating that the engines should stop there before approaching the bridge, to give the signal to enable them to cross the bridge in safety; but, instead of stopping there, on the occasion in question, the train went on and approached within a very few yards of the bridge and stopped, when those persons who were crossing the bridge were compelled to come immediately alongside, and within a few feet of the engine. The engine being there and blowing off steam, the horses of the plaintiff became frightened and ran away, causing the damages claimed. The accident was occasioned solely through negligence on the part of the defendants. If the engine had stopped at the indicated stopping place, the evidence showed that the accident would not have happened. Running it down as close as possible to where the carriages had to cross the bridge was a piece of recklessness. There was no contributory negligence on the part of the plaintiff; no neglect or want of care on his part, as he had a right to cross the bridge at the time, and under the circumstances could not be anywhere else than where he was.

Per Strong J.—The case appears one in which the maxim "*res ipsa loquitor*" applies. The defendants by putting the post with a printed sign board on it, with a direction to engine drivers not to pass it, as indicating the point beyond which it was not safe to proceed until it was ascertained that the bridge was clear, by their own act had shown that the omission to obey this direction would be negligence.

Per Henry J.—The mere fact that the post was established by arrangement between the city and railway authorities for engines to stop at, made

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the company liable for breaking the rule, there being no contributory negligence on the part of the plaintiff.

Appeal dismissed with costs.

Canadian Pacific Railway Co. v. Lawson.—12th May, 1885.

22. Use of streets of city of Quebec by North Shore Railway Company—Non-liability of corporations for damages caused by.

See CORPORATIONS 21.

23. Street railway—Accident—Action of damages for—Improper construction of track—Finding of court of first instance on the evidence affirmed.

The plaintiff, a driver employed by the Montreal Brewing Company, while crossing the track of the defendants on Place d'Armes, opposite the the church of Notre Dâme, was thrown out of the waggon which he was driving by the breaking of the rear axle, breaking his leg and sustaining other severe injuries. He brought an action of damages alleging that the accident had occurred by the fault of the defendants, owing to the improper construction and bad order of the track.

The Superior Court for Lower Canada, (Torrance J.) found that the track was in bad order, the switch being three inches above the level of the road, contrary to law, and that this caused the accident without any fault on the part of the plaintiff, whose damages he assessed at $2,500. The Court of Queen's Bench for Lower Canada (appeal side) reversed this judgment, being of opinion that the rails, as well as the part of the roadway the defendants were bound to maintain, were lawful and sufficient; that the defendants were not in fault, and that the plaintiff had not exercised the necessary caution and prudence to which he was bound, and might by the exercise of reasonable caution and prudence have avoided the accident.

On appeal to the Supreme Court of Canada, **Held,** that the questions to be decided were purely matters of fact, and the judgment of the court of first instance should not have been disturbed. Strong J. dissenting, on the ground that the judgment of the Court of Queen's Bench on the facts was correct.

Appeal allowed with costs.

Parker v. Montreal City Passenger Railway Company.—23rd June, 1885.

[In this case the Judicial Committee of the Privy Council refused leave to appeal.]

24. Negligence—Death of wife by—Damages to husband as administrator—Benefit of children—Loss of household services—Care and training of children.

Held, affirming the judgment of the Court of Appeal for Ontario (11 Ont. App. R. 1.), that although on the death of a wife, caused by negligence of a

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railway company, the husband cannot recover damages of a sentimenta character, yet the loss of household services, accustomed to be performed by the wife, which would have to be replaced by hired services, may be a substantial loss for which damages may be recovered, and so also may be the loss to the children of the care and moral training of their mother.

Appeal dismissed with costs.

[In this case the Judicial Committee of the Privy Council refused leave to appeal.]

St. Lawrence & Ottawa Ry. Co. v. Lett, 23 C. L. J. 18.—16th November, 1885.

25. **Railway Company—Carriage by railway—Special contract—Negligence—Liability for—Power of Company to protect itself from—Live stock at owner's risk—Railway Act, 1868, 31 Vic. ch. 68 sec. 20 sub-sec, 4—34 Vic. ch. 43 sec. 5—Cons. Railway Act, 1879, (42 Vic. ch. 9).**

A dealer in horses hired a car from the Grand Trunk Railway Company for the purpose of transporting his stock over their road, and signed a shipping note by which he agreed to be bound by the following, among other conditions:—

"The owner of animals undertakes all risks of loss, injury, damage and other contingencies, in loading, &c.

"3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury or detention of any person or persons travelling upon any such free passes, * * * the person using any such pass takes all risks of every kind, no matter how caused."

The horses were carried over the Grand Trunk Railway in charge of a person employed by the owner, such person having a free pass for the trip. Through the negligence of the company's servants a collision occurred by which the said horses were injured.

On appeal from the Court of Appeal for Ontario, 10 Ont. App. R. 162, affirming the judgment of the Divisional Court, 2 Ont. R. 197, in favor of the defendants, **Held**, per Ritchie C.J. and Fournier and Henry JJ., that under the General Railway Act, 1868, 31 Vic. ch. 68 sec. 20 sub-sec. 4, as amended by 34 Vic. ch. 43 sec. 5, re-enacted by Consol. Ry. Act, 1879, 42 Vic. ch. 9 sec. 25 sub-secs. 2, 3, 4, which prohibits railway companies from protecting themselves against liability for negligence by notice, condition or declaration, and which applies to the Grand Trunk Railway Company, the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants.

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Per Strong and Taschereau JJ.—That the words "notice, condition or declaration," in the said statute contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability.

Grand Trunk Ry. Co. v. Vogel.
Grand Trunk Ry. Co. v. Morton. } **9th March, 1886.**

26. Accident—Damages—Negligence—Wharf insufficiently lighted—No gate or chain—Ferry.

The respondent, plaintiff, alleged in her declaration that, on or about the 29th October, 1883, her husband Louis Hésique Fournier, upon whose labour she and her eleven children were dependent for their support, was drowned at the Grand Trunk wharf, in the city of Quebec; that the appellant company was the cause of his death by its gross negligence, and culpable and malicious imprudence and want of forethought ("par sa négligence grossière, son imprudence et imprévoyance coupable et malicieuse;") that the company was bound by law to keep its wharves, pontoons, etc., in good order; to put railings, guards and gates, and lights sufficient to ensure the safety of its passengers, and to light in a proper manner its wharves and pontoons, whenever necessary, all which it had failed to do for four or five months previous to the 29th October, 1883; that on that day the weather was rainy and very dark; that the husband of the plaintiff having purchased a ticket to cross on the appellant's ferry boat, went down to its wharf to take the steamer which was advertised to leave at 6.15 p.m.; that by reason of the imprudence and malicious and culpable negligence of the company, its wharf and pontoon were insufficiently lighted, and were in a dangerous and slippery condition, and not provided with doors, guards or gates, and that the ferry boat was not at the wharf, notwithstanding that the hour of its arrival had passed; that her husband, while proceeding to take the ferry, which he believed to be at the wharf, without negligence and imprudence on his part, and notwithstanding that he took all possible precautions, but by reason of the want of light, and the absence of guards or gates, fell over the wharf and was drowned; and she prayed for a condemnation for $5,000.

A perusal of the declaration establishes that the plaintiff relied upon charges of general negligence on the part of the company, and upon specific omissions: 1st. Insufficiency of light. 2nd. Want of gates, guards or railings. 3rd. The late arrival of the ferry boat.

To this action the appellants pleaded the general issue, thus negativing the allegations of care and prudence on the part of the plaintiff's husband, and of negligence, general or special, on its own part.

The company's premises consist of a large wharf, upon which the offices, etc., are built, and a double pontoon, necessary by reason of the great rise

Railways and Railway Companies—Continued.

and fall of the tide, to the outer one of which the ferry boat moors. The pontoons are reached by a slip in the wharf. Upon the outer pontoon is built a large freight shed, through which a passage about twelve feet wide by thirty feet long leads to the river, and by means of which the ferry boat is reached.

The deceased Hésique Fournier, on his way home, at about 6 o'clock in the evening, came to the Grand Trunk ferry; he crossed diagonally the first pontoon and had to enter the narrow corridor or passage-way on the covered pontoon, at the end of which passage he expected to find the steamboat ferry already moored and prepared to receive passengers on board. The end of this passage is closed by a door or gate sliding on rollers, which is usually kept shut for the safety of freight, and for preventing rain or snow from coming in. This door was not then closed. The deceased walked through this passage-way to get on board the ferry boat (which was late that evening), and the night being dark and foggy, and the passage lighted with only one lamp, he walked or slipped into the water and was drowned.

After a lengthy trial, in which the main point urged by the plaintiff was the pretended insufficiency of the lights, the judge who heard the case found that the death of the plaintiff's husband was solely due to his own gross negligence, want of care and prudence, and that the accident could not have happened had he exercised ordinary care and prudence, and dismissed the action.

This judgment was reversed on appeal to the Court of Queen's Bench for the Province of Quebec (Mr. Justice Cross dissenting), the court holding that the accident had been occasioned by the negligence and want of due care of the company, and not to any fault or negligence on the part of Fournier, and adjudged $1,000 to the plaintiff.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Queen's Bench, that the evidence showed culpable negligence on the part of the railway company in not having sufficient lights, and in not having a gate or chain to guard against accidents. The damages would not be increased, but interest should be allowed on the amount awarded by the Queen's Bench from the time of the demand.

Appeal dismissed with costs.

Grand Trunk Ry. Co. v. Boulanger.—17th March, 1886.

27. Agreement by municipal corporation to take stock in railway and to pay for same in debentures—Breach of agreement—Right of railway company to sue for special damages.

See DAMAGES 40.

Railways and Railway Companies—Continued.

28. Costs of arbitration under Consolidated Railway Act, 1879.

See COSTS 3.

29. Farm crossing—Liability of company to provide—14 & 15 Vic. ch. 51 sec. 13—Under crossing—Trestle bridge, right to substitute embankment for.

The plaintiff in his statement of claim alleged that in the month of March, 1871, he entered into a verbal agreement with the defendants, through their agent, John Avery Tracey, for the sale by the plaintiff to the defendants of $7\frac{21}{100}$ acres of land of the plaintiff taken by the defendants for the purposes of their railway, for which it was then agreed that the defendants should pay to the plaintiff $662, and should make five farm crossings across the railway on plaintiff's farm; that three of such crossings should be level crossings, and the other two under crossings; and that one of such under crossings should be of sufficient height and width to admit of the passage through it from one part of plaintiff's farm to the other of loads of grain and hay, reaping and mowing machines; and that such crossings should be kept and maintained by the defendants for all time for the use of the plaintiff, his heirs and assigns. That at the time when said agreement was entered into the plaintiff was desirous that the same should be reduced to writing and signed by himself and the said Tracey for and on behalf of the defendants, and that he particularly requested said Tracey to reduce to writing and sign that part of the said agreement relative to the farm crossings to be made and maintained by defendants for the use of the plaintiff, but that said Tracey assured the plaintiff that a writing was unnecessary, and that the law would compel defendants to build and maintain said crossings, although the agreement with reference thereto was not in writing, and the plaintiff believing such representations and relying thereon, did not further insist upon the said agreement being reduced to writing. That in pursuance of said agreement the plaintiff, by indenture bearing date the 16th day of March, 1871, duly conveyed the said $7\frac{21}{100}$ acres of land to defendants, and the defendants took possession of the same and paid the plaintiff the money consideration agreed upon therefor, and built their railway along and upon said parcel of land, and furnished the several level and under crossings so stipulated for and agreed upon between plaintiff and defendants as aforesaid, and had maintained the same for the use of the plaintiff, who had used the same without any interruption or hindrance from the time the said railway was built until the 8th of October, 1881, on which day the defendants caused the larger of the said two under crossings to be boarded so as to render it impassable by, and useless to the plaintiff; and on several occasions since the defendants had caused the said under crossings to be partly filled up with earth and rubbish, and the plaintiff had been put to great trouble and

expense in removing such earth and other obstructions from the said under crossings, and rendering them fit for use by the plaintiff. And the plaintiff claimed: 1st. Damages for the wrongs complained of. 2nd. An order restraining the defendants from any repetition of any of the acts complained of. 3rd. Such further relief as the nature of the case might require.

The defendants, in their statement of defence, admitted that Tracey was a purchasing agent of theirs for right of way; but they alleged that the sum paid to the plaintiff was not merely for the expropriation of his land, but was for all damages to his property through which the right of way was taken, in so far as it was injuriously affected. They denied that their agent made any bargain or contract with the plaintiff for three level and two under crossings, as alleged in the plaintiff's statement of claim; if he did he had no authority from the defendants to make the alleged promises, and that defendants were not bound thereby; and they denied that the plaintiff was entitled to the larger under crossing in respect of which this action was brought, or to any under crossing, or that the defendants were liable to furnish and maintain the same. They also denied that they furnished the under crossings in the plaintiffs claim mentioned in pursuance of any agreement. They alleged that at the places where the alleged under crossings were there were depressions in the ground which the defendants bridged over instead of filling up, for economy, intending that these and other similar depressions along the line of their railway should be filled up with earth as soon as they should have the means to do so, and the superstructures over such depressions should require removal; and although they were always ready and willing to allow land owners to use these places as under crossings and afforded them facilities for using them as such, it never was the intention of the defendants that the plaintiff or persons similarly situated should have the right to use these crossings permanently, and they avowed that they had furnished the plaintiff with good and suitable over crossings, and they denied that they were legally bound to furnish him with any others; and they finally pleaded the statute of frauds as a bar to the action.

Mr. Justice Proudfoot made a decree in the plaintiff's favor granting to him a perpetual injunction restraining the defendants from interfering with, hindering or obstructing the plaintiff in his possession, use and enjoyment of the under crossings, under the defendants railway on lots numbers 10 & 11 in the 9th concession of the township of Townsend (4 Ont. R. 28). The defendants appealed to the Court of Appeal for Ontario from this decree and that court varied the decree granting the plaintiff an injunction restraining the defendants from interfering with, hindering, or obstructing the plaintiff

Railways and Railway Companies—Continued.

in the use and enjoyment of the under crossing under the defendant's railway, &c., &c., until compensation should have been made in pursuance of the provisions of the statutes in that behalf for the additional injury to the plaintiff's farm from any further exercise of the powers of the company by which the plaintiff might be deprived of the said under crossing; and with these variations and directions the defendant's appeal was dismissed with costs (11 Ont. App. R. 287).

From the decree so varied both parties appealed, the defendants insisting that the plaintiff's action should have been wholly dismissed, and the plaintiff that the original decree as made by Mr. Justice Proudfoot should not have been varied.

Held, the evidence established that the plaintiff relied upon the law to secure the farm crossings to which he considered himself entitled, and not upon any contract made with the defendants through their agent, and that the cost of the under-crossing claimed would be altogether disproportionate to the plaintiff's own estimate of its value and of the value of the farm.

The plaintiff was entitled to get, and the defendants were bound to provide such farm crossings as might be necessary, or reasonably sufficient for the beneficial enjoyment of his farm, the nature, location and number of said crossings to be determined on a reference to the master of the court below. *Brown* v. *The Toronto and Nipissing Ry. Co.*, 26 U. C. C. P. 206, over-ruled.

Per Ritchie C.J. dissenting.—Tracey was the agent of the company to secure the right of way for the company, and, as incidental to that, was clothed with authority to make agreements with the parties whose lands he was negotiating for with reference to the nature and location of crossings; the evidence showed that he had concluded an agreement (subsequently ratified by the defendants) with the plaintiff for a crossing under the trestle bridge, which alone at the time of the agreement was in the contemplation of the company, and that the plaintiff had paid for it by the reduced price of his land; he should therefore not be deprived of his under-crossing, but the defendants if they wished to construct an embankment in lieu of the trestle bridge should do so in a manner to preserve the plaintiff's sub-way, or adopt such proceedings as will compensate plaintiff therefor.

Per Gwynne J.—The substitution of the word "at" in sec. 13 of ch. 66 of the C. S. C. for the word "and" in sec. 13 of ch. 51 of 14 and 15 Vic. makes no difference in the construction of the section. The amendment appears to have been made to make the section more perfect than it originally was and to express what was intended, but was omitted in the section as it was. The word "and" being by inadvertence used instead of "at,"

the section failed to express where the "openings, gates or bars in the fences" were to be. But it cannot be doubted that they were intended to be at "the farm crossings of the road for the use of the proprietors of the lands adjoining the railway." The substitution of "at" in the Consolidated Statutes for "and" precisely expresses this intention. This statute so amended is to be construed as regarding farm crossings to be a necessary convenience for the use of the proprietors of the lands adjoining the railway when one part of a man's property is separated from the residue by the railway, and to which necessary convenience such proprietor is entitled as of right, unless it shall appear that he has released and abandoned his right upon receiving compensation from the railway company. When a substantial part of a farm is separated by a railway from another substantial part, or a man's house is separated from his barn or stables, or the like, then farm crossings constitute such a necessary requisite to the beneficial enjoyment of his property by the owner that no man can be deprived of them otherwise than by an instrument to that effect voluntarily executed by him, upon receipt of compensation adjudged to him by process of law, and the ordinary courts of the country are the courts wherein all differences between parties as to the nature, location and number of the crossings and all other matters incidentally arising are to be adjudicated upon and determined.

Appeal allowed with costs.

Canada Southern Ry. Co. v. Clouse.—9th April, 1886.

30. **Farm crossing—Under crossing—Agreement for cattle pass—Trestle bridge, right to substitute embankment for.**

This case differs from that of *Clouse* v. *The Canada Southern Ry. Co.* (see *Railways and Railway Companies* 29,) in this that an agreement was reduced to writing to the effect that S., through whom the plaintiff claimed, should "have liberty to remove for his own use all buildings on the said right of way, and that in the event of there being constructed on the same lot a trestle bridge of sufficient height to allow of the passage of cattle, the company will so construct their fence to each side thereof as not to impede the passage thereunder."

Held, reversing the judgment of the Court of Appeal for Ontario (11 Ont. App. R. 306), Ritchie C.J. dissenting, that the agreement provided for a passage for cattle only, and that conditional upon there being a trestle bridge of sufficient height to permit of such a passage, and did not make the right of the company to discontinue the trestle bridge and erect an embankment subject to the construction of a cattle pass in the embankment or a re-valuation of the land. The plaintiff's statement of claim should be dismissed with costs, but such dismissal would not operate against any claim which he

Railways and Railway Companies—Continued.

might have under the law for such farm crossings as might be necessary for the reasonable enjoyment of the severed lands.

Appeal allowed with costs.

Canada Southern Ry. Co. v. Erwin.—9th April, 1886.

Reasonable and Probable Cause.

See CAPIAS.
" INSOLVENCY 9.
" LICENSE 7.

Res inter alios acta.—Judgment against original vendor in hypothecary action against sub-purchasers.

See SALE OF LANDS 9.

Rescission—Bill for, on ground of fraud.

See SALE OF LANDS 6.

2. Of contract.

See CONTRACT 23.

Registration—Agreement that mortgage should have priority.

See MORTGAGE 1.

2. Deed creating easement—Should be registered under Rev. Stats. N. S., 4th series, ch. 79 secs. 9 and 19—Defeated by registration of subsequent conveyance without notice.

See TRESPASS 5.

3. Purchase for value without notice.

See MORTGAGE 9.

Remoteness—Devise void for.

See WILL 1.

Renunciation—To the community.

See OPPOSITION.

Replevin—Contract not to distrain.

See DISTRESS 1.

2. Possession as against wrong-doer—Mixture of logs.

L. *et al.*, claiming certain lands in the township of Horton under a paper title, built a barn and camp in 1875, commenced and continued logging all that winter and in subsequent years. In 1877 McD., setting up a title under certain proceedings, adopted at a meeting of the inhabitants of the township in 1847, held for the purpose of making provision for the poor, by which certain commissioners were authorized to sell vacant lands, entered upon and cut on the lands in question some 500 trees, which he put on the ice outside and inside L. *et al.'s* boom, mixing them with some 900 logs

Replevin—Continued.

already in said boom and cut by L. *et al.*, in such a way that they could not be distinguished. McD. then claimed the whole as his own, and resisted L. *et al.'s* attempt to remove them. Action of replevin brought by L. *et al.* for 1,440 logs cut on said lands.

Held, that L. *et al.*'s possession of the lands in question was sufficient to entitle them to recover, in the present action against McD., who was a wrong-doer, all the logs cut on the lands in question.

Per Strong J.—When one party wrongfully intermingles his logs with those of another, all the party whose logs are intermingled can require is, that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed.

McDonald v. Lane.—vii, 462.

3. Possession by Sheriff under writ of.

See CONTRACT 14.

Requête Civile.

See OPPOSITION 2.

" SHERIFF 5.

Residuary Personal Estate.

See WILL 6.

Respondeat Superior.

See ASSESSMENT 3.

Returning Officer—Neglect of duty—Effect of.

See ELECTION 12.

Revendication—Of bonds deposited as collateral security.

See BONDS.

2. Of goods.

See DAMAGES 30.

Review, Court of, P. Q.—No appeal to Supreme Court from judgment of.

See JURISDICTION 12.

2. New trial ordered by, in case tried in a rural district—34 Vic. ch 4 sec. 10 and 35 Vic. ch. 6 sec. 13 (P.Q.)

See RAILWAYS AND RAILWAY COMPANIES 14.

Right of Way—Public—Extinguished by necessary implication.

See ACCRETION 1.

2. Possessory action—Plea of having exercised right of way for many years.

See POSSESSORY ACTION.

Riparian Proprietors—Rights of as to fishing.

See PETITION OF RIGHT 4.

" FISHERIES 3.

Rivers—Obstruction in navigable.

See LEGISLATURE 8.

" NAVIGATION.

Road—**Road under control of The Quebec North Shore Turnpike Road trustees—Petitory action by trustees—No title to support—No possession by trustees except of ground actually used by public—Semble, the property in such roads vested in the Crown—Power to widen by expropriation—36 Geo. 3 ch. 9—4 Vic. ch. 17—18 Vic ch. 100 sec. 41 (Q.)**

The appellants, as owners in trust and administrators of a certain turnpike road, extending from the city of Quebec to a place called Saut-a-la-Puce, instituted the present suit against the respondent to rectify an encroachment upon the said road. They alleged in their declaration: "That in the month of June, 1880, or about that time, the defendant illegally and without any right whatsoever, unjustly took possession of a part of the property belonging to plaintiffs, to wit: of a part of the aforesaid road, hereinabove described, being about 20 feet front by 5 feet in depth of the said road, situate in the said parish of Château Richer on the north side of said road, opposite a lot of land belonging to and possessed by the defendant.....That the said defendant, after having thus illegally, knowingly and without any right, taken possession of the said piece of land, dug deeply in and under the said road and erected and built on the said piece of land a building or cellar, and committed other acts and encroachments, which he had no right to commit, thereby decreasing the legal width of the road by at least 5 feet."

The delay for bringing an action *en démolition* being expired, the appellants by their conclusions asked to be declared proprietors in possession of said road and to have the said building or cellar removed in the ordinary course of law.

To this action the respondent pleaded (1) the general issue, and (2) specially by a peremptory exception that the part of the said road which ran through his land was a portion of said land; that he acquired said land at sheriff's sale; that he was owner of the land on each side of the road, which in the said place was bounded on the north by a ditch and on the south by a fence, and that the building of the said cellar in no way encroached upon the road in question.

The road was put under the control of the appellants by the 16th Vic. ch. 235 sec. 5 sub-sec. 9, in 1853. The width of main roads or the King's Highways was regulated then by the 36 Geo. III. ch. 9 sec. 2: "And be it further enacted, by the authority aforesaid, that the King's Highways shall be thirty feet wide between two ditches, each of three feet wide, and of sufficient depth to drain off the water, and where the said highways are not already thirty feet wide, [French measure—equal to thirty-one feet ten and one-half inches English]—the Grand Voyer, if he shall think it necessary and

Road—Continued.

practicable, shall cause them to be widened by the person bound to repair the same."

The statute which created the trust, ordinance 4 Vic. ch. 17 sec. 3, vested the trustees with all the powers which were vested in the Grand Voyers or the municipal councils by 36 Geo. III. ch. 9, and by ordinance, 4 Vic. ch. 4 secs. 37 and 45; 8 Vic. ch. 40 secs. 28 and 30; 10 and 11 Vic. ch. 7 secs. 33 and 39.

And it ordered and enacted that the said trustees, in the manner which they deem fit, might cause the said roads and each of them, and the bridges thereupon, to be improved and widened, repaired and made anew, and might, for the purposes aforesaid, or any of them, by themselves, their agents and servants, go into and enter upon, and take any land or real property.

In support of their pretension that the road should be thirty-six feet wide (French measure) the ditches forming part of the road, the appellants cited 41st sec. of 18 Vic. ch. 100 (Q.) which amended the existing law as to the width of highways: "No front road hereafter to be opened shall be less than thirty-six feet (French measure) in width," and argued that this Act must have been based on the general custom which had existed up to that time of making all front roads thirty-six feet wide (French measure.)

In 1854 the appellants macadamized the road in question and made the ditch on the north side of the road, thereby fixing, themselves, the limit of the road; and the evidence showed they placed it there because there is on the north side of the road a hill which terminates at the ditch, and at the distance of one foot, and one foot nine inches from the edge of the ditch, in front of the cellar, the ground is four feet some inches higher than the level of the road, therefore it was not possible to pass there, or to make a ditch to drain the road.

The appellants made the ditch at the foot of the hill, the only place where it was practicable to make it; and they thereby left beyond the ditch and consequently beyond the road, the ground they claimed as forming part of the road. The south side of the road was bounded by a fence, and between the fence and the north-east side of the ditch there was a width of thirty feet, and from the edge of the north-east side of the ditch to that of the corner of the cellar, there was a width of one foot nine inches; at the south corner the width was nine inches less.

The appellants' action was maintained in the Superior Court by Mr. Justice Casault.

Respondent having carried the case to the Court of Queen's Bench, three of the honorable judges, Dorion C.J. and Monk and Tessier JJ., reversed the judgment of the Superior Court, Cross and Baby JJ. dissenting. (The judgment of Dorion C.J. will be found reported in 3 Dorion's Q. B. R. 65.)

Road—Continued.

The appellants appealed to the Supreme Court of Canada and claimed that the said judgment of the Court of Queen's Bench should be reversed for, amongst others, the three following reasons, because: 1st. They had a perfect right to bring the action they instituted against the respondent; 2nd. The road in question should be 38 feet 3 inches (equal to 36 feet French measure) wide at least; and 3rd. Respondent had decreased the legal width of the road by at least 5 feet, which he was bound to restore to the appellants.

Held. per Ritchie C.J. and Fournier and Henry JJ., that the road was an ancient road which was not of the width of 30 feet (French measure) when the appellants received control of it; that the law clearly recognized such roads, and contemplated that the Grand Voyer, if he should think it necessary and practicable, should cause such roads to be widened, and this he had never done as regards this road; that the appellants in 1854 appear to have taken the road in the state it then was, and never to have exercised the power of widening it given them by 4 Vic. ch. 17, upon paying an indemnity to the proprietor; and that whether the road was the legal width or not the appellants had no right to any ground beyond what formed part of the road, and served as such for the use of the public and for the ditches, if any; and therefore could not claim the ground beyond the ditch on the north side of the road, which could not be and never was used by the public, and never formed part of the road.

Per Strong and Henry JJ., that the property of the road was vested in the Crown, and the effect of the statutes was not to take the property out of the Crown and vest it in the trustees, but to make them custodians of the road and the tolls, for the benefit of the bondholders and the public. The appellants failed to show either title or possession, and the action therefore failed.

Appeal dismissed with costs. (Gwynne J. dissenting).

The Quebec North Shore Turnpike Road Trustees v. Vezina.—8th March, 1884.

Road allowance.

See HIGHWAY.

Saint John, City of.

See ASSESSMENT AND TAXES 3, 6, 9, 11.

" CONTRACT 4. 20.

Sale of Goods—Damages for breach of warranty—Subsequent action for price—Evidence in mitigation.

C. wishing to procure a water wheel which, with the existing water power, would be sufficient to drive the machinery in his mill, A. undertook to put in a "Four-Foot Sampson Turbine Wheel," which he warranted would

Sale of Goods—Continued.

be sufficient for the purpose. The wheel was afterwards put in, but proved not to be fit for the purpose for which it was wanted. The time for payment of the agreed price of the article having elapsed, C. sued A. for breach of the warranty and recovered $438 damages. A. subsequently sued C. for the price, and C. offered to give evidence in mitigation of damages that the wheel was worthless and of no value to him. Objection was taken that it was not competent to C. to give any evidence in reduction of damages by reason of the breach of warranty, or on the ground of the wheel not answering the purpose for which it was intended, and the learned judge presiding at the trial declared the evidence inadmissible.

Held, on appeal reversing the judgment of the Court of Appeal for Ontario, that as the time for payment of the agreed price of the article had elapsed when the first action was brought, and only special damages for breach of warranty had been recovered, the evidence tendered by C. in this case of the worthlessness or inferiority of the article was admissible. (Strong J. dissenting.)

Church v. Abell—i, 442.

2. **Sale of goods—Goods sold by agent as principal—Right of set off.**

The B. M. Co. (plaintiffs) sued D. (defendant) for goods sold and delivered. D. pleaded that the goods were sold to him by one A., whom the defendant believed to be the principal, and that before the defendant knew that the plaintiffs were the principals, the said A. became indebted to the defendant in a sum of $400, which he, the defendant, was willing to set off against the plaintiffs' claim. The jury found a verdict for the defendant on this plea.

Held, that the defendant, having purchased the goods without notice of A.'s being an agent, and A. having sold them in his own name, could set off the debt due to him from A. personally, in the same way as if A. had been the principal; and that the verdict should be sustained.

The Bowmanville Machine Co. v. Dempster.—ii, 21.

3. Timber, sale .

See AGREEMENT 1, 4.

4. **Contract for purchase of corn—Bill of lading—Draft on purchasers—Jus disponendi—Delivery.**

W., a commission merchant residing at Toledo, Ohio, purchased and shipped a cargo of corn on the order of C. *et al.*, distillers at Bolleville, and drew on them at ten days from the date for the price, freight and insurance. This draft was transferred to a bank in Toledo and the amount of it received by W. from the bank, and the corn, having been insured by W. for his own benefit, was shipped by him under a bill of lading, which, together with the policy of insurance, was assigned by him to the same bank. The bank forwarded the draft, policy and bill of lading to their agents at Belleville, with

Sale of Goods—Continued.

instructions that the corn was not to be delivered until the draft was paid. The draft was accepted by C. *et al.*, but the cargo arriving at Belleville in a damaged and heated condition, between the dates of the acceptance and the maturity of the said draft, C. *et al.* refused to receive it and afterwards to pay draft at maturity. Thereupon the bank and W. sold the cargo for behalf of whom it might concern, credited C. *et al.* with the proceeds on account of draft, and W. filed a bill to recover balance and interest.

Held, reversing the judgment of the Court of Appeal for Ontario, Strong J. dissenting, that the contract was not one of agency, and that the property in the corn remained by the act of W. in himself and his assignees, until after the arrival of the corn at Belleville and payment of the draft; and the damage to the corn having occurred while the property in it continued to be in W. and his assignees, C. *et al.* should not bear the loss.

Corby v. Williams.—vii, 470.

5. **Sale of fish in storage—Right to hold goods by bailee for unpaid purchase money—Delivery of part.**

Action of trover charging the appellants with converting 250 barrels of mackerel, which were the property of W. M. R. the respondent's assignor. One of the branches of appellants' business was supplying merchants who were connected with the fishing business in the country, and who in return sent them fish, which was sold and the proceeds placed by appellants to credit of their customers. One S., who so dealt with appellants, in October, 1877, sent them 77 barrels of herring and 236 barrels of mackerel. On 3rd November, 1877, S. sold all the fish he had, including those mackerel, to one R. at $8 a barrel, when some were delivered, leaving 236 barrels in the appellants' store, and in payment received $4,000 and a promissory note for $4,000 at four months. This note was given to appellants by S. on account of his general indebtedness. On the 4th March, 1878, R. became insolvent, and the respondent, who was subsequently appointed assignee, demanded the 236 barrels of mackerel and brought an action to recover the same. After issue was joined, the appellants proved against the estate of R. on the note and received a dividend on it. The chief justice at the trial gave judgment for $1,888, less $46.10 for one month's insurance and six months' storage, and found that the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting.

Held, Strong J. dissenting, that the appellants having failed to prove the right of property in themselves, upon which they relied at the trial, the respondent had as against the appellants' a right to the immediate possession of the fish.

Sale of Goods—Continued.

2. That S. had not stored the fish with appellants by way of security for a debt due by him, and as the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, to which statement they made no objection, but proved against the estate for the whole amount of insolvent's note, and received a dividend thereon, they could not now claim the fish or set up a claim for lien thereon.

Troop v. Hart—vii, 512.

6. **Unwritten commercial contract for—Acceptance, evidence of—Parol admissible—Art. 1235 C.C. (P.Q.)**

Held, reversing the judgment of the court below, that in an action in the Province of Quebec upon an unwritten commercial contract for the sale of goods exceeding the sum of $50, oral evidence of acceptance, or receipt, of the whole, or any part, of the goods, is admissible, under Art. 1235 C. C.

Munn v. Berger.—x, 512.

7. **Consignment of goods subject to payment—Agreement that purchaser shall not sell—passing property.**

The plaintiff consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made up certain payments. Without making such payments, however, A. sold the oil to the defendants, without the knowledge of the plaintiff.

Held, affirming the judgment of the Court of Appeal for Ontario, that although the defendants were purchasers for value from A., in the belief that he was the owner and entitled to sell the oil in question, the plaintiff, under his agreement with A., having retained the property in the oil, and not having done anything to estop him from maintaining his right of ownership, was entitled to recover from the purchasers the price of the oil.

Forristal v. McDonald.—ix, 12.

8. Contract—Appropriation—Payment.

See CONTRACT 5.

9. Stoppage in transitu—Goods in bond.

See STOPPAGE IN TRANSITU.

10. **Contract, parol evidence to establish when admissible—As to whether a mem. in writing contained the terms of agreement, a question for jury—Statute of Frauds—Damages—Common counts.**

The plaintiff sued defendants upon a contract alleged to have been made by them with the plaintiff to deliver to the plaintiff at Saint John, N. B., 200 cords of good merchantable hemlock bark, suitable for tanning, at $4 per cord, the plaintiff paying freight from Shediac. He also declared upon the common money counts.

The plaintiff at the trial gave evidence to the effect that the contract was wholly verbal, and that the defendants had agreed that the bark should

Sale of Goods—Continued.

be all good hark; that it was to be delivered at St. John and measured on the cars there; that the defendants were to send some one to measure it, and that if they did not plaintiff's son was to measure it; that the plaintiff was to pay freight from Shediac, where the defendants were to load it on the cars, and as to payment the plaintiff gave evidence that $304.84, then due by defendants to plaintiff, was to be applied upon the bark, and that the defendants were to take leather from the plaintiff in payment of the balance; that the bark was to be delivered in two or three months, as the plaintiff wanted it. In answer to plaintiff's order to forward bark the defendants sent forward three car loads, which proved to be utterly worthless. The plaintiff also gave evidence that at the solicitation of the defendants he gave them his note for $500 at 4 months on the defendants promising that the bark would be all in before the note was due, and that, notwithstanding the giving of the note, the defendants would take leather in payment of the bark as agreed; that when plaintiff asked defendant Hamilton for a receipt for the note for $500, the latter wrote out the following paper:—

"C. H. PETERS, ESQ.,

"1876. "To HAMILTON & SMITH.

"April 20, To 200 cords hemlock bark at Shediac, $4	$800 00	
" " " "	4 84	
		$804 84

CR.

"By note at 4 mos	$500 00	
" goods per statement of acct	304 84	
		$804 84

"The above bark to be measured on the cars in St. John.

"Settled as above.

"HAMILTON & SMITH."

Upon this document being produced the defendants insisted that it contained the contract and that the plaintiff's evidence of the contract must fall to the ground. Both parties were permitted to give oral testimony to establish what the contract was. The evidence was chiefly that of the plaintiff and defendant Hamilton, and was very contradictory. The jury believed the plaintiff and rendered a verdict for him for $945.80 damages.

The Supreme Court of New Brunswick made a rule for a new trial absolute, being of opinion that the contract had been reduced to writing and was contained in the memorandum of the 20th April, 1876; that the words "at Shediac" in the mem. showed that the bark was at Shediac at that time, and that the parties were contracting with reference to that particular bark. That being the case, it was unnecessary to make any stipulation about the

Sale of Goods—Continued.

delivery, because by the sale the property vested in the plaintiff without any delivery, and the evidence of the plaintiff as to delivery should not have been received, for it was either immaterial, or the effect of it was to vary the terms of the written contract, which, being for the sale of goods above the value of £10 was required by the Statute of Frauds to be in writing.

On appeal to the Supreme Court of Canada, **Held,** that whether the mem. of the 20th April, 1876, was or was not drawn up by the consent of both parties with intent to be that which should settle and contain their contract in whole or in part was a question for the jury, and the *onus* of proving that the document was drawn up for that purpose lay upon the defendants. That the nature of the case required that both parties should be permitted to give oral testimony to establish what the contract was, and as the jury had wholly disbelieved the defendants' evidence the plaintiff was entitled to recover both on the common counts and on the special counts, and the verdict of the jury should not have been set aside.

Appeal allowed with costs.

Peters v. Hamilton.—10th June, 1880.

11. **Contract of sale—Goods not specified—Intention to pass property—Appropriation.**

T., a brick-maker, sold by sample 50,000 bricks out of a kiln containing 100,000, to the plaintiff, who paid the contract price, and hauled away about 16,000. The balance remained in the kiln in T's yard, and were never in any way separated from the rest of the kiln, or appropriated to the plaintiff. The defendant (the sheriff) subsequently sold them under an execution at the suit of W. against T. Plaintiff brought trover against the defendant, claiming property in 34,000 of the bricks.

The Supreme Court of New Brunswick held (Wetmore J. dissenting), that the contract was executed, and the property in the bricks passed to the plaintiff at the time of sale. (4 Pugs. & Bur. 234).

On appeal to the Supreme Court of Canada, **Held,** reversing the judgment of the court below, that the sale was one by sample; the bricks sold were not specifically ascertained, and there was no evidence from which it could be inferred that it was the intention of the parties the property in the bricks should pass before delivery.

Appeal allowed with costs.

Temple v. Close.--16th February, 1881.

12. **Plea of tender and payment into court acknowledges liability—Agent—Contract by, for undisclosed principal—Sale, with privilege of taking bill of lading, or reweighing at seller's expense.**

An action instituted by the Canada Shipping Co., to recover $3,038.44, being the price of 810 tons, 5 cwt. of steam coal sold by their agents, Thompson, Murray & Co., through T. S. Noad Broker as per following note.

Sale of Goods—Continued.

"No. 3,435. MONTREAL, 13th Aug., 1879.

"Messrs. Thompson, Murray & Co.:—

"I have this day sold for your account, to arrive, to the V. Hudon Cotton "Mills Company, the 810 tons, 5 cwt. best South Wales Black Vein Steam "Coal, per bill of lading, per "Lake Ontario," at $3.75 per ton of 2,240 lbs. "duty paid, ex ship; ship to have prompt despatch.

"Terms, net cash on delivery, or 30 days adding interest, buyers' option.

"Brokerage payable by you, buyer to have privilege of taking bill of lad- "ing, or reweighing at sellers' expense."

The defendants pleaded that the contract was with Thompson, Murray & Co. personally, and that the plaintiffs had no action; and, by a second plea, that the cargo contained only 755 tons, 580 lbs., the price of which was $2,868.72, which they had offered Thompson, Murray & Co., together with the price of 10 tons more to avoid litigation, in all $2,890.72 which they brought into court, without acknowledging their liability to the plaintiffs, and prayed that their action be dismissed as to any further or greater sum.

It was proved that the defendants agreed to take the coal as per bill of lading without having it weighed. They, however, caused it to be weighed in their own yard, without notice to the vendors, and the cargo was found to contain only 755 tons 580 lbs. About three weeks after having received the bill of lading, when called upon to pay, they claimed a reduction for the deficiency.

The Court of Queen's Bench for Lower Canada, **Held**, 1. That the plaintiffs had a right to bring an action to recover the price of coal sold by their agents in their own name, and without disclosing their principals.

2. That the defendants had no right to refuse payment for the cargo on the ground of deficiency in the delivery, considering that the weighing was made by the defendants in the absence of plaintiffs, and without notice to them, and at a time when the defendants were bound by the option they had previously made of taking the coal in bulk.

3. That the defendants in tendering and depositing in court the sum of $2,890.72 as the value of the quantity of coal actually received, had acknowledged their liability towards the plaintiffs. (*See* 2 Dorion's Q. B. R. 356:)

On appeal to the Supreme Court of Canada, **Held**, that it was unnecessary to decide the question as to whether the action could be brought against the undisclosed principal, for by their plea of tender and payment into court, the defendants had acknoweldged their liability towards the plaintiffs, although such tender and deposit had been made "without acknowledging their liability;" and that upon this ground, as well as upon

the second holding of the court of Queen's Bench the appeal should be dismissed. Fournier and Henry JJ. dissenting.

Appeal dismissed with costs.

The V. Hudon Cotton Co. v. The Canada Shipping Co.--30th April, 1883.

13. Agreement for sale of deals—Contract not complete—New trial.

Action for an alleged agreement contained in the following letters :—

MONCTON, September 13th, 1880.

Messrs. T. L. DeWolf & Co., Halifax :—

Dear Sirs,—I will sell and deliver to you on the cars at Point du Chene, all the merchantable deals and deal ends, I can manufacture at my mill at Meadow Brook, this season and next, during the shipping season, an estimated quantity from two to three millions. Deal ends not to exceed what may be required for broken stowage, and to be from three to eight feet long.

Price—nine dollars per thousand superficial feet for deals, and two-thirds price of deals for ends, and fourths, if any.

SPECIFICATION :

33	per cent.,	7 x 3 and 8 x 3
35	"	9 x 3
10	"	10 x 3
14	"	11 x 3
8	"	12 x 3 and upwards.

Average length, fourteen feet or more.

About ten per cent. pine, balance spruce.

The pine I will stick and pile well, and keep on my wharf until you require them sent forward.

About two millions to be ready for shipment by the first of July next, and a large portion ready as soon as navigation opens.

Terms—cash on delivery.

This offer to hold good until the first of October next.

Yours truly,

(Signed) ABNER JONES.

HALIFAX, 29th September, 1880.

Abner Jones, Esq., Moncton :—

Dear Sir,—We wired you this morning that we accepted your offer for next season's cutting of deals, which we now beg to confirm. If you have any deals sawn this fall we might be able to take them here, we paying the difference of railway freight between Point du Chene and Halifax. Please let us know what quantity you think you will cut this fall, what railway freight per car is to Halifax, and also to Point du Chene.

Please let us know if you would ship what you cut this fall to Halifax if we required them.

Sale of Goods—Continued.

We accept your offer, as made in your letter of the 13th inst., in all particulars.

We think this will serve instead of writing out a contract, but if you require it, will fill one up and send you.

Yours truly,

T. L. DeWolf & Co.

The action was tried before Mr. Justice King, at the Westmorland circuit, in December, A.D., 1881, and resulted in a verdict for plaintiff for $3,500. The jury were directed to find for the plaintiff, and that the only question related to the damages to be awarded plaintiff.

The defendants' counsel moved for a non-suit at the close of the plaintiff's case.

The defendants applied to the court *en banc* to set aside the verdict, and that a new trial be ordered on the grounds set out. This was granted.

The learned judge at the trial held that the letters of the 13th September, 1880, and 29th September, 1880, constituted a complete and binding agreement, and that the subsequent correspondence between the parties did not show that such agreement was rescinded.

The court (Allen C.J., Weldon J., Wetmore J., Palmer J. and Fraser J.—King J. delivering a separate judgment) in granting a new trial dealt only with these points, and held that the two letters above quoted constituted a complete binding contract between the parties, but that both agreed to abandon it—or, at all events, that certain letters were evidence of such abandonment—and that in this respect the direction to the jury was incorrect.

King J., while also of opinion that the two letters constituted a complete and binding contract, was inclined to think that there was a question for the jury whether the conduct of the plaintiff, after receiving the defendants' letter of the 17th December, and that in reply to his of the 16th December, was not such as to show that plaintiff acquiesced in the defendants' notice of refusal to abide by the bargain.

On appeal to the Supreme Court of Canada, **Held**, that the two letters of the 13th and 26th September, 1880, did not constitute a complete contract between the parties. The rule having been taken for a new trial only, the court refused to direct a non-suit or verdict for defendant, but affirmed the rule for a new trial. (Counsel for respondent not called on.)

Appeal dismissed with costs.

Jones v. Dewolf.—26th February, 1884.

14. **Fraudulent scheme to obtain goods—And to give inadequate security—Simulated hypothec—Right to sue for price.**

There were special counts in the plaintiff's declaration in this case, alleging that goods were sold to the defendants on a representation that the

Sale of Goods—Continued.

latter were the holders for value of a certain obligation and hypotheque in their favour by one Theodore Roy, of Montreal, for $3,000, payable by yearly instalments of $1,000, with interest; that such obligation represented the balance due defendants from said Roy on the purchase of certain real estate sold to Roy, and on which he had paid $300 at time of purchase, and that Roy was a man of means and had other property. The plaintiff sold goods to the defendants to the amount of $2,000, and accepted as payment the first two instalments of said obligation, which were duly assigned to him, the defendant Roy not being present at the time of such assignment, but afterwards being taken to the notary's office, where he accepted the said transfer. The declaration then alleged that the said representations by the defendants were false and fraudulent; that the transfer of the property to Roy and the said obligation were fraudulently made to enable the defendants to use the said obligation to obtain credit; that Roy never paid anything on account of the purchase of the real estate, or entered into possession thereof, but that defendants kept possession and collected the rents of the property; that the defendant Roy was not a man of means, but was a pauper and not carrying on any trade or business which the defendants knew, and that he was simply a *prête-nom* for the defendants. The declaration also contained the common counts. The plaintiff therefore concluded that he had a right to demand the price of the said goods from the defendants, and prayed that the obligation be set aside as regards the plaintiff, and that it be declared that said Roy was the agent (*prête nom*) of the defendants, and that defendants be condemned to pay the sum of $2,000, with interest and costs.

The defence was that the allegations in said declaration were false; that the transactions with Roy were *bonâ fide* and the sale an actual one; that the instalments of said obligation were accepted by plaintiff in payment of the goods after due enquiry; and that even if the allegations were true the plaintiff could not maintain his present action.

The Superior Court gave judgment for the plaintiff, finding that the property was worth much less than $2,000; that Roy never paid anything on the said land or entered into possession; and that the deed to and obligation from Roy were simulated and fraudulent. This judgment was confirmed by the Court of Queen's Bench, Justices Monk and Cross dissenting.

Held, affirming the judgments of the courts below, that the evidence shewed a fraudulent scheme on the part of the defendants to obtain the goods of the plaintiff and to cheat him out of the price by inducing him to accept an inadequate security; and that under the circumstances the plaintiff was entitled to recover for such price. (Henry J. dissenting.)

Sale of Goods—Continued.

Taschereau J.—The court should not reverse the findings on a question of fact of the two courts below, except under very unusual circumstances—*Hays* v. *Gordon* (L.R. 4 P.C. 337); *Gray* v. *Turnbull* (L. R. 2 H.L. 53); *Bell* v. *Corporation of Quebec* (5 App. Cases 94); *Smith* v. *St Lawrence* (L.R. 5 P.C. 308). He agreed, however, with the courts below on the facts.

Appeal dismissed with costs.

Black v. Walker.—8th March, 1886.

Sale of Lands—**Warranty—Effect of timber limits—Civil Code—Arts. 1515 and 1518—Sale en bloc—Deficiency.**

By a deed executed October 22nd, 1866, for the purpose of making good a deficiency of fifty square miles of limits which respondents had previously sold to appellants, together with a saw mill, the right of using a road to mill, four acres of land, and all right and title obtained from the Crown to 255 square miles of limits for a sum *en bloc* of $20,000, the respondents ceded and transferred "with warranty against all troubles generally whatsoever" to the appellants, two other limits containing 50 square miles. In the description of the limits given in the deed, the following words are to be found: "Not to interfere with limits granted or to be renewed in view of regulations." The limits were, in 1867, found in fact to interfere with anterior grants made to one H.

Held, that the respondents having guaranteed the appellants against all troubles whatsoever, and at the time of such warranty the said 50 miles of limits sold having become, through the negligence of respondent's auteurs, the property of H., the appellants were entitled, pursuant to Art. 1518 C. C. P. Q., to recover the value of the limits from which they had been evicted proportionally upon the whole price, and damages to be estimated according to the increased value of said limits at the time of eviction, and also to recover, pursuant to Art. 1515 C. C., for all improvements, but as the evidence as to proportionate value and damages was not satisfactory, it was ordered that the record should be sent back to the court of first instance, and that upon a report to be made by experts to that court on the value of the same at the time of eviction, the case be proceeded with as to law and justice may appertain.

Per Strong and Gwynne JJ. dissenting.—That the only reasonable construction which could be put upon the words "with warranty against all troubles generally whatsoever" in the deed, must be to limit their application to protecting the assignee of the licenses against all claims to the licenses themselves, as the instruments conveying the limits therein described, and not as a guarantee that the assignee of the licenses should enjoy the limits therein described, notwithstanding that it should appear

Sale of Lands—Continued.

that they were interfered with by a prior license. But, assuming a different construction to be correct, there was not sufficient evidence of a breach of the guarantee. [Reversed by Privy Council, 9 App. cases 150.]

Dupuy v. Ducondu.—vi, 425.

2. **Promise of sale—Construction of—Condition precedent—Mise en demeure—Arts. C. C. 1,022, 1,067, 1,478, 1,536, 1,537, 1,538, 1,550.**

On the 7th December, 1874, T. G., by a promise of sale, agreed to sell a farm to D. M., then a minor, for $1,200—of which $500 were paid at the time, balance payable in seven yearly instalments of $100 each, with interest at 7 per cent. D. M. was to have immediate possession and to ratify the deed on becoming of age, and to be entitled to a deed of sale, if instalments were paid as they became due, "but if, on the contrary, D. M. fails, neglects, or refuses to make such payments when they come due, then said D. M. will forfeit all right he has by these presents to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all monies already paid, and which hereafter may be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties will be considered as lessor and lessee." After D. M. became of age he left the country without ratifying the promise of sale; he paid none of the instalments which became due, and in 1879, T. G. regained possession of the farm. In October, 1880, D. M. returned and tendered the balance of the price, and claimed the farm.

Held, reversing the judgment of the court below, Strong and Taschereau JJ. dissenting, that the condition precedent on which the promise of sale was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately, on the failure of the performance of the condition, *ipso facto*, changed the relation of the parties from vendor and vendee to lessor and lessee.

Grange v. McLennan.—ix, 385.

3. **Vendor and purchaser—Verbal agreement—Subsequent deed—Alleged fraudulent representation by vendor—Refusal of Judge to postpone hearing.**

W. (plaintiff) being desirous of securing a residence, entered into negotiations with S. (defendant) to purchase a house which defendant was then erecting. W. alleged that the agreement was, that he should take the land (2½ lots) at $400 a lot of fifty feet frontage, and the materials furnished and work done at its value. In August, 1874, a deed and mortgage were executed, the consideration being stated in both at $5,926. The mortgage was afterwards assigned to the M. & N. W. L. Co. W. alleged in his bill, that S., in

Sale of Lands—Continued.

violation of good faith, and taking advantage of W.'s ignorance of such matters, and the confidence he placed in S., inserted in the mortgage a larger sum than the balance due as a fair and reasonable market value of the lands, and of what he had done to the dwelling house and other premises, and he prayed that an account might be taken of the amount due. S. repudiated the allegation of fraud, and alleged that W. had every opportunity to satisfy himself, and did satisfy himself, as to the value of what he was getting; that he had told the plaintiff he valued the land at $2,000, and that in no way had he sought to take advantage of the plaintiff. S. was unable to be present at the hearing, and applied for a postponement, on the grounds set forth in an affidavit, that he was a material witness on his own behalf, and that it was not safe for him, in his state of health, to travel from Ottawa to Winnipeg. Dubuc J. refused the postponement, on the ground that the court was only asked now to decree that the account should be opened and properly taken, and the amount ascertained, which would be done by the master if the court should so decide, and that the defendant would then have an opportunity of being present, and that he was not necessarily wanted at the hearing; and, as the result of the evidence, made a decree in accordance with the contentions of the plaintiff, and directed an account to be taken.

The Chief Justice of the Supreme Court, under sec. 6, of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of Canada, it being known that there were then only two judges on the bench in Manitoba, the plaintiff (Chief Justice) and Dubuc J., from whose decree the appeal was brought.

Held, that under the circumstances, the case ought not to have been proceeded with in absence of appellant, and without allowing him the opportunity of giving his evidence.

Per Ritchie C.J. and Strong and Gwynne JJ., that on the merits there was no ground shown to entitle the plaintiff to relief.

Per Ritchie C.J. and Strong J., that the bill upon its face alleged no ground sufficient in equity for relief, and was demurrable.

Schultz v. Wood.—vi, 585.

4. **Offer to sell—Acceptance on completion of title—Specific performance.**

On the 26th January, 1882, McI. wrote to H. as follows:—"A. McI. agrees to take $35,000 for property known as McM. block. Terms—one-third cash, balance in one year at eight per cent. per annum. Open until Saturday, 28th, noon." On the same day H. accepted this offer in the following terms:—"I beg to accept your offer made this morning. I will accept the property known as McM. block, being the property on M. street, for $35,000, payable one-third cash on completion of title, and balance in one

Sale of Lands—Continued.

year at eight per cent. You will please have papers and abstract submitted by your solicitor to N. F. H., 22 D. block, as soon as possible, that I may get conveyance and give mortgage." On a bill for specific performance, the Court of Queen's Bench (Man.) decreed that H. was entitled to have the agreement specifically performed.

Held, Ritchie C.J. and Fournier J. dissenting, that there was no binding, unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties.

McIntyre v. Hood.—ix, 556.

5. **Sale by agent—Obtaining conveyance from pretended purchaser—Trustee and cestui que trust—Laches.**

In 1874, the plaintiff, W. J. T., before leaving Canada, conveyed certain lands, in which he had an interest as assignee of a contract to purchase, to his brother, G. T., one of the defendants. In April, 1851, G. T., in anticipation of a suit which was afterwards brought by one C. against W. J. T., in relation to the lands in question, without the knowledge of his brother, re-assigned the property to him, and having paid the balance of the purchase money, a deed of the lot issued at G. T.'s request to W. J. T., as such assignee. In October following a power of attorney was sent to, and executed by, W. J. T. who was then in California, in favor of G. T., to enable him (G. T.) to "sell the the land in question, and to sell or lease any other lands he owned in Canada." In 1856, G. T. conveyed the property to W., the respondent, who had acted as solicitor for W. J. T., and had full means of knowing G. T.'s position and powers, for an alleged consideration of $1,000, and W. immediately re-conveyed to G. T. one-half of the land for an alleged consideration of $200. In 1873 W. J. T. returned to Canada, and in January, 1874, filed a bill impeaching the transactions between his brother and W., seeking to have them declared trustees for him.

Held, reversing the judgment of the Court of Error and Appeal, and affirming the decree of Vice-Chancellor Proudfoot, Strong J. dissenting, that W. J. T. was the owner of the lands in question; that he had not been debarred by laches or acquiescence from succeeding in the present suit, and that the transactions between G. T. and W. should be set aside.

Taylor v. Wallbridge.—ii, 616.

6. **Vendor and purchaser—Contract for sale of land—Bill for recission of, on ground of fraud—Or for compensation for deficiency—Contract perfected by conveyance.**

The Bill of Complaint was filed by the appellant (plaintiff) by his next friend against the respondents (defendants) in March, 1876, and made a case of actual fraud committed by Robert A. Murta, deceased, of whose will the defendants were executors.

Sale of Lands—Continued.

On the 29th of June, 1871, Murta conveyed to the appellant a piece of land described as containing by admeasurement one acre, "being the north-west square acre of lot number thirteen in the tenth concession of the said township of Reach, and which may be further known as being village lot number one on the registered plan of the village of Greenbank, save and except one quarter of an acre, more or less, off the south end of said lot number one, sold to one Henry Hall."

The whole consideration was $1,600, of which $700 was paid at the time of the sale, and a mortgage given for $900.

The appellant contended that the evidence established that Robert A. Murta, in the negotiations which resulted in the sale to the appellant, represented that he was the owner of the land running from the east side of the travelled road to a high board fence which he then pointed out to the appellant as the rear boundary of the property he was offering to her for sale; that the appellant believed the statements and representations of the said Murta, and on the faith thereof purchased the property, believing she was getting the land Murta had so pointed out, and that the land so purchased extended to the high board fence before mentioned, and included the orchard and yard in the evidence referred to. The evidence showed that the said Robert A. Murta was not the owner of lot number one on the registered plan in the village of Greenbank, and that the said village lot number one was not identical with the north-west square acre of lot thirteen in the tenth concession of Reach; that Robert A. Murta was well aware at the time he made such representations he was not the owner of a portion of the said lands he pointed out, but that the same had been claimed by one Ianson, whose title thereto he had acknowledged; and she prayed: (1) That the contract might be rescinded and set aside on the ground of fraud; or (2) That compensation might be awarded for the alleged deficiency in the quantity of land.

Proudfoot V.C., before whom the case was tried, found that there was no case of fraud proved as against Murta, and that the contract could not be set aside; but he thought that Murta had agreed to sell an acre to be measured from the travelled road, and that he did not own a part of the land which he agreed to convey, and decreed compensation for the deficiency to be made by the defendants to the plaintiff.

The Court of Appeal for Ontario agreed with the finding of the Vice-Chancellor, so far as any case of fraud was concerned, but differed from the conclusion of the Vice-Chancellor as to compensation, holding that after a contract had been perfected by conveyance a bill for compensation on account of defects cannot be maintained; that after the conveyance the

Sale of Lands—Continued.

purchaser is confined to his remedy upon the covenants, or, in a proper case, where he applies promptly, to a rescission of the contract. (*Follis* v. *Porter*, 11 Grant 442). If, therefore, the Vice-Chancellor was of opinion that it would be inequitable to decree a rescission, he ought to have dismissed the bill. But such a decree was not warranted by the evidence.

On appeal to the Supreme Court of Canada, **Held**, that the judgment of the Court of Appeal for Ontario should be affirmed. (Henry J. dissenting.)

Appeal dismissed with costs.

Penrose v. Knight.—7th May, 1879.

7. **Statute of frauds—Parol evidence—Trust account.**

The bill sought an account of the rents and purchase money received by the defendant upon the lease and sale of lot 18 containing 100 acres of land, in which (it alleged) the plaintiffs' father (now dead) and the defendant his brother were jointly interested. It appeared that the deceased had for years assisted the defendant in improving and cultivating this lot, on which they lived. The defendant had spoken of his brother having a deed of 50 acres of the place on which he lived. It was shown that the defendant, who had the fee of the whole lot, had, in 1850, made a deed to his brother of some land, which the plaintiffs insisted was 50 acres of this lot; but this deed could not be produced owing to its having been either lost or destroyed. The defendant denied this, but admitted having given his brother a deed of the adjoining lot 17 for the purpose of enabling him to vote. Lot 17 contained 120 acres, and the defendant's only interest in it was, that the person from whom he purchased lot 18, had cleared a few acres on it, and the Inspector of Clergy Reserves reported that he claimed the lot, but he was never recognized as a purchaser, and never made any payment on account of the land. The deed to the deceased had never been registered. In 1856, the defendant made a lease of lots 17 and 18 to one F., which transaction was negotiated by the deceased, and in 1875 the defendant sold lot 18 to F. with the concurrence of the deceased. The defendant swore that the deceased had never made any claim to the rent, and denied the whole case attempted to be made by the plaintiffs, but his evidence was not consistent or corroborated.

The Court of Appeal for Ontario **Held**, affirming the judgment of Sprague C. (26 Gr. 18), that the evidence showed that the deceased was the owner of half of lot 18; that the whole of the land having been sold with his assent, and the whole of the purchase money received by the defendant, it was so received for their joint use and benefit, and that the plaintiffs were therefore entitled to an account. (See 4 Ont. App. R. 63.)

On appeal to the Supreme Court of Canada, **Held**, per Ritchie C.J. and Fournier and Henry JJ.—that the evidence sufficiently established a deed by

Sale of Lands—Continued.

defendant to his brother of ½ of lot 18 for valuable consideration, that the understanding between the brothers was that when the land should be sold, a sale should be effected for their joint benefit, and that the land was sold to F. by defendant, with the knowledge and concurrence of his brother and for the benefit of both. Therefore the defendant should account to his brothers' representatives for his brother's share, as money had and received.

Per Strong, Taschereau and Gwynne JJ.—Although the evidence sufficiently established a deed for valuable consideration by defendant to his brother of ½ of lot 18, there was not sufficient evidence of either trust or contract as regards the payment of any portion of the purchase money received by the defendant, on the sale made by him, to entitle the plaintiffs to any relief.

The court being equally divided, the appeal was dismissed without costs.

Curry v. Curry.—13th March, 1880.

8. **Vendor and purchaser—Contract of sale—Rescission of—False representations—Fraud—Joint liability of parties who received consideration.**

The plaintiff May filed a bill to set aside the sale of a parcel of land in the Parish of St. John, described in the deed to May, as being block No. 55, containing fifty-two lots according to plan registered, alleging conspiracy and false and fraudulent misrepresentations. The sale to May was effected under the following circumstances:—McLean and McArthur were interested in a contract with the Bishop of Rupert's Land for the purchase of three block of land containing fifty-two lots each, and McLean with McArthur's consent and sanction came to Toronto to sell the land. In Toronto one Gilmour met McLean, and agreed with him to find purchasers, Gilmour to get any money over $100 per lot. Gilmour thereupon solicited May to purchase the land, stating that he had secured the lots for a very short time at $150 per lot, but that right was contingent upon his taking all the lots contained in the three blocks offered for sale, and representing that one block of land in question was facing McPhillips street. May said he would purchase, provided Gilmour and one Drynan and himself were co-partners or joint investors in the three blocks. An agreement was signed to that effect, but it was ultimately agreed that May should pay for and take the conveyance to himself of block 33 at $150 per lot. Gilmour filled up a conveyance which had been signed in blank by McLean of lot 35 from McArthur to May, and induced him to accept it without further inqury by producing and delivering a guarantee from McLean, that he had a power of attorney from McArthur, and that the plan was registered and title perfect. May paid $5,200 cash and gave a mortgage for $2,500. Gilmour got

Sale of Lands—Continued.

$2,500 of this purchase money. May subsequently ascertained that the block of land in question did not front on McPhillips street, and that Gilmour and Drynan were not joint investors with him, and that statements in the guarantee were false. By his bill May prayed that the sale be set aside, the portion of the purchase money already paid be re-paid to him, and that the mortgage given to secure payment of the remainder be cancelled.

Held, reversing the judgment of the Court of Queen's Bench in equity, Manitoba, that the false and fraudulent representations made by Gilmour and McLean, entitled May to the relief prayed for against McArthur, McLean and Gilmour jointly and severally.

Appeal allowed with costs.

May v. McArthur, 20 C. L. J. 248; 4 C. L. T. 336.—20th May, 1884.

9. **Hypothecary action against sub-purchasers—Acknowledgment of amount due signed by original vendor in error—Judgment against original purchaser res inter alios acta as regards sub-purchasers when action brought against former after purchase and registration of deed by latter—Variation of original promise of sale by subsequent deed—Evidence of notary not admissible to contradict deed—Bonus on transfer of timber limits payable by purchaser when agreement silent.**

This was an appeal from a judgment of the Court of Queen's Bench, reversing a judgment of the Superior Court, at Quebec, rendered on the 8th of July, 1882, in an hypothecary action instituted by Dubuc, the appellant, against the respondents. By its judgment the Superior Court declared certain real estate, the property of the respondents, hypothecated in favor of the appellant "for the capital, interest and costs mentioned in his decla- "ration, amounting to the sum of $5,250 currency, with interest from the 7th "of July, 1880, at the rate of eight per cent. per annum, and costs of suit, "and *frais des pièces,*" condemned the respondents to surrender the real estate in question to be judicially sold upon the curator to be named to the surrender, to the end that the appellant, out of the proceeds of the sale, might be duly paid, unless the respondents rather chose, within fifteen days of the service upon them of the judgment, to pay to the appellant the said sum of $5,250, interest and costs.

The action in the Superior Court originated under the following circumstances:

By memorandum of sale, bearing date the 31st of July, 1872, and deposited in the office of Mr. Clapham, N.P., on the 10th of September, of the same year, Dubuc, the appellant, sold to one Connolly "all the limits "belonging to the said Dubuc, on the Jacques Cartier River, containing "about 170 miles, together with all the square timber, logs and firewood "made on the said river, 200 pieces of which are now at St. Sauveur, and also

Sale of Lands—Continued.

" the property purchased from O'Sullivan, Buggy and Wolf, with the islands, " now belonging to the said Dubuc.....for the sum of $35,570 to be paid," as set out in the memorandum. It was further provided that a deed of sale should be prepared as soon as possible.

On the 21st of November following, the formal deed of sale from Dubuc to Connolly above mentioned was executed before a notary, the real estate conveyed being by it hypothecated in favor of the vendor for the balance of the purchase price.

The deed of the 21st of November made mention of the memorandum of sale as follows :—"The present sale and conveyance is thus made for and " in consideration of the price and sum of $35,087.37, lawful current money " of Canada, on account and in part payment whereof the said Charles " Alexandre Dubuc did and doth hereby acknowledge to have received at " and before the execution of these presents the sum of $4,095, of which said " sum of money the sum of $3,995 was employed in payment of wages to " laboring men for work done and performed on part of the property hereby " sold or intended so to be due by him, the said vendor, previous to the " thirty-first day of July, now last past, the day on which the same was sold " by the said Charles Alexandre Dubuc to the said James Connolly, as " appears by the memorandum of sale *sous seing privé* made between them " on the said last above mentioned day (the price and terms of payment in " the said memorandum of sale having been changed in the present deed of " sale made in pursuance thereof.")

The Wolfe property was not mentioned in this deed of the 21st November, and one of the questions arising between the parties was, as to whether the deed was intended to vary the agreement of the 31st July, 1872, so far as related to this property and the price thereof.

On the 4th of June, 1878, by deed, the respondents purchased from Connolly part of the property he had acquired from Dubuc, and on the 14th of the same month registered their deed of purchase.

In February, 1879, some months after the registration of the conveyance to the respondents, Dubuc sued Connolly, in the Superior Court, at Quebec, to recover the sum of $5,000, balance alleged to be due, on the price specified in the deed of sale above mentioned. To this action Connolly appeared and pleaded payment, and, in the result, the Superior Court, presided over by Mr. Justice Stuart, dismissed his plea, and entered judgment against him for the $5,000 demanded, with interest at eight per cent., from the 20th of February, 1879, and costs.

Failing to obtain payment from Connolly, the appellant Dubuc, in July, 1880, began the present action, to which the respondents pleaded payment

Sale of Lands—Continued.

by Connolly and consequent extinction of the hypothec, and further that their purchase was made in good faith, and in reliance upon a receipt from Dubuc, which their vendor held. Mr. Justice Stuart, before whom the case was heard, adhered to his previous decision.

The Court of Queen's Bench (Tessier and Baby JJ. dissenting) reversed the decision of the Superior Court, and from that judgment this appeal was taken.

The principal points presented for decision were :

1. Had the judgment obtained by Dubuc against Connolly the effect of *res judicata?*

2. On the 2nd September, 1876, Dubuc signed a statement of account, acknowledging that the purchase price then due by Connolly to him was $1,442.33. The respondents contended that Dubuc could not go behind this representation, their purchase being made subsequently to it ; but the appellant alleged that he had only signed such statement on condition that he was not to be bound by it, if incorrect, and that in any event it was not proved that it had ever been brought to the notice of the respondents.

3. On the 5th December, 1872, Connolly paid the Commissioner of Crown Lands, as the transfer bonus on the limits sold by Dubuc, the sum of $1,344. It was necessary to decide whether Dubuc, the vendor, or Connolly, the purchaser, was legally bound to pay this bonus, the agreement being silent as regarded it.

4. As respects the property mentioned in the agreement of the 31st July, 1872, as the Wolf property, the price of this property was fixed by the agreement at $1,350, but it did not then belong to Dubuc. Connolly, after the agreement on the 21st November, 1872, paid this amount to the owner, and he contended that although the property was omitted from the deed of the 21st November, 1872, the two documents should be read in connection with each other, and the omission did not relieve Dubuc from the liability to carry out his promise of sale, or to be charged with the price when paid by Connolly.

5. The notary who made the agreement of the 31st July, 1872, and the deed of the 21st November, 1872, being called as a witness, stated : "I have no doubt in my own mind that this lot (Wolf) was included in the sale. It was not put in this intentionally to avoid a repetition of the deed, and Mr. Hall undertook to make the assignment direct to Mr. Connolly, on getting paid out of that purchase money, which was part of the sale." The appellant contended that this evidence could not be received to contradict or vary the terms of a valid instrument.

Sale of Lands—Continued.

The Supreme Court of Canada **Held**, 1. Affirming the judgment of Casault J., who decided the question on demurrer, 7 Q. L. R. 43, and the unanimous judgment of the Court of Queen's Bench sustaining Casault J.'s judgment, that the judgment against Connolly was *res imter alios acta* as regarded the respondents and not binding on them.

2. That there was no evidence in the record to sustain the contention that the acknowledgment of account signed by Dubuc was ever brought to the notice of respondents before they purchased, and therefore the appellant might properly show it had been signed in error.

3. Reversing the judgment of the Court of Queen's Bench, that the bonus of $1,344 paid to the Commissioner of Crown Lands, was a payment which the purchaser of the limits was legally bound to make, and which, therefore, could not be charged against the seller, Dubuc.

4. Reversing the judgment of the Court of Queen's Bench, that the appellant was not properly chargeable with the amount paid for the Wolf property, an entirely new contract having been substituted by the deed of the 21st November, 1872, for the promise of sale of the 31st July, 1872.

5. That the evidence of the notary could not be received to contradict the deed of the 21st November, 1872.

Appeal allowed with costs. Henry J. dissenting.

Dubuc v. Kidston.—23rd June, 1884.

10. **Vendor and purchaser—Specific performance contract not signed by vendor, but subsequently admitted by his letters—Statute of Frauds.**

This was an appeal from a judgment of the Court of Appeal for Ontario, confirming a decree of the Court of Chancery, ordering specific performance of a contract of sale alleged to have been entered into between the parties under the circumstances stated in the report of the case in 28 Gr. 207 and 8 Ont. Ap. R. 161.

Held, affirming the judgments of the courts below, that although the vendor's name was not mentioned in the agreement signed by the auctioneer, the subsequent letters of the vendor and his admissions, written in the course of a correspondence relating to an alleged misrepresentation as to the fencing and clearing on the land and claiming compensation therefor, were sufficient to constitute a complete and perfect contract between the appellant as vendor and respondent as purchaser within the statute of frauds. Appeal dismissed with costs.

Stammers v. O'Donohoe. 20 C.L.J. 400, 4 C.L.T. 375.—23rd June, 1884.

11. **Agreement to assign mortgage in part payment—Construction of—Second mortgage, not a fulfilment of.**

W. agreed to sell to L. and L. agreed to purchase a messuage and land for $4,800, and L. agreed to give in part payment for the land a mortgage

Sale of Lands—Continued.

made by one Rorison on another parcel for the sum of $2,500. The mortgage offered in fulfilment of this agreement was not a first mortgage—a mortgage of the legal estate—but was subsequent to another mortgage for a large amount. W. refused to accept the mortgage, and in an action on the agreement to recover the purchase money and interest represented by such mortgage it was admitted that the mortgage was not a first mortgage upon the land described in it, and that no notice had been given to the vendee of its being a second mortgage, nor had there been any waiver of his right to demand a first mortgage. On the contrary he had asked, "Is this a negotiable instrument?" and was told "It is all right."

Held, affirming the judgment of the Court of Queen's Bench of Manitoba, that under the terms of the agreement the plaintiff was entitled to a good marketable mortgage—that is a first mortgage upon the real estate.

Per Ritchie C.J.—The words "negotiable instrument" did not mean a negotiable instrument in the nature of a promissory note, but an instrument which could be taken into the market as a saleable instrument.

Per Strong J.—An agreement to assign a mortgage on land by way of absolute transfer or sale, or, as in the present case, to assign a mortgage on land in payment, or part payment, of other land sold by the proposed transferee to the proposed transferor, is a contract of which a Court of Equity would decree specific performance, and in carrying out a decree for specific performance, the purchaser is always entitled to a reference as to title whatever may be the nature of the property which is the subject of the sale, the right to a reference of title not being confined to sales of real estate. A Court of Equity would not compel a party who agreed to purchase a mortgage on land simply to take any other than a mortgage of the legal estate free from all prior incumbrances. The title in such a case which the vendor of the mortgage impliedly undertakes to give is a good marketable title, which means a title to a mortgage of a legal estate in possession, just as the vendor who sells land without saying more impliedly agrees to show a good title to both the mortgage debt, the money secured by the mortgage, and to the security holden for the debt, the land; and he can only show the latter by proving the legal estate free from all incumbrances has passed under the mortgage. The same rule should prevail in a court of law, the construction of contracts being the same in both jurisdictions. If the agreement had been executed the remedy of the plaintiff would have been upon any covenants which the transfer might have contained, or, if still *in fieri*, if it could be shown there had been any waiver of the right to call for a good title, the plaintiff might be concluded; and this might have been a consequence of distinct notice to him during the negotiations that the mortgage was upon

Sale of Lands—Continued.

the equity of redemption only, but there was no proof of any such waiver or acceptance of notice from which it might be inferred.

Per Henry J.—When it was stipulated in general terms that a mortgage was to be assigned the agreement could only be performed by assigning a first mortgage.

Appeal dismissed with costs.

Lynch v. Wood.—23rd June, 1884.

12. **Agent, sale by—Duty of under instructions to sell lands—Vendor and purchaser—Contract not binding under statute of frauds—Commission—Mistrial—Reduction of verdict.**

About the first day of January, 1882, the appellants, who were real estate agents or brokers in the City of Winnipeg, received verbal instructions from the respondents to sell part of the south half of lot 12, in the Parish of Kildonan, containing 145 acres, at $275 an acre, the whole price amounting to $39,875 ; on the terms of $5,000 cash, $12,000 on a mortgage then existing on the property, and the balance cash in twenty days from date of sale.

On the 13th day of said month of January, the appellants sold the land at the said price, receiving from the purchasers the sum of $5,000 as a deposit on account of the purchase money, and giving therefor a receipt.

On the day the appellants sold the said land and received the said $5,000 from the purchasers, Henry F. Champion, one of the respondents, called at the office of the appellants, who informed him of the sale, and the said Champion then demanded and received from the appellants the $5,000, and gave the appellants a receipt therefor.

On the 14th day of the said month of January, the appellants received instructions from the respondents to sell 10 acres, being another part of said south half of lot 12, Parish of Kildonan, east of Main Street, in the City of Winnipeg, at the price of $1,500 per acre.

On the 15th day of January, the appellants, as such agents of the respondents, sold the said 10 acres to one F. W. Barrett (acting for the syndicate who had purchased the 145 acres) who agreed to purchase at the price at which the appellants had been authorized to sell, but the formal agreement was closed by said Barrett with Henry F. Champion, one of the respondents, to whom Barrett paid $1,500 on account of the purchase money of $15,000, and Champion gave to said Barrett a receipt for the amount so paid.

Prior to the expiration of the twenty days, within which the balance of the purchase money on the 145 acre parcel was to be paid, the purchasers discovered that the patent for 75 or 80 acres thereof (being what is known as the outer two miles thereof) had not been issued, and the respondents

Sale of Lands—Continued.

were without title to such portion ; and on account of this want of title in the respondents the purchasers refused to complete their purchase, and from the absence of a writing signed by them they could not be compelled to do so.

The appellants brought an action for commission upon the entire purchase money, $1,365.

The respondents set up the defence that the appellants promised to sell the said lands, and to complete such sale by preparing the necessary agreement in writing to make a binding contract with such person or persons as should become purchasers of the lands.

The case came on for trial before a jury who followed the charge of the Chief Justice, and found a verdict in favor of the plaintiffs for the full amount of their claim, thereby giving them 2½ per cent. upon the entire purchase money of both parcels of land. This verdict was moved against successfully, and judgment was rendered directing that the verdict should be reduced to $125, being commission at the rate of 2½ per cent. on the $5,000 actually paid, or, in the alternative, that there should be a new trial without costs, the plaintiffs to make their election between the two alternatives within 20 days.

On appeal to the Supreme Court of Canada, **Held**, per Ritchie C.J. and Fournier and Taschereau JJ., that there had been a mistrial, owing to certain matters which ought to have been submitted to the jury, not having been submitted by the judge with proper directions, matters in reference to the nature of the terms upon which the appellants were employed, the question whether the sale went off through the neglect of the appellants to take a writing binding the purchasers, or whether it went off by reason of the vendors not being able to complete the title, or because they were unwilling to do so.

The order for a new trial should be affirmed, the plaintiffs to have the alternative, to be exercised within 20 days after service of the order in appeal, of reducing his verdict to the $125.

Per Henry J.—It was the duty of the appellants to take from the purchasers a binding agreement under the statute ; and having neglected to do so, they were not entitled to any compensation.

Per Strong J. dissenting.—The appellants did all they were bound to do, and earned their commission by finding the purchasers, and did nothing and omitted nothing which amounted to misfeasance or nonfeasance disentitling them to the commission which they had earned.

Appeal dismissed with costs.

McKenzie v. Champion.—22nd June, 1885.

Sale of Lands—Continued.

13. Authority to deliver deed and receive purchase money—Agent exceeding authority—New agreement.

See AGENT 11.

14. **Contract for sale of land—Suit for rescission of—Fraudulent misrepresentation—Evidence.**

Where the court below dismissed the plaintiff's bill praying for the rescission of an executed contract, **Held,** that a clear case of fraud must be established to obtain the rescission of an executed contract, and the allegations of fraud made by the plaintiff being uncorroborated and contradicted in every particular by the defendant, neither the court below nor the court in appeal would be justified in rescinding the contract in question. Henry J. dissenting, on the ground that the evidence bore out the allegations of fraud.

Appeal dismissed with costs.

Hutchinson v. Calder.—23rd June, 1885.

15. Sale under power in a mortgage after foreclosure.

See MORTGAGE 15.

16. **Sale of lots by plan—Lanes shown on plan—Subsequent acceptance of conveyance according to different plan.**

The corporation of the city of Toronto, being owners in fee of certain lands situate on St. George street, Bloor street, Spadina Avenue, the south side of Cecil street, the east and west sides of Huron street, and the north side of Baldwin street, in the said city, caused the same to be subdivided into building lots, for the purpose of offering them for competition for leases at public auction. The lots on the north side of Baldwin street were delineated on a plan as ten in number, numbering from one to ten, lot No. 1 being shown to be twenty-five feet six inches in width, fronting on Baldwin street, and extending in a northerly direction along the east side of Huron street 120 feet to a lane of twenty feet in width, extending from Huron street to the easterly limit of the block at the north-easterly angle of the said block lot No. 10, which said lot No. 10, as also all the lots numbered from 2 to 10, were shown to be twenty-one feet in width fronting on Baldwin street, by 120 feet in depth measuring northerly parallel with Huron street to the lane 20 feet in width laid out along the rear of all the said lots fronting on Baldwin street. The lots on the south side of Cecil street were designated by Nos. 16 to 25, lot No. 16 being situate on the eastern extremity of the block, and lots 16 to 24, both inclusive, being shown to be each twenty-one feet in width fronting on Cecil street, by 120 feet in depth measuring in a southerly direction parallel with Huron street to a lane twenty feet in width in rear of the said tier of lots numbering from 16 to 25, inclusive, so laid

Sale of Lands—Continued.

out as fronting on Cecil street; such lane extending from Huron street to the eastern extremity of the block and the space between the lanes so laid down as in rear of the said lots fronting on Baldwin and Cecil streets respectively was laid out as five lots, numbering from 11 to 15, the former being 21 feet eight inches and the others 21 feet 9 inches each, fronting on Huron street by 194 feet 6 inches in depth on lines drawn in an easterly direction at right angles with Huron street to a lane, also 20 feet in width in rear af the said lots numbering from 11 to 15 inclusive. The object of laying out these lanes in rear of these several lots was to provide access, in the event of the lots being leased separately to different persons from the rear of each lot to the streets upon which the lots respectively fronted, for the convenience of the persons becoming lessees of such respective lots. The corporation caused an advertisement of the contemplated auction sale to be published in the public papers and in posters distributed through the city as follows:—

"City property for sale or lease by auction at noon on Wednesday, the "18th day of May, 1881, at the auction rooms of F. W. Coate & Co.

"Leases will be offered for twenty-one years, renewable, of the following "valuable lots, owned by the city of Toronto and situate as under, that is to "say:—

HURON STREET (BETWEEN CECIL AND BALDWIN STREETS).

No. on Plan.	Size.	Situation.	Reserve per Foot.
1 Lot 11,	21 ft. 8 in. x 194 ft. 6 in.	E. side of Huron st.	$1.00
4 Lots 12 to 15,	each 21 ft. 9 in. x 194 ft. 6 in.	do	$1.00
2 Lots 8 & 9,	each 27 ft. 2 in. x 128 ft. 8 in.	W. side of H. st.	$1.00

CECIL STREET RUNNING EAST FROM CORNER OF HURON STREET.

1 Lot 25,	25 ft. 6 in. x 120 ft., S. E. cor. of Cecil & Huron sts.	$1.00
9 Lots 16 to 24,	each 21 ft. x 120 ft., S. side of Cecil st., E. of No. 25,	$1.00

BALDWIN STREET RUNNING EAST FROM CORNER OF HURON STREET.

1 Lot 1,	25 ft. 6 in. x 120 ft., N. E. cor. of Baldwin & Huron sts.	$1.00
9 Lots 2 to 10,	each 21 ft. x 120 ft., N. side of Baldwin st., No. 1,	$1.00

PARTICULARS RELATING TO LEASES OF THE ABOVE PROPERTIES.

"The above properties will be virtually equivalent to freeholds in the "hands of lessees, who will hold for 21 years, renewable, rental to be paid "half yearly at the office of the City Treasurer, the first payment to be made "in advance by way of deposit at time of sale.

"Lessees of two or less than two lots on St. George or Bloor streets to "erect within two years a brick residence not less in value than $5,000.00.

"The lot on Spadina avenue will, if desired, be put up in two half lots "as the north and south half of said lot.

Sale of Lands—Continued.

"The sizes of lots above given are to be read as being according to said "measurement 'more or less.' Lanes run in rear of the several lots.

"Further terms and particulars made known at time of sale. For "further particulars apply at the City Hall, where plans and diagrams of the "several properties can be seen.

"City Hall, April 20th, 1881.

"JOHN IRWIN,

"Chairman Committee on Property."

In the conditions of sale it was provided that all bids should be at a frontage rate per foot per annum upon the lots offered, as the same appear upon the plan or survey produced, each lot being subject to a reserved bid.

At the sale the defendant Macdonnell was the highest bidder for, and as such became the purchaser of, the leasehold interest offered for sale in the lots 11 to 15 on the east side of Huron street; other persons became purchasers of all the other lots fronting upon Baldwin and Cecil streets respectively, and numbering from 1 to 10 on Baldwin street, and from 16 to 25 on Cecil street. The plaintiff, being the highest bidder for lot number 10 fronting on Baldwin street, signed his contract for that lot at the foot of the conditions of sale in the terms following:—

TORONTO, May 18th, 1881.

I hereby agree to lease the property described in the plan hereto annexed and marked A, as lot number 10 on the north side of Baldwin street, subject to the foregoing conditions of sale, for the sum of one dollar and thirty cents per foot frontage per annum on Baldwin street.

(Signed), P. F. CAREY.

The defendant Macdonnell, having become the purchaser of the lots 11 to 15 inclusive, and having no occasion for a lane in rear of those lots, but considering that the keeping it open as a lane would be a nuisance to him and to the corporation, made application to the city authorities before any plan of the several lots was registered, to have the space designed for a lane in rear of these lots thrown into the respective lots, and to have a lease given to him of the lots as including within their area the lane in rear, which had been designed for the purpose of affording access to those respective lots in the rear. This application, appearing to be reasonable, was concurred in, and a plan was prepared under the direction of the city authorities showing no lane in rear of the lots numbering 11 to 15 on Huron street, but showing lanes 20 feet in width, widening at their eastern extremity to twenty-five feet, in rear of the lots fronting on Cecil and Baldwin streets; which plan, duly certified under the corporate seal, and signed by the Mayor and City Treasurer, as representing correctly the lots and lanes, they caused to be

Sale of Lands—Continued.

registered in the registry office of the city of Toronto, on the 9th day of June, 1881, under the provisions of the Revised Statutes of Ontario in that behalf, as plan number 352. On the 14th of the same month of June, the corporation duly executed under the corporate seal, and signed by the Mayor and Treasurer of the city, an indenture of lease whereby, in consideration of the rents, covenants and agreements therein reserved and contained, they demised and leased unto the defendant Macdonnell his executors, administrators and assigns, the said lots 11, 12, 13, 14 and 15, according to the registered plan No. 352 *habendum*, for the term of twenty-one years, to be computed from the 1st day of July, 1881. The purchasers at the auction held on the 18th of May, of all the other lots fronting on Cecil street and Baldwin street, except the purchaser of lot No. 10 on Baldwin street, accepted leases for like terms of twenty-one years of the lots bid for by them respectively, in each of which leases their several lots were described as being according to the said registered plan No. 352. The plaintiff does not appear to have applied for a lease of his lot No. 10 fronting on Baldwin street until early in the year 1882, and when he did he refused to take his lease according to said plan 352, insisting that by the terms of his contract of the 18th of May, 1881, he had an interest in the lane as originally designed in rear of lots 11 to 15 on Huron Street of which, as he contended, he could not be deprived, and that the corporation had no right to register the plan No. 352 not showing such lane, but showing the said lots 11 to 15 leased to Mr. Macdonnell, to extend across the space as originally designed for a lane in rear of these lots. The plaintiff having brought the matter under the consideration of the committee of the City Council called the property committee, the defendant Macdonnell presented a petition in the shape of a letter addressed to the Mayor and aldermen of the city in council assembled remonstrating against any attempt to prejudice his rights. In this petition he referred to three certificates which he transmitted with, and made part of, his petition in support of his contention, one of these certificates was that of the City Commissioner, another of the City Treasurer and a third of the surveyors who had been employed by the city to sub-divide the block of land into the building lots offered at auction in May, 1881, and who had certified the plan No. 352 as correct in accordance with the provisions of the registry Act chapter one hundred and eleven of the revised statutes of Ontario, sec. 82, sub-sec. 2. These certificates were by the learned judge of first instance detached from the defendants petition which was received in evidence without the accompanying certificates. That of the City Commissioner is as follows:—

Sale of Lands—Continued.

CITY COMMISSIONER'S OFFICE,
TORONTO, 21st. Feb. 1882.

"I, Emerson Coatsworth, of the City of Toronto, city commissioner, do "hereby certify that I have examined the plan of sub-division of the block of "land owned by the city, lying on the east side of Huron Street between "Baldwin and Cecil Streets, and state that I find the allowance for lanes in "rear of the lots fronting on Baldwin and Cecil Streets respectively, ample "and sufficient for all purposes relating to the said lots, and I further state "that the permission to the lessee of the lots on Huron Street referred to, "to enclose the lane in rear thereof is undoubtedly in the interests of the "city, as thereby preventing the facility for nuisances being deposited clan- "destinely, and saving extra labor to this department in keeping same "clear, and there being but one lessee of all the lots for which said lane is "laid out, it cannot prejudice any other person whomsoever to have it closed.

"E. Coatsworth, Com. Works and Health."

The certificate of the City Treasurer who had also signed the plan No. 352 for registration on behalf of the corporation is as follows:—

OFFICE OF THE CITY TREASURER,
TORONTO, 23rd Feb. 1882.

"I, Samuel Bickerton Harman, of the City of Toronto, city treasurer, "certify that the plan for the sub-division of the blocks of land belong- "ing to the city, lying east of Huron Street, between Baldwin and Cecil Streets "was prepared under my supervision for the purpose of laying off same into "building lots with lanes at rear of the lots fronting on said streets respec- "tively, such lanes being intended to be appurtenant respectively to the "tier of lots lying between them and the streets on which such lots fronted. "The lanes in rear of the tier of lots fronting on Baldwin and Cecil streets "were made of sufficient width to serve every practicable purpose of lanes "for these lots respectively, without regard to the lane between them, in "rear of the lots fronting on Huron street, which was intended for the latter "named lots only; I fail to see how any one has any right or interest to "interfere in a matter which seems to me to affect only the purchaser of the "lots on Huron street."

"SAMUEL B. HARMAN, City Treasurer."

The certificate of the surveyors who laid out the lots for the corporation is as follows:—

"We, Unwin & Sankey, formerly Wadsworth & Unwin, of the city of "Toronto, land surveyors, hereby certify that the plan of subdivision of the "block of land owned by the city of Toronto, lying on the east side of "Huron street, between Baldwin and Cecil streets, prepared by us, shows

Sale of Lands—Continued.

" the allowance for lanes in rear of the lots fronting on said streets respec-
" tively, the lanes in rear of the lots on Baldwin and Cecil streets being wide
" and amply sufficient for all purposes relating to said lots. We further state
" that the lane originally proposed to extend along the rear of the lots front-
" ing on Huron street, was designed for the benefit of the lessees of those
" lots solely; and the lessees of lots fronting on Baldwin street and Cecil
" street could not be entitled to any right thereto practically; and the clos-
" ing up the said lane can only be a matter of business between the city and
" the lessee of the lots on Huron street.

" UNWIN & SANKEY, Provincial Land Surveyors.

" Toronto, 21st February, 1882."

The corporation thereupon caused to be prepared for registration a new plan, not corresponding with the one in existence at the time of the auction, but on which the space comprising the rear twenty feet of the lots 11 to 15 as leased to Macdonnell, together with angle cut off from lots 11 and 15, as shown on plan 352, is shown to be cut off with the words " Lane to be opened " thereon, and this plan is registered in the registry office of the city of Toronto with a certificate thereon under the corporation seal and signed by the same Mayor of the city as had signed plan 352, and by the same City Treasurer and the firm of surveyors who had prepared and signed that plan for registration and had signed the above certificates laid before the council: "We " certify that this plan represents correctly the manner in which we have " dedicated and set apart the rear twenty feet of lots 11 to 15, inclusive, for " the purposes of a public lane."

Upon this plan being registered the plaintiff on the same day that it was registered, namely, the 19th day of May, 1882, accepted a lease from the corporation, executed under the corporate seal, demising to him for 21 years " Lot No. 10 on the north side of Baldwin street, according to regis-
" tered plans Nos. 352 and 380."

In his statement of claim he set out the auction sale of May, 1881, and that at such sale, relying upon the plan and conditions of sale then produced, he bid for and became the purchaser of Lot No. 10 on the north side of Baldwin street. That on the 19th day of May, 1882, the defendants the said corporation executed a lease to the plaintiff of the said lot number ten, in which lease the said lot is described as being according to a plan of said property registered in the registry office of the City of Toronto numbered 380. That the said plan numbered 380 is identical with the plan produced at the day of sale and according to which the plaintiff purchased the said lot. That on the 14th day of June, 1881, the defendants the said corporation executed a lease to the defendant Alexander Macdonell and

Sale of Lands—Continued.

granted him lots 11, 12, 13, 14 and 15. That the said lots are described in the deed to the said Alexander Macdonnell as extending over the said lane already described as being shewn on the map or plan between the said lots 11, 12, 13, 14 and 15, and the property of the Hon. George Brown and no mention is made in the said lease of the reservation of the said, or of any, right of way by virtue of the said lane, but the said lots were sold as designated on the said plan, and the said Alexander Macdonnell had notice of the said plan and of the contract of the defendants the said corporation to lease the said lot number 10 to the plaintiff according to the said plan. That the said Alexander Macdonnell had caused the said lane lying in rear of the said lots 11, 12, 13, 14 and 15 to be closed up, with the approval and authority of the defendants the said corporation. That the plaintiff had applied both to the defendants and to the said Alexander Macdonnell to have the said lane re-opened and the obstruction removed therefrom in order that, with the other lessees, he might have the full, free and unrestricted use of the said lane to which he and they were entitled by virtue of the said lease to enjoy.

And the plaintiff claimed that by virtue of the said conveyance to him, he was entitled as owner of the said lot to have a right of way over the said lane lying in rear of the said lots 11, 12, 13, 14 and 15, and to have the said lane kept open and unobstructed in order that he might not be prevented or interrupted in the free use of the same. And the plaintiff prayed that the defendants should be ordered to open up and maintain a lane in rear of the said lots 11, 12, 13, 14 and 15, fronting on Huron street, as shown on the plan by which the said lots were sold and as shown on the new plan registered as plan 380.

The Court of Appeal for Ontario **Held,** reversing the judgment of Ferguson J. (7 O. R. 194), that as the plaintiff had ready access to the streets by the lane on which his lot abutted, he could not prevent the city from closing up other lanes on the property. (*See* 11 Ont. App. R. 416.)

On appeal to the Supreme Court of Canada, **Held,** 1. That the plaintiff, having taken his lease from the corporation with full knowledge of the lease to Macdonell, and with express reference to the plan 352, which showed that lots 11 to 15 on Huron Street were leased to Macdonell, including the space plaintiff claimed to have opened as a lane, was precluded from recovering in his present action, assuming that under the terms of the sale the exhibition of the plan used at the sale would give him a right, as against the corporation, to have had such a lane opened, or to get compensation in lieu thereof.

2. Per Fournier, Taschereau and Gwynne JJ.—That the plaintiff could not under the terms of the sale set up a right to such lane.

Sale of Lands—Continued.

Ritchie C.J.—Found it difficult to say that under the contract of sale the plaintiff did not acquire a right to or interest in the lane shown by the plan in the rear of lots 11 to 15 in view of its immediate contiguity to lot 10, on which it practically abutted or bounded, and to which it would be a material advantage, as would be patent to all parties bidding at the sale. If the plaintiff should be advised that he had any claim enforceable against the corporation as distinct from the defendant Macdonell, his lordship would feel disposed to reserve plaintiff's right to proceed to make good such claim in a suit properly framed for that purpose.

Henry J. expressed no opinion as to the plaintiff's rights under the original contract.

Per Gwynne J.—While the certificates attached to the petition of the defendant Macdonnell, could not be looked to as affording any evidence in this action in favor of the defendants of the truth of the matters therein alleged, they may, as representations made to the corporation by their officers of the intention of those officers in doing on behalf of the corporation the acts therein referred to, be looked at as matter before the corporation and as part of the *res gestæ* in respect of which the subsequent action of the corporation in relation to the subject-matter was taken, and to throw some light upon such action if it should prove to be of doubtful construction.

Appeal dismissed with costs.

Carey v. City of Toronto.—9th April, 1886.

17. **Will—Devisee under—Mortgage by testator—Foreclosure of—Suit to sell real estate for payment of debts—Decree under—Conveyance by purchaser at sale under decree—Assignment of mortgage—Statute confirming title.**

A. M. died in 1838, and by his will left certain real estate to his wife, M. M., for her life, and after her death to their children. At the time of his death there were two small mortgages on the said real estate which were subsequently foreclosed, but no sale was made under the decree in such suit.

In 1841 the mortgages and the interest of the mortgagee in the foreclosure suit were assigned to one J. B. U., who, in 1849, assigned and released the same to M. M.

In 1841 M. M., the administrator with the will annexed of the said A. M., filed a bill in chancery for the purpose of having this real estate sold to pay the debts of the estate, she having previously applied to the Governor in Council, under a statute of the Province, for leave to sell the same, which was refused on the ground that such leave could not be granted for the sale of a particular part of the estate, and if the whole estate were sold and there should be a surplus, there would be no mode of apportioning such surplus among the devisees. A decree was made in this suit and the lands sold, the said M. M. becoming the purchaser. She afterwards conveyed said lands to the

Sale of Lands—Continued.

commissioners of the lunatic asylum, and the title therein passed, by various acts of the Legislature of Nova Scotia, to the present defendants. A statute having been passed in 1874 confirming the title to the said lands in the Commissioner of Public Works and Mines, M. K., devisee under the will of A. M. brought an action of ejectment against the Commissioner of Public Works and Mines and the resident physician of the lunatic asylum which was built on said land, and in the course of the trial contended that the sale under the decree in the chancery suit was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor in Council. The validity of the mortgages and of the proceedings in the foreclosure suit were also attacked. The action was tried before a judge without a jury, and a verdict was found for the defendants, which verdict the Supreme Court of Nova Scotia refused to disturb.

On appeal to the Supreme Court of Canada, **Held,** affirming the judgment of the court below, that even if the sale under the decree in the chancery suit was invalid, the title to the land would be outstanding in the mortgagee or those claiming under her, and the plaintiff, therefore, could not recover in an action of ejectment.

Semble, that such sale was not invalid, but passed a good title. Henry J. *dubitante.*

Held, also, that the statute ch. 36 sec. 47 R. S., 4th series, vested the said land in the defendants, if they had not a title to the same before. Henry J. *dubitante.*

Appeal dismissed with costs.

Kearney v. Creelman.—17th February, 1886.

School—Grant of land for.

See CHARITABLE TRUST.

School Commissioners—Appeal from to Superintendent of education P.Q.—Mandamus to compel carrying out of decision of Superintendent—40 Vic. ch. 22 sec. 11, P.Q.

See EDUCATION 3.

Scire Facias.

See PATENT OF INVENTION 1, 5.

Scrutiny.

See ELECTION 12.

" CANADA TEMPERANCE ACT, 1878, 7.

Seal—Want of on insurance policy.

See INSURANCE, LIFE 2.

Security—For costs in petition of right,

See PRACTICE 101.

3. **Sale by—Procès-verbal of seizure, what it should contain—Art. 638 C. C. P.**

Under a writ of *venditioni exponas*, issued in a suit wherein M. C. was plaintiff and D. G. was defendant, the latter's property was seized, advertised and sold to the appellants, under the following description:—"4 lots of land or emplacements situate at Coteau St. Louis, in the Parish of l'Enfant Jesus, heretofore forming part of the Parish of Montreal, in the district of Montreal, being known and designated in the official plan and book of reference of the Village of Coteau St. Louis, in the said Parish of Montreal, under Nos. 18, 19, 20 and 21, of the sub-division of No. 167, of the said official plan and book of reference, with 4 wooden houses and dependencies thereon erected." The sale was made in one lot only, at the sheriff's office,

Sheriff—Continued.

in the City of Montreal. The respondents demanded the nullity of the sale by means of an opposition.

Held, that it was not sufficient to give only the number of the official plan and book of reference in the *procès verbal* of seizure and the advertisement of the sheriff, as under Art. 638 C. C. P. it is necessary to give the range or the street where the property is situated, in addition to the official number, and therefore the sale was null and of no effect.

[As to the sale having been made at the sheriff's office instead of at the church door of the Parish of l' Enfant Jesus, see 42 and 43 Vic. ch. 25, Q.]

Montreal Loan and Mortgage Co. v. Fauteux.—iii. 411.

4. Replevin—Possession, writ of—Trespass.

See CONTRACT 14.

5. **Action on bond given to sheriff in his official capacity—Nullité absolue—Opposition in natnre of petition in revocation of jndgment—Discovery of further evidence—Art. 581 C.C.P.—Dol personnel—Res judicata—Requête Civile.**

The appellant, Willism McD. Dawson, having purchased a property in the city of Three Rivers, which proved to be burdened with mortgages beyond its value, an action was brought on one of these mortgages by the hypothecary creditor, Dame Harriet Sawtell (Mrs. Dickson), upon which the appellant, Dawson, made *délaissement*. Judgment was accordingly obtained and the property sold at sheriff's sale on the 21st February, 1862, when the said William McD. Dawson became the purchaser.

Claims against the estate (*oppositions à fin de conserver*) were filed largely exceeding the amount of purchase money. Among these claims, (oppositions) was one by the said purchaser, Dawson, for a large sum of money, upon the filing of which the then sheriff, I. G. Ogden, took from him, the said purchaser, a small payment in cash and a bond or obligation for the balance, secured upon the property itself.

By the final judgment of distribution, the largest claim, that of the Honorable Judge Gale, was awarded a fraction of the amount due thereon, being the residuary amount of the purchase money after the collocations made in favor of prior claims; while for the claim of the purchaser, which was held to be the last, there was nothing left. It appeared that the collocation in favor of the late Judge Gale was not paid.

The then sheriff, the late I. G. Ogden, having died, his heirs or legatees all, in one form or another, renounced their legal rights to his estate, with the exception of the original plaintiff in this cause, Isaac Low Evans Ogden, one of his sons, who assigned the said obligation, as an asset of his father's estate, to William McDougall, then a practising attorney at the bar, who

Sheriff—Continued.

brought an action upon it against the present appellant, which action was defended on the plea that the said obligation was not a private or personal asset of the said I. G. Ogden, but a security to ensure the payment of the hypothecary creditors collocated by the final judgment of distribution, in the case of *Sawtell* v. *Dawson*. It was also pleaded that the then plaintiff, being a practising attorney at the bar of the same court where the action was brought, could not become the purchaser of a litigious right by the Arts. 1,485 and 1,583 of the civil code.

The said Wm. McDougall then reassigned the said obligation to I. L. E. Ogden, and an action was commenced on his behalf.

The defendant's (present appellant's) pleas in defence were, practically, that there was *litis pendens*, because of the action already pending on the same obligation;—that the record (which had been destroyed by the burning of the court house in Quebec) should be restored or at least an effort made to that effect, before any other proceeding could be taken;—and the repetition of the former pleading; that the obligation was the sheriff's security for the balance of the purchase price of the property, and did not represent a personal debt due to the late Mr. Ogden, and was sued upon as such, in fraud of the defendant and the true creditors of the debt it represented. The plaintiff denied that the previous action involved the same issue, or that the present action was for the security stated, or that the obligation represented the purchase money of the property.

On the 24th April, 1875, the respondent, sued out a writ of execution against the appellant in pursuance of this last mentioned judgment.

On the 3rd of May, 1875, the appellant filed an opposition in the nature of a petition in revocation of judgment, which is the subject of the present appeal.

Amongst other reasons it contained the following:—

1.—That since the rendering of the last mentioned judgment on the action itself, the representatives of the late Judge Gale had claimed from the said opposant, William McD. Dawson (the appellant), the amouut of their collocation, threatening to proceed at *folle enchère* to the re-sale of opposant's (appellant's) property, and that the said opposant thus found himself liable to pay twice the same amount.

2.—That since the rendering of the judgment the opposant (the appellant) had discovered proof that the security mentioned in the return of the sheriff was one and the same with the notarial obligation on which the judgment was founded.

3.—That since the judgment, the opposant (appellant) had made discovery of an authentic part of the record, and that the production of the said

Sheriff—Continued.

document, being of a nature to affect the judgment sought to be executed could take place under the article 581 of the Code of Civil Procedure of the Province of Quebec.

4.—That the judgment should be rescinded and revoked, having been rendered through the collusion and fraud of the respondent and others.

The missing document was the sheriff's schedule of the nature of sale, and an authentic copy of it certified by the prothonotary was found and produced. The opposant (the appellant) also produced with his opposition the sheriff's receipt for the obligation itself, which he alleged proved the obligation to be as contended by the defendant (the appellant) the security taken by the sheriff in his official capacity for the payment of the balance of the purchase money, which belonged to the hypothecary creditors.

On the 14th of May, 1875, a *tierce opposition* was filed by the representatives of the Gale estate, claiming the obligation above mentioned as a mere security for the amount of their collocation by the report of distribution and denying the right of the heirs Ogden to any part of the said obligation.

On the 8th of September, 1875, Isaac Low Evans Ogden having died, the present respondent, Charles Kinnis Ogden, brought himself into the case as plaintiff *par reprise d'instance.*

On the 11th May, 1877, the respondent produced his plea to the opposition of the defendant (appellant.)

On the 20th of September, 1877, the opposition of appellant was dismissed by the Superior Court at Three Rivers (McCord J.) on the ground that there was *res judicata* against him.

The Court of Queen's Bench on the 8th of March, 1878, by their judgment, ordered, "that the proceedings on the opposition of the said appel-
"lant shall be suspended until after the opposition of the representatives
"of the said Hon. Samuel Gale, filed in this cause, shall have been disposed of."

On the 12th December, 1878, the respondent contested the *tierce opposition* of the heirs Gale in obedience to this last judgment of the Court of Queen's Bench.

On the 13th April, 1879, the *tierce opposition* of the representatives Gale was maintained by the Superior Court at Three Rivers, with regard to the part of its conclusions which referred to the seizure of the real estate.

On the 7th September, 1880, this last judgment on the *tierce opposition* was modified by the Court of Queen's Bench. This judgment also admitted the rights of the heirs Gale, and ordered them to proceed in the space of

Sheriff—Continued.

four months to the re-sale at *folle enchère* of the property purchased in the case of *Sawtell* v. *Dawson*.

The present appellant, Dawson, contended that he was not a party to this appeal, and he was thus condemned without hearing and without notice to submit to the re-sale of a property which he had paid by an obligation, while the judgment of the 10th of June, 1874, condemning him to pay to the heirs of the sheriff personally the amount of said obligation, remained in full force.

The record having been sent back to Three Rivers, the four months expired without, as the appellant alleged, any notice whatever having been given to him of the judgment, or of any other proceeding since the judgment on his appeal given in his favor on the 8th of March, 1878.

On the 18th of January, 1881, an inscription on the merits of the opposition of May, 1875, was served upon him. This inscription was discharged by the court.

On the 17th of March, 1881, a new inscription was made, and also discharged.

On the 25th of June, 1881, the respondent made a motion before the Superior Court at Three Rivers, asking that the rights conferred on the heirs Gale by the judgment of the Court of Queen's Bench to have the property of the appellant re-sold at *folle enchère* in the space of four months, be declared elapsed. The appellant was not notified of the said motion, which was granted on the 25th of June, 1881.

A motion was then served upon the defendant, Dawson (the appellant) on the 19th of September, 1881, by the plaintiff, *par reprise d'instance*, to be allowed to make a new contestation of his opposition of May, 1875, which was refused by the court.

On the 23rd of November, 1881, the Superior Court at Three Rivers dismissed the opposition and petition in revocation of judgment of appellant. This judgment was confirmed by the Court of Queen's Bench on the 4th of December, 1882.

On appeal to the Supreme Court of Canada, **Held**, that the judgment of the Court of Queen's Bench should be reversed and the appeal allowed.

Per Taschereau J. delivering the judgment of the court.—Dawson's obligation to Ogden was not a *créance* of Ogden personally, but of him as sheriff only, and represented the price of Dawson's purchase at the sheriffs' sale. The sheriff's heirs therefore were not entitled to the amount of the obligation in the absence of the allegation and proof, that they or their father in his lifetime paid the amount to the various parties collocated.

Sheriff—Continued.

Moreover the obligation was null as being against public order, and a nullity of this kind was absolute and need not be pleaded, the tribunal being bound to notice it.

The judgment on the action did not decide any thing contrary to these views, because the courts below had not before them the proof that the obligation in question represented nothing but the adjudication price, the necessary documents to establish that fact having been since found by Dawson. The judgment appealed from was not based on *res judicata;* it conceded, as it was obliged to do in the face of the judgment of that court reversing the judgment of the court dismissing the *requête civile*, that the right to a *requête civile* was open. But it held that the opposant had not proved the facts he alleged. This court, however, is of opinion the appellant has clearly proved his allegations of fact:—1. That the words "value received" in the obligation were false; that the obligation was not given to the late sheriff personally, but to him in his official capacity only, and so has proved the *dol personnel*, the fraud by which the late Ogden obtained that obligation, and the fraud of the plaintiff's *auteur* is his fraud; 2. That the obligation was *nul d'une nullité absolue;* 3. The only *res judicata* is in favor of Dawson; 4. That not only the Gales, but all the other parties could ask a re-sale.

Appeal allowed with costs.

Dawson v. Ogden.—19th June, 1883.

6. Sale of mortgaged premises by, under decree of foreclosure, in Nova Scotia.

See MORTGAGE 12.

7. **Sale by—Purchase at—Adjudication to joint purchasers—Security not given as required by Art. 688 C. C. P. L. C.—One joint adjudicataire in default cannot demand a sale à la folle enchere—Arts. 691, 694, 760 C.C. P. L C.**

At a certain judicial sale, on the 10th of July, 1875, the appellant, James Shortis, the respondent Leduc, and one Michel Caron became joint purchasers of a certain immoveable for the price of $2,500.

On the 28th of August, 1875, the sheriff made his return on the writ of execution stating that he had levied a net sum of $2,352.90, which had been paid to him by a bond as required by law, and that he held that sum subject to the order of the court. This pretended bond was in reality a "bon" in the following terms: "Good to S. Dumoulin, Esquire, sheriff, for two thou- "sand two hundred and ninety-nine dollars and sixty-five cents, for value "received, payable to his order. This bon serves as security in the matter "No. 225 L. J. O. Brunelle & *al.* against Charles Coté. Three Rivers, 2nd "August, 1875," and signed by the three purchasers, James Shortis, Michel Caron, and the respondent Leduc.

Sheriff—Continued

On the return of the sheriff various distributions were made and the respondent collocated for the sums of $1876.76 and $259.93.

The appellant, R. H. McGreevy, being a creditor of James Shortis, the other appellant, in virtue of a judgment rendered in his favor, intervened in the case to exercise the rights of his debtor.

On the 5th of March, 1883, the respondent served the judgments of distribution on appellant James Shortis, and on the representatives of Michel Caron, deceased; and on the 20th of the same month he made his petition for an order to resell the very property purchased by himself jointly with the other "adjudicataires" for false bidding.

Appellant McGreevy was allowed to appear on the said petition and fyled an appearance.

These proceedings being of a summary nature no written answers were put in, and on the 16th of June following, the Superior Court, sitting at Three Rivers (Bourgeois J.) granted the said petition of respondent ordering the resale of the property for false bidding upon the purchasers, James Shortis and Michel Caron alone; and this judgment was confirmed by the Court of Queen's Bench, sitting at Quebec, on the 7th day of May, 1884, modifying, however, the judgment of the Superior Court by ordering the resale to be made upon the three "adjudicataires." Monk and Ramsay JJ. dissenting.

The question to be decided was, whether the respondent had the right to demand the resale of a property of which he was a co-purchaser together with Michel Caron and the appellant James Shortis, for false bidding, he himself being one of the "adjudicataries" in default, who had retained the purchase money by giving their joint "bon," instead of furnishing the sheriff with the sureties required by law.

On appeal to the Supreme Court of Canada, **Held,** per Strong, Henry and Taschereau JJ., Ritchie C.J. and Fournier J. dissenting, reversing the judgment of the courts below, that the respondent was not entitled to demand a resale. The bon given by the purchasers was not the surety contemplated by Art. 688 of the Code; and the three purchasers having made with the sheriff an agreement not contemplated by law, should be compelled to govern themselves according to that agreement, and the respondent's only course was by direct action against his co-debtors to recover from them their share.

Per Taschereau J.—The obligation contracted by Shortis, Caron and Leduc in becoming joint purchasers at a judicial sale was a joint and several obligation, and it follows that their "bon" bound them jointly and severally also. Under such an obligation they were responsible only towards each other for one-third of the purchase money, and each for the whole to the sheriff. By the judgments of the courts below, the appellant Shortis found

Sheriff—Continued.

himself individually compelled to pay the full amount of the price of sale to respondent, to prevent the resale of the property; (Arts. 694 and 760 C.C.P.); while, if there was any default, the respondent was equally in default with his co-adjudicataires, and there could be no doubt a private agreement had been come to between the three purchasers which the respondent sought to repudiate.

Per Ritchie C.J. dissenting.—McGreevy could be in no better position than his debtor, and to allow him to get a third of this property as the property of Shortis without payment by himself or Shortis of the third of the price which he was bound to pay, seems so unreasonable and unjust that it would be necessary to be satisfied beyond all doubt that the law was clear and unquestionable on the point before sanctioning what appears such manifest injustice.

Per Fournier J. dissenting.—The question whether there being three joint purchasers (adjudicataires) who have all made default in paying the price of their adjudication, one of them can, as hypothecary creditor mentioned in the certificate of registration and as a collocated creditor unpaid, proceed to a sale *à la folle enchère* of the immoveable sold to the three purchasers, is very clearly settled by Art. 691 of the C. C. P.

The only right the appellant had was that of exercising the rights of Shortis, his debtor, and if the appellant wished to avail himself of those rights, he should fulfil the obligation of his debtor by paying his share of the adjudication. He was seeking to have a third of the immoveable adjudged to Shortis without paying the third of the price of adjudication which Shortis was bound to pay.

Appeal allowed with costs.

McGreevy v. Leduc.—May 12th, 1885.

Ships and Shipping—Breach of agreement not to charter—Contract of agency apart from ownership—Ship's husband.

See CONTRACT 2.

2. Collision with anchor of vessel—Damages.

See MARITIME COURT OF ONTARIO 2.

3. **Assessment of ships—37 Vic. ch. 30 sec. 1, and 27 Vic. ch. 81 Rev. St. N.S.—Vessels not registered in Halifax not liable.**

K. resides and does business in the city of Halifax, and is owner of ships which are not registered at the city of Halifax, and which have never visited the port of Halifax. Under the authority of 37 Vic. ch. 30 sec. 1, and 27 Vic. ch. 81 secs. 340, 347, 361, Rev. St. N.S., the assessors of the city of Halifax valued the property of K. and included therein the value of said vessels.

Ships and Shipping—Continued.

Held, that vessels owned by a resident, but never registered at Halifax, and always sailing abroad, did not come within the meaning of the words "whether such ships or vessels be at home or abroad at the time of assess-"ment," and therefore were not liable to be assessed for city taxes.

The City of Halifax v. Kenny.—iii, 497.

4. **Charter Party—Damage to ship—Unavoidable delay—Refusal of charterers to load—Action by ship owners.**

By a charter party of December 11th, 1878, it was agreed that plaintiff's vessel, then on her way to Shelburne, N.S., should proceed with all possible despatch, after her arrival at Shelburne, to St. John, and there load from the charterers a cargo of deals for Liverpool; and if the vessel did not arrive at Shelburne on or before 1st of January, 1879, the charterers were to be at liberty to cancel the charter party. The vessel arrived at Shelburne in December, and sailed at once for St. John. At the entrance of the harbor of St. John she got upon the rocks and was so badly damaged that it became necessary to put her on the blocks for repairs. She was not ready to receive her cargo until 21st of April following, prior to which time—on 26th March—the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charter party, and on the trial defendants gave evidence, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer; that lumber would depreciate m value by being wintered over at St. John, and also as to the relative value of lumber during the winter and in the spring in the Liverpool market; and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the object of the voyage. The judge directed the jury that if the time occupied in getting the vessel off the rocks and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the shipowners and charterers, they should find for the defendants. The verdict being for the defendants, the court below made absolute a rule for a new trial.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, that as there was no condition precedent in the charter that the ship should be at St. John at any fixed date, and as the time taken in repairing the damage was not unreasonable, and the delay did not entirely frustrate the object of the voyage, the charterers were not justified in refusing to carry out the contract.

Carvill v. Schofield.—ix, 370.

Ships and Shipping—Continued.

5. Towage—Contract of—Liability under—Damage—Joinder of defendants—Right of a Saw Mill Company to let to hire a steam tug—Liability limited—25 & 26 Vic. (Imp.) ch. 63—31 Vic. ch. 58 sec. 12—Motion for judgment—Findings of Jury not against weight of evidence—Practice.

The B. C. T. Co. entered into a contract of towage with S. to tow the ship "Thrasher" from Royal Roads to Nanaimo, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to Nanaimo, under arrangement between the B. C. T. Co. and the M. S. Co., the remainder of the engagement was undertaken between the two companies, and the M. S. Co.'s tug boat, "Etta White," and the B. C. T. Co.'s tug, "Beaver," proceeded to tow the "Thrasher" out of Nanaimo on her way to sea, the "Etta White" being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions; and there was on the other side of the course they were steering, upwards of ten miles open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those aboard were strangers to the coast. In an action for damages for negligently towing the ship, and so causing her destruction,

Held:—1. That as the tugs had not observed those proper and reasonable precautions in adopting and keeping the courses to be steered, which a prudent navigator would have observed, and the accident was the result of their omission to do so, the owners of the tugs were jointly and severally liable, (Taschereau J. dissenting as to the liability of the M. S. Co., and holding that the B. C. T. Co. were alone liable).

2. That under the British Columbia Judicature Act the action was maintainable in its present form by joining both companies as defendants.

3. That as there was nothing in the M. S. Co.'s charter or act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was used for in the present case.

4. That as the tugs in question were not registered as British ships at the the time of the accident their owners were not entitled to have their liability limited under 25 and 26 Vic. (Imp.) ch. 63.

5. That the limited liability under section 12 of 31 Vic. ch. 58 (D.) does not apply to cases other than those of collision.

6. This case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with English Order 40, Rule 10, of the orders of 1875, the court could

Ships and Shipping—Continued.

give judgment, finally determining all questions in dispute, although the jury may not have found on them all, but does not enable the court to dispose of a case contrary to the finding of a jury. In case the court consider particular findings to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40.

The Supreme Court of Canada, giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing, and therefore a judgment should be entered against both defendants for $80,000 and costs.

[In this case the Judicial Committee of the Privy Council granted leave to appeal, but the case was settled before coming on for hearing.]

Sewell v. B. C. Tow. Co.—ix, 527.

6. Agreement to insure ship to amount of advances, construction of.

See AGREEMENT 10.

7. Merchants' Shipping Act, 1854—Does not prevent property in ship passing to assignee in insolvency under Insolvent Act, 1875.

See INSOLVENCY 13.

8. **Charter party—Demurrage—Dead freight—Damages.**

The "Whickham" was chartered by the appellants by a charter-party entered into between them as merchants, and the respondent as owner acting by Messrs. Carbray, Routh & Co., at Montreal, on the 25th of October, 1880; by which it was agreed that the steamship, then on her way to the port of Montreal with cargo from Barrow, should proceed to Montreal, and there be loaded by the appellants with a full and complete cargo of wheat (and) or rye or other goods; at least two-thirds of the cargo to be wheat, maize, peas (and) or rye; oats (and) or barley, if shipped, not to exceed one-third of the cargo, and if flour, not to exceed two thousand barrels.

The charterers were given the option of cancelling this charter party if the vessel did not arrive at Montreal by the 10th of November. The freight was fixed at certain rates for the different kinds of grain or flour, according as the ship should go to the continent direct, to the United Kingdom for orders, or to the United Kingdom direct. If other lawful merchandise were shipped, the charterers engaged to pay the same total amount of freight as the ship would make with a full cargo of wheat at the above rates. The penalty for non-performance of the agreement was fixed at the estimated amount of freight; that is to say, at the amount of freight the vessel would earn if fully loaded, estimated at the rate for a full cargo of wheat at the rate stipulated.

Ships and Shipping—Continued.

With reference to the rate of loading, the charter contained the clause which follows:—"Ten running days, Sundays excepted, are to be allowed the said merchant (if the ship be not sooner dispatched) for discharging; commencing from the time of ship being ready to deliver cargo. Ship to be loaded as fast as can be received in fine weather, and ten days on demurrage over and above the said lying days at £40 per day. Lighterage, if any, to be at merchant's risk and expense."

It was further provided that the cargo should be brought to and taken from alongside the ship at the ports of loading and discharge at the merchant's risk and expense.

Owing to the lateness of the season there was a special clause as to the time of the leaving of the ship, which read as follows:—"Should ice set in during the loading so as to endanger the ship, the master to be at liberty to sail with part cargo and to have leave to fill up at any open port on the way homeward for ship's benefit."

The vessel arrived at Montreal on the 8th of November, 1880. A verbal notice was given on the following day by the captain and Mr. Routh the agent, who were daily in communication with the appellants during the discharging of the ship, which was completed on the thirteenth November. On the fifteenth the ship was examined by the port warden, according to the custom of the port, and his certificate of her readiness for cargo delivered at half-past eleven in the forenoon to the appellants. And the respondent contended that the appellants were bound, according to the custom of the port, to begin loading at noon on that day. The appellants, however, had no cargo ready, and the loading only began at one o'clock on the following day; one day being thus lost, according to the respondent's contention. The cargo brought alongside on this day was rye alone, and was put into the number two hold of the vessel, forward, at the request of the appellant's foreman. The loading continued up to five o'clock in the afternoon of that day, and was re-commenced at seven o'clock on the following morning, the seventeenth.

The appellants continued loading rye into this forward hold until two o'clock in the afternoon, when they were stopped by the captain, the safety of the ship being endangered by her being loaded down by the head. He accordingly refused to take any more cargo into this forward hold, and the appellants refused to put the rye, which was the only grain that they had, into any other of the holds of the vessel, as they wished to keep them for wheat alone. The appellants having no other grain ready, the loading of the vessel was stopped until eight o'clock on the morning of the nineteenth, when other grain came alongside, and the loading was continued at number two and three holds; and went on night and day until six o'clock on the morn-

ing of Sunday the twenty-first, when the vessel sailed from the port in consequence of the setting in of the ice.

The respondent claimed that the whole of the eighteenth and half of the seventeenth were thus lost by the failure of the appellants to supply grain; and the loading of the vessel was thus delayed for one day and a-half, besides the first day already mentioned. The respondent also claimed that the vessel was not loaded at any time as fast as she could receive cargo; and had she been loaded from the time she was ready to take in cargo as fast as she could have received it, she would have been loaded with a full and complete cargo before sailing.

When the vessel left she was two hundred and fourteen and a-half tons short of a full cargo. The respondent therefore claimed two and a-half days demurrage at forty pounds per day; and the freight upon two hundred and fourteen and a-half tons of cargo, at the same rate as though an equal quantity of wheat had been shipped, namely; at the rate of six shillings and three pence a quarter, amounting in all to the said sum of £313.0.0. sterling.

The Superior Court for Lower Canada allowed the dead freight, £313, rejecting the claim for demurrage.

The Court of Queen's Bench confirmed the judgment of the Superior Court.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgments of the courts below, that the evidence showed that the freighters had not proceeded with the loading with the despatch required by the charter party, that the captain was justified in leaving when he did, and that respondent was therefore entitled as damages to the amount of the agreed freight which he would have earned upon the deficient cargo.

That the demurrage mentioned in the charter had no reference to the loading of the ship, but to the lying days and were over and above such days.

Per Ritchie C.J.—In this case the freighter agreed to load a full and complete cargo, and therefore he must have known that if he failed to perform his agreement he would be liable to the ship owner in damages under the name of dead freight, which damages, however, could not be considered unliquidated, because by the express terms of the agreement the proper measure of the ship owner's claim is to be the amount of the agreed freight which he would have earned upon the deficient cargo. Had there been no stipulation as to the measure of damages, the ship owner would have been entitled to a reasonable sum, or unliquidated damage (*McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128.) In this case a specific sum was fixed for dead freight in these terms, "penalty for non-performance of this agreement estimated

Ships and Shipping—Continued.

amount of freight." If therefore the ship owner was in fault the estimated amount of freight on cargo she might have received but for this default would be the estimated amount of freight the ship would have earned but for such default.

The facts sufficiently showed, in the absence of any evidence to the contrary, that the port warden's certificate was sent to the appellant's office before noon of the 15th of November, and therefore the loading should have commenced on that day; but, assuming that it was received after 12 o'clock of the 15th, the charterer did not commence loading until 1 o'clock p.m. of the 16th. There was ample evidence to show that had the loading been begun when and continued as it should have been, by the freighters supplying the cargo as required, a full cargo could have been loaded by Friday, the 19th, without night work, and she did not in fact leave until Sunday, the 21st. As to the loss of time from 2 o'clock of the 17th, when loading was stopped by the captain's order, up to 8 a.m. on the 19th, it arose entirely from the default of the shippers. The captain was justified in refusing to allow any more grain to be put in the forward hold, and the shippers should have been prepared with cargo to go on with the loading in a proper manner, and not being in a position, or willing, to do so, the responsibility for the delay must rest with them. The appeal should be dismissed with costs, and costs in the court below, except the costs of the respondent's cross appeal, which should be dismissed with costs, because, as to the question of demurrage the ten days on demurrage mentioned in the charter party clearly refer to, and are over and above, the lying days, which are the running days allowed for discharging cargo, commencing from the time of the ship's being ready to deliver cargo, necessarily at the port of destination, and have no reference to the loading of the ship, and therefore there is no ground whatever for any claim for demurrage.

The evidence clearly shows that the ship was entirely justified from the state of the weather in leaving at the time and under the circumstances she did. The exercise of the option to leave without a full cargo did not absolve the appellants from their obligation fully to load the ship, for their failure to do so arose from their own *laches*.

Fournier, Henry, Taschereau and Gwynne JJ. also gave judgments to the same effect.

Appeal dismissed with costs.

Lord v. Davidson.—8th March, 1886.

Short-hand Writer—Notes of—Not extended in his own handwriting, but signed by him, admissible in evidence.

See ELECTION 19.

Slander—Privileged communications—Public officer.

The appellant, D., having been appointed Chief Post Office Inspector for Canada, was engaged, under directions from the Postmaster General, in making enquiries into certain irregularities which had been discovered at the St. John post office. After making enquiries, he had a conversation with the respondent, W., alone in a room in the post office, charging him with abstracting missing letters, which respondent strongly denied. Thereupon the Assistant Postmaster was called in, and the appellant said: "I have charged Mr. W. with abstracting the letters. I have charged Mr. W. with the abstractions that have occurred from those money letters, and I have concluded to suspend him." The respondent, having brought an action for slander, was allowed to give evidence of the conversation between himself and appellant. There was no other evidence of malice. The jury found that appellant was not actuated by ill-feeling toward the respondent in making the observation to him, but found that he was so actuated in the communication he made to the Assistant Postmaster.

Held, on appeal, 1. That the appellant was in the due discharge of his duty and acting in accordance with his instructions, and that the words addressed to the Assistant Postmaster were privileged.

2. That the onus lay upon respondent to prove that the appellant acted under the influence of malicious feelings, and as the jury found that the appellant had not been actuated by ill-feeling, the respondent was not entitled to retain his verdict, and the rule for a non suit should be made absolute.

Dewe v. Waterbury.—vi, 143.

2. Damages, in action of—Duty of Appellate Court.
See JURISDICTION 5.
" LIBEL.

Solicitor and Client—Purchase of land by Solicitor.
See SALE OF LANDS 5.

2. **Negligence—Omission to include property in mortgage—Omission to register—Laches by client—Evidence.**

C., a member of defendant's firm of solicitors, was employed to prepare a mortgage for W., who gave instructions partly verbal and partly written. Nearly six years after W. brought an action against the firm for neglecting to register the mortgage, and shortly before the trial asked to be allowed to add to his statement of claim an allegation of neglect to include a certain property in the mortgage, which he claimed had been included in the instructions. There was conflicting evidence at the trial as to the instructions, and judgment was given for the defendants, which judgment was sustained by the Divisional Court and by the Court of Appeal.

Solicitor and Client—Continued.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgments of the courts below, that as the plaintiff had delayed so long in prosecuting his claim against the defendants, and the judge who heard the case had decided against him on the evidence, this court would not interfere with that judgment affirmed by two courts.

Appeal dismissed with costs.

White v. Currie. 22 C. L. J. 17.—November 16th, 1885.

Special Case—Further evidence.

See EVIDENCE 1.

Specific Performance—Of agreement for sale of lands.

See SALE OF LANDS 3, 10, 16.

2. Of agreement for sale of patent.

See PATENT OF INVENTION 2.

Stamps—On bill of exchange—Plea of want of.

See BILLS OF EXCHANGE AND PROMISSORY NOTES 2, 6.

Statutes.

See BRITISH NORTH AMERICA ACT, 1867.
" COMPANIES' ACT 1862 (IMP.)
" MERCHANTS' SHIPPING ACT 1854 (IMP.)
" STATUTE OF FRAUDS.
" STATUTE OF LIMITATIONS.
" SUPREME AND EXCHEQUER COURTS ACTS.

2. As to effect of recital in private act, and distinction between public and private acts.

Corporation of the City of Quebec v. Quebec Central Ry. Co.—x, 563.

Statute of Frauds.

See MORTGAGE 8.
" SALE OF LANDS 7, 10.
" BOUNDARY 2.
" SALE OF GOODS 10.

Statute of Limitations.

See LIMITATIONS
" POSSESSION.

Stenographer—Notes of received in evidence when signed by him.

ELECTION 19.

Stoppage in transitu—**Goods in bond.**

The appellants, merchants in New York, sold to E. B. & Co., at Toronto, 250 barrels of currants on credit, and consigned the same in bond. A bill of lading thereof was duly received by E. B. & Co., who paid the freight

Stoppage in transitu—Continued.

thereon and gave their acceptance for the price of the said goods, as well as for the cartage and American bonding charges. The goods, on arrival, were entered and bonded in the consignees' name, and placed in one of the customs bonded warehouses subject to the payment of the duties. E. B. & Co. sold and delivered 150 barrels, and the remaining 100 barrels were bonded under 31 Vic. ch. 6, D., in a portion of E. B. & Co.'s warehouse, partitioned off and used by the customs authorities. Before the acceptances matured, and while a portion of the goods remained in bond, E. B. & Co. became insolvent.

Held, affirming judgment of the Court of Error and Appeal, Ontario, that the *transitus* was at an end, and that the appellants had lost the right to stop the goods remaining in bond.

Howell v. *Alport*, 12 U. C. C. P. 375, and *Graham* v. *Smith*, 27 U. C. C. P. 1 over ruled.

Wiley v. Smith.—II, 1.

Streams—**R. S. O. ch. 115 sec. 1, construction of—Non-floatable streams—Private property.**

By the decree of the Court of Chancery for Ontario the respondents were restrained from driving logs through, or otherwise interfering with a certain stream, where it passed through the lands of the appellant, and which portion of said stream was artificially improved by him so as to float saw logs, but was found by the learned judge at the trial not to have been navigable or floatable for saw logs or other timber, rafts and crafts, when in a state of nature. The Court of Appeal reversed this decree, on the ground that C. S. U. C. ch. 48 sec. 15, re-enacted by R. S. O. ch. 115 sec. 1, made all streams, whether naturally or artificially floatable, public waterways.

Held, reversing the judgment of the Court of Appeal and restoring the decree of the Court of Chancery, that the learned Vice-Chancellor who tried the case, having determined that upon the evidence adduced before him, the stream at the *locus in quo*, when a state of nature, was not floatable without the aid of artificial improvements, and such finding being supported by the evidence in the case, the appellant had, at common law, the exclusive right to use his property as he pleased, and to prevent respondents from using as a highway the stream in question where it flowed through appellant's private property.

Held, also (approving of *Boale* v. *Dickson* 13 U. C. C. P. 337,) that the C. S. U. C. ch. 48 sec. 15, re-enacted by the R. S. O. ch. 115 sec. 1, which enacts that it shall be lawful for all persons to float saw logs and other timber, rafts and crafts down all streams in Upper Canada, during the spring, summer and autumn freshets, etc., extends only to such streams as would,

Streams—Continued.

in their natural state, without improvements, during freshets, permit saw logs, timber, etc., to be floated down them, and that the portions of the stream in question, where it passes through the appellant's land, were not within the said statute.

[The Privy Council have since reversed the decision of the Supreme Court and restored the judgment of the Court of Appeal, 9 App. Cases 392.]

McLaren v. Caldwell.—viii, 435.

Streets—Of city of Halifax, duty of corporation to keep in repair.

See CORPORATIONS 18.

2. Of city of Quebec—Authority to North Shore Railway Company to use—Non-liability of corporation.

See CORPORATIONS 21.

3. Of town of Portland, N.B.—Liability for defect in sidewalk.

See CORPORATIONS 23.

Substitution—Right of substitutes when substitution open, to attack deed given for insufficient consideration.

See DEED 3.

2. Action by substitute against institute for detaching property.

See WILL 10.

3. **Substitution, curator to—Rights of action—Intervention by a plaintiff in another capacity when irregular—Art. 154 C. C. P.**

Held, affirming the judgment of the court below, that a curator to a substitution has no right of action to recover from a curator in whose stead he has been appointed any monies due by the latter and belonging to institutes.

Also, that an assignee of the institutes has no right to intervene in an action brought by said assignee in his capacity of curator to the substitution, and in which no final judgment could have been obtained which could impair the legal rights of the institutes.

Semble.—An intervention filed when the action has been heard on the merits and the case is *en délibéré* is irregular.

Appeal dismissed with costs.

Dorion v. Dorion.—8th March, 1886.

Succession—**Acceptance of an insolvent succession—When obtained by fraud—Notary, duty of—Arts. 646, 650 C. C., P. Q.—Appeal.**

A., who had a claim against the insolvent estate of Dr. B., purchased a right of redemption Dr. B. had at the time of his death in a certain piece of land; and in order that B. *et al.* (the respondents, Dr. B.'s children), who were perfectly solvent, should accept the succession of Dr. B., A. caused to be prepared a deed of assignment by a notary of this right of redemption

Succession—Continued.

to B. *et al.*, who, a few days after the death of their father, had been induced for a sum of $50 to consent to exercise this right of redemption. The notary who prepared the deed without the knowledge of B. *et al.*, returned it to A., telling him that he did not like to receive the deed because he believed that in signing it B. *et al.* made themselves heirs of Dr. B., and besides he believed that if B. *et al.* knew that in signing the deed they accepted the succession of their father, and were responsible for his debts, they would not sign. Another notary residing at a distance was sent for by A., to whom he gave the deed as prepared, and the notary then went to the residence of B. *et al.*, read the deed to the parties, and without any explanation whatever passed and executed the deed of cession, whereby B. *et al.* became responsible for the debts of their father. On being informed of the legal effect of their signature, B. *et al.* formally renounced to the succession of their father. There was also evidence that B. *et al.* had done some conservatory acts and acts of administration for their mother, but it was not proved that in any of these transactions they had taken the quality of heirs. The amount in dispute was made up by including interest, which on the face of the declaration was prescribed. The respondents did not demur to this part of the demand, nor was any separate judgment rendered as to it.

Held, 1. That the case was appealable.

2. That the acceptance of an insolvent succession is null and of no effect when it is the result of deceit and corrupt practices, artifices and fraud.

3. That as A. in this case obtained the signatures of B. *et al.* to the deed in question by fraud, the latter should not be burthened with the debts of their insolvent father.

4. That it is the duty of a notary when executing a deed to explain to an illiterate grantor the legal and equitable obligations imposed by the deed, and consequent on its execution. (Henry J. dissenting.)

Ayotte v. Boucher—ix, 460.

2. Moneys deposited in bank to credit of—Relation of creditor and debtor.

See BANKS AND BANKING 4.

Supreme and Exchequer Courts Acts—**38 Vic. ch. 11—Construction of sec. 17.**

The court of last resort in Prince Edward Island is the Supreme Court of Judicature in that province.

Kelly v. Sullivan—i, 1.

2. Construction of—Sec. 17 "sum or value in dispute."

See JURISDICTION 4.

Supreme and Exchequer Courts Acts—Continued.

3. **Construction of sec. 22.**

Held, under section 22 of the Supreme and Exchequer Court Act, no appeal lies from the judgment of a court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion. [But see S. C. A. A. 1880 sec. 4.]

Boak v. The Merchants' Marine Ins. Co.—i, 111.

4. **Construction of sec. 26.**

Held, that the court proposed to be appealed from, or any judge thereof, cannot, under section 26 of the Supreme and Exchequer Court Act, allow an appeal when judgment had been signed, entered or pronounced previous to the eleventh day of January, 1876.

Taylor v. The Queen.—i, 65.

5. **Construction of sec. 38.**

By 38 Vic. ch. 11, sec. 38, the Supreme Court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion amongst the judges.

[But see *Practice* 29.]

The L. & L. & Globe Insurance Co. v. Wyld.--i, 605.

6. **Construction of secs. 38 and 49.**

Held, that since the passing of 32 and 33 Vic. ch. 29, sec. 80, repealing so much of ch. 77 of Cons. Stat. L. C. as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case; and of 32 & 33 Vic. ch. 36, repealing sec. 63 of ch. 77 Cons. Stat. L. C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial, and that the Supreme Court of Canada, exercising the ordinary appellate powers of the court, under secs. 38 and 49 of 38 Vic. ch. 11, should give the judgment which the court whose judgment is appealed from ought to have given, viz.. to reverse the judgment which has been given, and order prisoner's discharge.

Laliberté v. The Queen.—i, 117.

See ELECTION 10, 13.
" HABEAS CORPUS.
" INSOLVENCY 3.
" JURISDICTION 7, 8, 9, 11, 13, 17, 22, 23, 31, 36, 40.
" NEW TRIAL 4.
" LICENSE 7.
" PRACTICE. 41.

Suretyship—Contract of with firm—Death of partner—Liability of Surety after.

See PARTNERSHIP 6.

Synod—By-law of—Alteration of application of Commutation Fund.
See COMMUTATION FUND.

Tax—On transient merchants, traders, &c.
See LICENSE.

2. Upon filings in court—43 & 44 Vic. ch. 9 sec. 9 (Q.).
See LEGISLATURE 7.

3. Non-liability of Crown for.
See ASSESSMENT AND TAXES 12.
" PETITION OF RIGHT 21.

Telegraph Company—Liability of for message.
See LIBEL.

2. Erection of line—Right to cut trees.
See TRESPASS 7.

Tenants in Common—**Non-joinder of tenants in common as plaintiffs in action for use and occupation—Mesne profits.**

C. O. H. and J. E. H. were tenants in common of certain property under the will of their father, T. H., and each occupied a portion of such property. On the 30th December, 1868, the plaintiff purchased the interest of C. O. H. at sheriff's sale. C. O. H. died on the 7th March, 1870, and his widow, the defendant, with the assent of J. E. H., remained in possession of the portion of the property which had been in the possession of C. O. H. As the result of proceedings for partition carried on against the heirs of T. H., and to which the defendant was no party, the portion so occupied by the defendant was, on the 12th August, 1873, alloted to the plaintiff as sole owner. He thereupon brought an action for use and occupation, adding a count in trespass for the mesne profits since the death of C. O. H.

The Supreme Court of Nova Scotia made absolute a rule *nisi* to enter a non-suit, being of opinion that no action would lie for use and occupation, the widow occupying adversely; that no action would lie for mesne profits as there had been no previous recovery in ejectment by plaintiff, and that even if a contract had been proved to sustain use and occupation, the non-joinder of J. E. H., as a plaintiff, was fatal to the action as brought. (*See* 2 Russ. & Ches. 229.)

The Supreme Court of Canada, **Held**, 1. An action of trespass for mesne profits is consequential to the recovery in ejectment.

2. Even if such an action would lie under some circumstances without ejectment brought, the plaintiff could not recover without satisfactory evidence of actual entry and possession.

3. After entry there is a relation back to the actual title as against a wrong-doer, and an action may be maintained for trespass prior to such entry.

Tenants in Common—Continued.

But in this case, besides a deficiency of evidence of entry, there was some evidence that the defendant remained in possession subsequent to the 12th August, 1873, the day the plaintiff's title accrued, with the assent of the plaintiff. Strong J. *dubitante.*

4. In any event the action for mesne profits would not lie, the defendant having been previous to the 12th August, 1873, in possession with the consent of J. E. H., the co-tenant in common, and being, therefore, entitled to a notice to quit, or demand of possession, before her possession could be considered tortious.

Lecain v. Hosterman.—28th January, 1878.

Tenant for Life—Insurable interest of.

See INSURANCE, FIRE 14.

2. Possession of tenant of—Statute of Limitations as respects remainderman.

See POSSESSION 9.

Tenancy at Will—**Statute of Limitations—Possession as caretaker—Finding of the judge at the trial.**

The plaintiff's father, who lived in the township of T., owned a block of 400 acres of land, consisting respectively of lots 1 in the 13th and 14th concessions of the township of W. The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon them, to take what timber he required for his own use, or to help him to pay the taxes, but not to give any timber to any one else, or allow any one else to take it. He settled in 1849 upon the south half of lot 1 in the 13th concession. Having got a deed for the same in November, 1864, he sold these 100 acres to one M. K. In December following he moved to the north half of this lot No. 1, and he remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north 50 acres of the lot by the father's will, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by possession. The learned judge at the trial found that the plaintiff entered into possession and so continued merely as his father's caretaker and agent, and he entered a verdict for the defendant. There was evidence that within the last seven years, before the trial, the defendant as agent for the father was sent up to remove plaintiff off the land, because he had allowed timber to be taken off the land, and that plaintiff undertook to cut no more and to pay the taxes and to give up possession whenever required to do so by his father.

Tenancy at Will—Continued.

Held, reversing the judgment of the Court of Appeal for Ontario, that the evidence established the creation of a new tenancy at will within ten years.

Per Gwynne J.—That there was also abundant evidence from which the judge at the trial might fairly conclude, as he did, that the relationship of servant, agent, or caretaker, in virtue of which the respondent first acquired the possession, continued throughout.

Ryan v. Ryan.--v, 387.

Tender—Plea of—Effect of.

See SALE OF GOODS 12.

Timber—Sale of—Agreement for.

See AGREEMENT 1, 4.

2. License to cut.

See NEW TRIAL 3.

3. Crown regulations as to payment of dues on.

See PETITION OF RIGHT 18.

4. Advances to get out—Lien for.

See LIEN 2.

5. Proceeds of sale of Timber—Right to apply to re-pay advances—Account.

The declaration of the appellant, plaintiff in the court of original jurisdiction, set out, that at Quebec, on the 14th of June, 1877, he was the owner and in possession of a raft of white pine timber, containing about 156,000 feet, and valued at $30,000. That, being in want of money, he then applied to the defendant Ross for a loan of $3,000, which he obtained on transferring to the defendant, as security, the raft in question. That the defendant had since disposed of the timber, but never accounted to him for the proceeds. The plaintiff, admitting that the defendant was entitled to re-pay himself out of the funds in his hands, an advance of $3,000, and all expenses necessarily incurred by him in connection with the custody and sale of the raft, prayed that he be condemned to render an account, or, in default, to pay $30,000, the alleged value.

The defendant, while acknowledging the receipt of the timber, pleaded, amongst other things, that it was received, not from the plaintiff Doran, but from one William Bannerman, whose property it was, under whose instructions he had disposed of it, and to whom he had, long before suit brought, duly accounted for its disposal.

As the case turned exclusively on the view to be taken of the evidence respecting the nature of the transactions between Ross, Bannerman and Doran, and the facts are somewhat complicated, it is considered unnecessary to set them out at length.

Timber—Continued.

The Superior Court (Meredith C.J.), held that the plaintiff was not entitled to the account for which he asked, the dealings of defendant having been with Bannerman, to whom alone the defendant was accountable, and Doran having no real interest when his action was brought.

This judgment was affirmed by the Court of Queen's Bench for Lower Canada, and on appeal to the Supreme Court of Canada, it was **Held** that it should be affirmed by the latter court. Fournier and Henry JJ. dissenting.

Appeal dismissed with costs.

Doran v. Ross.—23rd June, 1884.

Timber License—**Injunction—41 Vic. ch. 14 (P. Q.)—Sale by commissioner of Crown lands of lands subject to current timber licenses, effect of—Licensee's rights.**

Under the provisions of the Quebec Act, 41 Vic. ch. 14, the D. of C. L. & C. Co., in November, 1881, alleging themselves to be proprietors and in possession of a number of lots in the township of Whitton, P. Q., obtained an *ex parte* injunction, restraining G. B. H. *et al.* from further prosecuting lumbering operations which they had begun on these lots. G. B. H. *et al.* were cutting in virtue of a license from the government, dated 3rd May, 1881, which was a renewal of a former license. By a report of the executive council of the Province of Quebec, dated 1st April, 1881, and approved of by the Lieutenant-Governor in council on the 7th of the same month, the commissioner of Crown lands was authorized to sell to the company the lands in question, and the company deposited $12,000 to the credit of the department, to be applied on account of the intended purchase. On the 9th of May the company gave out a contract for the clearing of a portion of the land, and on 19th July, 1881, the commissioner executed a deed of sale in favor of the company, subject, amongst other conditions, "to the current licenses to cut timber on the lots." Upon the writ being returned, the injunction was suspended. G. B. H. *et al.* answered the petition, and the Superior Court dissolved the injunction. On appeal to the Court of Queen's Bench, this judgment was reversed and the injunction applied for made perpetual.

On appeal to the Supreme Court of Canada, **Held**, (Henry and Gwynne JJ. dissenting), that D. of C. L. & C. Co. had not acquired any valid title to the lands in question prior to the 19th July, 1881, and that by the instrument of that date their rights were subordinated to all current licenses, and G. B. H. *et al.* having established their right to possess said lands for the purpose of carrying on their lumber operations under a license from the Crown, dated 3rd May, 1881, the injunction granted *ex parte* to the D. of C. L. & C. Co., in November, 1881, under the provisions 41 Vic. ch. 14 (P.Q.), had been properly dissolved by the Superior Court.

Hall v. Dom. of Canada Land and Colonization Company.—viii, 631.

Timber License—Continued.

2. Permits to cut timber (Man.)—Rights of holders of—Dominion Lands Act, 1879, sec. 52.

On the 21st November, 1881, Sinnott *et al.* obtained a permit from the Crown Timber Agent, Manitoba: "to cut, take and have for their own use from that part of Range 10 E, that extends five miles north and five miles south of the Canadian Railway track, the following quantities of timber, 2,000 cords of wood and 25,000 ties, permit to expire on 1st May, 1882." A similar permit was granted to Sinnott *et al.* on the 10th February, 1882, to cut 25,000 ties. In February, 1882, under leave granted by an order in council of 27th October, 1881, Scoble *et al.* cut timber for the purposes of the construction of the Canadian Pacific Railway, from the lands covered by the permit of 21st November, 1881. Sinnott *et al.* by their bill of complaint, claimed to be entitled by their "permit" to the sole right of cutting timber on said lands until the 1st of May, 1882, and prayed that the defendants Scoble *et al.* might be restrained by injunction from cutting timber on said lands, and might be ordered to account for the value of the timber cut. Scoble *et al.* justified their acts under the order in council of the 27th October, 1881, and denied the exclusive possession or title to the lands or standing timber.

The plaintiffs applied *ex parte* for, and obtained, an interim injunction against the defendants. At the hearing Miller J. made the injunction perpetual, and ordered a reference to ascertain the damages caused plaintiffs by the cutting of the timber by defendants. On re-hearing, this decree was reversed and a decree was made in effect dismissing, the plaintiff's bill with costs and directing an account to be taken of the damage sustained by reason of the interim injunction.

Held, that the decree made on re-hearing by the Court of Queen's Bench of Manitoba should be affirmed, that the permit in question did not come within the provisions of the Dominion Lands Act of 1879 and did not vest in the plaintiffs any estate, right or title in the tract of land upon which they were permitted to cut, nor did it deprive the government from giving like licenses, or others of equal authority, to other persons, as long as there was sufficient timber to satisfy the requirements of the plaintiffs' licenses.

Appeal dismissed with costs.

Sinnott v. Scoble. 20 C. L. J. 260; 4 C. L. T. 376.—23rd June, 1884.

3. License granted by Old Province of Canada—Dispute with New Brunswick—Petition of Right against Dominion by Licensee.

See PETITION OF RIGHT 20.

Timber Limits—Sale of.

See SALE OF LANDS 1.

Timber Limits—Continued.

2. Bonus on transfer of, payable by purchaser when agreement silent.

See SALE OF LANDS 9.

Title—Completion of—Specific performance.

See SALE OF LANDS 4.

2. Under decree—Confirmed by statute R.S.N.S. 4th series ch. 36 sec 47.

See SALE OF LANDS 17.

Tort—Petition of right will not lie for.

See PETITION OF RIGHT 1, 10, 11, 15.

Towage—Contract of.

See SHIPS AND SHIPPING 5.

2. "Vessel to go out in tow"—Insurance.

See INSURANCE, MARINE 1.

Trade and Commerce.

See PARLIAMENT OF CANADA 5.

Trade Mark—Infringement—Injunction.

B. *et al.* manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows: A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "J. Barsalou & Co., Montreal," was stamped on the reverse side. D. *et al.* manufactured cakes of soap similar in shape and general appearance to those of B. *et al.*, having stamped thereon an imperfect unicorn's head, being a horse's head, with a stroke on the forehead to represent a horn. The words "Very Best" were stamped, one on each side of the head, and the words "A. Bonin, 145 St. Dominique St." and "Laundry" over and under the head. At the trial the evidence was contradictory, but it was shown that the appellant's soap was known, asked for and purchased by a great number of illiterate persons as the "horse's head soap."

Held, Henry J. dissenting, reversing the judgment of the Queen's Bench (appeal side) and restoring the judgment of the Superior Court, that there was such an imitation of B. *et al.'s* trade mark as to mislead the public, and that they were therefore entitled to damages, and to an injunction to restrain D. *et al.* from using the device adopted by them.

Barsalou v. Darling.—ix. 677.

2. Action for infringement of, and for injunction—No resemblance likely to deceive ordinary purchasers—42 Vic. ch. 22, sec. 4.

The appellant, a resident of the United States, manufactured a stove polish put up in small oblong cubical blocks, encased in a wrapper of red paper, on which was printed a vignette or picture of an orb rising above a

Trade Mark—Continued.

body of water, and across the picture were the words " The Rising Sun Stove polish." This comprised the appellant's trade mark, and the same was duly registered in the United States Patent Office, on or about the 8th July, 1870, and ever since that time the appellant used in the United States and in certain parts of Canada the trade mark in the form described.

On the 20th of December, 1879, the appellant registered his trade mark with the Minister of Agriculture of Canada.

About the 22nd October, 1876, the defendant registered a trade mark for stove polish, called by him " The Sunbeam Stove Polish," without any cut or device resembling sunbeams or rays.

Afterwards, about the year 1877, the defendant put an indication of sunbeams upon his labels and upon his boxes containing packages of his stove polish.

This placing the device of sunbeams upon the packages was the subject-matter of the complaint in the present action.

The action was brought for the purpose of recovering damages from the defendant, and for an injunction restraining him from placing the said device of sunbeams upon his stove polish.

The defence fyled by the defendant in the Superior Court amounted to a denial that he took any portion of the appellant's trade mark as a device upon his packages of stove polish.

It was not pretended by the appellant that the packages in which the stove polish was put by the original defendant, resembled those in which the appellant's stove polish was put up, but it was urged that the appellant's stove polish was known throughout Canada and the United States as " The Rising Sun Stove Polish;" that persons hearing of the " Rising Sun Stove Polish," and enquiring therefor, could be deceived into taking "The Sunbeam Stove Polish " in lieu thereof, owing to the imitation of part of the device forming a portion of the appellant's trade mark, and that the device upon the boxes containing the original defendant's packages of stove polish was even a greater infringement of the appellant's trade mark than was the device upon the packages themselves.

The Superior Court for Lower Canada (Johnson J.) dismissed the plaintiff's action on the ground that he failed to show any infringement since the date of the registration of his trade mark, the 20th December, 1879, and that for any infringement prior to that date he was prevented from recovering by 42 Vic. ch. 22 sec. 4. The Court of Queen's Bench concurred in dismissing the action, but upon the merits.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Queen's Bench, that the trade mark used by the defend-

Trade Mark—Continued.

ant did not resemble that of the plaintiff, or a substantial part of plaintiff's, and was not calculated to lead a purchaser to believe that the goods on which it was placed were manufactured by plaintiff; in other words, to deceive ordinary purchasers by enabling defendant to pass his goods as those of the plaintiff.

Appeal dismissed with costs.

Morse v. Martin.—12th January, 1885.

3. **Right to use one's own name—Goods designated by one's own name sold to deceive public.**

Gage carried on partnership with appellant, Beatty, a valuable asset of the business being a series of copy books designed by Beatty, and sold under the name of "Beatty's Headline Copy Books." Beatty retired from the firm, receiving $20,000 for his share in the business, and Gage subsequently registered as a trade mark the word "Beatty" in connection with the copy books.

After the dissolution, Beatty, under an agreement with the Canada Publishing Co., prepared a series of copy books which were sold under the name of "Beatty's New and Improved Headline Copy Books," and a suit was brought by Gage to restrain the appellants from selling the said books.

Held, affirming the judgment of the Court of Appeal, 11 Ont. App. R. 402, Henry and Taschereau JJ. dissenting, that appellants had no right to sell "Beatty's New and improved Headline Copy Books," with the name "Beatty" on the cover in such a position, or with such prominence of color or form, as might deceive purchasers into the belief that they were purchasing Gage's books.

Appeal dismissed with costs.

Canada Publishing Co. et al. v. Gage. 22 C.L.J. 16.—16th November, 1885.

Trader—Transient—By-law of City of Quebec imposing license fee on.

See LICENSE 7.

2. Meaning of, under Insolvent Act, 1875.

See INSOLVENCY 4.

Trading Voyage.

See INSURANCE, MARINE 4.

Treating—On polling day—Corrupt practice.

See ELECTION 20.

Trees—Right of telegraph company to cut.

See TRESPASS 7.

Trespass—Right of action for, to wharf.

See NUISANCE.

Trespass—Continued.

2. Action against speaker and members of Legislative Assembly.

See LEGISLATURE 9.

3. Title by possession.

See LIMITATIONS 2.

4. By individual corporators.

See CORPORATIONS 7.

5. **Registration—Notice—Rev. Stats. N. S., 4 series, ch. 79, secs. 9 and 19.**

R. (the appellant) brought an action against H. (the respondent) for having erected a brick wall over and upon the upper part of the south wall or cornice of appellant's store, pierced holes, &c. H. pleaded *inter alia*, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable re-joinder alleging that plaintiff and those through whom he claimed had notice of the defendant's title to this easement at the time they obtained their conveyances. In 1859 one C., who then owned R's. property, granted by deed to H. the privilege of piercing the south wall, carrying his stovepipe into the flues and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than R's. R. purchased in 1872 the property from the bank of Nova Scotia, who got it from one F., to whom C. had conveyed it—all these conveyances being for valuable consideration. The deed from C. to H. was not recorded until 1871, and R's. solicitor, in searching the title, did not search under C's. name after the registry of the deed by which the title passed out of C. in 1862, and did not therefore observe the deed creating the easement in favor of plaintiff. There was evidence, when attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen.

Held, that the continuance of illegal burdens on R's. property since the fee had been acquired by him were, in law, fresh and distinct trespasses against him, unless he was bound by the license or grant of C.

2. That the deed creating the easement was an instrument requiring registration under the provisions of the Nova Scotia Registration Act, 4 series, Rev. Stats., N. S., ch. 79, secs. 9 and 19, and was defeated by the prior registration of the subsequent purchaser's conveyance for valuable consideration, and therefore from the date of the registration of the conveyance from N. to F., that the deed of grant to H. became void at law against F. and all those claiming title through him.

3. That to defeat a registered deed there must be actual notice or fraud, and there was no actual notice given to R. in this case, such as to disentitle him to insist in equity on his legal priority acquired under the statute.

Trespass—Continued.

Per Gwynne J. dissenting.—That upon the pleadings as they stood on the record, the question of the Registry Act did not arise, and that as the incumbrance complained of had been legally created in 1859, its mere continuance did not constitute a trespass, and that the action as framed should not be sustained.

Ross v. Hunter—vii, 289.

6. Obstruction in harbor of Halifax.

See NAVIGATION 1.

7. Telegraph Company—Erection of line—Right to cut trees—Company bound to show necessity—34 Vic. ch. 52 incorporating Dominion Telegraph Co.

The Act 34 Vic. ch. 52, incorporating the Dominion Telegraph Co., declares in the 4th section that the company may enter upon lands or places, and survey, set off and take such parts thereof as may be necessary for such line, &c., and in case of disagreement between the company and owners of lands so taken, or in respect of any damage done to the same, it may be settled by arbitration in the mode therein described. By section 20 the company are authorized and empowered to enter upon the lands of any person or persons, and survey and take levels, and to set out and ascertain such parts thereof as they shall think necessary and proper for making the said intended telegraph, and all such other works, matters and conveniences as they shall think proper and necessary for the making, effecting, preserving, &c., the said telegraph, and to build and set upon such lands, such station houses and observatories, watch houses, and other works, &c., as and where the said company shall think requisite and convenient, &c. Provided always, that the said company shall not cut down or mutilate any tree planted or left standing for shade or ornament, or any fruit tree, unless it be necessary so to do, for the erection, use or safety of any of its lines.

In an action against the company to recover damages for cutting down ornamental trees, the defendants pleaded that the trees were standing by the side of a public highway, and the defendants were erecting their line of telegraph along the highway; and because the trees were in the way and obstructed the passage of the line of telegraph, and because they deemed it necessary and advisable to do so, they committed the acts complained of by virtue of the statute and not otherwise.

The Supreme Court of New Brunswick, **Held**, 1st. That the arbitration clause in the 4th section did not apply to a case like this, where the complaint was that the defendants had wrongfully destroyed plaintiff's trees; 2nd. That the proviso in the 20th section imposed on the defendants, if the ornamental trees should obstruct their line on the side of the highway where they located it, the burthen of showing that it was necessary for them to take it on that side, and that the defendant's pleas were bad for want of an

Trespass—Continued.

averment that it was necessary to cut the trees, not merely that they deemed it necessary. (See 3 Pugs. & Bur. 553.)

On appeal to the Supreme Court of Canada, **Held,** that the judgment of the court below should be affirmed.

Appeal dismissed with costs.

The Dominion Telegraph Co. v. Gilchrist.—15th February, 1881.

8. Action of against sheriff.

See CONTRACT 14.

9. **Trespass q. c. f., action for—Limitations, Statute of—Judgment entered for defendant, evidence of—Plaintiff's title to locus insufficient, and evidence of continuous possession by defendant sufficient.**

This was an action by L. P. F. for trespass for breaking and entering the plaintiff's close, described as certain land and land covered with water in Dartmouth, being and forming the bed, bank and waters of the stream leading from Dartmouth first Lake and falling into the waters of Halifax harbor, and breaking down and prostrating the fences and walls of plaintiff there standing upon the said close. The case was tried in 1873 before a jury, who were unable to agree and were discharged by the Judge without rendering a verdict. No further proceedings were taken in the cause until November, 1878, when the plaintiff, as assignee in insolvency of said L. P. F., having intervened, it was ordered, by consent of parties, that a verdict should be entered for the plaintiff upon the minutes of the evidence taken on the said trial by the Judge, and that the cause with said evidence should be remitted to the full court in *banco* at the next term thereof, who should have power to draw inferences of fact as a jury might and to enter judgment therein for either party, and, in case of said verdict for the plaintiff being sustained, the court should have power to fix the damages. The plaintiff claimed to be the legal owner of the *locus in quo*, under a deed from the Inland and River Navigation Company, executed by the President and Secretary of that Company to said L. P. F. on the first of April, 1870. The defendant claimed the same land under a deed from the executors of James Stanford, as land to which Stanford acquired a legal title by an exclusive and uninterrupted possession, commencing as far back as 1832, and continuing up to the time of his death in 1870.

The Supreme Court of Nova Scotia entered judgment for the defendant with costs.

On appeal to the Supreme Court of Canada, **Held,** affirming the judgment of the court below, that the plaintiff failed to shew beyond a reasonable doubt that the *locus in quo* was within the boundary of the canal property and included in the deed to L. P. F., but, on the contrary, the court below

Trespass—Continued.

were justified in coming to an opposite conclusion; and further, that the court below were quite justified in coming to the conclusion that if the property was so included and the Company ever had a title to the *locus*, there was evidence of such an exclusive and continuous possession that any such right or title was barred by the Statute of Limitations.

Appeal dismissed with costs.

Creighton v. Kuhn.—13th May, 1882.

10. **Trespass q. c. f.—Marsh lands—Possession—Accretion—Justification as Commissioner of sewers under R. S. N. S. ch. 40—"New work"—Sanction of proprietors.**

This is an action of trespass brought in the Supreme Court of Nova Scotia, on the 23rd day of June, 1881.

The land upon which the trespass in question in this cause is alleged to have been committed is a salt marsh lying outside of a dyked marsh, in the township of Falmouth, and between the dykes and the river Avon. It has been formed within the last forty years, or thereabouts, by an accumulation of mud gathered there from time to time, in front of the plaintiff's land, and extends southwardly and westwardly. It has been staked off for many years on the north-east, designating the division line between that part of it claimed and used for cutting grass by the plaintiff, on one side, and his neighbor Church on the other. It is bounded on the N. W. by the running dyke; on the N. E. by the stakes mentioned; and on all the other portions of it by the Avon river, and a certain creek called the Windmill Creek. After the mud had sufficiently accumulated grass began to grow, which was cut by the plaintiff's brother, George, now deceased, for years. George died five years before the trial, which took place in May, 1882, having first made his will, by which he devised to the plaintiff all his landed property that he died possessed of. The stakes were there since about 1855 or 1856, one of them being a solid, permanent one, and the others, if carried away, being replaced, from time to time, by new ones, taking the solid stake as a guide. The plaintiff and his brother, on one side of these stakes, and Church on the other, cut the grass year after year, or allowed others to do so, although the land does not appear to have yielded grass worth cutting till about 13 years before, one witness said 17. Since that time the plaintiff, either for his brother or for himself, cut and took away the grass growing there, or permitted others to do so. The defendant, who was commissioner of sewers, and acting as such, undertook to cut the ditch in question through the property for the purpose of carrying away the water from the dyke, alleging that the means formerly used were inadequate for that purpose. At the trial defendant disclaimed any right personally, but sought to justify the cutting of the ditch as commissioner of sewers, claiming that the work came within the first part

Trespass—Continued.

of the 4th section of chapter 40, Revised Statutes, N.S., which authorizes a commissioner to build or repair dykes, &c., and that it was not new work within the meaning of the last part of that section, which says that, "In case of the commencement of new work, two-thirds, in interest, of the proprietors of the land shall first agree thereto." It was admitted that there was no such agreement; and, in answer to a question submitted to the jury by the learned judge, they answered that the work was new work.

The action was tried before Smith J. and a verdict given for the plaintiff. A rule *nisi* for a new trial was taken out and was argued before the Supreme Court *en banc*, Macdonald C. J., McDonald, Smith, Weatherbe and Rigby JJ. composing the court. The said rule was discharged, Weatherbe J. and Smith J. dissenting.

On appeal to the Supreme Court of Canada, **Held**, that there was evidence establishing a continuous exclusive possession by the plaintiff, for many years, quite sufficient to enable him to maintain an action of trespass against a wrongdoer who interfered with that possession.

The question of "new work" was purely a question of fact for the jury, and they having found in the affirmative, their finding should not be reversed. The intention of the Legislature in this Act would appear to be to empower the commissioners of sewers to act in making ordinary repairs, or in any sudden emergency, without consultation with or the consent of the proprietors, but that these proprietors should not be taxed for the construction of any new work not immediately essential to the preservation or interests of common property, without their consent to such work being first obtained.

As the defendant entered upon the plaintiff's property to perform this work, without the sanction of the proprietors first obtained, he could not justify the trespass under his commission.

Appeal dismissed with costs. (Henry J. dissenting.)

Davison v Burnham.—17th February, 1885.

11. Interim Injunction in—Order quashing, not appealable.

See JURISDICTION 38.

12. **Measurements and distances—Verdict set aside by Court below on review of the evidence—New trial—Order for not interfered with.**

Action of trespass and trover. The declaration alleged a trespass on certain lands claimed by the plaintiff, and had also a count in trover and a count for the trespass to personal property. The pleas traversed the allegations of trespass and conversion, and the allegations as to property in the plaintiff, and justified by title in some of the defendants.

The place of beginning in the plaintiff's grant was identified and the description then read "running south 52 chains to a large pine tree marked

Trespass—Continued.

'J. G.,' and then west," &c. To reach the *locus* the line should be extended about 50 chains more. To that increased distance the surveyor's line on the ground extended, but there was no pine tree so marked either at the distance expressed in the description, or at the end of the surveyor's line. At the latter point, however, a spruce tree was marked "H. G." and "J. G." The plan attached to the grant represented the lot as a different shape from that claimed, and the area expressed in the grant was inconsistent with plaintiff's contention.

The cause was tried before Rigby J. and a jury, and a verdict found for plaintiff. This verdict was set aside by the court *en banc*, McDonald C.J. and Weatherbe and Thompson JJ. holding that the plaintiff had given no evidence of title to the *locus*, and Rigby J. holding that the preponderance of evidence was against plaintiff's contention. (5 Russ. & Geld. 431.)

On appeal to the Supreme Court of Canada, **Held**, that there was evidence for the jury that the line claimed by the plaintiff was the western line of his grant. The case, however, was not so clear as to justify the court in reversing the decision of the court below, come to on a review of the evidence; but was a proper case for further consideration on a new trial. (Henry J. dissenting.)

Appeal dismissed with costs.

Gates v. Davidson.—12th May, 1885.

13. Water lots in Toronto harbour—Interference with use of, by owner —Navigation—Easement—Crown grant.

See NAVIGATION 4.

14. Title—Declaration of—Description—Boundaries—Patent improvidently granted.

The action was brought for certain alleged trespasses charged to have been committed by the defendant during the winters of 1878–9, 1879–80, and 1880–1, upon land alleged by the plaintiff to be part of lots 34 and 35 in Concession C, in the Township of Etobicoke, in the County of York and Province of Ontario, and to be his property. The plaintiff claimed damages for the cutting and removal of timber, and an injunction to restrain any future trespass.

The entry and cutting of some timber were, at the trial, admitted on the part of the defendant, but it was contended as alleged in his statement of defence, that the land in question was not part of lots 34 and 35 in Concession C, but part of lots 34 and 35 in Concession B, and was his property.

Both parties derived their title under one Henry John Boulton, who executed a mortgage bearing date April 30th, 1856, to one Samuel Foster, comprising among other lands "lots numbers thirty-four and thirty-five in Concession B, in the township of Etobicoke."

Trespass—Continued.

A suit in chancery was brought for a foreclosure of that mortgage, and in that suit a final order was made March 1st, 1874, for the sale of the mortgaged lands, and under it lots 34 and 35 in Concession B, in the Township of Etobicoke, were sold to one James Metcalfe.

The said lots were conveyed to the said James Metcalfe in pursuance of such sale by the administrator and the sole devisee of the mortgagee Foster, by deed, dated April 10th, 1875.

By deed dated May 8th, 1875, James Metcalfe conveyed to John Blackwell lots numbers 34 and 35 in broken front, concession B.

By deed dated July 14th, 1875, the said John Blackwell conveyed to the defendant lots 34 and 35 in broken front, concession B.

By deed dated October, 27th, 1857, (after the mortgage from Boulton to Foster), Henry John Boulton, the mortgagor, conveyed to the plaintiff a parcel of land containing seven acres more or less, composed of parts of lots numbers thirty-four and thirty-five in concession B., in the said township of Etobicoke, known as the Ox-bow, &c., describing it particularly by metes and bounds. This parcel, as described in this deed by metes and bounds, is the land in question in this action.

It was not disputed by the defendant that by this deed the plaintiff acquired the equity of redemption in the land in question subject to the mortgage from Boulton to Foster, but he contended that by the mortgage sale under the decree of the court, the title passed to the purchaser free from the equity as being a part of lots 34 and 35 in concession B., the whole of which lots were included in the mortgage and sold to Metcalfe.

The plaintiff on the other hand contended that the land in question, although erroneously described in the deed of it from Boulton to him, as forming part of lots 34 and 35 in concession B., really formed part of lots 34 and 35 in concession C., and was therefore not included in the mortgage from Boulton to Foster.

In the alternative the plaintiff contended that if the land in question did not form part of concession C., it formed part of broken front parcels of land lying in front of, and separate from lots 34 and 35 in concession B., and therefore was not included in the mortgage from Boulton to Foster, which contains no mention of any broken front.

On the second day of April, 1883, after the commencement of the action, the Crown granted to the plaintiff a piece of land said to contain $3\frac{75}{100}$ acres, and being the north end of the Ox-bow or land in question, describing it by metes and bounds as being lot number thirty-five in concession C. of the township of Etobicoke.

Held, reversing the judgment of the court below, that the evidence established that there were no such lots as 34 and 35 in concession C; that

Trespass—Continued.

the various descriptions in the patents and other title deeds also showed that the lands in dispute formed part of lots 34 and 35 in concession B, and therefore the description in the mortgage from Boulton to Foster was sufficient to include such lands, and the defendant was entitled to a declaration that he was seized in fee of such lands; and that the patent issued on the 20th April, 1883, was void as having been improvidently granted.

Appeal allowed with costs.

Johnson v. Crosson.—9th April, 1886.

Trover—**Action of, against sheriff—Transfer of property by execution debtor—Misdirection by jury.**

In an action of trover or conversion against appellant, high sheriff of the County of Cumberland N. S. to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff, and justification under a writ of execution against the execution debtor. The learned judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shown the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence."

Held, that the sheriff was entitled under his pleas to have it left to the jury to say whether the plaintiff had shown title or right of possession to the goods in question, and therefore there was misdirection.

McLean v. Hannon.—iii. 706.

See BILL OF LADING.
" CHATTEL MORTGAGE.

Trusts and Trustees—Agent for sale of lands—Obtaining conveyance from pretended purchaser.

See SALE OF LANDS 5.

2. Of Quebec Turnpike Roads.

See PETITION OF RIGHT 6.
" ROAD.

3. Contract by trustee for Crown.

See PETITION OF RIGHT 7.

4. Land sold for joint benefit.

See SALE OF LANDS 7.

5. Defendant sued as trustee of church property—Denial of quality by.

See PETITORY ACTION.

Trusts and Trustees—Continued.

6. Assignment in trust—Legal title of trustee as against equitable title of mortgagee of chattels—Priority.

See CHATTEL MORTGAGE 3.

7. Charitable trust—Grant of land for school.

See CHARITABLE TRUST.

8. Commutation Fund—By-law of Synod—Altering disposition of.

See COMMUTATION FUND.

9. **Shares held in trust—Bank—Transfer to, as security, effect of—Mandatory and pledgee, obligations of—Action to account—Arts. 1755, 2268, C.C. (P. Q.)**

S. brought an action against the Bank of Montreal to recover the value of shares in the Montreal Rolling Mills Company, transferred to the bank, under the following circumstances. S.'s money was originally sent out from England to J. R., at Montreal, to be invested in Canada for her. J. R. subscribed for a certain amount of stock in the Montreal Rolling Mills Company as follows:—"J. Rose in trust," without naming for whom, and paid for it with S.'s money. He sent over the certificates of stock to S., and subsequently paid her the dividends he received on the stock. Becoming indebted to the Bank of Montreal, R. transferred to the manager of the bank as security for his indebtedness, some 350 shares of the Montreal Rolling Mills Company, and the transfer showed on its face that he held these shares "in trust." The Bank of Montreal then received the dividends, credited them to J. R., who paid them to S. J. R. subsequently became insolvent, and S., not receiving her dividends, sued the bank for an account.

Held, reversing the judgment of the court below, Strong J. dissenting, that there was sufficient notice to the bank that J. R. was acting as agent or mandatory of S., and the bank not having shewn that J. R. had authority to sell or pledge the said stock, S. was entitled to get an account from the bank. Arts. 1755 and 2268 C. C.

Appeal allowed with costs.

[An appeal to the Privy Council is now pending.]

Sweeny v. Bank of Montreal. 5 C. L. T. 503; 21 C. L. J. 355.—22nd June, 1885.

10. Purchase by Mortgagee at sale—Right of Mortgagor to redeem—Trustee for sale—Limitations—R. S. Ont. ch. 108 sec. 19.

See MORTGAGE 16.

Ultra Vires.

See RAILWAYS AND RAILWAY COMPANIES 1.

" LEGISLATURE.

" MARITIME COURT OF ONTARIO.

" PARLIAMENT OF CANADA.

Usage—Existence of.

See INSURANCE, MARINE 1.

Use and Occupation—Action for—Mesne profits—Tenants in common.

See TENANTS IN COMMON.

2. Of Land—Action for—Valuation.

See LAND 3.

Vendor and Purchaser.

See SALE OF GOODS.

" SALE OF LANDS.

Verdict—For Excessive damages.

See JURISDICTION 22.

2. Against weight of Evidence.

See JURISDICTION 23.

3. Affirmed by two Courts on weight of Evidence not interfered with.

See EVIDENCE 21.

4. Rule to reduce—Or for new trial.

See SALE OF LANDS 12.

" NEW TRIAL.

Vice-Admiralty—Court of—Jurisdiction to enforce penalties for illegal distilling.

See PARLIAMENT OF CANADA 18.

Voluntary Payment.

See ASSESSMENT 4.

Warehouse Receipts—**34 Vic. ch. 5 D—Right of property.**

At the request of the Consolidated Bank, to whom the Canada Car Company owed a large sum of money, M. consented to act as warehouseman to the company for the purpose of storing certain car wheels and pig iron, so that they could obtain warehouse receipts upon which to raise money. The company granted M. a lease for a year of a portion of their premises, upon which the wheels and iron were situate, in consideration of $5. The Consolidated Bank then gave him a written guarantee that the goods should be forthcoming when required, and he therefore issued a warehouse receipt to the company for the property, which they endorsed to the Standard Bank and obtained an advance thereon, which they paid to the Consolidated Bank. It appeared that M. was a warehouseman carrying on business in another part of the city; that he acquired the lease for the purpose of giving warehouse receipts to enable the company to obtain an advance from the Consolidated Bank; and that he had not seen the property himself, but had sent his foreman to examine it before giving the receipt. In February, 1877,

Warehouse Receipts—Continued.

an attachment in insolvency issued against the company, and K. *et al.*, as their assignees in insolvency, took possession of the goods covered by this receipt, claiming them as part of the assets of the estate. M. then sued K. *et al.* in trespass and trover for the taking.

Held, per Strong, Taschereau and Gwynne JJ., affirming the judgment of the Court of Appeal for Ontario, and that of the Court of Queen's Bench, that M. never had any actual possession, control over, or property in, the goods in question, so as to make the receipt given by M., under the circumstances in this case, a valid warehouse receipt within the meaning of the clauses in that behalf in the Banking Act.

Per Ritchie C.J. and Fournier and Henry JJ., *contra*, that M. *quoad* these goods was a warehouseman within the meaning of 34 Vic. ch. 5 D, so as to make his receipt endorsed effectual to pass the property to the Standard Bank for the security of the loan made to the company in the usual course of its banking business.

Milloy v. Kerr.—viii, 474.

2. **34 Vic. ch. 5 (D.) intra vires.**

The appellants discounted for a trading firm on the understanding that a quantity of coal purchased by the firm should be consigned to them, and that they would transfer to the firm the bills of lading, and should receive from one of the members of the firm his receipt as a wharfinger and warehouseman for the coal as having been deposited by them, which was done, and the following receipt was given: "Received in store in Big Coal House warehouse at Toronto, from Merchants' Bank of Canada (at Toronto), fourteen hundred and fifty-eight (1458) tons stove coal, and two hundred and sixty-one tons chestnut coal, per schooners 'Dundee,' 'Jessie Drummond,' 'Gold Hunter,' and 'Annie Mulvey,' to be delivered to the order of the said Merchants' Bank to be endorsed hereon. This is to be regarded as a receipt under the provisions of Statute 34 Vic. ch. 5—value $7,000. The said coal in sheds facing esplanade is separate from and will be kept separate and distinguishable from other coal. (Signed), W. Snarr. Dated 10th August, 1878." The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents, and filed a bill impeaching the validity of the receipt. The Chancellor who tried the case found that the receipt given was a valid receipt within the provisions of the Banking Act, and was given by a warehouseman, and that the bank was entitled to hold all the coal in store of the description named in the receipt. This judgment was reversed by the Court of Appeal for Ontario.

On appeal to the Supreme Court of Canada, **Held,** reversing the judgment of the Court of Appeal, that it is not necessary to the validity of the

Warehouse Receipts—Continued.

claim of a bank under a warehouse receipt, given by an owner who is a warehouseman and wharfinger and has the goods in his possession, that the receipt should reach the hands of the bank by indorsement, and that the receipt given by W. S. in this case was a receipt within the meaning of 34 Vic. ch. 5 (D).

2 (Ritchie C.J. and Strong J. dissenting),—That the finding of the Chancellor as to the fact of W.S. being a person authorized by the statute to give the receipt in question should not have been reversed, as there was evidence that W. S. was a wharfinger and warehouseman.

3. Per Fournier, Henry and Taschereau JJ.—That sections 46, 47 and 48 of 34 Vic. ch. 5 (D.) are *intra vires* of the Dominion Parliament.

Merchants' Bank of Canada v. Smith.—viii, 512.

Wager—By election agent.

See ELECTION 20.

Waiver—Of notice of abandonment.

See INSURANCE, MARINE 9.

Warranty—Effect of in sale of timber limits and lands—C. C. Arts. 515, 518.

See SALE OF LANDS 1.

2. No other insurance.

See INSURANCE, MARINE 17.

Water Lots—In Toronto harbor—Trespass—Easement—Navigation.

See NAVIGATION 4.

Will—Construction - Remoteness - Estate tail—Heir-at-Law.

P. F., sen., proprietor of 180 acres of Lot 13, 10th Concession of the Township of Drummond, Lanark Co., by a will, dated 3rd December, 1845, devised as follows: "It pleased the Lord to give me two sons equally dear to my heart; to give them equal justice I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free of any encumbrance, except the burying ground and the quarter of acre for a place of worship. To Duncan Ferguson, my son, I bequeath my family bible and five shillings over and above what I have done for him * * * To Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer State dues and public burdens himself, and the lawful male offspring of his body until the proper heir are come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber whatsoever kind away off the land, or bringing any other family on to it but his own. But if he leaves a situation so advantageous, and cannot maintain himself upon it * * * * I appoint Peter

Will—Continued.

McVicar, my grandson, to take charge of the whole place—farm and all that pertains to it—and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age as aforesaid." The testator died in 1849, leaving two sons, D. and P., jun., and three daughters and one grandson, P. McV., being a son of a daughter. When the testator died the property was subject to a lease, which expired in 1857. P. F., jun., after having gone into occupation, in that year conveyed his interest to P. McV. and left the place. Subsequently, the appellant, son of D. F., and heir-at-law of P. F., senr., took a conveyance from P. McV., and thereupon the respondent, heir-at-law of P. F., junr., brought an action in ejectment, claiming that under the will his father took an estate tail which descended to him. The Court of Queen's Bench gave judgment in favour of the heir-at-law, which judgment was reversed by the Court of Appeal for Ontario.

Held, on appeal, that the devise by the testator to his first great grandson being void for remoteness, and there being no intention to give to P. F., junr., any estate or interest independent of, or unconnected with, the devise to the great grandson, there was no valid disposition to disinherit the heir-at-law, and therefore the plaintiff was not entitled to recover. (Strong J. dissenting.)

Per Ritchie J.—Where the rule of law, independent of and paramount to the testator's intentions, defeats the devise, the proper course is to let the property go as the law directs in cases of intestacy.

Ferguson v. Ferguson.--11, 497.

2. **Ejectment—Statute of Limitations—Acceptance of deed by person in possession—"Any issue of his body lawfully begotten or children of such issue surviving him"—Question not raised at trial.**

In 1830 James Gray took possession of east half of lot No. 13, in the 1st concession of East Hawkesbury. He resided on the west half of said lot with his sons, and occasionally assisted in working the whole lot, until his death, which occurred in 1857. In 1847-48, while his son Adam was working the east half, and in possession, James Gray devised it to him by will, and the land was known as "Our Adam's." In 1857, James Gray made a second will, in which he said: "I give and devise to my son John Gray, his heirs and assigns, &c., to have and to hold the premises above described to the said John Gray, his heirs and assigns forever. But if my said son John should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then in such case I will and devise the said, &c., to my son Thomas Gray, his heirs and assigns, to have and to hold the same at the death of the said John Gray." After the father's death Adam remained in possession, and in 1862 he accepted a conveyance with full covenants for

Will—Continued.

title from John. On 15th September, 1868, Adam conveyed to A. McC., one of the respondents, and R., the other respondent, claimed title under A. McC. as landlord. In 1874 John died without leaving any lawful issue, and on the 5th May, 1875, Thomas (appellant) brought ejectment against respondents, but neither at the trial nor in term was any question raised as to the effect of John's deed.

Held, 1. That James Gray, the father, at the time of his death had acquired a title to the lot by length of possession. That, under the will, John Gray took an estate in fee, with an executory devise over to Thomas Gray, in the event that happened of John Gray dying without leaving lawful issue.

2. That Adam, having recognized, in 1862, John's interest in the land by purchasing from him, by deed of bargain and sale, a limited and contingent estate, its effect was to stop the running of the statute, and the respondents cannot set up Adam's possession under John to defeat the contingent estate.

3. That the Court of Appeal could not refuse to entertain the question as to the effect of John's deed, although not raised at the trial nor in term.

Gray v, Richford.—II, 431.

3. **Administratrix with Will annexed, purchase of real estate by, when personal assets of testator sufficient to pay off incumbrance—Subsequent parol agreement to sell part of said land null—Compensation money for land, right to and how to be treated—Revised Statutes of Nova Scotia (4th Series) ch. 36 sec. 40.**

About 1837 Andrew McMinn devised his lands to his wife, Mary McMinn, for life, with remainder to Maria Kearney. Letters of administration with the will annexed were granted to the widow. At the time of testator's death the lands were mortgaged for £150. A suit to foreclose this mortgage was instituted after the testator's death, and it was alleged that under it a foreclosure was obtained, and the property sold, and purchased by the administratrix for £905. There was evidence that the administratrix received personal assets of the testator sufficient to have paid off the mortgage, had she chosen so to apply them. The sum of £725 was lent to the administratrix by Ann Kean, her daughter by a former marriage. The administratrix then sold the property to the public authorities for £1,750, out of which she paid her daughter £400. From 1858 the daughter, with the leave of the administratrix, occupied about ¼ of an acre of the land, until, in 1873, under the authority of an expropriation Act, she was ejected from it, the Commissioner taking in all 3 acres $\frac{3}{10}$ths of this property, the balance being in the occupation of Maria Kearney and her husband, Francis Kearney (the appellants). These 3 acres 3 ths were appraised at $2,310, and that sum was paid into court to abide a decision as to the legal or equitable rights of the parties respectively. Ann Kean claimed a title to the whole of the land

Will—Continued.

taken, under an alleged parol agreement with her mother, that she should have the land in satisfaction of £325, the residue unpaid of the loan of the £725, and obtained a rule *nisi* for the payment to her of the sum of $2,310, the amount awarded as compensation for the land. In May, 1872, the administratrix executed an informal instrument under seal, purporting to be a lease of her life estate to the appellants in the whole property, reserving a rental of $80 a year and liberty to occupy two rooms in a dwelling house then occupied by her. On a motion to make this rule absolute, several affidavits were filed, including those of the appellants. On the 18th January, 1875, the matter was referred to a master, to take evidence and report thereon, subject to such report being modified by the court or a judge. The master reported that the appellants had the sole legal and equitable rights in the property. On motion to confirm that report, the court made an order apportioning the $2,310 between Ann Kean and the appellants, the former being declared entitled to be paid $1,015.61, and the latter, on filing the written consent of Mrs. McMinn, the residue of the $2,310.

Held, on appeal, 1st. That the administratrix, having personal assets of the testator sufficient to discharge the mortgage, was bound in the due course of her administration to discharge said incumbrance, and that the parol agreement made by her with her daughter was null and void.

2nd. That when the land is taken under authority of legislative provisions similar to Revised Statutes of Nova Scotia (4th Series), ch. 36 sec. 40, *et seq.*, the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land.

Kearney v. Kean. iii, 332.

4. **Construction of—Tenants in common or joint tenants—Costs.**

By will J. H. A. directed:—"Until the expiration of four years from the time of my decease, and until the division of my estate as hereinafter directed, my executors shall every year place to the credit of each of my children the sum of sixteen hundred dollars, and if any of my children shall have died, leaving issue, then a like sum to and among the issue of the child so dying, such sum of sixteen hundred dollars to be paid by half yearly instalments to such of my children as shall be of age or be married; but if any advances shall have been made to any of them, and interest shall be due thereon, such interest to be deducted from the said sum of sixteen hundred dollars. As regards the division, appropriation, and ultimate disposition of my estate, it is my will that, subject to the payment of my just debts and legacies, bequests and annuities, I have heretofore given or may hereafter give, and to the expenses of the management of my estate, all the rest, residue and remainder of my estate, and the interest, increase

Will—Continued.

and accumulation thereof, be distributed, settled, paid and disposed of, to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead, at the time and in the manner following, that is to say; that immediately, on the expiration of four years from my death, my executors, after making such provision as may be necessary for the payment of any debts and legacies that may be outstanding and unpaid, and of outstanding annuities, and of the expense of the management of my estate, shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before them have died, leaving lawful issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said then surviving children, and one such share to the lawful issue of each of my then deceased children, whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child. And it is my will, and I direct, that from henceforth a separate account shall be kept by my trustees of each share, and of the interest and profit thereof, and the payments made to or on account of or for the maintenance and education of each of my said children or issue, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that all accumulations and profits that may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue—it being my intention that after such division shall take place, the maintenance, education and support of each of my children while under the age of twenty-one years shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before them died, leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children. And that my children, and such issue of deceased children being of age, that is to say, of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled." On 26th May, 1864, M. L. A., testator's daughter, married C. H. F., appellant. Testator died 24th December, 1870. On 25th August, 1872, testator's daughter died, leaving three children. H.A.F.,E.B.F., and W.S.F. On the 14th September, 1877, H. A. F., the eldest son of appellant and M. L. A., died. Thereupon the appellant claimed that the three brothers took their mother's share under the will as tenants in common and the property being personal property, H. A. F.'s share vested in the appellant, his father.

Will—Continued.

Held, that the intention of the testator was that his estate should be divided, and that the children of testator's daughter took as tenants in common, and consequently on the death of the eldest son the whole right, title and interest in his share, vested in the appellant.

Fisher v. Anderson.—1v, 406.

5. **Annuities, sale of corpus to pay.**

J. R. died on the 3rd August, 1876, leaving a will dated 6th August, 1875, and a codicil dated 21st July, 1876. By the will he devised to his widow an annuity of $10,000 for her life, which he declared to be in lieu of her dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules, marked respectively, A, B, C, D and E, annexed to his will, upon these trusts, viz.: Upon trust, during the life of his wife, to collect and receive the rents, issues and profits thereof which should be, and be taken to form a portion of his "general estate;" and then from and out of the general estate, during the life of the testator's wife, the executors were to pay to each of his five daughters the clear yearly sum of $1,600 by equal quarterly payments, free from the debts, contracts and engagements of their respective husbands. Next, resuming the statement of the trusts of the scheduled property specifically given, the testator provided, that from and after the death of his wife, the trustees were to collect and receive the rents, issues, dividends and profits of the lands, etc., mentioned in the said schedules, and to pay to his daughter M. M. A., the rents, etc., apportioned to her in schedule A; to his daughter E. of those mentioned in schedule B; to his daughter M. of those mentioned in schedule C; to his daughter A. of those mentioned in schedule D; and to his daughter L. of those mentioned in schedule E; each of the said daughters being charged with the insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss, it should be optional with the parties to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the will there were the following words:—"The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise and bequeath the same to my said executors and trustees, upon the trusts

Will—Continued.

and for the intents and purposes following:" He then gave out of the residue a legacy of $4,000 to his brother D. R., and the ultimate residue he directed to be equally divided among his children upon the same trusts with regard to his daughters, as were thereinbefore declared, with respect to the said estate in the said schedules mentioned. The rents and profits of the whole estate left by the testator proved insufficient, after paying the annuity of $10,000 to the widow, and the rent of and taxes upon his house in L, to pay in full the several sums of $1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether the executors and trustees had power to sell or mortgage any part of the *corpus*, or apply the funds of the *corpus* of the property, to make up the deficiency.

Held, on appeal, that the annuities given to the daughters, and the arrears of their annuities, were chargeable on the *corpus* of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity.

Lewin v. Almon.—v, 514.

6. **Construction of—Surplus—Whether residuary personal estate of the testator passed.**

Among other bequests the testator declared as follows:—"I bequeath to the Worn-out Preachers' and Widows' Fund in connection with the Wesleyan Conference here the sum of £1,250, to be paid out of the moneys due me by Robert Chestnut, of Fredericton. I bequeath to the Bible Society £150. I bequeath to the Wesleyan Missionary Society in connection with the Conference the sum of £1,500." Then follow other and numerous bequests. The last clause of the will is: "Should there be any surplus or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, namely, the Worn-out Preachers' and Widows' Fund, Wesleyan Missionary Society, Bible Society." When the estate came to be wound up it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed on the one hand, under the will, by these charitable institutions, and on the other hand by the heirs-at-law and next of kin of the testator, as being residuary estate, undisposed of under his will.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the "surplus" had reference to the testator's personal estate out of which the annuities and legacies were payable; and therefore a *pro rata* addition should be made to the three above-named bequests, statutes of Mortmain not being in force in New Brunswick. (Fournier and Henry JJ. dissenting.)

Ray et al. v. The Annual Conference of New Brunswick, &c.—vi, 308.

Will—Continued.

7. **Validity of—Insanity—Legacy to wife—Error—False cause—Question of fact on appeal—Duty of Appellate Court.**

P. L., executor under the will of the late W. R., sued W. C. A., curator of the estate of W. R. during the lunacy of the latter, to compel W. C. A. to hand over the estate to him as executor. After preliminary proceedings had been taken, E. R. (the appellant) moved to intervene and have W. R.'s last will set aside, on the ground that it had been executed under pressure by D. J. M., W. R.'s wife, in whose favor the will was made, while the testator was of unsound mind. The appellant claimed and proved that D. J. M. was not the legal wife of W. R., she having another husband living at the time the second marriage was contracted. W. R., who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about $16,000. On the 4th October, 1878, W. R. made a will by which he bequeathed $4,000 and all his household furniture and effects to his wife J. M.; $2,000 to his niece E. R.; $1,000 to F. S. for charitable purposes, and the remainder of his estate to his brothers, nephews, and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving $800 to his wife J. M., $400 to each of his nieces M. and E. R., and $400 to his brother, with reversion to the nieces if not claimed within a year, and the remainder to E. R. On the 17th November, 1878, W. R. made another will, which is the subject of the present litigation, and by which he revoked his former wills and gave $2,000 to F. S. for the poor of the parish of St. Rochs, and the remainder of his property to his "beloved wife J. M." On the 10th January following W. R. was interdicted as a lunatic, and a curator appointed to his estate. He remained in an asylum until December, 1879, when he was released, and lived until his death with his niece E. R., sister of the appellant. Chief Justice Meredith upheld the validity of the will, and his decision was affirmed by the Court of Queen's Bench.

On appeal to the Supreme Court of Canada **Held**, 1. Reversing the judgments of the courts below, Ritchie C.J. and Strong J. dissenting, that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 21st November, was that the testator, at the date of the making of the will, was of unsound mind.

2. That, as it appeared that the only consideration for the testator's liberality to J. M. was that he supposed her to be "my beloved wife Julie Morin," whilst at that time J. M. was, in fact, the lawful wife of another man, the universal bequest to J. M. was void, through error and false cause.

3. That it is the duty of an Appellate Court to review the conclusion arrived at by courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credibility of any of the

Will—Continued.

witnesses, but upon the proper inference to be drawn from all the evidence in the case.

[An application for leave to appeal was refused by the Judicial Committee of the Privy Council.]

Russell v. Lefrançois.—VIII, 335.

8. **Construction of—Art. 889, civil code—Liability of universal legatee for hypothec on immoveables bequeathed to a particular legatee.**

On the 30th April, 1869, H. S. being indebted to J. P. in the sum of $3,000, granted a hypothec on certain real estate which he owned in the city of Montreal. On 28th June, 1870, H. S. made his will, in which the following clause is to be found: "That all my just debts, funeral and testamentary expenses be paid by my executors, hereinafter named, as soon as possible after my death." By another clause he left to W. H. in usufruct, and to his children in property, the said immoveables which had been hypothecated to secure the said debt of $3,000. In 1879 H. S. died, and a suit was brought against the representative of his estate to recover this sum of $3,000 and interest.

Held, reversing the judgment of the Court of Queen's Bench, Strong J. dissenting, that the direction by the testator to pay all his debts included the debt of $3,000 secured by the hypothec.

Per Fournier, Taschereau and Gwynne JJ.—When a testator does not expressly direct a particular legatee to discharge a hypothec on an immoveable devised to him, art. 889 of the C. C. does not bear the interpretation that such particular legatee is liable for the payment of such hypothecary debt without recourse against the heir or universal legatee.

Harrington v. Corse.—IX, 412

9. **Construction of—Executor, powers of—Prohibition to alienate—Art. 972 C. C. P. Q.**

By the 3rd clause of her will, H. M., the testatrix, disposed of all her property, moveables, and immoveables, in favor of her children as universal legatees. The legacy was subject to the extended powers of administration conferred by the 5th clause of the will (referred to in the statement of the case) and also to the power to alter the disposition in favor of the testatrix's children given by the same clause to her husband H. L., the executor and also by the will the executor was exonerated from the obligation of making an inventory and rendering an account. H. L., in his quality of testamentary executor and administrator to the estate of the said H. M., endorsed accommodation promissory notes signed by C. L., one of his children, and the respondent, as holder thereof for value, obtained judgment against both the maker and indorser. An execution was subsequently issued against H. L., *esqualité*, and certain real estate of the late H. M., which he

Will—Continued.

detained in his said capacity, was seized and advertised for sale. J. D. L. *et al.*, (the appellants), who are the only children of the defendant H. L., and his wife, opposed the sale of the property seized on the ground that the said property was *insaisissable*.

Held, reversing the judgment of the court below, Taschereau and Gwynne JJ. dissenting, that the endorsements were not authorized by the will, and that the clause in the will, exempting the property of the testatrix from execution, is valid, and must be given effect to. Art. 972 C. C.

Lionais v. Molson's Bank.—x, 526.

10. **Institute—Substitute—Revendication—Prescription—Possession in good faith—Art. 2268 C.C.P.Q.**

On the 27th Oct., 1828, Suzanne Pepin, widow of Toussaint Dufresne, made her will in authentic form, by which she instituted her eleven children her universal legatees; one of the said children being Jean Baptiste Dufresne, the father of the plaintiffs. The will contained the following clause concerning the property bequeathed to the children:—"*Pour être partagé également, pour iceux en jouir leur vie durante, pour après leur mort, retourner et appartenir à leurs enfants nés et naître en legitime mariage, ou à leurs héritiers suivant la loi.*" The testatrix died on the 29th July, 1834, and her will was published (*lu et publié*) on the 15th April, 1835. A partition took place between her eleven children, and the lot of land mentioned in the declaration of the plaintiffs fell to Jean Baptiste Dufresne, their father, who had the enjoyment of the land up to the time of his death, on the 5th March, 1872.

The said Jean Baptiste Dufresne left eight children, the plaintiffs being six of them.

The will of Suzanne Pepin having created a substitution in favour of her grandchildren, the plaintiffs renounced to the succession of their father, Jean Baptiste Dufresne, and claimed all the rights that might accrue to them as substitutes in virtue of the will of their grandfather, and they took possession of the lot of land above referred to.

During his enjoyment of the said lot of land in virtue of the will of his mother, Jean Baptiste Dufresne by two deeds, dated respectively the 18th Dec., 1866, and 8th Oct., 1868, sold to the defendants the right to work, draw and carry away all the sand that could be found in certain parts of the said lot of land described in the said deeds. The defendants opened sand pits on the said property and removed all the valuable sand which could be found during the period from 1867 to 1870.

The plaintiffs claimed that their father, Jean Baptiste Dufresne, as institute to the substitution created in their favour by the will of Suzanne

Will—Continued.

Pepin, had no right to make the above sale, and claimed from the defendants the value of the sand so removed.

The Superior Court of the Province of Quebec rendered judgment in accordance with the respondents' conclusions. The Court of Queen's Bench for that province (appeal side) confirmed the judgment of the Superior Court in principle, reducing the amount awarded by two-eighths, in respect of the shares of a daughter not properly represented in the cause, and of a son who had ratified the sales made by his father.

Held, affirming the judgments of the courts below, that the substitute has on the opening of the substitution a personal action, founded on the obligation which the law imposes upon the institute (grévé) to restore the property, to compel the latter to deliver to him any property detached from the land and so converted into moveables which remains in specie in his possession, or to indemnify him in money for any property so detached which may have gone into the hands of *tiers détenteurs*.

As against *tiers détenteurs* of moveables detached from the land which is the subject of substitution, the substitute has a real action, an action of revendication, for the recovery of his property. In such an action alternative conclusions may be taken that the *tiers détenteur* may deliver the thing sought to be recovered, or, if being a possessor in bad faith he has ceased to possess by consuming the thing, or by disposing of it to another, that he may be made to pay damages. If it is alleged in the action that the thing has already been destroyed, consumed, or converted, then the first alternative conclusion may be suppressed.

As regards prescription, the action of the substitute falls under article 2,268 C. C., and the *tiers détenteur* of moveable property subject to substitution, in order to avail himself of prescription must show possession in good faith for three years from the date of the opening of the substitution before the institution of the action. The publication and insinuation of the will of Suzanne Pepin was not sufficient notice from which to presume bad faith, which must be proved, but the contracts of sale of 18th December, 1866, and 8th October, 1868, described the property as belonging to the "succession Dufresne," and this was sufficient to put them in bad faith, as they had no right to assume their *auteur* was the absolute proprietor.

Appeal dismissed with costs.

Bulmer v. Dufresne.—9th May, 1879.

11. Will, construction of—Legacy—Condition.

A testator, by the 3rd clause of his will, devised and bequeathed the residue of his estate to his wife, four sons and two daughters, the devise and bequest being subject to the condition that they should all unite in payin

Will—Continued.

to the executors, before the 1st January, 1877, the sum of $1,600, and the same sum before the 25th January, 1882, said sums to pay the shares of two of the sons, Alexander and Duncan. By the 4th clause he gave the sum of $1,600, without condition, to each of his sons, Alexander and Duncan. By the 5th clause, he devised to his sons, Douglas and Robert, two lots; and after giving several legacies to his daughters, he proceeded: "And further that Alexander and Duncan work on the farm until their legacies become due." Alexander left the farm in 1871 and entered into mercantile pursuits.

Held, reversing the judgment of the Court of Appeal for Ontario (6 Ont. App. R. 595), Ritchie C.J. and Henry J. dissenting, that the construction of the paragraph in the will, bequeathing the $1,600 to Alexander must be based on a consideration of the whole will, and that the intention was that Alexander's right to receive his legacy was conditional on his working on the farm and assisting in earning it.

Appeal allowed with costs.

Oliver v. Davidson.—xi, 166.

12. Removal of executrix for wasteful and fraudulent administration.

See EXECUTOR 5.

13. **Construction of—Contingent interest.**

T. McK., a testator, having previously given all his estate, real and personal, to trustees in trust for his wife for life, or during her widowhood, made a devise as follows:—"In trust also, that at the death, or second marriage of my said wife, should such happen, my son Thomas, if he be then living shall have and take lot number 1, etc., which I hereby devise to him, his heirs, and assigns to and for his and their own use for ever." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage all his personal property and estate remaining was to be equally divided among his children; provided always, that in the event of any child dying without issue before coming into possession of his or her share "of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue, if any, as shall have died leaving issue. The residuary clause was as follows:—"All other my lands, tenements, houses, hereditaments, and real estate," etc.

Held, Ritchie C.J. and Fournier J. dissenting, reversing the judgment of the court below, that the interest devised to Thomas was contingent upon his surviving his mother.

Will—Continued.

Per Strong J.—As a devise of other lands includes undisposed of interests in lands, in which partial interests, or contingent interests which have failed, have been previously given, the devise of lot number 1 at Thomas's death formed part of the residuary lands of the estate, subject to the provisions as to survivorship and substitution mentioned in the will. Mrs. E. K., one of the testator's children, having died in the lifetime of her mother, the substitution in favor of her children was restricted to the children who survived their mother, and they became entitled absolutely among themselves, as tenants in common, to an equitable estate in fee simple in remainder expectant on the death or second marriage of the testator's widow, in one undivided fourth part of said lot No. 1. And upon the death of the said testator's widow, the testator's children A. K., C. McK. and J. C., the three surviving daughters of the testator became entitled absolutely to an equitable estate in the remaining three undivided fourth parts of lot 1 as tenants in common in fee simple. (See *Keefer* v. *McKay*, 9 Ont. App. R. 117.)

Appeal allowed with costs.

Merchants Bank, v. Keefer.—12th January, 1885.

14. **Will, construction of—Devise to creditor of certain specific lands and of unascertained chattels not superseded—Satisfaction.**

The will of the late John Severn by clause "B" provided as follows:—

"I devise all the lands situate in said village of Yorkville, and particu-
"larly described in the first schedule hereto, unto my son George, his heirs
"and assigns, together with their actual and reputed appurtenances, or with
"the same or any part thereof, held, used and occupied or enjoyed, or known,
"taken or considered as part or parcel thereof, together also with all and all
"manner of engines, fixtures, utensils and implements, and the appurten-
"ances and stock in trade therein, or in or about the premises at my decease,
"he or they paying in exoneration of any other estate, any incumbrances
"which at the time of my decease shall affect the same, and this devise to
"be accepted by and to be in full discharge of any and every claim he shall
"have against my estate at the time of my decease."

Clause "L" provided: "And it is my will and desire that if at any
"time between the day of the date of this my will and the time of my
"decease, any sale or other disposition of any of the said lands and premises
"herein specifically devised by me shall be made by me, the consideration
"money received therefor in money or otherwise, to the amount thereof, or
"the value thereof, shall be a charge upon the whole of my real estate, and
"shall become due and payable to the devisee to whom the said land is herein
"specifically devised, or to his or her heirs, executors, administrators or
"assigns, within five years after my decease, with interest after the first

Will—Continued.

" year of my decease, the securities (if any) received in part or whole pay-
" ment of such consideration, if any being at the time of decease, to be
" transferred, conveyed and assigned to the said devisee, his or her execu-
" tors, administrators or assigns, and to be by him, her or them received as
" to the amount then owing thereon in part or in whole payment of the said
" consideration money as the case shall be."

Between the date of the making of the will and the death of the said John Severn, the said testator sold the said properties specifically devised by Clause "B" of the said will, comprising a brewery and stock and plant therein, to his son George, the appellant, the purchase money paid thereon being the sum of $33,987.20, and it was contended on the part of the appellant that, to the extent of this sum of $33,987.20, the said appellant was entitled under Clause "L" of the said will to a charge upon the estate of the testator.

The Court of Appeal for Ontario held, reversing the judgment of Ferguson J., that in effecting the sale to the appellant, the testator made a sale in a manner not contemplated by him at the date of the making of the said will; and that by the said will the said testator provided in Clause "L" for a sale by himself to some third person, and that the testator intended when entering into the agreement with the appellant to supersede the devise referred to in favor of the appellant, and that the effect of the sale was to accomplish that purpose. (Sec. 8 Ont. App. R. 725).

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the Court of Appeal, that the devise of the lands was not superseded—(Gwynne J. dissenting). But the appellant was not entitled to the value of the stock and plant in the brewery, in the event of their sale to him in the testator's lifetime, because what was given to him was not, as in the case of lands, certain specific ascertained property, but only fluctuating and unascertained property, that is, such property as should be on the premises at the time of the testator's decease.

Appeal allowed with costs of all parties out of the estate.

Severn v. Archer.—16th February, 1885.

15. Devisee—Mortgage by testator—Foreclosure of—Suit to sell real estate for payment of debts—Decree under—Conveyance by purchaser at sale—Assignment of mortgage—Statute confirming title.

See SALE OF LANDS 17.

Winding up—Of insolvent bank under Imperial Companies Act, 1862.

See CORPORATIONS 15.

2. Of insolvent bank under 45 Vic. ch. 23 D.

See BANKS AND BANKING 7.

Winding up—Continued.

3. Right of set off by shareholder in action against—45 Vic. ch. 23 sec. 76 D.

See BANKS AND BANKING 8.

4. Of insolvent bank—Priority of Crown—Not taken away by 45 Vic. ch. 23 D.

See CROWN 15.

Witness—**Refusal to answer questions on cross-examination—Improper ruling—Misdirection.**

Plaintiff (respondent), a teller in a bank in New York, absconded with funds of the bank, and came to St. John, N. B., where he was arrested by the defendant (appellant), a detective residing in Halifax, N. S., and imprisoned in the police station for several hours. No charge having been made against him he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house and saw his wife, read to her a telegram and demanded and obtained from her money she had in her possession, telling her that it belonged to the bank, and that her husband was in custody. In an action for assault and false imprisonment and for money had and received, the defendant pleaded, *inter alia*, that the money had been fraudulently stolen by the plaintiff at the city of New York, from the bank, and was not the money of the plaintiff; that defendant as agent of the bank, received the money to and for the use of the bank, and paid it over to them. Several witnesses were examined, and the plaintiff being examined as a witness on his own behalf did not, on cross-examination, answer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his so doing would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the questions proposed. The learned judge then told the jury that there was no identification of the money, and directed them that, if they should be of opinion that the money was obtained by force or duress from plaintiff's wife, they should find for the plaintiff.

Held. Henry J. dissenting, that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him.

Power v. Ellis—vi, 1.

2. Right of two Counsel to cross-examine the witness.

See CONTRACT 4.

3. Cross-examination of witness—Contradiction.

See CRIMINAL APPEAL 4.

Words, Construction of—Income.

See ASSESSMENT 6.

2. Good merchantable Timber

See AGREEMENT 1.

3. Wilful Offence.

See ELECTION 8.

4. At owner's risk.

See RAILWAYS AND RAILWAY COMPANIES 6.

5. Go out in tow.

See INSURANCE, MARINE 1.

6. On view.

See PARLIAMENT OF CANADA 4.

7. Trader.

See INSOLVENCY 14.

The following cases should have appeared under their respective heads:

Bills of Exchange and Promissory Notes.

3 (a). **Notice of dishonor to endorser—37 Vic. ch. 47, sec. 1.**

The Merchant's Bank of Halifax (appellants) as holders of promissory notes endorsed by McN. (respondent) brought an action against him for their amount. The notes were dated at Summerside, and were payable at the agency of the Merchant's Bank of Halifax, Summerside. The defendant resided at the town of Summerside, and his place of business was there. Notices of dishonor were given to defendant by posting such notices, addressed to the defendant at Summerside, at 1 o'clock p.m. on the day after the day on which the notes matured, the postage on such notices being duly prepaid. There is no local delivery by letter carriers from the post office in Summerside. No evidence was given by defendant that he did not receive the notices of dishonor, nor was any evidence given by the plaintiffs that the defendant had received them.

Held, reversing the judgment of the Supreme Court of P.E.I., that such notices were sufficient under 37 Vic. ch. 47, sec. 1.

Merchant's Bank of Halifax v. McNutt.—xi, 126.

Election.

12 (a). **Rule rescinding ex parte order extending time for service of petition—S. C. A. A., 1879, sec. 10.**

The petitioner, on an *exparte* application to a judge of the Supreme Court of N. S., obtained an extension of time for service of the petition, but subsequently, on application of respondent, on cause shown, the judge rescinded the order as made improvidently. On a second application made *exparte* by petitioner supported by affidavits the judge made another order extending the time. The respondent then obtained from the judge a rule *nisi* to set aside this second order, and such rule was made absolute by the full court, on the ground that all the facts on which the second application was based were in the knowledge of the petitioner when the first application was made.

Held, Fournier and Henry JJ. dissenting, that the rule of the Supreme Court of N. S. was not a judgment, rule, order or decision on a preliminary objection from which an appeal would lie under sec. 10, S. C. A. A., 1879.

Kings County., N. S. Election Case (Dickie v. Woodworth)—viii, 192.

[This case was approved of and followed in the Gloucester, N. B., election case. See *Election* 13.]

Election—Continued.

22. **Dominion Elections Act, 1874, secs. 96 & 98—Promise to pay debts due for a previous election—Hiring of carters to convey voters to poll—Corrupt practices.**

Held, affirming the judgment of the court below, 1st. When an agent of a candidate receives and spends for election purposes large sums of money, and does not render an account of such expenditure, it will create a presumption that corrupt practices have been resorted to.

2. The payment by an agent of a sum of $147 to a voter claiming the same to be due for expenses at a previous election, and who refuses to vote until the amount is paid, is a corrupt practice.

3. The hiring and paying of carters by an agent to convey voters, who are known to be supporters of the agent's candidate, is a corrupt practice. *Young* v. *Smith*, 4 Can. S. C. R. 494, followed.

Levis Election Case (Belleau v. Dussault).—xl, 133.

Habeas Corpus.

4. **Application for writ of—Imprisonment of execution debtor—Application for discharge under ch. 118 R.S.N.S. 5th ser.—Examination of debtor—Fraud disclosed on—Remand to jail for six months—Order dated on Sunday—New order.**

J. was in custody on an execution for debt and applied to a Judge of the County Court, under ch. 118 R.S. N.S. 5th series, to be examined as to his affairs with a view to obtaining his discharge. The examination was held by the County Court Judge, who, on January 23rd, 1886, made an order to the effect that J. was adjudged guilty of fraud in respect to the delay of payment of his debt to the execution creditors, and in regard to the disposal of his property, and by such order remanded J. to jail, without privilege of jail limits, for a further period of six months from the date of the remand. When the order was drawn up it was dated 24th of January, 1886, (which was Sunday) and directed that J. be confined in the county jail for six months from that date.

J. was taken back to jail, the order dated on Sunday being delivered to the jailer, and the counsel for the execution creditors, on Monday, January the 25th, procured from the County Court Judge another order dated the 25th, ordering J. to be imprisoned for six months from January 23rd.

Application was made to the Supreme Court of Nova Scotia for the discharge of the prisoner on *habeas corpus*, which was refused, the majority of the court holding that he was rightly held in custody, if not on the order of the County Court Judge, then on the original cause of his detention, the writ of execution.

On appeal to the Supreme Court of Canada, Held, that the appeal must be dismissed. Appeal dismissed without costs. (See *Practice* 31).

In re George R. Johnson.—20th February, 1886.

APPENDIX A.

Cases in which the Judicial Committee of the Privy Council have granted or refused leave to appeal from the judgment of the Supreme Court of Canada.

1. **Johnston v. The Ministers, &c., St. Andrew's Church, Montreal.**

Leave to appeal refused.

The Judicial Committee Held, that, although her Majesty's prerogative to allow an appeal was preserved by sec. 47 of the Sup. and E. C. Act (38 Vic. ch. 11), neither the magnitude of the case, nor the effect which the decision might have upon a number of other cases, made it a case in which an appeal should be allowed. (See *Pewholder*.)

3 App. Cases 159.—10th Decr., 1877.

[As to the prerogative right to allow an appeal as an act of grace, see *Cushing* v. *Dupuy*; 5 App. Cases 409.

In a case of the *Bank of New Brunswick* v. *McLeod* (not reported) a petition was presented for special leave to appeal from the judgment of the Supreme Court of New Brunswick. In refusing leave the Judicial Committee gave reasons to the following effect:—

1. The policy of the Dominion Legislature is to discountenance appeals in matters of insolvency, so much so that not even an appeal to the Supreme Court of Canada is allowed, and the final decision is made to rest with the highest court in each province.

2. The Dominion Legislature cannot affect the prerogative of the Crown to grant special leave to appeal, but in advising her Majesty whether the prerogative should be exercised, the Privy Council pays attention to the expressed wishes of the Colony, and will not recommend its exercise except in cases of general interest and importance, and then only when it manifestly appears that the court below has erred in a matter of law.

3. But even if it should be shown that the court below has so erred, leave will be refused, if it appear that the court below has decided the case independently of any point of law upon a particular view of the facts, for the Privy Council adopts the facts as found by the court below, and will not review such findings in an appeal entertained as an act of grace. June, 1882.]

2. **Gagnon v. Prince.**

Leave to appeal refused.

The Judicial Committee held that they will not advise her Majesty to admit an appeal from the Supreme Court of Canada save where the case is

of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount; or where the case is otherwise of some public importance, or of a very substantial character.

(See *Evidence* 8).

8 App. Cases 103.—25th November, 1882.

3. **Montmorency Election Case (Vallin v. Langlois).**

Leave to appeal refused.

(See *Election* 4).

5 App. Cases 115.—13th December, 1879.

4. **Lawless v. Sullivan.**

Judgment of Supreme Court of Canada reversed.

(See *Assessment and Taxes* 6.)

6 App. Cases 373.—22nd February, 1881.

5. **Moore v. Connecticut Mutual Life Ins. Co.**

The holding of the Judicial Committee will be found at page 238.

(See *Jurisdiction* 20.)

6 App. Cases 644.—7th July, 1881.

6. **Citizens Insurance Co. v. Parsons.**
Queen Insurance Co. v. Parsons.

Judgment of the Supreme Court of Canada respecting the validity of 39 Vic. ch. 24 O. affirmed. Judgment on the merits reversed.

(See *Legislature* 5.)

7 App. Cases 96.—16th November, 1881.

[See also *Dobie* v. *Temporalities Board*, 7 App. Cases 136.]

7. **Belleau v. The Queen.**

Judgment of the Supreme Court of Canada reversed and judgment directed to be entered for the Crown.

(See *Petition of Right* 6.)

7 App. Cases 473.—20th June, 1882.

8. **The Mayor, &c., of Fredericton v. The Queen.**

Reviewed by the Judicial Committee in the case of *Russell* v. *The Queen*. Judgment of the Supreme Court of Canada affirmed.

(See *Parliament of Canada* 5.)

7 App. Cases 829.—23rd June, 1882.

[*Russell* v. *The Queen* explained and approved in *Hodge* v. *The Queen*. 9 App. Cases 117.—15th Decr., 1883.]

9. **Canada Central Ry. Co. v. Murray.**

Leave to appeal refused.

Application refused on the ground that the question raised involved no issue except an issue of fact; and that the judges below had differed upon a question of fact in regard to an ordinary contract of employment did not seem to be any reason for permitting an appeal, having regard to the terms of the statute which now regulates these appeals.

Their Lordships also stated that they were desirous in this case "to lay down the rule that they will in future expect parties who are petitioning for leave to bring an appeal before this Board to state succinctly, but fully, in their petition the grounds upon which they make that demand. They certainly expect that parties will confine themselves in future to the petition, and will not wander into extraneous matter, such as the record and proceedings, over which this Board, until an appeal is permitted and the papers are sent to England by the proper authorities, have no control, and which they cannot accept on an *ex parte* statement, which an application of this kind is." (See *Agreement* 6.)

8 App. Cases 574.—30th June, 1883.

10. Mercer v. Attorney General for Ontario.

Judgment of the Supreme Court of Canada reversed.

(See *Legislature* 6).

8 App. Cases 767.—18th July, 1883.

11. Dupuy v. Ducondu.

Judgment of the Supreme Court of Canada reversed.

(See *Sale of Lands* 1).

9 App. Cases 150.—27th November, 1883.

12. Maclaren v. Caldwell.

Judgment of the Supreme Court of Canada reversed.

(See *Streams*).

9 App. Cases 392,—7th April, 1884.

13. Queen v. Doutre.

Judgment of the Supreme Court of Canada affirmed.

For the holdings of the Judicial Committee see p. 351. (*Petition of Right* 5).

9 App. Cases 745.—12th July, 1884.

14. Sewell v. British Columbia Towing Co.

Leave to appeal granted 26th June, 1884.

(See *Ships and Shipping* 5.)

[The appeal was never heard before the Judicial Committee, the case having been settled between the parties.]

15. Reed v. Mousseau.

Judgment of the Supreme Court of Canada affirmed.

(See *Legislature* 7.)

10 App. Cases 141.—26th November, 1884.

16. Corporation of the City of Quebec v. Quebec Central Ry. Co.

Leave to appeal granted 5th March, 1885.

(See *Railways and Railway Companies* 9.)

[The appeal has not yet been heard by the Judicial Committee.]

17. In re Liquor License Act, 1883, and Act amending.

The Acts were held by the Judicial Committee *ultra vires* in whole.

(See *Liquor License Act*, 1883.)

18. **Lewin v. Wilson.**

Leave to appeal granted 24th June, 1885.

Judgment reversed 25th June, 1886.

(See *Mortgage* 2.)

19. **Windsor and Annapolis Ry. Co. v. The Queen.**

Leave granted to the Windsor and Annapolis Ry. Co. to appeal.

Leave granted also to the Attorney General for the Dominion of Canada to appeal.

[The appeals have been heard and stand for judgment.]

(See *Petition of Right* 15.)

20. **Sweeney v. Bank of Montreal.**

Leave to appeal granted 29th December, 1885.

(See *Trusts and Trustees.*)

[The appeal has not yet been heard by the Judicial Committee.]

21. **Halifax and Cape Breton Ry. and Coal Co. v. Gregory.**

Leave to appeal refused 3rd April, 1886.

(See *Railways and Railway Companies* 19.)

22. **Parker v. Montreal City Passenger Ry. Co.**

Leave to appeal refused.

(See *Railways and Railway Companies* 23.)

23. **St. Lawrence and Ottawa Ry. Co v. Lett.**

Leave to appeal refused.

(See *Railways and Railway Companies* 24.)

24. **Chevrier v. The Queen.**

Leave to appeal refused.

(See *Petition of Right* 3.)

25. **Russell v. Lefrançois.**

Leave to appeal refused.

(See *Will* 7.)

26. **Smith v. Goldie.**

Leave to appeal refused.

(See *Patent of Invention* 1.)

27. **Nasmith v. Manning.**

Leave to appeal granted, but case was settled before appeal heard.

(See *Corporations* 8.)

TABLE OF CASES IN THE DIGEST.*

* This table includes all reported cases published prior to the 1st day of July, 1886, and contained in vols. 1 to 10, and 350 pages of vol. 11 of the reports. It also includes all unreported cases decided by the court prior to the 1st day of May, 1886, and a few decided since that date.

D.

H.

R.