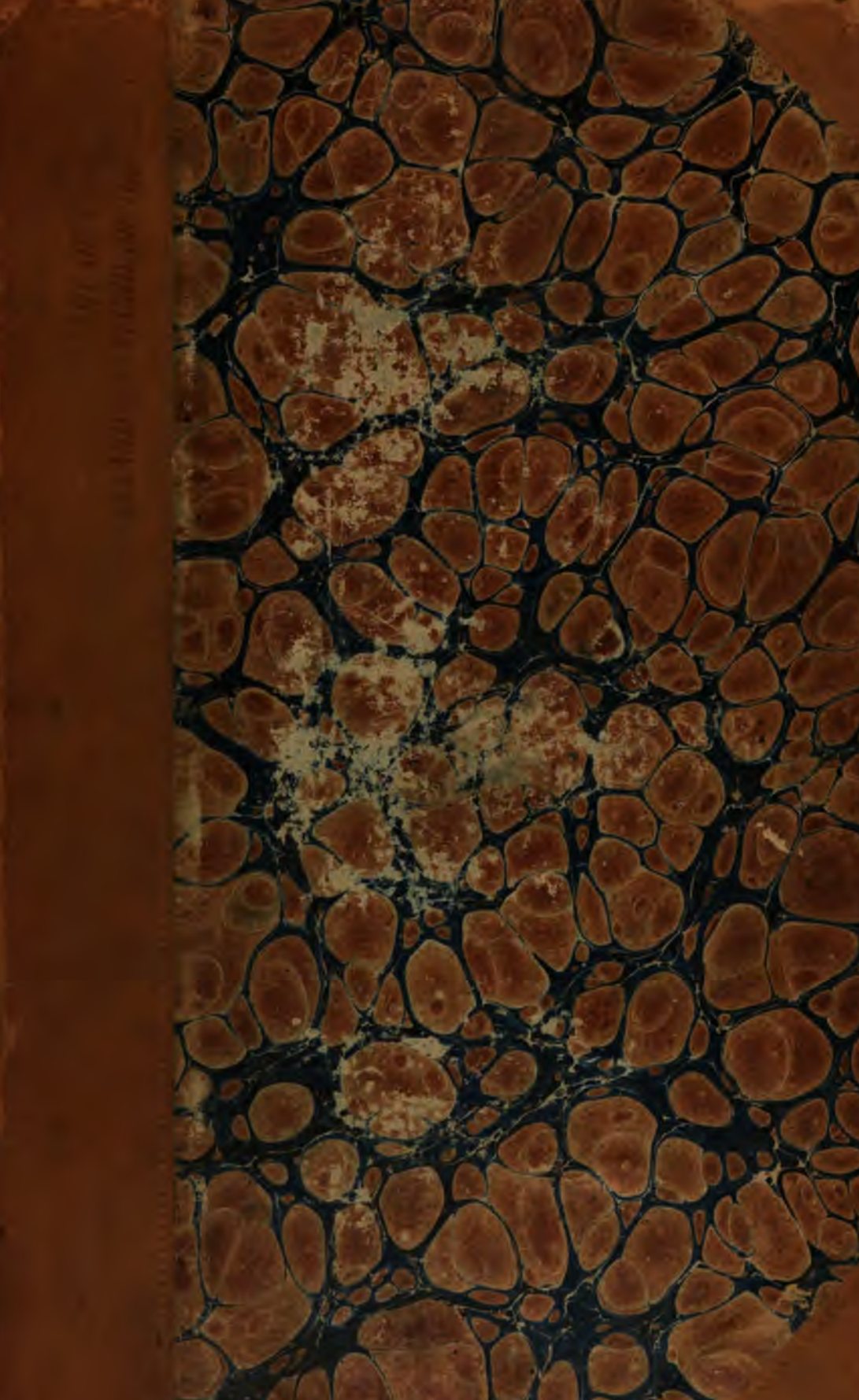

THE

LAW REPORTS.

Privy Council Appeals.

CASES

HEARD AND DETERMINED BY

THE JUDICIAL COMMITTEE

AND THE

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

REPORTED BY EDMUND F. MOORE, ESQ., M.A.,
BARRISTER-AT-LAW.

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LIST

OF THE

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

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The Duke of *Buccleuch*, formerly Lord President.

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The Right Hon. Sir *William Bovill*, Knt., Lord Chief Justice of the Court of Common Pleas.

The Right Hon. Sir *John Rolt*, Knt., one of the Lords Justices f the Court of Appeal in Chancery.

ERRATA.

Page.	*Line.*	
20	26,	*for* "licenses" *read* "licensees."
36	28,	after "*Ex parte Peele*" *insert* "(2)" and add a note "(2) 6 Ves. 601."
44	3 from bottom,	*for* "at" *read* "a."
109	6 from bottom,	*for* "persons" *read* "person."
163	9,	*for* "neither could be a *Commettant*" *read* "neither could *he* be a *Commettant*."
225	9 from bottom,	*for* "claimed to regain it" *read* "claimed to *retain* it."
356	14,	*for* "September, 1830," *read* "September, 1860."
359	10,	*for* "exercitation on her behalf" *read* "*exertion* on her behalf."
362	14 from bottom,	*for* "Burgess" *read* "Burgers," and throughout case.
518	6,	after "Vict." *insert* "c. 83."
525	13 from bottom,	*for* "Supreme Courts in Westminster" *read* "*Superior* Courts *at* Westminster."

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

[Those in *Italics* have been commented on, impeached, or overruled.]

A.

B.

C.

D.

E.

F.

G.

S.

T.

V.

W.

X.

Y.

Appeal Cases,

BEFORE THE

JUDICIAL COMMITTEE

AND

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

MUTUSAWMY JAGAVERA YETTAPA NAIKER,
APPELLANT;
AND
VENCATASWARA YETTIA, RESPONDENT.

J. C.*
1865
Nov. 27.

ON APPEAL FROM THE HIGH COURT OF MADRAS.

Practice—Appeal—Under appealable value.

Special leave to appeal granted, notwithstanding that no application had been made for such leave to the Court below: upon the allegation, that though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject-matter at issue exceeded in value the appealable amount.

THIS was a petition for leave to appeal from a decree of the High Court at *Madras*, dated the 3rd of January, 1865, which affirmed a decree of the Civil Court of *Tinnevelly* of the 31st of March, 1864, awarding to the Plaintiff (the Respondent), as the illegitimate son of the Appellant's eldest brother, a former *Zemin-*

* *Present*:—LORD CHELMSFORD, LORD JUSTICE KNIGHT BRUCE, LORD JUSTICE TURNER, SIR JAMES W. COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR LAWRENCE PEEL (Indian Assessor).

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dar of *Yettiapooram*, an annual maintenance of Rs. 2,500 from the villages forming the private property of the present *Zemindar's* family. The Defendant (the present Appellant) disputed the Plaintiff's claim, alleging that he was not the illegitimate son of the late *Zemindar*, that his mother was a dancing woman (wearing *Botter* on her neck) attached to a *Pagoda* at *Kalugumalia*, situate within the *Zemindary*; this *Botter* being different from *Tally* (nuptial mark), worn by married women among Hindoos, and he insisted that she was a *Dasce*, or woman of caste, cohabiting with several men.

It appeared that the suit was originally instituted by the Respondent in the Court of the Principal *Sudder Ameen* of *Tinnevelly*, praying that a decree might be passed, awarding to him and his heirs, on account of their maintenance, Rs. 8,400 per annum, to be paid from the income of the *Zemindary*. That Court, on the 11th of November, 1863, dismissed the suit with costs, whereupon the Respondent appealed to the Civil Court of *Tinnevelly*, which reversed that decision and decreed to the Respondent an annual sum of Rs. 2,500 for maintenance, being the largest sum that Court had jurisdiction to award, which decree was affirmed on appeal by the High Court at *Madras*. The present Petitioner, the *Zemindar* of *Yettiapooram*, applied to that Court for a review of the decree of the 3rd of January, 1865, which application was rejected with costs.

No application was made by the Petitioner to the High Court for leave to appeal to Her Majesty in Council, inasmuch as he was advised that, the judgment being only for Rs. 2,500 (though the real value of the annuity was much beyond that sum, and exceeded Rs. 10,000, the appealable value), applications for leave to appeal had, under similar circumstances, been refused both by the *Sudder* and High Court, on the ground that those Courts were bound by the actual amount of the judgment. The Petitioner, therefore, now applied direct to Her Majesty in Council for special leave to appeal, stating various points of law involved in the suit, which affected the caste, or *status*, of the parties; he, moreover, urged that the suit having been originally brought in the Court of the *Sudder Ameen*, which Court was prohibited from entertaining any suit where the sum at issue exceeded

Rs. 2,500, he was precluded from availing himself of important evidence in that Court, or bringing the same before the High Court, and submitting to that Court many questions of fact and law affecting both the *status* and claim of the Plaintiff, and from bringing the same ultimately on appeal before Her Majesty in Council; and he insisted, that it was worthy of the gravest consideration, whether a Plaintiff by instituting a suit in an inferior Court for a sum below the appealable value Rs. 10,000 to Her Majesty in Council, when the amount at issue was really of much greater value, as in this case, should by such means be enabled to exclude an appeal against a judgment of the High Court, if the case should be carried there.

The *Attorney-General* (Sir *R. Palmer*), with whom was Mr. *Mackeson*, for the Petitioner:—

This is a very important application. The circumstances disclosed in the Petition shew abundant grounds for the allowance of the indulgence we ask for. The question at issue involves important points of law, affecting not only the interests of the parties claiming and disputing the right to the annuity sued for, but questions of caste and *status* of the utmost importance in *India*. In the case of *Rogers* v. *Rajendro Dutt* (1), though the amount was under the appealable value, this Court gave special leave to appeal on the ground that an important point of law was involved. It did not there appear that any application for leave to appeal had been made to the Court below the Supreme Court at *Calcutta*. In the cases of *Maharajah Sutteeschunder Roy* v. *Guneschunder* (2), *Gooroopersad Knoond* v. *Juggutchunder* (3), the principles upon which the Courts in *India* are to estimate the appealable value prescribed by the Order in Council of the 10th of April, 1838, were distinctly stated by this Court; in both these cases it was held that where interest was by the decree to be added to the principal sum decreed, and the aggregate amount exceeded Rs. 10,000, the case was within the appealable value, and leave to appeal to Her Majesty in Council was given. But that course could not be followed in this case, because there was nothing to add to the decree which would raise it to the appeal-

(1) 8 Moore's Ind. App. Cases, 103. (2) *Ibid.* 164. (3) *Ibid.* 166.

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able value. In the case of *Sree Mutty Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy* (1), an estate, the subject of the suit, was charged with a fixed annual quit rent of Rs. 64, which the *Sudder* Court decreed with a declaration of the right of the Plaintiff to an enhanced rent of Rs. 822 13 as. It was held by the Court that the value of the subject-matter in suit, in the circumstances, ought to be estimated as amounting to Rs. 10,000; and upon special Petition leave was given to appeal. That is exactly our case. The annuity charged by the decree of the High Court upon our *Zemindary*, though of the annual value only of Rs. 2,500, is, in the aggregate, of far greater value than Rs. 10,000, the appealable value under the Order in Council. There is another consideration which ought, we apprehend, to entitle us to the indulgence asked for. The suit was originally instituted in the Court of the *Sudder Ameen;* the jurisdiction of that Court is limited by *Mad.* Reg. III. of 1833, s. 4, to suits under Rs. 2,500. The appeal from that Court is to the *Sudder*, now the High Court, but the sum claimed and decreed being under the appealable value from that Court, no appeal can be granted by the High Court to Her Majesty in Council, and thus, though the aggregate amount at issue is far above the appealable value, the suit being really of the value of an annuity of Rs. 2,500, yet by suing but for one year's annuity, and in a Court not having jurisdiction above the sum of Rs. 2,500, the Defendant in the Court below is ultimately precluded from bringing an appeal to Her Majesty in Council, though the decision against him involves not only an amount exceeding in value the requisite sum, but concludes questions of title and law which cannot be satisfactorily raised before the inferior Court or brought before the High Court.

Sir *Hugh Cairns*, Q.C., and Mr. *C. P. Phillips*, opposed the application.

There are no grounds for this application. The question before the Courts below was one of fact and not of law; and the only question that can be brought here, if this appeal is allowed, is a question of fact upon the evidence. The facts lie in a very narrow compass, taking them even from the statement for the Petition.

(1) 8 Moore's Ind. App. Cases, 165.

The Respondent, the Defendant in the original suit, is the *Zemindar* of *Yettiapooram*, inheriting immediately from his brother *Vencataswara*, the last *Zemindar*. In 1854 the Petitioner's mother brought a suit in the Court of the *Sudder Ameen* of *Tinnevelly* against the Respondents, on behalf of her son, to recover possession of a village, part of the *Zemindary*, which she claimed as a gift from *Kumura*, a previous *Zemindar*. This gift was, however, declared void for want of registration, and her claim was defeated. In September, 1863, the Petitioner brought the present suit against the Respondent for an allowance of Rs. 8,400 for maintenance. The defence pleaded was that already stated, and the only issue raised was as to the *status* of the Petitioner's mother and his paternity. No other issue was stated or applied for, and upon that issue the suit was dismissed. On the appeal to the *Sudder* Court the Petitioner raised no objection to the issues, but adduced further evidence of his claim, and no fresh point was raised or insisted on, as was open to him before that Court. The High Court, when the appeal came before them, proceeded on the same grounds. There is, therefore, no pretence for saying that there are important questions of law which could not be raised in the Courts below, and can be determined here. If there had been any decision by the Court of the *Sudder Ameen* contrary to law or usage, it might, and, for aught we know, was brought before the High Court, under the provisions of the Code of 1859, art. viii. ch. x. sec. 372-5. Then, with regard to the sum at issue not being of sufficient value to allow of an application to the High Court for leave to appeal, if the Petitioner is right in his calculation, it was much above Rs. 10,000, and at least the fact of such value ought to have been brought before the High Court, and an application made to that Court for leave to appeal, the omission to make which, under the circumstances, is fatal to this application. The observations regarding the institution of the suit in the Court of the *Sudder Ameen* cannot prevail to the prejudice of the Respondent. The Court of the *Sudder Ameen* was the proper and only Court in which the claim could be made in the first instance. and it is no ground for applying for liberty to appeal here that that Court, which is limited by law to claims of a certain amount, took cognizance, as it was bound to do, of this claim, and rejected it,

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LORD CHELMSFORD:—

Their Lordships have had considerable difficulty in coming to a conclusion in this case. They consider, under the peculiar circumstances, that leave to appeal ought to be given. They have no doubt that substantial questions of law are involved in the case, and therefore, upon that ground, if there were no other, their Lordships might be disposed to come immediately to a conclusion in favour of the application now made to them. But the great difficulty of the case arises from the rule with regard to the necessity of applying to the High Court in *India* before coming here for leave to appeal. Some years ago various petitions came before their Lordships asking for leave to appeal where that preliminary form of applying to the Court below had not been pursued, upon the ground that the *Sudder* Court had expressed an opinion with regard to the mode of estimating the value of the subject of dispute, confining the parties to the actual sum claimed, and intimating that they would certainly adhere to such estimate; applications were, therefore, made direct to Her Majesty in Council, the Petitioners alleging that they were precluded from applying to the Court below, because in such circumstances that Court would certainly consider the subject matter under the appealable value of Rs. 10,000.

In the case of *Maharajah Sutteeschunder Roy* v. *Guneschunder*, that was cited from 8 Moore's Ind. App. Cases, 164, which was a judgment given by Lord Justice *Turner*, upon several applications similar to that now before us, their Lordships gave leave to appeal, but they stated that it must be understood in similar circumstances that application ought always to be made to the Court below, and that that Court was bound to give leave to appeal in cases in which the specified amount of Rs. 10,000 could be reached, though only, as it there appeared, by the addition of interest subsequent to the decree; and it was essential that such an application should be made to the Court below before coming here. Since those decisions, and very recently, an application was made to this Court for leave to appeal, where there had been no previous application to the *Sudder* Court below, and their Lordships expressed very strongly their determination to adhere to the rule

so laid down by them, and not to grant leave to appeal in future unless there had been such previous application made to the Court in *India*, and they refused that application. That decision would of course be binding upon their Lordships now, and would compel them to say on the present application that, as there had been no application for leave to appeal to the High Court, therefore the Petitioner's application to this Court ought not to be entertained, and no leave given to appeal. But there are very peculiar circumstances in this case. The suit was instituted in the *Sudder Ameen's* Court, which has no jurisdiction in any demand above Rs. 2,500. Supposing that, upon the face of the plaint, it appeared the demand was really beyond the value of Rs. 2,500, it was competent to the Defendant to have pleaded to the jurisdiction of the Court; but no such course was taken, and a decision having been given, and an appeal made to the High Court, both parties proceed on the footing and upon the admission that the sum in dispute is under Rs. 10,000, the appealable amount to Her Majesty in Council.

Supposing, therefore, that an application had been made to the High Court for leave to appeal, it would not have been competent to the parties, in this state of circumstances, to turn round and say that the value was above Rs. 10,000; and if not so, the High Court would have had no power to give leave to appeal.

Therefore, under these very peculiar circumstances, which distinguish this case from those which have been previously determined, their Lordships grant leave to appeal here, reserving of course to the Respondent liberty to apply upon the subject of costs, in case the appeal should not be prosecuted.

Solicitors for the Petitioner: *Jones & Blaxland.*

Solicitors for the Respondent: *Williamson, Hill, & Co.*

J. C.*
1865
Nov. 28.

NAWAB SIDHEE NUZUR ALLY KHAN . APPELLANT;
AND
RAJAH OOJOODHYARAM KHAN . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Practice—Stay of proceedings in Court below.

Application to stay proceedings in a cause in which an appeal from an Order in the nature of an interlocutory Order is pending before Her Majesty in Council, ought satisfactorily to shew that a serious injury will be the result to the party applying unless the delay asked for be granted, and that the party applying has come promptly to make the application.

Where, therefore, an Appellant from an Order of the High Court of Judicature, which remitted a cause, appealed to that Court from the *Zillah* Court, back for the trial of issues framed in accordance with the provisions of Act No. 8 of 1859, s. 139, having failed in obtaining an Order from the High Court to stay proceedings in the *Zillah* Court, pending the appeal, but not having appealed from that decision; presented a petition to Her Majesty in Council praying that all proceedings in the remanded suit might be stayed till the pending appeal had been heard; the Judicial Committee, without determining the question of their right to interfere in such circumstances, held that the Petitioner had not shewn any such injury, or used such expedition as entitled him to ask for a stay of proceedings.

Quære, whether, where an order has been made by the Superior Court below refusing to stay proceedings, and such Order is not specially appealed from, the Judicial Committee have any authority to interfere, though an appeal is pending before them from a previous Order of the Superior Court made in the same suit, remitting the cause back to the inferior Court before which it is pending.

THIS was an application to stay proceedings in a suit instituted in the *Zillah* Court of *Midnapore*, in which an appeal had been interposed from an interlocutory Order, to the *Sudder* Court (afterwards the High Court of Judicature) at *Fort William, Bengal*, and by that Court, after a hearing and rehearing, remanded back to the *Zillah* for trial on the merits.

The circumstances as they were stated in the petition of the

* *Present:*—LORD CHELMSFORD, LORD JUSTICE KNIGHT BRUCE, LORD JUSTICE TURNER, SIR JAMES W. COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR LAWRENCE PEEL (Indian Assessor).

Appellant, were as follow: On the 30th of May, 1860, a plaint was filed in the Civil Court of *Zillah, Midnapore*, by the Respondent against the Appellant and others to recover possession as mortgagor of certain *Pergunnahs* therein specified, charging the Appellant and other Defendants with fraud and collusion in obtaining possession of the *Pergunnahs*, and for the sum of Rs. 2,72,000, the alleged mesne profits.

The Defendants put in answers to the plaint, and on the 10th of November, 1860, the cause came before the *Zillah* Judge, who framed issues of law and fact in pursuance of the provisions of s. 139, Act No. 8, of 1859. On the 19th of November, 1860, the first hearing of the suit took place before the same Judge, who gave judgment on the issues directed, in favour of the Appellants, and dismissed the plaint.

The Respondent appealed from this judgment to the *Sudder* Court at *Calcutta*, and on the 1st of June, 1863, the High Court, having been substituted for the *Sudder* Court, reversed the judgment of the *Zillah* Court of *Midnapore* and remanded the suit back to that Court for trial upon the merits.

The Appellant applied for and obtained a re-hearing by the High Court, which, on the 12th of January, 1864, affirmed its previous judgment and decree: whereupon the Appellant petitioned for and obtained leave to appeal to Her Majesty in Council from such decree and judgment. The Appellant in his petition to the High Court for leave to appeal against the before-mentioned decree and judgment, prayed that until his appeal (for leave to present which he was then petitioning) should be heard, or decided, or until the further order of the High Court, all further proceedings in the High Court and in the *Zillah* Court of *Midnapore* should be stayed; and on the 16th of June obtained an order *nisi* calling on the Respondent to shew cause why the hearing of the suit under the aforesaid order of remand should not be postponed, pending the result of the appeal to Her Majesty in Council, which Order, on cause being shewn, was discharged on the 25th of August, 1865. No appeal was asked for or interposed from this Order of dismissal, but the Appellant, believing, as he stated in his petition, that he would be put to great trouble and inconvenience, and would be forced to incur great expense in and about obtaining the evidence

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which he had been advised and believed would be necessary to give on his behalf at the trial, and being advised and believing that the determination by the trial of the issues in fact raised in the suit would be wholly immaterial as regarded the result of the suit, if he succeeded in his appeal to Her Majesty in Council, which he had been advised and believed he should do, and believing that the trial of the remanded suit would be proceeded with in the *Zillah* Court, pending the hearing of his appeal, presented a petition to Her Majesty in Council, praying that an early day might be appointed for the hearing of the appeal, and that all proceedings in the remanded suit might be stayed until the pending appeal should have been heard and decided.

The *Attorney-General* (Sir *R. Palmer*) (with whom was Mr. *A. Stephenson*) now moved to stay proceedings.

It is necessary to state shortly the facts of this case. The suit is one for possession by redemption of certain mortgaged *Pergunnahs* which have been sold at a sale purporting to have been a revenue sale, which, as we say, by reason of collusion and fraud, was a fictitious sale. We claim to redeem these *Pergunnahs*, and for an account of mesne profits. The sale is alleged to have been for Government arrears of revenue, which we say were purposely allowed to fall in arrear, and the sale, instead of being a public, was, by the fraud and collusion of the parties, really a private one. It was urged against us that we were barred by the *Ben.* Regulation of Limitations, III. of 1793, sec. 14; but as we allege fraud and collusion, we claim exemption from that Regulation, and insist on our right to come in under cls. 1, 3, sec. 3 of Reg. II. of 1805, which allows sixty years to bring an action. The issues directed by the *Zillah* Judge go directly to these points, and if determined on the appeal in our favour, will dispose of the case; that, therefore, is a reason sufficient to induce this Court to stay the proceedings below. The issues of fact, moreover, if found against us at the trial would, on the points there stated, exclude us from any benefit we may derive from a decision in our favour on the appeal. We only ask that the trial may be postponed till the appeal has been heard; we are ready to proceed with the appeal immediately.

Mr. *Rolt*, Q.C., and Mr. *Leith*, opposed.

This is an unprecedented application. It is quite irregular for the other side to go into the facts or merits of the case. Neither is this Court, nor are we ourselves, sufficiently informed of the facts to come to any conclusion. We know nothing of the merits, and this Court has no materials before it to enable your Lordships to say on what grounds you could order a stay of the proceedings. What claim has the Appellant to such an indulgence? The decree of foreclosure which is now sought indirectly to impeach was pronounced so long ago as on the 16th of November, 1852, there was no appeal from that judgment, and the present proceedings are long subsequent. Even admitting the dates as stated by the Appellant in his petition, the final judgment on the rehearing was pronounced on the 12th of January, 1864, and though appealed, the appeal was not prosecuted; nor was the Order *nisi* which is now sought to be incorporated as part of the proceedings applied for, or obtained before June in the same year; there has been no diligence, therefore, if that could be urged as a ground for granting this application. But the consequences to the Respondent, if the proceedings are stayed, may be most unjust and injurious. Evidence both oral and documentary may be lost, witnesses may die, and all the other casualties that impede a cause may intervene. There is, moreover, a fatal objection, as we apprehend, to the application. It is an appeal against an Order of the High Court which discharged the Order *nisi* of the 16th of June, 1864, from which no appeal was either asked for or asserted. The only appeal pending in this Court is from the decree of the 1st of June, 1863, confirmed by the judgment of the 12th of January, 1864, and we submit that, independent of the want of merits, this Court has no jurisdiction to review an order not appealed from.

LORD CHELMSFORD:—

Their Lordships have not entered into the consideration of the merits of this case, nor will they decide any question with regard to the right or authority which they may have to interfere by ordering a stay of proceedings in the circumstances of these cases; but they decide upon this petition entirely upon these grounds: that any application for a stay of proceedings must be founded upon two

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points, which are essential to sustain the application; first, that a serious injury will be the result to the party applying unless the stay of proceedings is granted, and secondly, that the party has come promptly to make the application for delay.

Now, with regard to any suggested injury which may arise to the Petitioner in case the delay asked for is not granted, there is no ground whatever for supposing that any such injury will be sustained. All that he can allege is, that he may be put to costs upon the trial of these issues of fact remitted to the *Zillah* Court, supposing ultimately the decision of their Lordships on the appeal now pending in this Court should be in his favour, upon the questions of law which it is said are raised therein. But the answer to that objection, if it be one, is, that if the Petitioner is put to costs improperly, those costs will ultimately fall on the Respondent while, on the other hand, the situation in which the Respondent would be placed, if their Lordships were to grant this application, must be considered, because there might be very great danger of his losing evidence, parol and documentary, if the delay asked for were granted. Therefore, with respect to any supposed injury which would arise from the cause being allowed to take its course, and the issues of fact allowed to be tried in due form in the *Zillah* Court of *Midnapore*, there is no pretence for saying that any such injury will arise.

Then, has the Petitioner come promptly with his application? which is another essential requisite of an application for delay, or for a stay of proceedings in any case.

The appeal to the High Court of Judicature was decided finally on the 12th of January, 1864; on the 10th of February, 1864, there was a petition for leave to appeal, and no application to stay proceedings made till the month of June, 1865. The delay was endeavoured to be accounted for from the Respondent having objected to the leave to appeal, on the ground that the six months ought to be dated from the date of the original decree, and not from the order on review; but that really appears to their Lordships to be no explanation at all, at least no satisfactory explanation of the delay which has taken place, of sixteen or eighteen months before this application to stay proceedings is made.

Under these circumstances, there being no proof of any serious injury which would be sustained by the Petitioner, by their Lord-

ships, supposing they have the power to interfere, not interfering to stay proceedings, and on the other hand, the Petitioner not having come, as rightly and properly he ought to have done, promptly with this application to stay the proceedings below, their Lordships think this petition ought to be dismissed, and with costs (1).

Solicitors for the Petitioner: *Young & Jackson.*
Solicitors for the Respondent: *Wilson, Bristow, & Carpmael.*

THE QUEEN . . . . . APPELLANT;

AND

FREDERICK WILLIAM DALLIMORE, JOHN HENRY CLOUGH, AND WILLIAM BOGG . . . } RESPONDENTS.

J. C.* 1865 Dec. 5, 6, 7, 24.

ON APPEAL FROM THE COLONY OF VICTORIA.

Victoria—Crown Lands—License—Occupation—Sale of Lands by the Crown—Col. Acts, 24 *Vict. No.* 117, *and* 25 *Vict. No.* 145.

Construction of the *Victoria Colonial Acts,* 24 Vict. No. 117, and the 25 Vict. No. 145, for regulating and amending the laws relating to the sale and occupation of Crown lands in the Colony.

C. and *B.* having been in the occupation of certain waste lands as licensees paying an annual rent, obtained from the Governor a license in writing to occupy the same for one year and no longer, subject also to the reserved right of the Crown, to sell or proclaim any portion of such lands, as a gold-field common without compensation for the loss of enjoyment to the licensee:—

Held, upon a sale being made by the Crown of a portion of such lands after proclamation, and the expiration of the tenancy for the year, that the Crown had, under the terms of the licenses, as also upon the construction of the Colonial Acts, an indefeasible title to such lands, notwithstanding the previous and subsequent occupation by the licensees, and payment of rent by them, which, under the circumstances, did not constitute a tenancy from year to year, or give the licensee any title to the lands in question.

THIS was an appeal from a judgment of the Supreme Court of *Victoria,* making absolute a rule to enter a verdict for the Defen-

(1) See upon this point *Rajah Perladh Sein* v. *Baboo Bhoodoo Singh,* 10 Moore's Ind. App. Cases, 78.

* *Present*:—LORD CHELMSFORD, SIR JOHN TAYLOR COLERIDGE, SIR JAMES W. COLVILE, SIR EDWARD VAUGHAN WILLIAMS.

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dants, in an action of ejectment brought by the Crown against the Respondents.

The question in dispute was the title of the Crown to certain lands in that Colony which were in the occupation of the Respondents.

The Respondents, *Clough* and *Bogg*, were, on the 21st of January, 1861, and for some time previously had been, in the occupation of certain unsettled Crown lands, known as the *Maiden Hills*, *Woodstock* and *Lamplough* runs. Of these, the *Lamplough* run contained about 17,380 acres.

There was not, before the year 1861, nor until the passing, in the year 1862, of the *Colonial Act*, 25 Vict., No. 145, called the *Land Act*, any legislative provision for granting licenses to occupy for pastoral purposes the unsettled Crown lands of the Colony.

The sale of such lands was provided for by the *Imperial Act*, 5 & 6 Vict. c. 36, which was amended by the *Imperial Act*, 9 & 10 Vict. c. 104. Section 1 of this latter Act provided, that it should be lawful for Her Majesty to demise for any term, not exceeding fourteen years, any waste lands of the Crown in the Colony, or to grant to any person or persons a license for occupation, for any term not exceeding fourteen years, any such waste lands. The 6th section of this Act gave authority to Her Majesty by any order in Council to make and establish rules and regulations respecting such licenses or demises. Various Orders in Council were made under the authority of this enactment, having reference to the grant of leases, but not applying to licenses to occupy for pastoral purposes.

By the *Imperial Act*, 18 & 19 Vict. c. 55, generally known in the Colony as the *Constitution Act*, the Legislature of the Colony of *Victoria* as now subsisting, was established, and by the *Imperial Act* of the 18 & 19 Vict. c. 56, the Act, 5 & 6 Vict. c. 36, and 9 & 10 Vict. c. 104, were repealed; and it was enacted, amongst other things, in substance by section 4, that it should be lawful for the Legislature of the Colony of *Victoria* to repeal, alter or amend any Order in Council made under the authority of the 9 & 10 Vict. c. 104, and that until so repealed, and subject to any such alteration or amendment, every such Order in Council should remain in force.

Various licenses to occupy the unsettled Crown lands in the Colony for pastoral purposes had been, for some years previous to 1861, granted, from time to time, by the Government. According to the custom prevailing at the commencement of that year, the licensees of Crown lands paid an annual license fee of at least £10, and if the lands occupied exceeded a given area, or were capable of depasturing more than a given quantity of sheep and cattle, the license fee was increased in proportion.

The lands in question comprised in the *Lamplough* run, were thus held by the predecessors of the Respondents, from whom they derived title.

On the 18th of September, 1860, the Act, 24 Vict. No. 117, entitled "*An Act for regulating the sale of Crown Lands, and for other purposes,*" was passed by the Colonial Legislature. By the 71st section of that Act it was provided that the Governor in Council might proclaim that any Crown lands in the vicinity of any gold-field should be a common for the use of all holders of miners' rights, business licenses, and carriers' licenses, and other residents on such gold-field, and every such holder or other resident should from the time of such proclamation be entitled to depasture his horses and cattle on such common, subject to the rules and regulations thereinafter mentioned, and that such common should be called a "gold-fields common." By section 77 the Governor was empowered (*inter alia*) at any time to increase, diminish, alter or abolish any gold-fields common.

By a proclamation dated the 28th of January, 1861, and published in the *Victoria* Government Gazette of the 5th of February, 1861, reciting and professing to be made in pursuance of the last mentioned Act, the Governor of the Colony proclaimed certain Crown lands in the vicinity of the gold-fields thereinafter mentioned, which included portions of the *Lamplough* run, to be a gold-fields common within the meaning of the Act.

At the time of the proclamation, the Respondents, *Clough* and *Bogg*, were in occupation of the whole of the *Lamplough* run, and continued after the proclamation to occupy the residue not included in the gold-fields common, together with *Woodstock* and *Maiden Hill* run previously occupied by them. Up to this period no lease had been granted of the *Lamplough* or other runs, the

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Respondents and their predecessors, holding only under annual licenses, granted under the provision of the before-mentioned Acts and Orders in Council. It appeared, however, that an application for a lease had been made by one of the Respondents' predecessors, under an Order in Council of the 9th of March, 1847 (which was one of the orders made pursuant to the 9 & 10 of Vict. c. 36), but no such lease was granted.

On the 20th of March, 1862, the Respondents, *Clough* and *Bogg*, having made application for the license to occupy the *Lamplough* run, a license under the hand of the Governor was made to them in the following terms:—

"License to occupy waste lands of the Crown, by his Excellency the Governor of *Victoria*, &c."

"Whereas *T. H. Clough & Co.* have made application for a license to occupy waste lands of the Crown, situate in the district of *Castlemaine*, and known as *Lamplough*. Now I, the Governor aforesaid, do hereby authorize the said *F. H. Clough & Co.*, upon payment by them of the sum of £10 sterling into the hands of the receiver at *Melbourne*, on or before the 31st day of March next, and upon the due acknowledgment of such payment here made by the said receiver, to occupy the said waste lands for the term hereinafter mentioned. Upon the issue of this license by the said receiver, the same is to operate and be in force from the 1st day of January, 1862, until the 31st day of December, 1862, and no longer."

"Given under my hand at *Melbourne, Victoria*, this 20th day of March, A. D. 1862.

"*Henry Barkly.*

"N.B. Although the above-mentioned waste lands of the Crown are described as being known as *Lamplough*, yet it is to be understood that no right is hereby granted to occupy land merely because such land may have been at some time heretofore known or described as *Lamplough*, and this license will not authorize the said *T. H. Clough & Co.* to occupy any land which is now, or which may formerly have been known as forming part of such run, but which shall be or may have been lawfully taken away from such run, by or on behalf of the Crown, or the Board of

Land and Works, by alienation or otherwise, howsoever; and the said *T. H. Clough & Co.* shall not be entitled to any compensation, or to a return of any portion of the above-mentioned sum, if any portion of the above-mentioned waste lands of the Crown shall hereafter be alienated, or be otherwise lawfully dealt with by the Crown, or the Board of Land and Works; or if the said *T. H. Clough & Co.* shall be deprived of the enjoyment of any portion of such lands by reason of the same being proclaimed a common, or by reason of any other lawful act to be done on behalf of the Crown, or by the Board of Land and Works.

"Received the above sum £10, per receiver.

"*A. S. Thomson.*

"Treasury, *Melbourne*, March 31, 1862."

Previous to the issuing of this license and on the 31st of December, 1861, *Clough* and *Bogg* had paid to the paymaster at the Treasury the sum of £99 10*s.* 8*d.*, a portion of which was for assessment on stock, depastured on *Lamplough* station for the second half-year of 1861. And on the 30th of June, 1862, they paid the sum of £329 11*s.* 8*d.* to the same officer, a portion of which was assessment on stock depastured on *Lamplough* station for the first half-year of 1862.

On the 18th of June, 1862, the *Colonial Act*, 25 Vict. No. 145, entitled an "Act to consolidate and amend the Laws relating to the sale and occupation of Crown Lands," was passed. By the first section certain Colonial Acts, including the 24 Vict. No. 117, and all Orders in Council, and regulations respecting the sale or other disposal of the waste lands of the Crown in force in *Victoria* at the time of the passing of that Act, were repealed, saving, however, all estates, rights, and interests created or existing under or by virtue of the Act, 24 Vict. No. 117. The Act No. 145 was divided into parts. Part I. sections 1 to 11, was the introductory, Part II., sections 12 to 46, provided for the sale of Crown lands which were to be made under the direction of the Board of Land and Works. Part III. sections 47 to 62 provided for leases and licenses for other than agricultural purposes. Part IV. sections 63 to 79 related to commons. Section 63 saved (except as in the Act provided) all commons proclaimed under

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the Act 24 Vict. No. 117, and the rights of any person entitled under the authority of the last-mentioned Act to depasture his horses or cattle upon any such common. Section 65 gave the Governor in Council power in certain cases to proclaim lands to be a municipal common, or a gold-fields common, or a town common, or a farmers' common, as the case might be; section 67 reserved the rights of commonage to all persons resident on the lands so selected to be proclaimed. Section 77 provided that nothing therein contained should prevent the sale by auction, or selection, or the leasing under that Act, of any land comprised in any common proclaimed, or subject to licenses granted as aforesaid, before or after the passing of that Act; and the Governor in Council might at any time increase, diminish, alter, or abolish any such common. Part V., from section 80 to 121, related to "Licenses for pastoral occupation," section 80 providing that yearly licenses as to existing runs should be issued to confer no greater privileges than previous pastoral licenses conferred, while sections 81 to 87, contained specific provisions for the payment and assessment of the rents, and for ascertaining the grazing capabilities of the runs, which were to be fixed and determined on by the Board of Land and Works, in manner and form therein particularly provided; and when so determined, to be conclusive unless appealed against.

In pursuance of these provisions, the Board of Land and Works proceeded to determine the grazing capabilities of each of the four classes of runs, into which the pastoral lands of the Colony were directed to be divided, and published, as required by the Act, in the *Victoria* Government Gazette of the 10th of December, 1862, the amount of rent to be paid in respect of such runs.

The area of the *Lamplough* run was treated as 1500 acres, and the annual rent was fixed at £25. There was no appeal against the determination of rent for the *Lamplough* run, and the annual rent so determined was duly paid in respect thereof.

On the 4th of March, 1863, the Respondent, *Dallimore*, and one *Charles Forster* purchased of the Respondents, *Clough* and *Bogg*, all their right, title, and interest to depasture stock on the *Woodstock* stations or runs, which, in the contract of purchase, were stated to include the stations or runs then known as *Lamplough*,

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Maiden Hill, *Woodstock*, *Lansdown* and *Knighton*, as the same were then held and occupied by *Clough* and *Bogg* under depasturing licenses from the Crown, standing in the names of the last-named Respondents, together with the benefit of the licenses. It was by such contract provided that the boundaries of the runs should be as stated in the Government Gazette, except such portions as might have been deducted for commonage, sales, or reserves.

The benefit of this contract became, by an agreement between the parties, dated the 4th of March, 1863, vested in the Respondent *Dallimore* alone.

By a proclamation dated the 26th of October, 1863, the Governor of the Colony, in pursuance of the power given him by the "*Land Act*, 1862," abolished the gold-fields common described among others in the proclamation of the 28th of January, 1861, under the designation of *Lamplough*, and declared that the area therein described and marked as containing 3600 acres should be and constitute the gold-fields common for *Lamplough*.

Notwithstanding that the original gold-fields common was thus abolished, the rents paid by the Respondents in respect of *Lamplough* run remained the same as before such abolition. But no fresh license for occupation was granted to them.

On the 31st of December, 1863, the Board of Land and Works in pursuance of the 98th section of the "*Land Act*, 1862," No. 145, exposed to sale by auction in lots divers unoccupied Crown lands, including those in question in this appeal. The northernmost portion of the *Lamplough* run containing 3580 acres formed Lot 2, and was put up for sale by the name and description of *Lamplough* A. run, the amount of rent determined for the same being £50. This lot was sold to *Ambrose Bowles* at a premium of £75. The southernmost portion of the same run, containing 5500 acres formed Lot 3, and was exposed for sale by the name of *Lamplough* B. run, the amount of rent determined for the same being £85. This was sold to *Daniel Noonan* at a premium of £151.

Chauncey, one of the officers of the Board of Land and Works was instructed by the Board to put *Bowles* and *Noonan* in possession of the runs purchased by them. He accordingly met them by appointment on the land, and formally gave them possession. A shepherd of the Respondent, *Dallimore*, was at the

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time in possession of both the purchased runs, on behalf of the Respondent, and refused to give up such possession.

On the 30th of March, 1864, *Chauncey* as such agent of the Board, made a demand on *Dallimore* personally of possession of the lands in question for the above purchases. He refused, however, to give up possession: whereupon the Appellant on the 13th of April, 1864, brought an action of ejectment in the Supreme Court of the Colony against the Respondent, *Dallimore*, for the two portions of *Lamplough* run, known as *Lamplough* A. run, and *Lamplough* B. run.

On the 7th of June, 1864, the Respondents, *Clough* and *Bogg*, obtained leave to appear to the action, as landlords of the Respondent, *Dallimore*, and defend the property sought to be recovered.

The action was tried before Mr. Justice *Williams*, and a jury, and a verdict was returned for the Appellant with one shilling damages, leave being reserved to the Respondents to move to enter a verdict for them on the grounds appearing on the Judge's notes of the evidence given.

On the 24th of June, 1864, the Respondents obtained a rule *nisi* to set aside the verdict for the Appellant and to enter a a verdict for the Respondents on the grounds, first, that the right of entry was not in the Crown, but in *Bowles* and *Noonan*. Second, that the proclamation of the common did not determine the possession of the Defendant, or if it did, the revocation of such proclamation revested the possession in the former licenses. Third, that the Crown had no power, under the 98th section of the *Land Act*, 1862, to dispose of the lands to *Bowles* and *Noonan*, in the manner proved at the trial. Fourth, that no demand of possession was proved, the demand itself being insufficient, and no authority to make the demand was proved. Fifth, that, as licenses to occupy the land from 1847 to 1863, continuously, and particularly for the year 1861 were issued, the 71st section of the Act, 24 Vict. No. 117, did not apply to the *Lamplough* run, but only to unoccupied Crown lands, or if it did so apply, that the licensee was as much entitled to occupy the land as the commoners. Sixth, that the order in council of the 9th of March, 1847, coupled with possession and payment of license fees, and rent, and recognition, from time to

time, by the Crown and its officers, established a tenancy, and that such tenancy had not been determined.

The rule *nisi* was argued before the Supreme Court, and judgment having been given for the Respondents on the 10th of September, 1864, was then made absolute.

The Appellant applied for, and obtained, leave to appeal from this judgment.

The *Attorney-General* (Sir *R. Palmer*), Sir *Hugh Cairns*, Q.C., and Mr. *Kekewich*, for the Appellant:—

The question at issue, though seemingly involved, is simply one of tenure. The Respondents derive their original title, if they have any beyond that conferred by the license of the 20th of March, 1862, from the occupation of their predecessors as licensees under the Crown, of lands forming part of a run in the unsettled district called *Lamplough*. It is not pretended that there has been any sale of these lands under the provisions of the *Imperial Acts*, the 5 & 6 Vict. c. 36, or the 9 & 10 Vict. c. 104, or in fact any lease under the Order in Council made pursuant to the last-named Act, though it is said that a lease had been applied for by one of the Respondents' predecessors. Be this as it may, the question would still remain, what claim such occupier had to the grant of a lease, even if applying for it, and that is not sufficiently before the Court to require argument, for both these Acts were repealed, while the Orders in Council made under them were made subject to future amendments and alterations by the *Constitution Act*, 18 & 19 Vict. c. 55. Now, it was in this state of things that the Respondents or their predecessors were in occupation of the lands in question as licensees of the Crown. Then came the *Colonial Act*, 24 Vict. No. 117, for the sale of Crown lands, and the proclamation of gold-fields commons, and the due proclamation of the *Lamplough* run, notwithstanding its occupation by the licensees as such, who continued to hold the residue with the other lands occupied by them. It was after this proclamation that the Respondents, *Clough* and *Bogg*, applied for and obtained the license of the 20th of March, 1862, which by the terms of it is limited to one year and no longer; and besides being so limited by the memorandum appended to it, so much only of the original *Lamplough* run as remained after the goldfield

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proclamation, was subject to future appropriations by the Crown or Board of Land Revenue. Then came the Act 25 Vict. No. 145, with all its special provisions to be found in the sections under Parts 1, 2, 3, 4, and 5.

Notwithstanding these various dealings by the Crown and its officers with the lands so occupied by the Respondents, they continue in the occupation and treat their possession as if it was a valid and subsisting title, by parting with it to the Respondent, *Dallimore*. They obtain, however, no renewal of the license of March, 1862, and must, therefore, be held to be but tenants on sufferance. But the proclamation of 26th of October, 1863, which abolished the previous goldfields common, and constituted one for *Lamplough*, put an end at once to the Defendants' right of possession. We say, then, that the Crown was, throughout these proceedings, and is now, the owner of the lands in question, and on the true construction of the Acts, was entitled to dispose of them in the manner stated, having, before the commencement of the action, done all things necessary to entitle it to recover possession of such lands.

Mr. *Bovill*, Q.C., Mr. *Cotton*, and Mr. *A. K. Stephenson*, for the Respondents.

At the time of the agreement for transfer by the Respondents, *Clough* and *Bogg*, to *Dallimore*, they were in licensed occupation of the land mentioned in the writ, which they, or their predecessors, had held anterior to and in the year 1861. Their title, therefore was transferred to the Respondent, *Dallimore*, who, at the date of the writ of ejectment, was in the lawful possession and occupation of the land in question. We maintain that the Crown had no power to determine the tenancy of the Respondents by proclamation, and never intended to do so. The proclamation for making the *Lamplough* run a goldfields common, had no such effect. That is evident from the continued occupation of the Respondents, and the license subsequently granted to them. There never was any due revocation of the occupancy of *Clough* and *Bogg*, who by the payment and acceptance of rent, as well as under the general lease of their licenses, were at the least tenants from year to year. The Order in Council of March, 1847, gave the licensees a claim to a

lease of the lands with a right of renewal and preemption, and that until the 31st of December, 1870.

Though the Act 24 Vict. No. 117, section 71, under which the proclamation issued, which is the foundation of the Appellant's title, empowers the Governor in Council to proclaim Crown lands in the vicinity of a goldfield as a goldfields common, and by section 77 to diminish, alter, or abolish such common, it contains no reference whatever to licensed occupants; their title remained therefore untouched. No lands in pastoral occupation of a licensed occupier could be legally proclaimed as a goldfield common within the meaning of the 71st section of the 24 Vict. No. 117. Now, the lands mentioned in the writ were not unoccupied Crown lands within the meaning of the *Colonial Act*; they were in the pastoral occupation of the Respondents, and the attempted sale by auction of them was illegal and void. But independent of the licensed occupation, which would of itself create a yearly tenancy, the Respondents had, by virtue of such tenancy under the provisions of the Order in Council of March, 1847, a right to a lease for years of the lands, and such right had been transmitted to them by the previous occupants, the original licensees. The Crown had no right to sell any lands but waste lands. The judgment of the Court below proceeded on the correct construction of the various Acts and Orders in Council, and must be affirmed.

Their Lordships' judgment was delivered by

SIR EDWARD V. WILLIAMS:—

Dec. 21.

In this case the principal question argued by Counsel before us, and considered in the judgment of the Court below, was, what effect the proclamation of January 28th, 1861, whereby a portion of the *Lamplough* run was proclaimed a goldfield common under the *Colonial Act*, 24 Vict. No. 117, had on the then existing right to occupy the run. On the part of the Appellant it was contended that the effect of the proclamation was to take away absolutely the space proclaimed a common from the run, and so to diminish its area to that extent, at the same time determining absolutely all title, legal or equitable, of the Respondents, and those under whom they claim thereto. On the part of the Respondents the

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contention was, that the effect of the proclamation was merely to subject the run to the servitude of the rights of common enumerated in the Statute by which the proclamation was authorized, and that, subject to such servitude, the rights of the occupier continued to exist undiminished over the whole run.

But in the view we take of the case, it is not necessary to decide this question.

It is plain that neither the Respondents, *Clough* and *Bogg*, nor the Respondent, *Dallimore*, who claims under them, had any rights, legal or equitable, as licensees at the time this suit was commenced; for the last license obtained by *Clough* and *Bogg* was dated on the 25th of March, 1862, and it mentions expressly that it is to operate and be in force from the 1st of January, 1862, until the 31st of December, 1862, and no longer.

But the Respondents claim as tenants, and that claim is founded on two subsequent payments of rent, the one on September 28th, 1863, for rent due 30th of June, 1863, and the other on December 31st, 1863, for rent due on that day, which payments were accepted as rent on behalf of the Appellant, and having been so accepted constituted, as it was contended, a tenancy from year to year.

It cannot be disputed that payment and acceptance of rent will furnish a sufficient evidence of a tenancy: but it is plain that such tenancy can only be thus implied with regard to the land in respect of which the rent is paid and accepted, and cannot be implied with regard to any land in respect of which the rent was not paid and accepted. It follows, therefore, that if it appears that the rent in question was not paid and accepted in respect of any part of the land which formed that portion of the run over which the common was proclaimed, no tenancy could be constituted by such payment of rent as to any part of that land.

If the rent paid after the license had ceased to operate had been paid without anything having occurred but the substitution of the payment of rent for the obtaining a new license, it would, perhaps, follow that the implied tenancy ought to be regarded as co-extensive with the whole area to which the license extended, and it would then have been necessary to construe the license—which license was in the terms already stated.

On the part of the Crown the contention was, that the terms of

the notice excluded the land which had been proclaimed a common from the right granted by the license, because such land had been "lawfully taken away" from the run. On the part of the Respondents it was contended that the concluding part of the notice treats the deprivation of the right of enjoyment of any portion of the land, by reason of the same being proclaimed a common, as a distinct thing from the being "lawfully taken away" mentioned in the earlier part, and indicates that such land is not to be considered as excluded from the right granted by the license, but only as deteriorated in value, so as to entitle the occupier to a compensation but for the provision contained in it.

It is not necessary, we think, to decide this point, because the extent of the implied tenancy is ascertainable, in our judgment, by reference to matters independent of the license, and which occurred subsequently to its expiration.

The subsequent matters arose out of the exercise by the Board of Works of the powers conferred under sections 84, 85, 86, and 87 of the *Land Act*, 1862, 25 Vict. No. 145.

By those enactments rents are substituted for the former assessments of stock depastured on the runs, such rent to be paid according to the grazing capabilities of the run, to be determined by the Board, and when they have been so determined, the Board is directed to cause to be inserted in the Government Gazette a notice of the amount of rent to be paid, in the form mentioned in one of the schedules of the Act, and the amount there mentioned is to be binding and conclusive, unless the occupier shall within two months of the publication send a notice of appeal. The form given by the seventh schedule consists of several columns, in one of which the area of the run is to be inserted, in another the grazing capabilities of the run, in another the annual rent, and in another the quantity of stock depastured on the run in 1861, and the last column is headed "general observations." Accordingly, on the 10th of December, 1862, the Board having determined the grazing capabilities of *Lamplough* run, published in a supplement to the *Victoria* Government Gazette the amount of rent, in a schedule framed in accordance with the Act; and in that schedule *Lamplough* run was stated to have an area of 1500 acres, with a grazing capability of 750 sheep. The rent was fixed at £25. The

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quantity of stock depastured on the run in 1861 was stated at 5972, and in the columns for "general observations" there was an entry, "area diminished by sale and commonage."

It is probable that this schedule was intended to be framed in conformity with the license of 1862, according to the Appellant's construction of it. At all events, we cannot doubt that the payments of rent, which are relied on as establishing the tenancy, were made, and accepted on the footing of the statements contained in the schedule. The amounts paid corresponded with the rent fixed, for although the receipt for the payment made in December. 1863, shews that £78 6*s*. 8*d*. was paid for the half year, yet it is satisfactorily shewn by the evidence that this sum was composed of £12 10*s*., the half-year's rent mentioned in the schedule, with an augmentation of £53 6*s*. 8*d*., in respect of the southern part of the run which had not been considered in the first instance to belong to the *Lamplough* run. And the amount paid for the earlier half-year's rent is £12 10*s*.

If this be so, it is plain that the payments of rent were made for the run exclusively of the land in question in this cause. And the result is, that no tenancy was established in respect of it; but that as soon as the Respondents assented to become tenants of the diminished area only, all title to the land in question ceased, both at law and in equity, and they became merely tenants at sufferance of it, supposing them to have had a right to hold it up to that time; and consequently no notice to quit, or demand of possession was requisite.

The judgment in the Court below assumes that the occupation, as licensees and tenants, of the run continued all along to be of the same dimension, and does not advert to the facts which, in our opinion, shew that the tenancy, if established, was of a diminished area, so as to exclude the land in question.

For these reasons, their Lordships think they ought to advise Her Majesty to reverse that judgment, with costs, and that the verdict found for the Appellant ought to stand.

Solicitors for the Appellant: *Freshfields & Newman.*

Solicitors for the Respondents: *Young, Maples, Teesdale, & Young.*

GEORGE ROLFE AND EDWARD BAILEY,
AND
THE BANK OF AUSTRALASIA . . .
AND
FLOWER, SALTING AND COMPANY . . RESPONDENTS.

APPELLANTS.

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Dec. 9, 11, 12, 13;
Feb. 1.
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ON APPEAL FROM VICTORIA. (INSOLVENCY JURISDICTION.)

Insolvency—Partnership—Liability of New Firm for debts of Old—Victoria—Colonial Act, 5 Vict. No. 17—Proof admitted against Joint Estate by Creditor holding security on Separate Estate.

R., *F.*, and *R.*, partners in business, and dealing with *F.*, *S.*, *& Co.*, took *T.* and *S.*, clerks in their employment, into partnership with them. The partnership was constituted by deed, to continue for three years, and a balance-sheet shewing the liabilities and assets of the existing firm was drawn up and admitted by all the partners. The new firm continued to trade, up to the period of its insolvency, upon the same footing and with the same books as the old firm—no distinction being made in their payments, or balances, or between the debts or assets of the new, or what was the old firm. *F. S., & Co.*, continued to deal with the new as they had done with the old firm. *R. F.* and *R.* having become insolvent, *F., S., & Co.*, creditors to a large amount, proved against the estate of the new firm. *R.* and *B.*, also creditors of the new firm, proved against their estate: and sought to expunge the proof of *F., S., & Co.*, on the ground that their debt having accrued previous to the new partners being taken in, was due from the old, and not from the new firm:—

Held, by the Judicial Committee (affirming the judgment of the Supreme Court), that there was sufficient proof in the dealings and transactions of the several parties, to show that the new firm on its formation adopted the liabilities of the old firm, and that *F., S., & Co.* had consented to accept the liability of the new firm, and to discharge the old firm, their original debtors.

The Act of 5 Vict. No. 17 (the principal *Insolvent Act* of the Colony of *Victoria*), sec. 39, enacts, "that any creditor who shall have or hold any security or lien upon any part of the insolvent estate, shall, when he is the petitioning creditor, be obliged upon oath, in the affidavit accompanying the Petition, and when he is not the petitioning creditor, in the affidavit produced by him at the time of proving his debt, to put a value upon such security, so far as his debt may be thereby covered, and to deduct such value from the debt proved by him, and to give his vote in all matters

* *Present*:—LORD CHELMSFORD, SIR JOHN TAYLOR COLERIDGE, SIR JAMES W. COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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respecting the insolvent estate as creditor only for the balance, &c. And in case any creditor shall hold any security or lien for payment of his debt, &c., upon any part of the said estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of, or a dividend for, the balance after such deduction."

Held, that this enactment does not destroy the distinction between the joint and separate estate of an insolvent, so as to compel a creditor, holding a mortgage security on the separate estate, to estimate and deduct its value before he can be allowed to prove against the joint estate.

The English law of Bankruptcy which allows a joint creditor, though holding a security on the separate estate, to prove against the joint estate without giving up his security, prevails in the Colony of *Victoria*, and is not altered or varied by the Insolvent Acts of that Colony.

THESE were two appeals arising out of the insolvency, and regarding the estate, of *William Rutledge*, *Horace Flower*, and *Francis Forster* (trading under the firm of *William Rutledge & Co.*), of *Belfast*, in the Colony of *Victoria*. The first was an appeal from a judgment of the Supreme Court delivered in the matter of the insolvency of *William Rutledge & Co.* The application in that Court, from the refusal of which the appeal was brought, being, in substance, that a proof by the Respondents, *Flower, Salting & Co.*, against the estate of *Rutledge & Co.*, for a sum exceeding £50,000, might be expunged.

The Appellants, *Rolfe* and *Bailey*, who were creditors to a considerable amount of the late firm of *Rutledge & Co.*, insisted that it ought to be expunged, on the ground that it was not a debt of the firm, but a separate debt of two only of the three partners of the firm.

In the second case, the Appellants, the Bank of *Australasia*, who were creditors to a very large amount of the late firm of *Rutledge & Co.*, insisted that as the Respondents, *Flower, Salting, & Co.*, held securities for their debt on the real estate of one of the partners, and made no deduction from the amount which they claimed in respect of the value of these securities, the proof which they tendered was wholly irregular and inadmissible.

The Respondents were traders at *Sydney, New South Wales*, under the style or firm of *Flower, Salting, & Co.*, and at *Melbourne*, under the firm of *Flower, Macdonald, & Co.* They were also traders in *London*, under the firm of *P. W. Flower & Co.* All the three

firms consisted of the same partners, though trading in different places, and bearing different names.

In both cases the questions were raised by the Appellants respectively, and were throughout severally contested between them and the Respondents, *Flower* and *Salting*, exclusively, without any intervention on the part of the official assignee, though he was named as a formal party in the proceedings below.

The firm of *W. Rutledge & Co.* carried on business at *Belfast*, in the Colony of *Victoria*. The founders and original members of it were *William Rutledge* and *Horace Flower; Lloyd Rutledge* afterwards became a member of the firm; he died in the year 1858, and the firm, until 1859, consisted only of the two original members. On the 7th of April, 1859, the then members of the firm agreed to admit two new partners, *D. Talbot* and *F. Forster*, who had both been and then were clerks of the firm, and both of whom were admitted as from the 7th of April, 1859, to the 1st of July, then next ensuing, and thenceforth for a period of three years.

This partnership was created by a deed bearing date the 7th of April, 1859; by which it was declared that the partnership should commence from the date thereof, but that neither *D. Talbot* or *F. Forster* should "be entitled to any share of the profits, or be subject to any losses connected with the partnership from the day of the date thereof until the 1st of July then next." On the 30th of June, 1859, a balance-sheet was drawn out, shewing the position of the firm at that date; by which an excess of assets over the liabilities appeared which was treated as capital belonging to *W. Rutledge* and *H. Flower*, in certain ascertained proportions, which were separately placed to their respective credits. Neither *D. Talbot* or *F. Forster* brought in any capital.

Upon the complete constitution of the new partnership, all the assets and liabilities of the old firm were, with the consent of all the partners, transferred to and assumed by the new firm, with the exception that by the 18th article of the deed of partnership it was declared that in taking the yearly accounts of the partnership "the said *D. Talbot* and *F. Forster* should not be debited or credited with any loss or gain connected with any freehold or leasehold property belonging to or held by *W. Rutledge* and *H. Flower* as security. No new books were opened by the new

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firm, but the accounts were continued in the old books in the same manner as they would have been if no change had been made in the members of the firm, and the Respondents, who were well aware of the change in the firm, continued to deal with the new firm as they had done with the old one.

It appeared that previous to and pending these arrangements, *W. Rutledge* had by a deed, dated the 25th of September, 1857, and by another dated the 30th of June, 1859, mortgaged certain freehold estates which were his private property to the Respondents as a security to them for the debt due from *W. Rutledge & Co.*

Talbot died in February, 1862; and the firm of *William Rutledge & Co.*, from that time until its insolvency, consisted of the three surviving partners.

In the month of April, 1862, *William Rutledge & Co.* stopped payment; and on the 4th of June, 1862, an order was made by a Judge of the Supreme Court, on the petition of *W. Rutledge*, *H. Flower*, and *F. Forster* (the three existing members of the firm), by which order the Court accepted the surrender of the joint estate of the firm for the benefit of their creditors.

The insolvents filed a joint schedule, to the truth of which they all deposed, and from which it appeared that they were indebted to the Respondents, Messrs. *Flower & Salting*, for merchandize, in a sum exceeding £50,000, without security on the insolvents' estate, but secured on the private estate of *W. Rutledge*; and to the Appellants, the Bank of *Australasia*, for advances made by them, in a sum exceeding £30,000.

The first meeting under the insolvency was held at *Geelong* on the 9th of July, 1862. At that meeting, the Respondents tendered a proof against the estate for £53,587 10*s.* 10*d.*

It was contended by the Appellants, the Bank of *Australasia*, who had proved at the same meeting for the sum of £30,249 18*s.*, that the Respondents were, according to the Acts and Ordinances relating to insolvency in force in the Colony, bound to set off against, and deduct from their proof the value of the before-mentioned mortgage securities which they held against the separate estate of *W. Rutledge*.

The Commissioner before whom the meeting was held, con-

sidered the contention valid, and required the Respondents to value their debt accordingly. The Respondents refused to do this, and the Commissioner thereupon, for the purpose of enabling them to bring the question before a Court of appeal, rejected the proof altogether.

On the 25th of July, 1862, the Respondents' appeal from the Commissioner's decision was heard before Mr. Justice *Chapman*, who held that they were not bound to value their security, and accordingly admitted the proof. The Appellants, the Bank of *Australasia*, appealed to the Supreme Court from this decision.

The case was argued at length before the Chief Justice, Sir *William Foster Stawell*, Mr. Justice *Molesworth*, and Mr. Justice *Chapman*, who, by an order of the 24th of September, 1862, dismissed the appeal, without costs. Against this order the Bank of *Australasia* appealed to Her Majesty in Council.

On the 1st of August, 1862, the Appellants, *Rolfe* and *Bailey*, who carried on business as merchants at *Melbourne*, in the Colony of *Victoria*, under the firm of *Rolfe & Bailey*, proved against the insolvent estate two debts, amounting in the aggregate to £288 13*s.* 2*d.*

The Appellants *Rolfe* and *Bailey*, alleging that the Respondents were not creditors of the firm of *W. Routledge & Co.*, the joint estate of which was being administered under the insolvency, applied on the 11th of December, 1862, before Mr. Justice *Chapman*, for, and obtained, a rule *nisi* to expunge the Respondents' proof, on the ground that their alleged debt was not a joint debt of all the partners in the firm of *W. Rutledge & Co.*, but in fact a separate debt of *W. Rutledge* and *H. Flower*, for which *Forster*, their partner in the firm, was in no ways liable. In support of their application to expunge the Respondents' proof, the Appellants filed an affidavit made by *Foster*, one of the insolvents, to shew that on the 1st of July, when he and *Talbot* (both then clerks of the firm, as before stated) became partners in the firm of *W. Rutledge & Co.*, a debt of much more than £80,000 was due from *W. Rutledge* and *H. Flower* (the then partners) to the Respondents, under one or other of the names under which the Respondents traded; and that they, *Forster* and *Talbot*, became partners under, as they alleged, a distinct agreement between themselves on the one hand, and

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W. Rutledge and *H. Flower* on the other, that the debt to the Respondents was to remain exclusively the debt of the latter two persons. The affidavit in question further affirmed that *F. Forster*, while a partner in the firm, had done nothing whatever to make himself liable to the debt so due to the Respondents, either as between himself and the Respondents or as between himself and his partners.

The Respondents filed affidavits in opposition to the Appellants' application, the purport of which was to establish: First, that according to the articles of partnership under which *Talbot* and *Forster* were admitted into the firm of *W. Rutledge & Co.*, *F. Forster* had, as between himself and his partners, made himself jointly liable with them for the debt which the Respondents proved, and, secondly, that *Forster* had, as between himself and the Respondents, made himself a joint debtor for it to the Respondents with the other partners in the firm constituted in 1859.

In answer to this evidence, affidavits were filed by the Appellants and by the insolvent, *Forster*, in support of the Respondents' claim on the separate estate of *Rutledge & Co.*

The evidence was conflicting; and is stated and commented on, so far as is requisite for the decision of the case in the judgment of their Lordships on the appeal.

On the 2nd of March, 1863, Mr. Justice *Molesworth* pronounced judgment on the application made by the Appellants, Messrs. *Rolfe & Bailey*, to expunge the proof. After considering the facts of the case, he expressed his opinion that *Talbot* and *Forster* had never adopted or become liable for the debt to the Respondents, and he accordingly ordered the Respondents' proof to be expunged.

The Respondents appealed from the decision of Mr. Justice *Molesworth* to the Supreme Court of the Colony in *banco*. On the 12th of May, 1863, the Supreme Court made an order allowing the appeal, and discharging with costs the rule *nisi* to expunge the proof.

The Appellants applied for leave to appeal against the last-mentioned decision to Her Majesty in Council. On the 28th of May, 1863, this leave was refused by Mr. Justice *Molesworth*, on

the ground that, the matter in issue being only for the sum of £288, it was not within the appealable value as declared by the *Colonial Act*, 15 Vict. No. 10, s. 33. On the 21st of September, 1863, the Supreme Court of *Victoria*, sitting in *banco*, reversed the last-mentioned order, and granted the Appellants leave to appeal to Her Majesty in Council.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Hobhouse*, Q.C., and Mr. *Wickens*, for the Appellants in both cases:—

These cases arise out of the insolvency of the firm of *Rutledge & Co.* The Appellants in either case are creditors of that firm, and have tendered and proved their respective debts. The Respondents, *Flower & Salting*, were also admitted creditors to a very large amount, and it is against their claim in fact that the proceedings in both cases are directed. The Appellants, Messrs. *Rolfe* and *Baily*, seeking to expunge the Respondents' debt altogether as not due from the insolvent firm of *Rutledge, Flower, & Forster*, but from the previous firm of *Rutledge & Flower*; and the Appellants, the *Bank of Australasia*, insisting that by the law of the Colony the Respondents are bound to deduct the value of the mortgage securities held by them on the separate estate of *William Rutledge* from the debt which they claim to prove under the insolvency of *W. Rutledge & Co.* We say, therefore, first, that the debt proved by the Respondents against the estate of "*William Rutledge & Co.*" was in no sense a debt of that firm, but merely the separate and personal debt of *William Rutledge* and *Horace Flower*, two of the partners in it. They alone constituted the firm at the time the Respondents' debt was incurred. There is nothing in the partnership deed, nor in the subsequent dealings of the parties, which could render the new firm liable for the debts of the old firm; there was no novation of the old debts by *Talbot* or *Forster*. If an incoming partner chooses to make himself liable for debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But even if an incoming partner does agree with his co-partners that the debts of the old firm shall be taken by the new firm, this, though valid between the partners, is, as regards strangers, *res inter alios acta*, and does not confer on them any right to fix the old debts on the new

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partner: *Park*, J., in *Vere* v. *Ashby* (1), *Ex parte Peele* (2), *Ex parte Williams* (3). These cases shew that in order to render an incoming partner liable to the creditors of the old firm, there must be some agreement to that effect entered into between him and the creditors, and founded on some sufficient consideration. There is no pretence for saying there was any such agreement, made between the creditors of the old firm and *Talbot* or *Forster*; and all the authorities shew that it is only by such an agreement and not by reason of partners being such, that any liabilities in respect of the old debts of the firm will attach to the new partners. There must be some agreement, though it was said by Lord *Thurlow* a very little will suffice to shew it, between the partners themselves and the creditors: *Ex parte Jackson* (4); *Ex parte Bingham* (5); *Ex parte Clowes* (6); *Ex parte Liddiard* (7); an arrangement between the partners themselves is no evidence: *Ex parte Freeman* (8). The whole question, whether the estate of one of two partners who died, was after his death discharged from a partnership debt, is discussed, and all the authorities referred to in the case of *Winter* v. *Innes* (9); *Devaynes* v. *Noble* (10).

The case then resolves itself upon the evidence to the questions, first, whether the new partners took upon themselves the joint liability for the debts of the old firm; and, secondly, whether the creditors of the old firm agreed to accept the liability of the new for that of the old firm. Upon the facts and circumstances of the case, and looking to the whole evidence, we maintain that no such agreement was come to by either parties, and that the new firm were not liable for the debts of the old. The proof of the Respondent's debt, therefore, against the firm of *Rutledge, Flower, & Foster*, was rightly expunged.

Secondly, as regards the appeal of the *Bank of Australasia*, the estate to be administered under the joint adjudication included both the joint estate of the three partners as well as the separate estate of each of them. The Respondents' proof, therefore, against the joint estate was subject to the deduction of the amount of the

(1) 10 B. & C. 298.
(2) 6 Ves. 601.
(3) Buck. 13.
(4) 1 Ves. Jun. 131.
(5) Cooke's Brp. Laws, 534.
(6) 2 Bro. C. C. 595.
(7) 2 M. & Ayr. 87.
(8) Buck. 471.
(9) 4 My. & Cr. 101.
(10) 1 Mer. 530.

securities held by them against the separate estate, that was held by the Commissioner of Insolvent Estates in the argument before him, and the proof tendered by them was rejected. That, we maintain, was the correct decision, and according to law: *Ex parte Peacock* (1); *Ex parte Davenport* (2); *Ex parte Shepherd* (3); *Ex parte Free* (4); *Ex parte Hallifax* (5).

The estates are to be administered under the insolvent law of the Colony, and especially under the Act 5 Vict. No. 17, passed in 1841, which contains various provisions differing from the bankruptcy law of this country, especially in reference to the proof of joint and separate debts. The 39th section of that Act provides that any creditor who shall have or hold any security upon any part of the insolvent estate shall be obliged to put a value upon such security, and to deduct such value from the debt proved by him; which compels the joint creditor holding a security against the separate estate, to value such security, and prove only for the balance against the joint estate. That may be different from our law, but is the express enactment of the Colonial Act, and has no doubt been adopted, for, as we contend, good and obvious reasons. The case is analogous to, and seems to have been borrowed from, the Scotch law of sequestration, where, if a creditor hold a security for his debt over the bankrupt estate, its value must be deducted from the debt: 2 & 3 Vict. c. 41, s. 35; *Burton's* Law of Bankruptcy, ch. viii. sec. 1 (581).

Sir *Hugh Cairns*, Q.C., Mr. *Mellish*, Q.C., Mr. *Pearson*, and Mr. *W. S. Salting*, for the Respondents:—

It was not competent for either of the Appellants, after the debt due to the Respondents had been finally admitted to proof by the order of the 24th of July, 1862, confirmed on appeal by that made by the Supreme Court on the 24th of September, to question the proof of such debt in the proceedings which they instituted for that purpose. The learned Judge of the Court below had no authority to grant the rule *nisi* for expunging the Respondent's debt at the instigation of the Appellants, *Rolfe* and

(1) 2 Gl. & Jam. 27.
(2) 1 M. D. & De G. 313.
(3) 2 M. D. & De G. 204.
(4) 2 Gl. & Jam. 250.
(5) 2 M. D. & De G. 544.

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Baily, who proved subsequent to the admission of the proof of the Respondents. The jurisdiction of the Colonial Court is entirely dependent on legislative enactment. There is no clause in the Insolvent Acts for the Colony (the 5th Vict., No. 9 & No. 17; the 7th Vict., No. 19; the 8th Vict., No. 6 & No. 15; the 10th Vict., No. 14; and the 18th Vict., No. 11), giving power to expunge proofs analogous to those contained in the English Bankruptcy Acts, 6th Geo. 4, c. 16, sec. 60; and the 24th & 25th Vict. c. 134, sec. 155; and we maintain that the omission of such a clause implies that no such power exists. The 89th and following sections of the Colonial Act, 5th Vict., No. 17, could alone support such authority, but the proceedings here are not taken under any of those sections. Assuming, however, as the Supreme Court seems to have decided, that the learned Commissioner had jurisdiction to entertain such an application, the question resolves itself into one of evidence, whether in fact there was an agreement, tacit or expressed, by the Appellants as creditors of Messrs. *Rutledge & Co.*, to accept as their debtors the new instead of the old firm. Now, though we admit it does not follow that because there is evidence of such an agreement being made between the old and new firm themselves, such evidence necessarily leads to the conclusion that such an agreement existed between the creditors and the firm; yet, if the dealings of the parties have been such as to lead to the necessary inference that the creditors recognised and knew of the change of firm, their assent to such change will be implied: *Ex parte Jackson* (1), cited on the other side, is no authority against this principle, neither is *Ex parte Peele*. All the authorities relating to incoming partners, their rights and liabilities, are collected in *Lindley's* Treatise on the Law of Partnership, vol. i. pp. 314, 317, 352, and vol. ii. p. 985, where it is expressly laid down, as we maintain the law to be, namely, that the substitution of debtors can only be made with the creditors' consent.

Now, looking to the articles of partnership entered into between *Rutledge, Flower, Forster, & Talbot*, the affidavits of *Forster*, the bankrupts' books and schedules, there was abundance of evidence for the conclusion the Supreme Court came to, namely, that the Respondents adopted the new firm instead of the old, and were

(1) 1 Ves. Jun. 131.

consequently entitled to prove their debt against that firm from which their debt was justly due to them.

Then as regards the appeal of the Bank of *Australasia*, who insist that, as we hold a separate security against the separate property of one of the partners, we must deduct the value of that security before we can be admitted to prove against the joint estate.—the language of the 39th section of the *Colonial Insolvent Act*, 5 Vict. No. 17, warrants no such conclusion; it speaks of securities or liens upon the insolvent estate, not upon the separate property of one of the insolvents. Messrs. *Flower & Salting* hold no security on the joint estate of *W. Rutledge & Co.*, and never pretended to hold such; but they claimed, and are entitled to prove, for the whole debt due to them from the estate of *W. Rutledge & Co.*, against that estate, without reference to, or abatement on account of, the security they hold on the separate estate of *W. Rutledge*. The joint and separate estates are entirely distinct, and must be separately administered. The practice of the Scotch Courts has no reference to the present case; there are no provisions in the Insolvent Acts of *Victoria* analogous to or having the same effect as the law of sequestration in *Scotland*.

LORD CHELMSFORD:—

These are appeals from two judgments of the Supreme Court of *Victoria* in a matter of insolvency of a firm of *William Rutledge & Co.*, Merchants, carrying on business at *Belfast*, in that Colony, by which the Respondents, Messrs. *Flower, Salting, & Co.*, were admitted to prove against the estate of the Insolvents for a debt of £53,587 10*s.* 10*d.*

The questions raised in the two cases were different; but as the facts in each were the same, and both related to the same debt, they were argued together. They must now, however, receive a separate consideration.

To begin with the appeal of Messrs. *Rolfe & Bailey:* The judgment appealed from in their case was pronounced on an application by them to expunge the proof of the debt of Messrs. *Flower, Salting, & Co.*, on the ground that it was not a joint debt of all the partners in the existing firm of *William Rutledge & Co.*,

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to proof, said, "The deed being silent on the subject, we cannot on ordinary principles vary the expressed agreement by parol evidence, and say that an assumption of old debts and liabilities was part of the contract." This is not strictly accurate. Such an arrangement would be something in addition to the other terms, not inconsistent with them, and might be established either by parol evidence or by conduct.

In arguing the question as to the assumption of the liabilities of the old firm by the new, some reliance was placed upon probabilities. On one side it was said to be most improbable that *Talbot* and *Forster* should have agreed to undertake liabilities to the large amount of £162,000, which at any moment might occasion their ruin. On the other, it was argued that nothing was more likely than that two persons who had been clerks in the house, and who were to contribute no capital, should eagerly avail themselves of the opportunity of becoming partners upon any terms, however hazardous, in a concern which the state of the accounts shewed to be on the whole a flourishing one. The question, however, is not to be decided upon probabilities, but upon evidence, although much evidence is not required to establish the assumption by the new firm of the debts of the old. Lord *Thurlow*, in *Ex parte Jackson* (1), said, "If one man having debts takes another into partnership with him, a very little matter respecting those debts will make both liable." And Lord *Eldon*, in *Ex parte Peele* (2), thought that "slight circumstances" might be sufficient to prove an agreement to undertake such a liability. The evidence in this case, however, appears not to be slight, but cogent, to fix the liabilities of the old firm upon the new. Not only was there a continuance of the former dealings of the old firm upon precisely the same footing and with the same books as before, but the liabilities of the old firm were regularly inserted in the balance-sheets of the new, and the assets of the old firm credited as belonging to the new, without any distinction between them. Large sums of money also were paid out of the general assets of the firm in reduction of the debt of *Flower, Salting, & Co.*, and the interest upon their debt was regularly charged in the annual balance-sheets of the partnership.

(1) 1 Ves. Jun. 132. (2) 6 Ves. 604.

It was said by the Appellants that all that was done in payment of the debts of the old firm was in the discharge of a duty assumed by the new firm, as the agents of the old, to receive their assets and discharge their liabilities. But the course of the partnership transactions scarcely admits of this argument; for, if it were merely a case of agency, it might have been expected that these assets and liabilities would have been kept separate and distinct from the partnership business, instead of being blended and intermingled with it.

Independently, however, of the dealings and conduct of the partnership generally, there is evidence of acts, and admissions of *Forster* (the only one of the insolvents who attempted to defeat the claim of *Flower, Salting, & Co.*, to prove under the insolvency), which is of great importance. In an affidavit made by him on the 2nd of December, 1862, he deposes as follows:—"In or about the months of February or March, 1859, before the execution of the deed of partnership between the said *William Rutledge, Horace Flower, David Talbot*, and myself, I had a conversation with the said *William Rutledge*, relative to the debt due to *Flower, Salting, & Co.*, when he told me that it was secured to that firm on his (the said *William Rutledge's*) own private property, and that I was not to be liable for it, nor for the debt of £19,000 then due to the Bank of *Australasia*." And again, "I never, directly or indirectly, agreed with the said firms of *Flower, Salting, & Co.*, and *Flower, McDonald, & Co.*, or with either of them, or any member thereof, to take upon myself the liability of the said debts so due by the said firm of *William Rutledge & Co.* to the said firms of *Flower, Salting, & Co.* and *Flower, McDonald, & Co.* respectively, nor did I ever, directly or indirectly, authorize any or either of my partners to enter into any such agreement on my behalf."

The alleged conversation before the execution of the deed of partnership is positively denied by *Rutledge* in his affidavit of the 9th of February, 1863, in these terms:—"I never on any occasion, either before or after the deed of partnership was drawn up, told the said *Francis Forster* that he was not, upon entering my firm, to be liable to the debt due by my then firm to Messrs. *Flower, Salting, & Co.*, but I say that in conversing with them upon the terms of entering my firm, I explained to both the said *Francis*

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Forster and the said *David Talbot* that, as the new firm were to take over the whole of the assets of the old firm, they must also take all the liabilities."

The credit of *Rutledge* is sought to be impeached by the affidavit of *Edward Klingender*, of the 25th of February, 1863, in which he states that *William Rutledge* was examined as a witness at the second meeting under the insolvency, upon the subject of the debt due to the Bank of *Australasia*, and that he then distinctly and positively swore that the firm of *William Rutledge & Co.*, consisting of the above-named insolvents, and the said *David Talbot* deceased, did not take over all the liabilities of the old firm of *Rutledge & Co.*, and that they did not take over the debt due to the Bank."

There can be no doubt that for that portion of the debt due to the *Australasian* Bank, for which they held security, the new firm was not liable; and *Rutledge* must have been inaccurate (to say the least) in swearing that he told *Forster* and *Talbot* that the new firm would have to take all the liabilities. On the other hand, as the new firm was not to be liable for a part of the debt of the *Australasian* Bank, it seems likely that some such conversation as that stated by *Forster* should have taken place. Whether he has not extended to the debt due to *Flower, Salting, & Co.*, expressions which were meant to be confined to the bank, may in some degree be judged of by his subsequent conduct. According to the affidavit of *Horace Flower*, of the 16th of February, 1863, before *Forster* joined the firm, he "pointed out to him the heavy liabilities of the firm, and recommended him not to join in the partnership." *Flower's* affidavit further states, "The principal debts due by the said firm at the time I recommended the said *Francis Forster* not to join in the partnership were those due to Messrs. *Flower, Salting, & Co.*, Messrs. *Flower, McDonald, & Co.*, Messrs. *P. W. Flower*, and the Bank of *Australasia*, with which debts the said *Francis Forster* was, as I believe, perfectly conversant; but the said *Francis Forster* said that he was satisfied to join the said partnership, and did so join." *Forster* made an affidavit on the 25th of February, 1863, in which he answers passages in the affidavits of other persons, but takes no notice of the above statement made by *Flower*, which is wholly uncontradicted.

In addition to this evidence there are affidavits of admissions made by *Forster*, and also proof of acts done by him, which strongly confirms the case of the Respondents.

A statement by *Rutledge* of one of these admissions is contradicted by *Forster*, and therefore may be disregarded. But Mr. *Salting*, one of the Respondents, in an affidavit dated the 13th of February, 1863, deposes to a conversation which he had with *Forster* in 1861, upon the subject of his debt, and says: "Upon all these occasions the said *Francis Forster* invariably spoke of the said debt as due by his firm, and never in the remotest manner denied or expressed the slightest doubt of his firm's liability in respect thereof. Upon one of these occasions, in answer to my inquiries as to his opinion of the security of our position (meaning our position as creditors of his firm), he remarked that he considered the funds of the firm sufficient to discharge their liabilities, and that in all likelihood no necessity would arise for us ever to have recourse to the security which we held upon Mr. *Rutledge's* private estate."

This is not denied by *Forster* in the affidavit of the 25th of February, 1863, to which reference has been already made, but it is almost impliedly admitted by his statement that "any expressions he may have used respecting the said debt were not intended by him to induce the said *Severin Kanute Salting* to believe that he had taken upon him that debt."

There is, however, one act of *Forster's* which seems decisive of his opinion that the firm of which he was a partner were liable to pay the debt of *Flower, Salting, & Co.* In the Insolvent's schedule, to which *Forster* and his partners *Rutledge* and *Flower* were sworn, the names of *Flower & Co., London*, and of *Flower, Salting, & Co., Sydney*, are inserted in the list of creditors, and under the column headed, "whether any security given," is inserted, "no security on insolvent's joint property, but secured on the private estate of *W. Rutledge*." Now *Forster's* case is not that a sudden light broke in upon him as to his legal position after the filing of the schedule, but that from the first and continually down to the time of the insolvency he considered himself not to be liable for these debts. *Forster* says, indeed, that at the time of the preparation of the schedule he had no separate legal adviser, that

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instructions were given for it by *Rutledge*, and that he signed and swore to it, as prepared by the solicitor, without having taken advice as to the way in which the debts due to *Flower, Salting, & Co.*, and the Bank of *Australasia*, should be inserted. But this explanation can hardly be accepted, for *Forster*, upon his examination at the first meeting, under the insolvency, said, "I believe *Flower, Salting, & Co.* are correctly entered in the schedule. I believe they hold security. I never saw the deed, but heard of it from Mr. *Flower*, our partner." Besides, if it be true that *Forster*, as a partner in the new firm, was not liable for these debts, the existing partnership of *W. Rutledge & Co.* was not insolvent, as the debts of *Flower, Salting, & Co.*, and of the Bank of *Australasia*, amounted together to £63,000, and the deficiency of assets stated in the schedule is only £53,118 17*s.* 1*d.* There seems to be no reasonable doubt, upon the above facts, that the insolvent partnership, at the time of its formation, assumed the debts and liabilities of the former firm of *W. Rutledge & Co.*, including the debt due to *Flower, Salting, & Co.*, and the only remaining question to be considered is whether *Flower, Salting, & Co.*, being aware of this arrangement, consented to accept the liability of the new firm, and to discharge their original debtors. Upon this question, as upon that of the agreement of the partners *inter se*, it was said by Lord *Eldon*, in *Ex parte Williams* (1), "A very little will do to make out an assent by the creditors to the agreement."

This case is different from many of the cases mentioned in the course of the argument, where there had been a change in a firm of which a person trading with it had notice, and went on dealing with the new firm, and afterwards sought to make the old firm liable, and a question arose whether by his conduct he had not discharged the old firm, and adopted the liability of the new. Here the creditors of the old firm, knowing of the change of partnership, and that the new partners had taken over all the assets, and had agreed to be subject to all the liabilities of the former firm, not only continued their dealings with the new firm upon the same footing as with the old, and received payment of a portion of their debt out of the blended assets of the old and new firms, but themselves proved that from the time when they

(1) Buck, 13.

understood that the new partners took over all the assets, and became subject to all the liabilities of the preceding firm, they "thenceforth treated the partners in that firm as their debtors, in respect of the debt owing to them at the time of the creation of that firm, or of so much thereof as for the time being remained due."

If *Flower, Salting, & Co.* had, under these circumstances, endeavoured to enforce the payment of their debt from the partners in the old firm of *W. Rutledge & Co.*, there would have been ample evidence to satisfy a jury that they had discharged the old firm, and had accepted the new one as their debtor.

Their Lordships, therefore, are of opinion that the judgment of the Supreme Court was right, and that the Respondents were entitled to prove against the estate of the insolvent firm of *W. Rutledge & Co.* for the amount still owing to them of the debt originally due from the former firm.

The appeal of the *Australasian* Bank relates to the proof under the insolvency of *W. Rutledge & Co.*, of the same debt of *Flower, Salting, & Co.*, as in the case just considered, but raises an entirely different question.

At the time of the insolvency of *W. Rutledge & Co.*, the *Australasian* Bank were creditors, and proved against the estate for the sum of £30,249 18*s.* 6*d.*, the amount of their debt, after deducting £9500, the estimated value of a security held by them over the separate estates of *William Rutledge* and *Horace Flower*.

At the same meeting, *Flower, Salting, & Co.* tendered a proof for their debt of £53,587 10*s.* 10*d.* This was opposed by the bank on the ground that *Flower, Salting, & Co.* were first bound to deduct from the amount for which they sought to prove the value of certain securities which they held on the estate of *William Rutledge*. The Commissioner of Insolvent Estates decided that *Flower & Co.* were bound to make this deduction, and rejected the proof.

From this decision *Flower, Salting, & Co.* appealed to the Supreme Court of the colony. The appeal was heard by Mr. Justice *Chapman*, one of the Judges of that Court, who overruled the decision of the Commissioner, and ordered that the proof tendered by *Flower, Salting, & Co.* should be admitted for the full

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amount. The Appellants appealed from this judgment to the full Court, when, after argument, an order was made dismissing the appeal, without costs. From this order the present appeal is brought.

The question to be determined is, whether *Flower, Salting, & Co.*, being creditors of an insolvent partnership, before they could be allowed to prove against the joint estate of the insolvents, were bound to value a security which they held upon the separate estate of one of the partners. If the question had arisen in this country, there would have been no difficulty in answering it. It was asserted, indeed, in argument, that the rule that the security to be deducted must be upon the same estate as that against which the proof is directed, was not laid down as a general rule by Lord *Eldon* in *Ex parte Peacock* (1). This, however, was not the opinion of Lord *Lyndhurst*, who in the case *In re Plummer* (2) said: "In administration under bankruptcy, the joint and separate estate are considered as distinct estates: and accordingly it has been held, that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security; on the ground that it is a different estate. That was the principle upon which *Ex parte Peacock* proceeded, and that case was decided first by Sir *J. Leach*, and afterwards by Lord *Eldon*, and has since been followed in *Ex parte Bowden* (3)."

Whatever may have been the origin of the rule, it must now be considered to be the established law in this country.

It was said by Mr. *Hobhouse*, for the Appellants, that the rule was laid down without any consideration of its justice or expediency, and that it was most unjust that a creditor should secure himself *aliunde*, and yet come in *pari passu* with the other creditors. That the colony of *Victoria*, in introducing the new Code of Insolvent Law, which is applicable to the present question, had been careful to prevent such injustice in the distribution of an insolvent's estate. And he contended that this was effectually done by the provisions of the Colonial Act, 5 Vict. No. 17, and especially by the 39th section. That section enacts, "that any

(1) 2 Gl. & Jam. 27. (2) 1 Ph. 60.
(3) 1 Dea. & Ch. 135.

creditor who shall have or hold any security or lien upon any part of the insolvent estate shall, when he is the petitioning creditor, be obliged upon oath, in the affidavit accompanying the Petition, and when he is not the petitioning creditor in the affidavit produced by him at the time of proving his debt, to put a value upon such security, so far as his debt may be thereby covered, and to deduct such value from the debt proved by him, and to give his vote in all matters respecting the insolvent estate as creditor only for the balance, &c. And in case any creditor shall hold any security or lien for payment of his debt, &c., upon any part of the said estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of, or a dividend for, the balance after such deduction."

The whole stress of the argument arising out of this section is laid upon the words "any part of the insolvent estate." Mr. *Hobhouse* went carefully through the different sections of the Act in order to shew that throughout one estate only is mentioned; and he contended that in every part of the Act an intention is manifested that there should be only one sequestration extending over every part of an insolvent's estate, applying to all the debts both of joint and separate creditors, and one single indivisible administration of the whole. Of course, if he could prove that the Act intended to annihilate the distinction between joint and separate debts and joint and separate estates, in the distribution of an insolvent's estate, he would establish his point. But it seems to be assuming the whole question thus to argue from the use of the word "estate" (in the singular) in the different sections of the Act. Even if the Act contemplated that both joint and separate estates would have to be administered, the language is quite capable of application to each estate respectively under administration. Too much reliance was placed upon the notion that the Colonial Legislature were impressed with a sense of the injustice of the rule prevailing in *England*, and were determined to guard against it in their new Code of Insolvent Law. Indeed, it may be doubted whether a new law on the subject of insolvency was introduced by the Act of 5 Vict. No. 17, for mention is made in it of two former Acts for the relief of debtors in execution for

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debts which they are unable to pay, one of them as early as the 2 Wm. 4.

But if this were the establishment of a new code of insolvent law, and it was the object of the Colonial Legislature to prevent the operation of a rule which they considered unjust, it is hardly to be imagined that they would have committed their intention to the equivocal meaning of a few words in a single section of the Act. It is just as reasonable to suppose that, knowing the rule established in this country, which is founded not upon any statute, but upon general principles applicable to many other cases, they did not intend to disturb it. The alleged injustice of the rule has been endeavoured to be shewn by viewing it on one side only. While the joint creditors are alone regarded, it may be successfully argued to be a hardship upon them that a creditor secured on a separate estate should resort to the joint estate, and so reduce their dividend; but, on the other hand, it may be contended, on the part of the separate creditors, that it would be great injustice to them to compel the joint creditor, with a separate security, to have recourse, first to the separate estate, which he might exhaust, and thus leave the separate creditors without a fund for the payment of their debts. These conflicting views seem to put the argument of hardship aside, so as to allow the operation of the well-established principle that, upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and that the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it. There seems to be no reason, therefore, why the words in the 39th section of the 5 Vict. No. 17, "any security or lien on any part of the insolvent estate," should not receive the construction of which they are capable, and be applied in each instance to the particular estate which is at the time the subject of administration.

There is one other point which does not bear upon the main question, but which, as it has been introduced as a ground of complaint on the part of the *Australasian* Bank, ought not to pass unnoticed. The Appellants state in their case, "that acting upon what they believe to be the law and justice of the case, they reduced the proof which they tendered by almost a fourth. The Respondents, holding securities of a much larger value, have

claimed and established their right to prove for the whole debt without deduction."

If the secured debts of the parties were both due from the insolvent estate, there would of course be no reason for making any distinction between them. But a reference to their respective securities will shew that this is not the case. The mortgage from *Rutledge* and *Flower* to the Bank of *Australasia* recites that *Rutledge* and *Flower* are indebted to the bank in the sum of £10,000, and the proviso is for the payment of the mortgage-money by *Rutledge* and *Flower;* therefore the debt was not one which could have been proved against the insolvent firm of *Rutledge & Co.*, being due from two of the partners only. But the mortgage from *William Rutledge* to *Flower, Salting, & Co.*, which is dated on the 30th of June, 1859, the day before the new partnership of *W. Rutledge & Co.* came into complete operation, contains a recital that there is due from the said firm to *Flower, Salting, & Co.* the sum of £60,000 and upwards, and the proviso is for payment by *W. Rutledge* or the firm of *William Rutledge & Co.* of the principal and interest of £60,000 "due and owing from the said firm of *William Rutledge & Co.*" So that this debt was a liability of the insolvent partnership, and not of some of the partners only.

Their Lordships will in both these cases humbly recommend to Her Majesty that the judgments be affirmed, and the appeals be dismissed with costs.

Solicitors for the Appellants: *Farrer, Ouvry, & Farrer.*
Solicitors for the Respondents: *J. W. & W. Flower.*

J. C.* 1865 Dec. 18, 19; Feb. 16, 1866

THOMAS WALKER . . . . . APPELLANT;

AND

AUBER GEORGE JONES . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT (EQUITY SIDE) OF NEW SOUTH WALES.

Mortgagor and Mortgagee—Assignee of Mortgagee—Mortgagee holding collateral securities—Severance of, from Mortgage—Action at Law—Injunction.

The assignee of a mortgagee cannot stand in any different character, or hold any different position, from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment. Every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage, and the mortgagee is charged with the duty of making such re-conveyance upon such payment being made.

Where, therefore, a mortgagee having besides the property mortgaged, certain promissory notes made by the mortgagor as collateral security for his debt, transferred the mortgage without assigning the collateral securities:—

Held, that he was not entitled so to sever the debt from the security, and an injunction, granted against his proceeding at law to recover the amount of one of the notes, pending a suit instituted by the mortgagor, to redeem and to settle the equities of the parties, sustained.

IN the autumn of 1861 the Respondent, *Auber George Jones*, in pursuance of a partnership arrangement entered into between him and one *Ralph Meyer Robey*, made and delivered to *Robey* four promissory notes in favour of *Robey*, for securing the sum of £8148 13*s*. 4*d*., each note bearing date the 17th of October, 1861, being for one-fourth of such amount, and payable respectively at six, twelve, eighteen, and twenty-four months after date, with interest at ten per cent. per annum. Some alterations were afterwards agreed to be made in the amounts and times of payment of the notes, and ultimately five notes were given of the same date, for sums amounting in the whole to £9505 6*s*. 5*d*., payable at six, twelve, eighteen, twenty-four, and thirty months respectively after date, with such interest as before stated.

* *Present*:—LORD CHELMSFORD, LORD JUSTICE KNIGHT BRUCE, LORD JUSTICE TURNER, SIR JAMES W. COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

The due payment of these notes was further secured by a mortgage executed by the Respondent, *Jones*, in favour of *Robey*, of the undivided share of the Respondent in certain stations known as *Gobbagumblin* and *Tooyal*, with the live stock thereon.

The mortgage was dated the 14th of April, 1862, and contained a power of sale, exercisable in the event of default being made in payment of any one or more of the promissory notes.

In the month of April, 1862, *Robey* discounted one of the promissory notes for £2,444 12*s.* 4*d.*, and indorsed the same with the three other promissory notes which had been made by the Respondent by way of renewal of his original notes, to the Appellant, by whom they were discounted.

Robey received from the Appellant the full value of the notes discounted, and he at the same time executed in favour of the Appellant a transfer of the mortgage of the 14th of April, 1862.

The transfer was endorsed on the mortgage deed, and was as follows:—"By this instrument, made the 24th day of April, 1862, upon a mortgage of live stock from *Auber George Jones* to me, the undersigned, *Ralph Meyer Robey*, dated the 14th of April, and registered the 23rd of April, I, the said mortgagee, do, in consideration of value received by the discounting of four promissory notes, now current, and secured by the within mortgage, transfer the said mortgage to *Thomas Walker*, of *Sydney*, Esquire, at present absent from the Colony, to the intent that, in pursuance of the legislative provision in this behalf, the said *Thomas Walker* may, as such indorsee, have the same right, title, and interest as I have or should otherwise have therein. And in case it shall at any time be found necessary or convenient to act in my name in the premises, as the original or apparent mortgagee, I hereby constitute the said *Thomas Walker*, his executors, administrators, and assigns, my lawful attorney or attorneys, with full power of substitution for all purposes in relation to the said mortgage, or the enforcement of the terms and conditions thereof."

The payment of the amount advanced by the Appellant, on the above promissory notes, and of any further advances, which might be made by him to *Robey*, was further secured by a mortgage of other property of *Robey*, known as a portion of the *Camperdown* estate.

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On the 24th of September, 1862, the Appellant, in consideration of £4,000, paid to him by *Robey*, executed a re-conveyance to *Robey* of the undivided share in the station and premises comprised in the mortgage of 14th of April, 1862.

The re-conveyance was endorsed on the mortgage deed, and was in the following terms:—"Know all men by these presents, that I, the within named *Thomas Walker*, in consideration of £4000, by the within named *Ralph Meyer Robey* to be paid, the receipt of which I do hereby acknowledge, do, by these presents, assign to the said *Ralph Meyer Robey* all my interest in the within indenture of mortgage, and all and singular the stations and live stock, and all other the premises comprised therein, to hold to the said *Ralph Meyer Robey*, his executors and administrators, discharged from the payment of the several promissory notes held by me, and the moneys thereby secured, and for his and their own absolute property, subject to any equity of redemption subsisting therein (if any), on the part of the said *Auber George Jones*, but without prejudice to any other remedy or security for the said *Thomas Walker* for any of the said promissory notes remaining in his hands unretired and unsatisfied."

The Appellant retained and continued to hold the promissory notes discounted by him as aforesaid.

The promissory note for £2,444 12*s.* 4*d.*, which matured on the 20th of October, 1863, was the first of the notes that fell due, and as it was not paid at maturity, the Appellant brought an action in the Supreme Court of *New South Wales* against the Respondent, to recover the amount thereof.

On the 27th of May, 1864, the Respondent filed a bill in the Supreme Court, in its equitable jurisdiction, against the Appellant and *Robey*, then out of the jurisdiction, as the Defendants thereto, and thereby alleged, that he had in the month of November, 1861, entered into a partnership arrangement with *Robey* for carrying on the business of wool-growing and breeding sheep and cattle on the stations of *Gobbagumblin* and *Tooyal*, and that he had given the four promissory notes to *Robey* on the occasion of his entering into such partnership, some of which were renewed, and that subsequently, and in the month of September, 1862, the Respondent, in consideration of £1,000, to be paid to him by *Robey*, and in further

consideration of *Robey* delivering up to him the promissory notes, cancelled, sold, and relinquished all his interest in the station and stock to *Robey*, and determined the partnership; but that *Robey* had not delivered up the promissory notes, and that he still retained the first of the promissory notes which fell due on the 20th of April, 1862; and after stating the above facts, the Respondent alleged, to the effect, that the Appellant had notice of the Respondent's position as mortgagor when the Appellant discounted the promissory notes for *Robey*, and also that the Appellant at the time he executed the conveyance to *Robey*, had notice of the rights and interests of the Respondent, under the alleged agreement for dissolution of the partnership between him and *Robey*, and of the alleged dissolution having taken place; and the bill prayed that the promissory notes in the hands of the Appellant might be delivered up to be cancelled, and for an injunction to restrain the action, or any further proceedings on the promissory notes, or, if necessary, for accounts, and for further relief.

The Respondent applied *ex parte* for an injunction to restrain further proceedings in the action, and he supported his application by the affidavits of himself and his Solicitor, *Hillyer*, and the Primary Judge in Equity of the Supreme Court, Mr. Justice *Milford*, awarded an injunction restraining the Appellant from further proceeding in the action, and from prosecuting any further action on the note, or any of the notes, in the bill mentioned, until further order.

The Appellant thereupon moved the full Court to dissolve the injunction, and evidence by affidavit and *viva voce* was produced both by the Appellant and Respondent, in support of and against the application. It did not appear by the evidence that the Appellant had notice of the partnership arrangement between the Respondent and *Robey*, or of the agreement for the dissolution thereof, when he discounted the promissory notes and executed the reconveyance to *Robey*, and he insisted that he was in fact a *bonâ fide* holder for value without notice of the promissory notes discounted by him.

The motion came on to be heard before the Primary Judge, on the 21st of June, 1864, and was refused with costs.

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The Appellant appealed from the decision of the Primary Judge to the full Court, and the appeal came on to be heard before the full Court, consisting of the Chief Justice, Sir *Alfred Stephen*, Mr. Justice *Milford*, and Mr. Justice *Wise*, on the 6th of August, 1864, and was also dismissed with costs.

The Judges differed in their opinions. The Chief Justice was of opinion that the order of the Primary Judge should be reversed and discharged; but the majority of the Court were of opinion that the order should be confirmed, and held in effect that the Appellant, by conveying the share of the station and premises comprised in the mortgage of the 14th of April, 1862, to *Robey*, had prejudiced the right of the Appellant to redeem the mortgaged premises on payment of the amount of the promissory notes, and, therefore, that it was inequitable for the Appellant to sue the Respondent on the promissory note. The Chief Justice was of opinion that the Appellant, as holder for value of the promissory notes, was entitled to deal with his security, and to convey the mortgaged premises to *Robey* in consideration of the payment made by him to the Appellant; that the promissory notes were not necessarily to be held with the mortgage security; and that the Appellant, having acted in good faith, was entitled to convey the property as he did, subject to the equity of redemption of the Respondent, reserving his remedies on the promissory notes.

From this judgment of the full Court the Appellant brought the present appeal.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *Druce*, for the Appellant:—

The judgment of the majority of the Judges in the Court below is, we apprehend, erroneous, and cannot be supported. There is nothing in the circumstances of the case to preclude the Appellant from recovering at law on the note in question, or any of the other notes in his hands. It is admitted that *Robey* was the Appellant's debtor on the discount transaction. The Appellant was entitled, on receiving a payment from *Robey*, to deal with the mortgage securities in such manner as *Robey* and he might agree, subject, of course, to the Respondent's equity of redemption, with-

out any prejudice to the Appellant's legal remedies on the promissory notes remaining unpaid. In *Ex parte Loaring* (1), a vendor was held not to have waived his lien on the estate sold by taking the promissory note of the vendee, and receiving its amount by discount: *Grant* v. *Mills* (2); and in *Ex parte Waring* (3) it was ruled that a holder of a bill of exchange had no lien on property deposited by the drawer with the acceptor to cover the liability of the latter in respect of his acceptance, yet that on the bankruptcy of the drawer and acceptor the arrangement of the property between the two estates may indirectly render such an equity available. Here the debt and the mortgage security are in the very nature of the transaction divisible, and were intended by both the original parties to have been so, with all the consequences attaching to such a state of things, from the outset. The effect of the re-conveyance of the mortgaged premises to *Robey* was not in any manner to injure or prejudice the right of the Respondent as mortgagor, but merely to leave matters in the same situation in which they would have been if the promissory notes had been discounted by the Appellant, without any conveyance to him of the mortgaged premises. In that case, *Robey* would have been entitled, according to the original contract on the mortgage, to hold the premises as his security for the payment of the notes, although in the hands of his endorsee; and the Respondent, on payment or satisfaction of the notes, would have been entitled to a re-conveyance from *Robey*. The mortgaged premises, when re-conveyed by the Appellant, were subject to redemption by the Respondent in the hands of *Robey;* and the Appellant cannot be held liable for the defaults of *Robey*. The Appellant, when he executed the re-conveyance, had, in fact, no notice of the matters alleged in the bill; but the Respondent, having made default in payment of the promissory notes, is not entitled to any relief in equity against the Appellant. The Respondent was in no respect injured by the transfer of the mortgage to the Appellant, and all ground of complaint against either the Appellant or *Robey* in respect of that act fails.

(1) 2 Rose's Bankruptcy Cases, 79.
(2) 2 Ves. & Bea. 306.
(3) 2 Rose's Bankruptcy Cases, 182.

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Sir *Hugh Cairns*, Q.C., and Mr. *A. T. Watson*, for the Respondent:—

The injunction in this case was rightly granted, the Appellant by his conduct, and by the manner in which he has dealt with the mortgage security, has deprived himself of all right to sue on the promissory notes. A Court of equity will not allow a mortgagee to proceed on his collateral securities when he has put it out of his power to re-convey the mortgaged property: *Lockhart* v. *Hardy* (1). In that case, after foreclosure, the mortgagee fairly sold the estate for less than was due to him, and it was held that he could not afterwards recover from the mortgagor, upon his collateral personal securities, the amount still remaining unpaid. That is good law, and has been followed by *Palmer* v. *Hendrie* (2). In *Perry* v. *Barker* (3); *Thornton* v. *Court* (4), after foreclosure and sale of a mortgaged estate, an injunction was granted to restrain the mortgagee from recovering the difference at law: *Schoole* v. *Sall* (5); *Bentinck* v. *Willink* (6). The principle of all these cases is, that a mortgagee should be in a condition to return the mortgaged property in *statu quo ante* when paid the debt, and that if he cannot do this, he will not be allowed to proceed for the debt, on any other security he may have. And this principle invokes another, namely, that in whose hands soever the debt is, there also the securities must likewise be, a mortgagee not being allowed to alienate the securities away from the debt. The Appellant, by his dealing with the property, has put it out of his power to re-convey the mortgaged premises unless he get them back again; he ought not, therefore, to be allowed to proceed with his action until the hearing of the suit; and the injunction granted by the Court below is consistent with the law and equity of the case, and the practice of our Courts.

LORD JUSTICE TURNER:—

1866. *Feb.* 16.

This is an appeal from an order made by the full Court of appeal of the Supreme Court of the Colony of *New South Wales* in its equitable jurisdiction, confirming an order of the Primary

(1) 9 Beav. 349.
(2) 27 Beav. 349; S. C. 28 Beav. 341.
(3) 8 Ves. 527a.
(4) 3 D. M. & G. 293.
(5) 1 Sch. & Lef. 176.
(6) 2 Hare, 1.

Judge in Equity of that Court, whereby a motion on the part of the Appellant to dissolve an injunction which had been obtained against him by the Respondent *ex parte* was refused with costs.

In the month of November, 1861, the Respondent purchased a share in some extensive sheep and cattle stations, and the stock thereon, to which *Ralph Meyer Robey* was then entitled, and became a partner with *Ralph Meyer Robey* in carrying on the said stations and the business incident thereto. The terms of the purchase were, that the Respondent should pay to *Ralph Meyer Robey* £8148 13*s.* 4*d.* by four promissory notes, each for one-fourth of such amount at 6, 12, 18, and 24 months respectively, with interest added at 10 per cent. per annum, and that the payment of the notes should be secured by a mortgage of the Respondent's share of the partnership property, and that upon the notes being delivered and the security given, the Respondent should be entitled to one-third share or interest in the stations and stock. Some alterations were afterwards agreed to be made in the amounts and times of payment of the notes, and ultimately the notes given by the Respondent to *Ralph Meyer Robey* in respect of the purchase, which were all dated the 17th of October, 1861, and drawn by the Respondent in favour of *Ralph Meyer Robey*, were for

£2,139 0*s.* 6*d.* due 20th of April, 1862.
£2,286 1*s.* 6*d.* due 20th of January, 1863.
£2,444 12*s.* 6*d.* due 20th of October, 1863.
£1,288 10*s.* 3*d.* due 20th of April, 1864.
£1,347 1*s.* 8*d.* due 20th of October, 1864.

By an indenture dated the 11th of February, 1862, and made between *Ralph Meyer Robey* of the one part, and the Appellant of the other part, after reciting that the Appellant had agreed to make advances to *Ralph Meyer Robey* by way of discount of the promissory notes secured by a lien or mortgage upon a share of the said stations and stock, and that it had been agreed between the parties that in addition to the endorsement of the said promissory notes and the transfer of the security for the same, the retirement thereof, and generally the payment of all moneys which should at any time become due from *Ralph Meyer Robey* to

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the Appellant should be further collaterally secured by a mortgage of the land and hereditaments thereinafter described, *Ralph Meyer Robey* conveyed to the Appellant by way of security for the advances a parcel of land belonging to him, part of an estate called the *Camperdown Estate*. By another indenture dated the 14th of April, 1862, and made between the Respondent of the one part and *Ralph Meyer Robey* of the other part, the Respondent assigned to *Ralph Meyer Robey* for his absolute benefit his the Respondent's one-third share of said stations and stock subject to a proviso, that if the Respondent should pay and retire the said promissory notes as and when the same should become due, the said indenture should become null and void, but that if the Respondent should make default in payment of the said promissory notes or any of them on the days when the same should respectively become due, then and at any time after such default it should be lawful for *Ralph Meyer Robey* to take possession of the premises and hold the same as his absolute property, and whether such possession had been taken or not, to sell and dispose of the same as he should think fit, and that the moneys to arise from any such sale after payment of the expenses should be applied in payment of the promissory notes, or such of them as should remain unpaid, whether the same should be due or not, and the surplus, if any, should be paid to the Respondent.

On the 20th of April, 1862, the first of the above-mentioned notes became due. It does not appear whether it was paid or what was done with respect to it, nor is it material, the transactions with which we have to deal in this case having reference to the four other notes which at this time remained current. On the 24th of April, 1862, *Ralph Meyer Robey*, by an endorsement on the mortgage of the 14th of April, 1862, in consideration of value received by the discounting of the four promissory notes then current, and secured by the said mortgage, transferred the said mortgage to the Appellant to the intent that in pursuance of the legislative provision in that behalf the Appellant might, as such indorsee, have the same right, title, or interest as he the said *Ralph Meyer Robey* had or would otherwise have had therein; and by this indorsement the said *Ralph Meyer Robey*, in case it should at any time be found necessary or convenient to act in his name

in the premises as the original or apparent mortgagee, constituted the Appellant his attorney for all purposes in relation to the said mortgage or the enforcement of the terms and conditions thereof.

On the 12th of September, 1862, it was agreed between the Respondent and *Ralph Meyer Robey* that the partnership between them should be dissolved, and that the Respondent should sell to *Ralph Meyer Robey* all his interest in the said stations and stock in consideration of the sum of £1000 to be paid to him by *Ralph Meyer Robey*, and of *Ralph Meyer Robey* delivering up all the said promissory notes cancelled. The partnership was accordingly dissolved, and *Ralph Meyer Robey* gave to the Respondent two promissory notes of £500 each, but he did not deliver up the promissory notes which had been drawn by the Respondent, the Respondent being satisfied with his assurance that they were cancelled.

On the 24th of September, 1862, the Appellant by his attorney, executed a deed-poll (which was also endorsed on the mortgage of the 14th of April, 1862), whereby, in consideration of £4000 to him paid by *Ralph Meyer Robey*, he assigned to *Ralph Meyer Robey* all his interest in the mortgage and all and singular the stations and stock, and all other the premises comprised therein, to hold to *Ralph Meyer Robey* discharged from the payment of the several promissory notes held by him the Appellant, and the moneys thereby secured, and for his own absolute property subject to any equity of redemption subsisting therein, if any, on the part of the Respondent, but without prejudice to any other remedy or security of the Appellant on any of the said promissory notes remaining in his hands unretired and unsatisfied.

Some time after the promissory note, which was due on the 20th of October, 1863, had become due, the Appellant commenced an action in the said Court in its common law jurisdiction against the Respondent upon that note, and thereupon and on the 27th of May, 1864, the Respondent filed the bill in the cause out of which this appeal has arisen against the Appellant and *Ralph Meyer Robey*, who was out of the jurisdiction of the Court, stating the facts above mentioned, and further to the effect that the Respondent had no notice of the dealings between the Appellant and *Ralph Meyer Robey*, and that the Appellant had notice of the

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dealings between *Ralph Meyer Robey* and him, the Respondent, and that the Appellant could by sale or realization of the stations and stock assigned to him, have obtained a sum of money sufficient to have paid off all the said notes, and that the value of the property re-assigned to *Ralph Meyer Robey* was sufficient to pay a larger sum than the total sum for which the said notes were given, and praying that the promissory notes in the hands of the Apellant might be delivered up to be cancelled, and that the Appellant might be restrained from proceeding in the action commenced by him, and from prosecuting any further action on any of the said notes, and that if necessary an account might be taken of what was due on the notes, and that on taking such account the Respondent might be credited with the £4000, and with the difference between the actual value of the mortgaged property re-assigned by the Appellant to *Ralph Meyer Robey* and the said sum of £4000; and that if upon taking such account any sum should be found due from the Respondent, he might be reimbursed out of the securities given by *Ralph Meyer Robey* to the Appellant by the deed of the 11th of February, 1862. Upon the filing of this bill an *ex parte* injunction was granted by the Primary Judge of the Court to restrain the Appellant from proceeding in the said action, and from prosecuting any further action on any of the said notes. A motion was afterwards made on the part of the Appellant before the Primary Judge to dissolve the injunction, but, on the 21st of June, 1863, the Primary Judge refused this motion with costs. Upon these motions evidence was adduced on the part of the Respondent for the purpose of fixing the Appellant with notice of his the Respondent's dealings with *Ralph Meyer Robey*, but the evidence was not sufficient to fix the Appellant with such notice.

The Appellant appealed from the order of the Primary Judge dismissing the motion to dissolve the injunction to the full Court of appeal, but that Court, by an order bearing date the 6th of August, 1864, dismissed the appeal with costs. It is from this last-mentioned order the appeal which we have now to dispose of has been brought.

In disposing of this appeal, we think it right, in the first place, to observe that questions possibly of some nicety and difficulty as

to the rights and obligations of mortgagees, in their dealings with the mortgaged property, appear to be involved in this cause, and that the stage of the cause in which this appeal has been brought renders it difficult for us now to deal with those questions. They are questions more proper to be determined at the hearing of the cause, and it is not necessary, nor, indeed, would it be right, for us now to give any final opinion upon them; but yet the consideration of them is necessarily, to some extent at least, involved in the question which alone we have to consider, whether the order under appeal ought or ought not to have been made. The real point before us upon this appeal is not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the questions is such that it was proper that the injunction should be granted until the time for deciding them should arrive. The material points, and those with which only we think it necessary to deal, appear to us to be these:—What were the relations subsisting between the Appellant and the Respondent? what were the rights and obligations flowing from those relations? and whether the course of conduct pursued by the Appellant has been in conformity with, or in opposition to, those rights and obligations, considering, as we repeat, these several questions with reference only to their bearing upon the order under appeal, and not for the purpose of finally deciding them. As to the first of these questions, we think that no doubt can reasonably be entertained. We take it to be clear that the endorsement of the 24th of April, on the mortgage of the 14th April, 1862, placed the Appellant in the position of a mortgagee of the property comprised in that mortgage, and that thenceforth the relation of mortgagee and mortgagor subsisted between the Appellant and the Respondent. The assignee of a mortgage cannot, in our opinion, stand in any different character, or hold any different position, from that of the mortgagee himself, although, as in this case, the mortgagor may not have been a party to the assignment; then, secondly, what were the rights and obligations flowing from this relation between the Appellant and the Respondent, and we think that this point is open to no greater difficulty. It is also clear that every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the

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mortgage; and that every mortgagee is charged with the duty of making such re-conveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt.

Has, then, the course of conduct pursued by the Appellant been in conformity with, or in opposition to, these rights and obligations? Now, what the Appellant has done is this: he has, by the endorsement of the 24th September, 1862, transferred the property comprised in the mortgage to *Ralph Meyer Robey*, retaining to himself the debt secured by the mortgage. He has not, as he might have done, sold the property comprised in the security, but he has, in effect, sold the security itself, which he certainly was not authorized by the mortgage deed to do. Now, it is not necessary for us to say that in no case can the mortgage debt be severed from the security for that debt; nor is it even necessary for us to say that, in this particular case, the debt and the security could not be so severed. It is sufficient, if there be a question upon the point proper to be determined upon the hearing of the cause, and on looking to the cases of *Palmer* v. *Hendrie* (1) and *Thornton* v. *Court* (2), we have no difficulty in arriving at this latter conclusion.

It was said for the Appellant that *Palmer* v. *Hendrie* was the case of principal and surety, but what was said upon the point under consideration did not proceed upon that ground, and the case of *Thornton* v. *Court* in no way involved any question of suretyship. These cases, therefore, from which we see no reason for dissenting, seem to us be of themselves sufficient to shew that upon this point alone, there was a question of no little importance to be decided at the hearing of the cause; and, therefore, to have furnished sufficient ground for the granting of this injunction. But this case does not rest here, for upon the transfer of the security to *Ralph Meyer Robey*, by the endorsement of the 24th of September, 1862, the Appellant received from him the sum of £4000., which after paying the bill due on the 20th of January, 1863, would go far to meet the bill which became due on the 20th of October, 1863, and on which the Appellant has brought his

(1) 27 Beav. 349. (2) 3 D. M. & G. 293.

action; and it cannot we think, be otherwise than a very serious question to be decided at the hearing of the cause, how this sum of £4000 ought to be dealt with in account between the Appellant and the Respondent; there was here, therefore, further ground for granting this injunction. It was urged for the Appellant that the position of the Respondent was in no way altered; that had *Ralph Meyer Robey* retained the security when he discounted the bills, the Appellant must have paid the bills, and then sued *Ralph Meyer Robey* for the re-conveyance of the mortgaged property, and that he could do so now, the transfer to *Ralph Meyer Robey* having been made subject to the Respondent's equity of redemption, if any; and, further, it was urged for the Appellant, that the Respondent had nothing to do with the transaction between the Appellant and *Ralph Meyer Robey*, but we are by no means satisfied that it may not well be held to be a sufficient answer to these arguments that they lay out of consideration the Appellant's position and duties as mortgagee, and proceed more upon a view of the case as it might have stood, than as it actually stands. It was further argued, on the part of the Appellant, that in any event, the order under appeal ought not to have been made except upon the terms of the money being paid into Court, but the receipt by the Appellant of the £4000 goes far to answer this objection, and we see no sufficient reason for interfering with the discretion exercised by the Court in this respect. Upon the whole, therefore, we are of opinion that this appeal cannot be supported, and we shall humbly recommend Her Majesty to order that it be dismissed, and dismissed with costs.

Solicitors for the Appellant: *Walton & Bubb.*
Solicitors for the Respondent: *Wilde, Rees, Humphry, & Wilde.*

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HENRY WICKHAM WICKHAM AND OTHERS, ON BEHALF OF THEMSELVES AND THE DEBENTURE HOLDERS IN THE NEW BRUNSWICK AND CANADA RAILWAY AND LAND COMPANY . . . . } APPELLANTS;

AND

THE NEW BRUNSWICK AND CANADA RAILWAY COMPANY AND OTHERS . } RESPONDENTS.

ON APPEAL FROM NEW BRUNSWICK.

Railway and Land Companies—Debentures—Construction of the word "Undertaking"—Registration—Judgment creditors.

The *St. A. & Q. Railway Company*, incorporated by a local Act, being also a land Company, transferred by agreement, together with the undertaking, all its property, lands, rights, and appurtenances to the *N. B. & C. Railway Company*, also incorporated—such agreement being confirmed by a private Act of the Imperial Parliament.

The *N. B. & C. Railway Company* having borrowed money, issued Debentures to secure the same; these were termed Mortgage Debentures, the principal and interest thereon being secured on the undertaking, and all moneys to arise from the sale of the lands of the Company, all future calls on shareholders, and all tolls and sums of money which should become due, with the plant and rolling-stock, and with power of entry and possession of the same, in failure by the Company of payment of principal and interest as therein specified, with a proviso that nothing therein contained should be held to limit the power of sale or appropriation by the Company of any of the lands of the Company, nor constitute a charge on the same. These Bonds were not registered:—

Held, by the Judicial Committee, first, that such Debentures did not constitute a charge in the nature of an equitable mortgage on the lands of the Company, so as to give the holders of such Debentures a right to restrain the sale of the lands by Judgment creditors of the Company, or any title to the proceeds of the lands when sold.

Secondly, that as Judgment creditors under an execution take the precise

* *Present*:—LORD CHELMSFORD, THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, SIR JAMES W. COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

interest, and no more, which the debtor possesses in the property seized, the sale being a sale by the law, and not by the Company, such Judgment creditors took the lands, subject to any incumbrances, legal or equitable, that they were subject to in the hands of the Company.

According to the law of *New Brunswick*, freehold lands of a debtor, if the personal estate is exhausted, may be sold under a *fi. fa.*

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IN this case, the appeal was brought from an order of the Supreme Court of *New Brunswick*, on its equity side, which affirmed a previous order of a single Judge of that Court, refusing a motion on behalf of the Appellants and other debenture-holders in *The New Brunswick & Canada Railway Company*, Plaintiffs in the original suit, for an injunction to restrain the Respondents; the Railway company and others, execution creditors of the Company, with the Sheriffs of the counties of *York* and *Charlotte*, the President and Company of the *St. Stephen's* Bank, the Defendants, from selling, and, if allowed to sell, from paying over the proceeds of the sale of the lands of the *New Brunswick & Canada Railway* to certain Judgment creditors of the Company, upon whose judgments executions had issued, and for an order to compel the Sheriffs, on the sale of such lands, if sold, to pay over the proceeds to the Receiver appointed by a previous order of the Supreme Court in a cause in which the Appellants were Plaintiffs, and the *New Brunswick & Canada Railway Company* Defendants.

The facts were these:—

The *St. Andrew & Quebec Railway Company* was incorporated in 1836, by an Act of the local Legislature of *New Brunswick*, for the purpose of making a Railway from *St. Andrew's*, in that Province, to *Quebec*, in *Canada*. The shares in this Company were divided into two classes; and those of them which were distinguished as Class A shareholders were, by an Act of the Imperial Parliament, 13 & 14 Vict. c. 106, constituted a separate corporation, with special property and rights.

The *New Brunswick & Canada Railway & Land Company (Limited)*, was incorporated under the provisions of the *Joint Stock Companies Act*, 1856, with a nominal capital of £800,000, divided into 40,000 shares of £20 each. The memorandum of association of the company stated it to be incorporated for the object of

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pari passu, one with another, to their respective proportions of the undertaking, proceeds of sales, tolls, calls, and sums of money, according to the respective sums in such mortgages mentioned, to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference, one above another, by reason of the priority of the date of any such mortgage. But the Bonds of the said first issue of £200,000 shall have a prior claim to any other Bonds whatever which may be issued, in addition to the said first series of £200,000: Provided also, that nothing herein contained shall be held to limit the power of sale or appropriation by the said Company of any of the lands of the said Company, nor constitute a charge upon the same."

The other Appellants, also Debenture-holders, claimed to be entitled under similar instruments.

None of the Debenture Bonds granted by the Company were registered, in accordance with the Statute for the Registry of Deeds and other Instruments (*Revised Statutes* of *New Brunswick*, tit. xxx. c. 112), which (s. 4) provides that "all conveyances, memorials of judgments, or other instruments by which any lands may be affected, in law or equity, except any lease for a term not exceeding three years, shall be registered at full length in the registry office of the county where the lands lie, and, if not so registered, shall be fraudulent and void against subsequent purchasers for valuable consideration whose conveyances are previously registered;" and every judgment so registered, or an execution thereon delivered to the Sheriff to be executed, shall bind the lands of the persons against whom the judgment was incurred or the execution issued.

The Respondents, the President, Directors and Company of the *St. Stephen's* Bank were, with others, execution creditors of the Company for sums amounting in the aggregate to £12,547 15*s.* 10*d.* The Respondents' judgments were registered in the month of August, 1863, in the counties of *York* and *Charlotte*, in *New Brunswick*; and writs of *fieri facias* were issued on them respectively, and placed in the hands of the Sheriffs of those counties.

By the 6th section of the same *Statute*, tit. xxx. c. 113, freehold lands of a debtor are saleable under a writ of *fieri facias*, when

personal estate, if any can be found, is exhausted. In the present case no personal estate of the debtors could be found in either county, the whole having been seized on behalf of the Debenture-holders, and the Sheriffs accordingly proceeded to seize and advertise for sale certain lands of the company situate in their respective counties. The lands so seized did not constitute any part of the permanent way, and were not in fact any part of the railroad or works connected therewith; but, as it appeared, consisted of lands which were granted to the Company by the Government of the Province, by way of subvention, and which the Company might either have sold or divided among its shareholders.

On the 9th of May, 1864, the bill was filed by the Appellant, *Wickham*, who claimed to be a Debenture-holder of the Company to the amount of £92,000 sterling, of which £10,000 was alleged to have become payable on the 1st of March previously; together with *Evan Thomas* and *John Field*, two other Debenture-holders to a large amount, against the Respondents, the Railway Company; the President and Directors of *St. Stephen's* Bank, and also four other execution creditors of the Company. The Sheriffs of the counties of *Charlotte* and *York* were also made Defendants to the bill. The bill, after stating to the effect hereinbefore mentioned, alleged that the Sheriffs had levied upon and advertised all the lands of the Company for sale under the respective executions in the months of June and September then next, and that the Sheriff of the county of *York*, upon being applied to to pay the proceeds of the land, when so sold under the executions, into the hands of the Receiver (appointed under an order of the Court made in August, 1863, in a cause wherein the Appellants were Plaintiffs, and the *New Brunswick & Canada Railway & Land Company (Limited)* were Defendants, to receive the proceeds of the sale of the lands of the Company), declined to pay the same unless under the order of the Court, or to stay the sale thereof; and that the Sheriff of *Charlotte* had given a nearly similar answer, alleging in addition, that in regard to the proceeds of the sale of the lands under the executions, he should be governed by circumstances, and either pay them to the Plaintiffs in the executions, or hold them subject to the order of the Court. The bill also alleged, that the interest on the Debentures was in arrear from the 1st of January,

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1863, and that the Debenture-holders had no means of obtaining payment of the bonds and interest thereon, except through the lands so levied upon and advertised for sale, and the other property of the Company mortgaged to them; and the bill prayed, that the *New Brunswick & Canada Railway & Land Company*, the Sheriffs and Judgment creditors, might be restrained from selling the lands so levied upon and advertised until the debentures were paid; or in the event of a sale being allowed, the Sheriffs might be restrained from paying over the proceeds of such sale to the Judgment creditors; and for an order compelling the Company, the Sheriffs, and the Judgment creditors to pay over the proceeds to the Receiver so appointed as aforesaid.

A motion was made on notice before Mr. Justice *Wilmot*, one of the Judges of the Supreme Court, for an injunction in terms of the prayer of the bill, who refused the application. From the order refusing the injunction, an appeal was brought to the full Court, and on the 22nd of October, 1864, the judgment of that Court was delivered by Chief-Justice *Carter*, dismissing the appeal with costs. The grounds of the judgment were, first, that the Judgment creditors, whose judgments were duly registered, had no notice of the debentures; and, secondly, that the Debenture-holders' claim, that the Bonds amounted to a Mortgage of the proceeds of the lands, and that they were in the position of equitable mortgagees of the land itself, could not be sustained, as there was no analogy in the circumstances to an equitable mortgage. The learned Chief-Justice then proceeded:—"At the time when the judgments were recovered the land became legally charged and liable to be sold as personal estate to satisfy these judgments. It can only be sold for that purpose, under executions issued on these judgments, and when so sold the proceeds must be applied as the law authorizing the sale directs, and equity cannot, in our opinion, in this case stop such sale and so prevent a party having a charge by Statute from making available such lien in the manner pointed out by the enactment, binding the land, for the simple reason that the party asking the intervention has no right, or title to, or charge on the land, and so no interest therein. Nor can equity declare the Judgment creditors, or the Sheriff, after such a sale, trustees for the Deben-

ture-holders and decree either of them to hold the proceeds of such sale (not for the Judgment creditors for whose sole benefit the law gives the charge and authorizes the sale, but) for the benefit of parties setting out a claim directly antagonistic. To do so would be to destroy the legal charge of the one party, and give to the other a charge which by their agreements they expressly stipulated they were not to have. Can it be said that in competition with the Judgment creditors who have perfected their title by registry, execution, levy, and sale, the Debenture-holders have an equal equity, they have acquired no right, legal or equitable, to the land itself, though very possibly a right to proceed against their debtors *in personam* upon a sale by them. We would not, however, by any means be understood as saying that a Judgment creditor may take any property whatever without regard to equitable interests. If the title of an equitable mortgagee is complete, and so constitutes a lien or charge on the land, it may be fairly open to argument, that, notwithstanding our Registry Acts, though the judgments operated as a charge, they must be taken as a charge subsequent to the lien or charge before created by a perfected equitable mortgage. In the view we have taken of this case the question does not arise, and we express no opinion on it. But to allow parties to hold lands unencumbered on the records of the county in which they lie, and thus enable them to obtain credit on the strength of owning such unincumbered lands, and after judgments obtained and registered, to permit such judgments to be cut down by secret bonds of the extraordinary character now put forward, and which expressly reserve the lands free from charge, would, in our opinion, be not only at variance with the whole policy of our legislation on this subject, but with every principle of justice and equity."

The present appeal was brought from this order.

Sir *Hugh Cairns*, Q.C., and Mr. *Swanston*, for the Appellants :—

First, we submit that the Debentures held by the Appellants constituted a Mortgage on all the property of the Company. As the Debentures give the holders an absolute mortgage over all the property of the Company, the Company could not give their Judgment creditors any greater interest in the property than they had

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themselves at the date of the judgments, at which time the Company had no interest in its property except subject to the debentures, and the Judgment creditors can only take what the Company had the power to charge. The true construction of the clause in the debentures which provides that nothing therein contained should be held to limit the power of sale or appropriation by the Company of any of the lands of the Company is plain; it was introduced for the sole purpose of enabling the Company, as a land company, to effect sales of lands whenever they judged it expedient so to do, without the concurrence of the Debenture-holders being required to perfect the title of the purchaser, the right of the Debenture-holders attaching to the proceeds of the sale in the place of the land sold. It cannot be doubted that the true effect of the Debentures is to give the Debenture-holders an absolute mortgage over all the property of the Company, and this is not made less absolute by the condition that the Company might exchange land for money whenever it chose. The Debentures amount to an agreement that the Company should hold their lands in trust to sell them, when and as they should think expedient, and apply the proceeds of the sale in payment of the Debenture-holders; neither the Company nor any Act of Parliament regulating the right of Judgment creditors can override this agreement. Under the *Col. Stat.*, tit. xxx c. 113, s. 10, nothing could be sold by the sheriff but the interest of the debtor, and the interest of the company is an interest subject to the agreement with the Debenture-holders. In *Beavan* v. *The Earl of Oxford* (1), it was held that a Judgment creditor was not a purchaser within the meaning of the Statute, 27 Eliz. c. 4, and had no title to set aside a voluntary deed. *Whitworth* v. *Gaugain* (2) was a suit by an equitable Mortgagee against a Judgment creditor of the Mortgagor, who had obtained possession of the mortgaged estates under *elegits*, and the Court held that the Plaintiff acquired a special lien on the property, and that a judgment had relation to the time it was entered up, and did not affect any *bonâ fide* conveyance made before that time. Assuming then that the judgments were properly registered, as required by the registration laws of *New Brunswick*, they would only affect

(1) 6 D. G. M. & G. 507.
(2) 1 Ph. 728; S. C. 3 Hare, 416; Cr. & Ph. 325.

property which the debtor was lawfully possessed of at the date of the judgment, and could not displace a previous equitable mortgagee: *Benham* v. *Keane* (1); *Eyre* v. *M'Dowell* (2); where the authorities on this point are all collected. Even if the interest of the company in the lands was sold under the *Colonial Statute*, tit. xxx c. 113, s. 6, such interest could only be sold as personal estate, for, according to the law of *New Brunswick*, freehold lands of a debtor are saleable under a *fieri facias;* and as soon as the lands are converted into personalty, the right of the Debenture-holders, even if they had none to the land, when in specie attaches. Under section 10 of the same *Statute* nothing can be sold but the interest of the debtor, and the interest of the Company in these lands, was an interest subject to the agreement with the Debenture-holders. If the Debenture-holders have no charge on the lands, neither have the Judgment creditors; for they also could only call on the Sheriffs to sell the interest of the debtors in land as personal estate. The position, therefore, of the parties is that the Debenture-holder has an agreement with the Company, by which the Company is trustee of the land with power to sell it, and must hold the proceeds as trustee for the Debenture-holder, while the Judgment creditor has a right subsequently acquired, to have the interest in the company in the lands sold, and the proceeds paid to him. Each party is, therefore, entitled only to receive the proceeds, and the Debenture-holder being prior in time has the priority in right.

Secondly. There was no necessity to register these debentures as against a Judgment creditor. A judgment can only affect the interest which the debtor has in land: *Rose* v. *Watson* (3). Section 4 of the *Revised Statutes* of *New Brunswick*, tit. xxx. c. 112, provides that all conveyances, memorials of judgments, or other instruments by which any lands may be affected, shall be registered; and if not so registered, shall be fraudulent and void against subsequent purchasers for valuable consideration whose conveyances are previously registered, and by tit. xli. c. 161, s. 7, a conveyance is defined to mean any instrument by which any freehold, leasehold estate or interest in real estate may be transferred or affected. Here registration is not required, for a Judgment creditor is not a

(1) 1 J. & H. 685. (2) 9 H. L. C. 619. (3) 10 H. L. C. 672.

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purchaser. Notice does not affect a Judgment creditor claiming interest in land by contract.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *Wickens*, for the Respondents:—

These debentures, or mortgage bonds, as they are called, create no charge on the lands advertised for sale by the Sheriffs. The question as to what interest the Debenture-holders take in a great measure depends upon the construction of the agreement, the Statute, 21 & 22 Vict. c. 154, carrying out that agreement and the language of the Debentures. By that Statute the "undertaking" of *St. Andrew's & Quebec Railway Company* was transferred to the *New Brunswick & Canada Railway & Land Company*. The word "undertaking" is a general expression, and its meaning must be ascertained from the intention manifested in the agreement and Statute. All that the Debentures affect to transfer to the Debenture-holders is the "undertaking" of the Company, and the money to arise from the sale of the land, tolls, &c.; but these words do not give the Debenture-holders or confer on them any legal title to restrain the sale of the lands in the hands of the Sheriff for the Judgment creditors; neither does the proviso authorizing them to enter upon the undertaking and into the receipt of the proceeds of the sales, give them a charge upon the lands. The case of *Doe dem Wyatt* v. *The St. Helens & Runcorn Gap Railway Company* (1) is on all fours with the present case. That was an action of ejectment brought by a mortgagee of the "undertaking," and, as in this case, turned upon the meaning of that word, and the Court of Queen's Bench held that the word "undertaking" did not give to the mortgagee such an interest as would enable him to maintain ejectment. Land of a Railway company is not included in a Mortgage by the Company under such a term, and cannot pass: *Russell* v. *The East Anglian Railway Company* (2); *Fripp* v. *The Chard Railway Company* (3). In equity a covenant to settle on *A.* lands of a certain yearly value without mentioning any lands certain, will not create a specific lien: *Fremoult* v. *Dedire* (4); *Berrington* v. *Evans* (5). Even if the deben-

(1) 2 Q. B. Rep. 364.
(2) 3 Mac. & Gor. 125.
(3) 11 Hare, 241.
(4) 1 P. Wms. 429.
(5) 3 Y. & C. 384.

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tures were effectual to create a charge on land, they were not registered as required by the law of *New Brunswick, Revised Statutes*, tit. xxx. c. 112, s. 4, and on that ground are inoperative against the Respondents as Judgment creditors.

But there is no precedent for such a bill as this to restrain the Sheriffs selling the lands. In the case of an ordinary Mortgagee it certainly would not lie; and as to the alleged equitable right, there is no relation subsisting between the Debenture-holders and the Judgment creditors to affect a trust in their favour upon the proceeds of sale of the lands. There is no allegation in the bill of any equitable ground whatever for interfering with the ordinary remedies of the Respondents as execution Creditors according to the laws prevailing in *New Brunswick*.

Their Lordships' judgment was delivered by

LORD CHELMSFORD:—

1865
Dec. 22.

This is an appeal from an order made by the Supreme Court of Judicature of *New Brunswick*, affirming an order made by a single judge of that Court refusing a motion for an injunction to restrain the Defendants in the suit from selling, and, if allowed to sell, from paying over the proceeds of the sale of lands of the *New Brunswick & Canada Railway & Land Company* to certain Judgment creditors of the said Company upon whose judgments executions had issued, and in the event of a sale to restrain the Sheriffs from paying over the proceeds of the sale to the Judgment creditors, and to order such proceeds to be paid over to a Receiver previously appointed on the application of the Plaintiffs.

The Plaintiffs were the holders of certain mortgage debentures granted by the Company, and claimed under the terms of those debentures to have a right to prevent the sale of the lands under the executions issued by the Defendants the Judgment creditors, or at all events to be entitled to the proceeds of such sale.

There is no doubt upon principle, as well as on the authority of the cases cited in the argument at the Bar, that the right of a Judgment creditor under an execution is to take the precise

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interest, and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the Sheriff with all the charges and incumbrances, legal and equitable, to which it was subject in the hands of the debtor. In other words, what the debtor has power to give is the exact measure of that which the execution creditor has the right to take. This case, therefore, depends entirely upon the question what, as between the *New Brunswick & Canada Railway Company* and the Debenture-holders, was the interest which the Company had in the lands taken in execution by the Judgment creditors. The title of the Company depends upon a private Act of the Imperial Legislature, 21 & 22 Vict. c. 154, by which the undertaking of the *St. Andrews & Quebec Railroad Company* was transferred to them in pursuance of an agreement entered into between the two companies which is set out in the schedule to the Act.

Under this agreement the shares of a class of shareholders in the *St. Andrew's & Quebec Company*, called the Class A Company, were to be transferred to the Transferee Company, and the Class A Company were to be entitled to receive the quantity of 42,670 acres, in addition to a quantity of 20,630 acres already granted to them. And the Transferee Company were to be entitled to appropriate out of the lands to be granted to them 16,000 acres of land in respect of their Class A shares, and 105,000 acres in respect of their Class B shares.

Both in the agreement and in the Act confirming it a marked distinction appears to be made between the undertaking itself of the *St. Andrew's & Quebec Railroad Company* and the lands and other property belonging to the Company. In the agreement the companies mutually agree with each other that the undertaking of the *St. Andrew's & Quebec Railroad Company*, and the control and management thereof (*i.e.*, of the undertaking), "and all the lands, goods, chattels, and present and future property and effects, rights, and expectancies of the *St. Andrew's & Quebec Railroad Company* shall be and are hereby transferred to the Transferee Company." And the 3rd section of the Act confirms the agreement in these words: "the transfer by the same agreement of the said undertaking and of the said lands, rights, and expectancies to the Company is hereby confirmed, and the same

undertaking, lands, rights, and expectancies shall from and after the passing of this Act be vested in the Company." It will be necessary to bear this distinction in mind in determining what were the rights which were acquired by the Appellants under the terms of the Debentures issued by the Company.

The Company, it appears, was by its constitution a land as well as a Railway company. Of course it was essential to the carrying out of the objects of this part of their undertaking that they should have the power of dealing freely with the lands belonging to them, and as they were also to be entitled to appropriate a large quantity of these lands to their shareholders, that they should not be restricted in the exercise of this right of appropriation.

The debentures which the Company issued to the Appellants and others seem to have been framed with a special view to these objects.

The one given to Mr. *Wickham*, one of the Appellants, is printed in the proceedings as a specimen of them all. It is termed an indenture of mortgage, dated May 29, 1862, made between the Company of the one part, and Mr. *Wickham* of the other part. It recites the advance by him of £1000 to the Company on condition that they will repay the same to him on the 1st of January, 1867, with interest in the meantime at the rate of 6 per cent. per annum, by equal half-yearly payments on the 1st of July and the 1st of January in every year. It then proceeds: "Now it is hereby witnessed that for securing the said advance and interest, the said Company hereby grant to the said *Henry Wickham Wickham*, his executors, administrators, and assigns, the undertaking of the said *New Brunswick & Canada Railway & Land Company*, and all moneys to arise from the sale of the lands of the said Company for the time being, and all future calls on shareholders of the said Company, and all the tolls and sums of money which shall become due to the said Company, including the provisional guarantee, and also all engines, tenders, passenger and other cars, and every description of rolling-stock, rails, sleepers, goods, and chattels, of the said Company whatsoever or wheresoever being, and all the estate, right, title, and interest of the said Company in the same."

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It is then declared that if the Company fails in paying the said principal or interest moneys on the days specified for payment, Mr. *Wickham* may, upon giving three months' notice to the Company, enter upon the receipt of the said proceeds of sales, tolls, calls, and sums of money which may thereafter become due to the said Company in any manner from or in respect of the said undertaking, and upon the absolute possession of the said engines, tenders, cars, rolling-stock, rails, sleepers, goods, and chattels of the said Company before mentioned, and the said road and the entire charge, control, and working thereof, and reimburse himself thereout the sums due upon his security and his expenses. And the debenture closes with a proviso in these terms: "Provided also, that nothing herein contained shall be held to limit the power of sale or appropriation by the said Company of any of the lands of the said company, nor constitute a charge upon the same."

It was contended on the part of the Appellants that these Debentures transferred to the mortgagees all the property of the Company without any exception; for that the undertaking itself being granted, the lands which are a portion of the undertaking must necessarily pass under that word. On the other side, the case of *Doe dem. Myatt* v. *The St. Helen's & Runcorn Gap Railway Company* (1) was cited to shew that the mortgage by a railway company of their undertaking did not give the mortgagee any title to land so as to enable him to maintain ejectment. That case did not determine that the conveyance of an undertaking by a railway company would in no case carry the land; but, as was said by Mr. Justice *Coleridge*, "The word is ambiguous and may be construed as meaning the speculation generally, or possibly it might be taken to include the land itself."

Having, then, no certain and settled meaning, when this word is used in any conveyance of property by a company, it must be construed according to the obvious intention of those who employ it.

As a guide to its meaning in the debentures in question, reference may again be made to the agreement and the Act transferring the undertaking to the *New Brunswick & Canada*

(1) 2 Q. B. Rep. 364.

Company, and to the manner in which the undertaking and the lands are in expression (at least) distinguished from each other. Turning from them to the debenture it will appear that this distinction is not only preserved but strengthened. For as if to shew in the clearest manner that the word "undertaking" was not intended to include the lands belonging to the Company, it is immediately followed by a grant of all moneys to arise from the sales of such lands. Now if it was intended to comprehend the lands themselves in the Mortgage debentures, or if the word "undertaking" would *ex vi termini* contain them, the Debenture-holders would not only have been entitled to, but would have had the complete control over, the proceeds of the sales of lands, as the Company could not have sold without their consent, and it would, therefore, have been quite unnecessary to provide specifically for their having the moneys to arise from the sales. It ought, perhaps, also to be noticed that even when provision is made for the default of the Company by non-payment of the principal or interest secured by the debentures, the right of entry which is given to the Debenture-holders is not upon the lands themselves, but only upon the receipt of proceeds of sales. But if any doubt exists upon these terms of the debenture the proviso must entirely remove it. It has been already observed that the company is a land company, whose very object is to deal with and dispose of lands, and that it has a right to appropriate portions of these lands to its shareholders. With these operations, any interest in or charge upon the lands would materially interfere. The words of the debenture are so sweeping and general that it might well be supposed they would give the mortgagees the right to every description of property belonging to the Company. Therefore, to prevent any misconception, the proviso in express and clear terms says to the Mortgagees, what has been previously granted to you shall not limit the power of sale or appropriation by the Company of any of the lands of the Company, nor constitute a charge upon the same. In this view the proviso is not inconsistent with but merely explanatory of what has gone before; but, according to the Appellants, the meaning of the proviso is, that although all the lands are granted to the Debenture-holders, yet in every instance in which the Company wishes to exercise its power of sale

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or of appropriation the charge upon the particular lands is to be withdrawn, but to remain upon the unsold and unappropriated residue. It is not, however, usual to treat the actual right to lands as a mere charge upon them; and as the power of sale and appropriation extends to any and all of the lands of the Company, it does seem unreasonable, upon the Appellant's construction, that all the lands should be given to the mortgagees as a part of their security, and a power left in the Company immediately to take them all away again. It seems clear to their Lordships that the lands not being in terms granted by the Mortgage debentures, the proviso makes the intention of the parties perfectly clear that no general expression used in the grant was intended to comprehend them, and therefore that the Debenture-holders are not entitled to interfere with the sale of the lands under the execution issued by the Judgment creditors.

But the Debenture-holders insist that if they cannot stop the sale of the lands, they are entitled, under the terms of their debentures, to all the moneys arising from such sale. It is quite clear, however, that the sales contemplated by the grant are those which are to be made by the Company in the course of their regular operations. It was contended on the part of the Appellants, that the sale under the execution would be virtually a sale by the Company, as the title of the Judgment creditors is derived from them. But that is not so. The Judgment creditors take what belonged to the Company, but do not take under them; and a sale by the Sheriff under an execution is a sale by the law, and not by the Company.

It is clear, upon the whole case, that the lands of the Company did not pass to the Mortgagees under the Debentures, nor are they entitled to the proceeds of the forced sales.

Their Lordships will, therefore, recommend to Her Majesty that the decree appealed from be affirmed, and the appeal be dismissed with costs.

Solicitors for the Appellants: *Chilton, Burton, Yeates, & Hart.*

Solicitors for the Respondents: *Bircham, Dalrymple, Drake, & Co.*

THE QUEEN . . . . . APPELLANT;

AND

WALTER WATSON HUGHES AND EDWARD STIRLING . . . . . RESPONDENTS.

J. C*.
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ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF SOUTH AUSTRALIA.

Dec. 20, 21, 22; *Feb.* 1, 1866

Crown grants—Leases under Colonial Act—Scire facias—Record—Supreme Court of South Australia.

Leases granted by the Governor of *South Australia* under powers conferred on him by the *Colonial Act*, 21 Vict. No. 5, sec. 13, for regulating the sale and other disposal of waste lands belonging to the Crown, sealed with the public seal of the Province, but not enrolled or recorded in any Court, are not in themselves Records; and, though bad on the face of them, being for a larger quantity of land than allowed by that Act, cannot be annulled or quashed by a writ of *Scire facias*.

Such writ is a prerogative judicial writ, which must be founded on a Record, and cannot under the constitution of the Supreme Court in *South Australia* issue out of that Court.

The proper remedy for an unauthorized possession of lands of the Crown in the Colony is by an information in Chancery, or Writ of Intrusion.

The case of *The Queen* v. *Clarke* (1), commented on and explained.

THIS was an appeal against a decision of the Supreme Court of the Province of *South Australia*, making absolute a rule obtained by the Respondents for quashing a writ of *Scire facias* issued out of that Court at the suit of the Appellant, on the prosecution of *Samuel Mills*, whereby the Respondents were commanded to shew cause why certain leases granted by the Governor of the Colony of *South Australia* to the Respondents should not be declared void. The question raised by the rule, though affecting the rights of the Crown and the validity of the leases, was narrowed in the first instance, both in the Court below and on the appeal, to the power of the Supreme Court of *South Australia*, to issue the writ of *Scire facias* to annul grants or leases of Crown lands within that Province.

* *Present*:—LORD CHELMSFORD, SIR JAMES W. COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

(1) 7 Moore's P. C. Cases, 77.

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The grants sought to be annulled were made by twelve indentures of lease, two of which were dated on the 7th of September, and the remaining ten on the 22nd of October, 1861; and all of which were made between Her Majesty the Queen, of the first part, Sir *Richard Graves MacDonnell*, Captain-General and Governor in Chief of the Province of *South Australia*, of the second part, and the Respondents of the third part; and by such indentures, in consideration of the respective rents thereby reserved to Her Majesty, Her heirs, successors, and assigns (being in each case the minimum rent of 10*s.* per acre required to be reserved by the local Act called the *Waste Lands Act*, 21 Vict. No. 5, sec. 13), and of the reservations, covenants, and agreements to and with Her Majesty, Her heirs, successors, and assigns, thereby made and entered into, divers portions of the waste lands of the Crown within that Province were expressed to be demised by the Governor, under and in pursuance of the powers and regulations of the aforesaid Act, to the Respondents, their executors, administrators, and assigns, for the purposes of mining, for the respective terms of fourteen years from the dates of the indentures, with such right of renewal as therein mentioned.

These indentures were sealed with the public seal of the Province, and were signed and executed in the name and on behalf of Her Majesty by the Governor of the Province, in accordance with the provisions of the before-mentioned *Waste Lands Act*, but were not filed or recorded in the Supreme Court.

It was alleged on the part of *Mills*, the prosecutor of the writ of *Scire facias*, that the indentures of lease or grant of the 7th of September, 1861, and the 22nd of October, 1861, did not comply with the provisions of the *Waste Lands Act* and the regulations made in pursuance thereof, and were obtained by the Respondents by false representations and upon false suggestions, which were set out in the writ of *Scire facias*, and that the indentures were not good and valid grants of the portions of waste lands of the Crown purporting to be thereby demised, and that the same ought, therefore, to be annulled.

The Supreme Court of the Province was established by a Provincial Act, 17 Vict. No. 31, as a Court of Record, with all the jurisdiction, within the Province and its dependencies, the Courts of Queen's

Bench, Common Pleas, and Exchequer have in *England*, and also as a Court of Oyer and Terminer and gaol delivery, and as a Court of Equity in the Province and its dependencies, with all the jurisdiction of the Court of Chancery. The 16th section of the Act gave the Judges of the Supreme Court power to make rules and orders concerning the practice and procedure of the Court.

No Act of the Imperial or Colonial Legislature gave the Governor of the Colony authority in the matter of writs for repealing grants from the Crown, nor had there been any legislation in the Colony in reference thereto, nor was any power given in express terms to the Supreme Court to issue writs of *Scire facias*. Except the Supreme Court, there is no other Court in the Province of *South Australia* out of which a writ of *Scire facias* to annul a Crown grant within the Province could issue.

On the 16th of September, 1864, *Mills* presented a petition to Sir *Dominick Daly*, the then Governor of the Province, in which it was alleged that the several leases above mentioned ought not to have been granted to the Respondents, and were contrary to law.

By a warrant under the hand of the Governor, and sealed with the public seal of *South Australia*, bearing date the 2nd of March, 1864, and directed to the Attorney-General for the Province, the Governor authorized and required the Attorney-General to sue out in the name of the Crown a writ of *Scire facias*, for the purpose of compelling the Respondents, and all other persons claiming under them, to shew cause why the indentures of lease should not be declared void and annulled.

In pursuance of the warrant and fiat, a writ of *Scire facias* was on the same day issued out of the Supreme Court, directed to the Sheriff, who, on the 28th of April, 1864, made his return to the writ.

On the 29th of May, 1864, a rule *nisi* was obtained by the Respondents for quashing the writ of *Scire facias*, on the grounds, first, that the Supreme Court had no jurisdiction to issue a *Scire facias* for annulling a Crown grant. Secondly, that there was no record in the Supreme Court of *South Australia* whereon to ground such writ. Third, that it did not appear by the records of the Supreme Court that the authority of Her Majesty's Attorney-

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General in the Colony had been obtained prior to the issuing of such writ. Fourth, that the writ did not sufficiently disclose that the prosecutor was a party damnified. Fifth, that the writ did not set forth any record for annulling of which it had been issued; and sixth, that the writ was wrongly tested.

On the 29th of August, 1864, the Supreme Court gave judgment on this rule in favour of the Respondents. Two of the Judges (Mr. Justice *Gwynne* and Mr. Justice *Boothby*) being of opinion that, as there was no record to ground the proceedings, the writ must be quashed: the Chief Justice (The Hon. *Richard Davies Hanson*) dissented, holding that grants from the Crown in the Colony, under the public seal of the Colony, were records; whereupon the rule was made absolute.

From this judgment the present appeal was brought. It was assumed for the purposes of the appeal that the leases in question were void, being for quantities of land exceeding eighty acres, the limit named in the 13th section of the *Waste Lands Act*, 21 Vict. No. 5.

Sir *Hugh Cairns*, Q.C., Mr. *Mellish*, Q.C., and Mr. *G. W. Mounsey*, for the Appellant.

This is a question of the utmost importance regarding the interests of the Crown and the inhabitants of the Colony. Though in form it relates to the jurisdiction of the Supreme Court, in substance, it affects durably the interests of the Crown as well as the interests and the individual rights of the subject; for if the right of *Scire facias*, enjoyed and exercised as a prerogative by the Crown from the very earliest times, and still subsisting in full vigour, can be taken away, not by direct legislation, but indirectly, this branch of the prerogative, intended as much for the protection of public interests as individual rights, and which in many cases affords the only remedy either for the Crown or the subject, becomes a dead letter as far as Her Majesty's Colonies are concerned. Now, the property in the waste lands comprised in the indentures of lease was at their date vested in the Crown. There is no doubt of that. The leases were executed by the Governor in the name and on behalf of Her Majesty, in pursuance of and accordance with the provisions of the *Waste Lands*

Act, 21 Vict. No. 5. They were sealed with the public seal of the Province, which is equivalent to the Great Seal, and being grants of the Crown were to all intents and purposes Records sufficient to found thereon the writ of *Scire facias*. There is no provision in the *Waste Lands Act*, or by the rules of the Supreme Court, which required the enrolment of the grants; nor is such enrolment, in the circumstances, necessary to give the Supreme Court authority to issue the writ of *Scire facias*, which is the proper, and only remedy, for setting such leases aside: 4 Inst. 72; *Rex* v. *Sir Oliver Butler* (1). The Queen has by common law, *jure regio*, an undoubted right to proceed by *Scire facias*, if she has been deceived in Her grant, or if Her subjects have been prejudiced thereby: 4 Inst. 88; *Magdalen College Case* (2); *Bynner* v. *The Queen* (3). The case of *The Queen* v. *Clarke* (4) is precisely in point. There a grant similar to these made by the Governor of the Colony of *New Zealand*, which exceeded, as we allege here, the amount of land prescribed by the Local Ordinance, was upon a *Scire facias* held void, and such decision was confirmed by this Court. Here the writ was duly authorized by the only Court out of which it could issue on the fiat of the Attorney-General, and we submit that the grounds stated for making absolute the rule for quashing the writ were insufficient to support such a rule.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Rolt*, Q.C., and Mr. *Macnamara*, for the Respondents.

The writ of *Scire facias* is wholly inapplicable to the laws and constitution of the Colony. There is no Officer or Court in the Colony having jurisdiction to issue such a writ. It is a judicial and high prerogative writ, and cannot be granted but upon a Record. *Bac.* Abr. tit. *Sci. fa.* (A), 2 Inst., 470. 2 *Wm.'s Saund.*, p. 71, note (4). *Forster* on *Scire Facias*, 2. Grants of Crown lands in the Colonies are not Records, they are not Patents, nor are they proceedings of a Court of Record, or enrolled, which is necessary to constitute them Records. *Com.* Dig. tit. Record (A); Ib. tit. Patent (F 7); *Hindmarsh* on Patents, p. 37-9; 3 Inst. 71. Crown

(1) 3 Lev. 220.
(2) 11 Co. Rep. 75.
(3) 9 Q. B. 523, 529.
(4) 7 Moore's P. C. Cases, 77.

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grants of land can only be made by Letters Patent under the Great Seal, which are Records without further proof, being enrolled in the High Court of Chancery, from whence they issue: *Co. Litt.* 16; *Vin.* Abr. tit. Prerog. (C); *Peake* E. 31, note c. (4th ed.); 2 *Bla.* Comm. 346; Doc. & Stud. B. I. dial. 8; *Chitty* on Prerog. 331. The leases here were not grants at all, they are only statutory assurances, made by the Governor in execution of the powers conferred on him by the *Waste Lands Act*, in the name but not on behalf of the Sovereign, as if by Letters Patent enrolled; grants they cannot be, but they may be of the same nature as leases granted here by the office of Woods and Forests. The seal of the Governor is not equivalent to the Great Seal; he has no Sovereign authority, and an act done by him unauthorized by his commission is void: *Cameron* v. *Kyte* (1). In the making of the leases he could only act under the authority of the Colonial Act.

In our Colonies, questions regarding the title to lands are to be decided, in the first instance, by the Court of local judicature, from whence an appeal lies to Her Majesty in Council: *Attorney-General* v. *Stewart* (2). This must be done in the ordinary mode of procedure; there is no instance of such a proceeding as this in the Colonies. The case of *The Queen* v. *Clarke* (3) does not apply; it was heard *ex parte*, and the right of the Governor of *New Zealand* to make grants at all of waste land was not questioned, though the particular grant in question was held bad for excess; that was the point determined, and no reference was made, or required to be made, to the irregularity of the proceeding by *Scire facias*. There is no authority or machinery in the Supreme Court for the issuing of a writ of *Sci. fa.*

There were other remedies to which resort might have been had; the parties might have proceeded by Bill in equity, to set aside the grants as unduly obtained: *Sawyer* v. *Vernon* (4); *Attorney-General* v. *Chambers* (5); *Alcock* v. *Cooke* (6); or, as in the case of a grant under the Duchy Seal of *Lancaster*, of a manor with certain rights, where the question was raised in an action of

(1) 3 Knapp's P. C. Cases, 332.
(2) 2 Mer. 143.
(3) 7 Moore's P. C. Cases, 77.
(4) 1 Vern. 370.
(5) 4 D. M. & G. 206.
(6) 5 Bing. 340.

trover; or by information of intrusion, *Chalmers'* Opinions, vol. i., p. 160, where the very case is put, of error on the face of the grant; or by writ of intrusion, *Chitty* on Prerog., 332-3.

But the writ itself was invalid, being tested in the name of the Chief Justice of the Supreme Court, that Court having no authority to issue the writ. The trial of the question at issue in this case would put the Respondents under great and very unfair advantages, and neither the Crown nor any one entitled to impeach the indentures of lease, are without remedy, although there is no jurisdiction in the Colony to issue the writ of *Sci. fa.*

1866
Feb. 1.

LORD CHELMSFORD:—

This is an appeal against a rule of the Supreme Court of the Province of *South Australia*, making absolute a rule of the same Court obtained by the Respondents for quashing a writ of *Scire facias*, issued for the purpose of revoking certain leases of Crown lands granted by the Governor of the Province to the Respondents.

The question raised by the rule, and to be decided upon the appeal, is whether the Supreme Court of *South Australia* had jurisdiction to proceed by writ of *Scire facias* to annul grants or leases of Crown lands within the Province.

The writ of *Scire facias* to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded upon a Record. These Crown grants and charters under the Great Seal are always sealed in the Petty Bag Office, which is on the Common Law side of the Court of Chancery, and become Records there. Whether grants would be Records by the mere act of sealing without enrolment in the Court, it is unnecessary to consider, because in point of fact such grants are invariably enrolled. They are then at all events brought within the definition of a Record given in *Com.* Dig., tit. Record (A), upon the authority of *Co. Litt.* 260A, viz., "A memorial of an act or proceeding of a Court of Record proceeding according to the course of the common law, entered on parchment for the preservation of it." All Charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by writ of *Scire facias.* And

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if the grant or Charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy. For, as was said by Chief Justice *Jervis*, in the case of *The Eastern Archipelago Company* v. *The Queen* (1), "To every Crown grant there is annexed by the common law an implied condition that it may be repealed by *Scire facias* by the Crown, or by a subject grieved using the prerogative of the Crown upon the fiat of the Attorney-General."

This being the long-settled and well-known rule of proceeding with respect to Crown grants in this country, the question to be determined is whether grants and leases of Crown lands in *South Australia* are of such an analogous character and description as to be necessarily subject to the same remedial process of *Scire facias* for their repeal.

The first thing to be considered is the constitution of the Supreme Court in the Province. This was settled by a Colonial Act, 17 Vict., No. 31, 1856, intituled, "An Act to consolidate the several Ordinances relating to the establishment of the Supreme Court of the Province of *South Australia*." By the 7th section of that Act, the Court is constituted a Court of Record, and is to have cognizance of all pleas, civil, criminal, and mixed, and jurisdiction in all cases whatsoever, as fully and amply in the Province and its dependencies as Her Majesty's Courts of King's Bench, Common Pleas, and Exchequer at *Westminster*, or either of them, lawfully have or hath in *England*. And by the 8th section, it is enacted "that the Supreme Court shall be a Court of Equity in this Province and its dependencies, and shall have power and authority to administer justice, and to exercise and perform all such acts, matters, and things necessary for the due execution of such equitable jurisdiction as the Lord High Chancellor of *Great Britain* can or lawfully may within the realm of *England*; and all such acts, matters, and things as lawfully can or may be done by the said Lord High Chancellor within the realm of *England* in the exercise of the jurisdiction to him belonging." The 16th section gives the Judges of the Supreme Court power to make and practise (probably a misprint for "frame") general rules and orders "touching and concerning the time and practice of holding the

(1) 2 E. & B. 94.

Courts, the forms and manners of proceeding, and the practice and pleading upon all indictments, informations, actions, suits and other matters to be brought therein." Whether, under the powers conferred by this section, it would have been competent to the Judges to have made a rule for "the form and manner of proceeding" in suits to revoke grants of Crown lands, and to have ordered that the remedy by *Scire facias* should be applicable to such cases, it is unnecessary to consider. They have not done so. They have promulgated a rule as to the teste of writs of *Scire facias*, but as that process is applicable to other objects besides the grants of Crown lands (such as recognizances and judgments), the right to use it in order to annul the leases in question must depend upon whether the grants are of the peculiar nature and character to render them a proper foundation for this particular remedy.

The leases were granted by the Governor under the powers conferred upon him by a Colonial Act, 21 Vict. No. 5, of 1857, intituled "An Act for regulating the sale and other disposal of waste lands belonging to the Crown in *South Australia*." By the first section of this Act, "All the waste lands of the Crown within the Province are to be disposed of in the manner and according to the regulations therein provided, and not otherwise." The absolute sale of these lands is provided for by the 5th section in these terms, "Under and subject to the various provisions and regulations hereinafter contained, the Governor is hereby authorized and required, in the name and on the behalf of Her Majesty, to convey and alienate in fee simple, or for any less estate or interest, to the purchaser or purchasers thereof, any waste lands of the Crown in the said Province, which conveyances and alienations shall be made in such forms as shall, from time to time, be deemed expedient by the Governor with the consent of the Executive Council, and shall be sealed with the public seal of the said Province."

There can be no doubt that under the words, "in fee simple or for any less estate or interest," in this section, the Governor might have granted leases of the Crown lands "in the name and on the behalf of Her Majesty." But the leases in question were made by the Governor himself under the authority of the 13th section of the Act, which enacts that "it shall be lawful for the

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Governor to demise for the purposes of mining for any metal or mineral (excepting gold) to any person applying for the same, any portion of the waste lands of the Crown within the said Province, not exceeding eighty acres, for any period not exceeding fourteen years, at an annual rent of 10*s.* per acre, &c.; subject to such regulations for the granting of such leases, and for the working and resumption of the same, as may, from time to time, be in that respect made by the Governor with the advice and consent of the Executive Council." The leases described in this section are not required to be under the Provincial seal; and although the leases in question were so sealed, the authority would probably have been as strictly pursued if they had been executed under the private seal of the Governor.

It may be assumed for the purposes of the present case that these leases are void, being of quantities of lands exceeding eighty acres; and the Appellant insists that the remedy by *Scire facias* is not only the proper, but the only remedy for setting them aside.

It was contended, in the first place, that these leases were virtually Records. That the Governor was entrusted with all the ministerial duties of putting the Provincial seal (the Queen's seal of the Province) to grants of Crown lands. That the Supreme Court besides being a Court of Record is also a Court of Equity, and can perform "all such acts, matters, and things as lawfully can or may be done by the Lord High Chancellor within the realm of *England*, in the exercise of the jurisdiction to him belonging."

The meaning of this argument seems to be that all the machinery existed in the Province for placing grants of Crown lands on the same footing with those in this country, both in their original creation, and for constituting them a Record. But it was not pretended that any enrolment of them had taken place, and it, therefore, became necessary for the Appellant to insist that the leases were in themselves Records. With this view it was asserted that every grant under the Great Seal is *ipso facto* a Record, and that the seal of the Province, which was entrusted to the Governor by the Queen's commission for the purpose of making grants in Her Majesty's name, is equivalent to the

Great Seal. Assuming this to be the case, it would advance the argument a very short way, unless it could be established that the mere affixing the seal to an instrument by the Governor at once made it a Record. But a Record (to recur to the definition of it given in *Comyn's* Digest) must be "A memorial of an act or proceeding of a Court of Record," and when it is asserted that when the seal of the Province is affixed to a lease by the Governor it becomes a Record, it may not unreasonably be asked, a Record of what Court? It must be borne in mind that the Governor in granting these leases was not exercising any delegated authority from the Crown, but a mere statutory power conferred upon him to demise in his own name.

But it was contended that, if these leases were not Records, and, consequently not in every respect assimilated to royal grants, yet that form must yield to substance; and when grants of Crown lands were introduced into *South Australia*, they were necessarily accompanied with all their incidents, one of which is the right of a subject who receives prejudice from them to invoke the aid of the writ of *Scire facias* for their repeal. And that if persons injured by these grants were debarred from this mode of proceeding, they would be remediless. To this it was correctly answered that the question of the power of a Court to proceed in a particular course of administering justice, was one of substance and not merely of form. And that, however convenient or necessary a mode of proceeding for the redress of certain wrongs might be, that consideration alone would not confer jurisdiction on the Court to sanction its introduction.

But it was further argued on the part of the Respondents that, even if *Scire facias* does not lie in this case, the Appellant will not be without remedy, as the leases may be impeached either by a writ of intrusion, or an information in Chancery. It was denied by the Appellant that these remedies existed; but it was said that, even if they did, they were inefficacious, as a subject has not a right to them *ex debito justitiæ*, as he has to a writ of *Scire facias*. But assuming this to be correct, it would furnish no ground for the unauthorized introduction of a remedy to meet a particular occasion.

There can be no doubt, however, that the other modes of pro-

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ceeding pointed out by the Respondents are applicable to the grant of the leases in question. The writ of intrusion lies in every case in which a trespass is committed on the lands of the Crown, or a person enters on the same without title. And the information in Chancery may be used to assert the Crown's right to property, as it was in the case of the *Attorney-General* v. *Chambers* (1), upon a question of the right of the Crown to the shore between high and low water mark.

In the present case a statutory power is given to the Governor to be exercised over the Crown lands. This power must be strictly pursued. The leases which he is authorized to make are limited to the extent of eighty acres. This quantity is said to be exceeded in the leases in question; if so, they are altogether void, and the lessees are intruders upon the lands. The remedies which have just been adverted to are, therefore, strictly applicable to the Respondents' unauthorized possession of the lands of the Crown.

In the argument for the Appellant, the case of the *Queen* v. *Clarke* (2) was relied upon. That was a proceeding in *Scire facias* to annul a grant of Crown lands in *New Zealand*, where the Judicial Committee upon appeal recommended that judgment should be entered for the Crown. This, it was insisted, is an express decision that *Scire facias* will lie although there is no Record. In the judgment of the learned Chief Justice of the Supreme Court the case is treated as a conclusive authority in favour of the promoters of the *Scire facias*. But it appears to their Lordships that it cannot properly be regarded as a determination of the question. From the beginning to the end of that case there was nothing to raise any doubt as to the propriety of the proceeding by *Scire facias*. No objection was taken to it in the Colony. Not the slightest suggestion was offered upon the subject in the course of the argument upon the appeal. The hearing before the Judicial Committee was *ex parte*, the Respondent not having appeared, and the attention of their Lordships was not in any way called to the irregularity of the proceeding in the validity of which they are supposed by their silence to have acquiesced. Even if the point occurred to their own minds, they might very fairly have inferred from the absence of all objection in the Supreme Court of *New*

(1) 4 D. G. M. & G. 206. (2) 7 Moore's P. C. Cases, 77.

Zealand that the proceeding by *Scire facias* to annul grants of Crown lands was proper in that Colony, either from the grants being made Records of the Court or from the Judges having power to make rules as to the form and manner of proceeding, and having authorized the process of *Scire facias* in the case of Crown grants.

The presumption arising from the clause in the Act, 1859, No. 18, authorizing the Governor to grant letters of registration for inventions, which expressly makes them liable to be repealed by writ of *Scire facias*, is unfavourable to the Appellant's argument. It may not unreasonably be supposed, that the Legislature never contemplated that grants or leases of waste lands would be made improvidently by the Governor, and would require to be recalled. But grants of monopolies to exercise inventions were likely to be occasionally prejudicial to private interests, and, therefore, it was thought expedient to give the subject the protection of this prerogative remedy.

If from the experience of the present case it should be thought desirable that the writ of *Scire facias* should be made available for the repeal of Crown grants, the Judges appear to have the power, under the Provincial Act "for consolidating the several Ordinances relating to the establishment of the Supreme Court," to promulgate a rule that the form and manner of proceeding in these cases may be by *Scire facias*. Or if there be any doubt of the sufficiency of such a rule, the remedy may, as in the case of letters of registration for inventions, be given by the Legislature. All difficulty for the future will thus be removed.

Their Lordships being of opinion that the rule granted by the Supreme Court for quashing the writ of *Scire facias* was rightly made absolute, will recommend to Her Majesty that the appeal against it be dismissed with costs.

Solicitors for the Appellant: *Gray & Mounsey.*
Solicitors for the Respondents: *Torr, Janeway & Tagart.*

P. C.*
1866
Jan. 17, 18.

IN THE MATTER OF THE JERSEY JURATS.

ON PETITION FROM THE ISLAND OF JERSEY.

Constitution of the Royal Court of Jersey—Prerogative of the Crown—Resignation of Jurats—New elections.

By the constitution and law of the Island of *Jersey*, the Royal Court is composed of a Bailiff and twelve *Jurats*, and upon the voluntary resignation of a *Jurat* it is the prerogative of the Crown to permit such resignation, and to authorize a new election to fill up the vacancy so occasioned.

Secus, on a vacancy occasioned by the death of a *Jurat*, when the Royal Court have power alone to order a new election.

The States of *Jersey* passed two *Actes* accepting the resignation of two *Jurats* on the ground of their length of service and inability to continue to perform the duties of their office. These *Actes* were objected to by certain landowners and others in the Island, who petitioned the Crown against confirming the same, and to suspend the filling up of those offices until a reform, long in contemplation, of the Royal Court had taken place; but, although it was considered by the Lords of the Committee that a complete change in the constitution of the Royal Court was necessary, yet, as the suspension of new elections of *Jurats* would not affect any improvements in the constitution of that Court, Her Majesty was advised to permit such resignations, coupled with directions that the same privileges and distinctions that the retiring *Jurats* had enjoyed as *Jurats* should continue to them during their lives, and ordering new elections to supply the place of such vacancies.

THIS was a petition and representation of the States of *Jersey* to Her Majesty in Council in support of two *Actes* of the States, dated the 14th and 29th of January, 1864, for obtaining new elections of *Jurats* in the room of *Philipe De Ste. Croix* and *Philipe Winter Nicolle*, resigned. The petition was met by a counter petition from certain landed proprietors, merchants, and others, praying for the suspension of the elections to the vacant posts of *Jurats* of the Royal Court. Another petition was also presented on behalf of an association designated "the Committee for the Reform of the

* *Present*:—The LORD PRESIDENT (the EARL GRANVILLE), the LORD CHANCELLOR (LORD CRANWORTH), LORD CHELMSFORD, the Right Hon. SIR GEORGE GREY, and the Right Hon. J. A. BRUCE.

Assessors:—The ATTORNEY-GENERAL (SIR R. PALMER), and the QUEEN'S ADVOCATE (SIR R. PHILLIMORE).

Royal Court of *Jersey*," against the acceptance and confirmation by Her Majesty of these resignations.

These petitions and representations were severally referred by Her Majesty to the Lords of the Committee of Council for the affairs of *Jersey* and *Guernsey*, for their opinion and advice thereon.

The circumstances which gave rise to these proceedings were as follows:—

In the year 1864, Messrs. *Ste. Croix* and *Nicolle* had exercised the functions of *Jurats* in the Island of *Jersey* for many years. *Ste. Croix* for thirty years and *Nicolle* for twenty-six years.

On the 14th of January in that year, at a meeting of the States of the Island of *Jersey*, that Assembly took into consideration a letter addressed to it by *Ste. Croix*, praying the States, on account of his long service and ill health, to solicit from Her Majesty in Council permission to resign his office of *Jurat;* and the States, after deliberating thereupon, acceded to the request, and passed an *Acte* for that purpose, which they directed the *Greffier* to transmit to the Privy Council.

On the 29th of January, 1864, the States, at their sitting of that day, took into consideration a similar application of *Nicolle*, and passed a similar *Acte*.

These *Actes* were transmitted by the *Greffier* of the States to the Privy Council in the usual manner for the sanction of Her Majesty.

In the month of February, 1864, a petition was presented by *William Lempriere* and *John Le Couteur* on behalf of themselves and 279 landowners and others of the Island of *Jersey*, praying that all future elections of *Jurats* might be suspended, until such measures should have been taken as Her Majesty should deem necessary for separating the judicial from the legislative functions of the *Jurats*, and for insuring the due administration of justice.

The Lords of the Committee of Council for the affairs of *Jersey* and *Guernsey* took this petition into their consideration, and, on the 9th of March, 1864, the Lieutenant-Governor was officially informed that the Lords of that Committee would be prepared to recommend to Her Majesty that the prayer of the petition should be granted, and to advise Her Majesty to accept the resignation of

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the two *Jurats*, and to direct that their places should not be filled up, on receiving a distinct assurance from the States of *Jersey* that they were prepared to take the necessary measures for carrying into effect, in whole or in part, the recommendation of the Royal Commissioners with regard to the constitution of the Royal Court.

The States of *Jersey* on the 7th of April, 1864, forwarded to the Lord-President of the Council a representation, urging, amongst other things, that the suspension of the elections for new *Jurats* would be in direct violation of the constitution of the Royal Court as by law established, and that it would likewise, in effect, operate as a repeal of the law which directs that upon a vacancy occurring, a new election to the vacant office should be ordered by the Court.

In the mean time, a Bill had been introduced into the House of Commons by Mr. *Locke*, "to amend the constitution, practice, and procedure of the Court of the Island of *Jersey*," which Bill, among other provisions, provided for the substitution of a Court consisting of the Bailiff and two other salaried Judges.

On the 13th of April, 1864, Mr. *Waddington*, one of Her Majesty's Under-Secretaries of State, informed the Lieutenant-Governor of the island that Her Majesty's Secretary, Sir *George Grey*, had felt himself obliged to assent to the second reading of Mr. *Locke's* Bill, and that he should not have done so had he been able to hold out to the House of Commons the hope that measures would be taken by the States for the improvement of the judicial system, and the better administration of justice in *Jersey*. Mr. *Waddington* added, that Mr. *Locke* consented to postpone the next step of the Bill to a time sufficiently distant to enable the States to give an assurance of their being in earnest in dealing with this subject; and if the States availed themselves of that interval to frame and submit such a *Projet de Loi* as was described in the Lieutenant-Governor's letter, that Sir *George Grey* would willingly use his influence to induce Mr. *Locke* not to press his Bill.

Mr. *Waddington's* letter was, on the 16th of May, 1864, laid before the States of *Jersey*, who, on the 21st of May, 1864, forwarded to Sir *George Grey* a letter, wherein, among other things, they stated that they felt that they could not discuss and pronounce upon any question or measure having reference to the

reform of the judicial system and administration of justice with the untrammelled liberty of opinion, without which their deliberations and decisions as a representative and legislative assembly would be fallacious and worthless, so long as the constitutional question now before the House of Commons, in connection with Mr. *Locke's* Bill, and which, as the States alleged, struck at the very root of the rights of the Assembly, and of the most cherished privileges of the people of *Jersey*, that of being legislated for by their own representatives in all matters of local and internal administration, remained in suspense, and that they, therefore, respectfully postponed for the present the consideration of the correspondence submitted to the States. They stated that they were not unduly attached to the established order of things, nor unmindful of, or indisposed to entertain and carry out the wishes of Her Majesty's Government, the manifestations of public opinion, or the recommendations of the Royal Commissioners.

After the receipt of this representation Mr. *Locke's* Bill was withdrawn.

On the 4th of August, 1864, the States of *Jersey* passed an *Acte* making provision for the office of a *Juge d'Instruction*, necessitated by the new criminal procedure law, which was to come into operation on the 1st of November following, which received the Royal sanction.

On the 15th of December, 1864, the States of *Jersey* met for the purpose of taking into consideration two motions, the first being for "the substitution of paid judges for the present *Jurat* system," and the second, "for separating the judicial from the legislative functions of the *Jurats*." The States ultimately resolved, by a majority of one, that the constituencies of the Island (the ratepayers in the several twelve parishes) should be consulted upon the abstract question, whether they were of opinion that it was desirable to substitute salaried Judges for the twelve *Jurats* of the Royal Court, and fixed the 2nd of January following for collecting the votes of the ratepayers in all the parishes of the Island.

The votes of the ratepayers of the Island, in accordance with this resolution of the States, were taken on the 2nd of January,

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1865, and the result was, that out of 2,470 ratepayers who voted, 2,290 voted against, and 180 for paid Judges. At a meeting of the States on the 12th of the same month, in consequence of the result of this vote, that body at once rejected the two former motions.

On the 14th of January, 1865, *Edward Mourant*, and other persons, associated under the designation of "The Committee for the Reform of the Royal Court," presented a representation to the Lords of the Privy Council, explanatory of the result of the voting, and alleging the illegality and unfairness of the States' resolution.

By another petition or representation from the same body, dated the 24th of June, 1865, addressed to the Lords of the Committee of Council for the affairs of *Jersey* and *Guernsey*, it was prayed that Her Majesty might not be advised to accept the resignations of the two *Jurats*, and that a Commission might be appointed to examine the state of the finances of the Island with respect to certain alleged misappropriation of the revenue.

The States, in their case in support of the *Actes* of the 14th and 29th of January, 1864, set forth the nature and constitution of the Royal Court, stating that it was composed of the Bailiff and twelve *Jurats;* that the Bailiff was president of the Court, and presided over the meetings of the States, that he was appointed by Patent from the Crown, being selected on account of his learning and knowledge of the laws and customs of the Island; that the qualification for the office of *Jurat* was the possession of landed property in the island to the amount of 40 quarters of wheat rent (£30. 15*s.* 3*d.* per annum); that such property qualification was one fixed in ancient times, and was then deemed of sufficient amount; that the *Jurats* were chosen from among gentlemen of independent fortune and reputed ability, and who not unfrequently had shewn their fitness for the office from having held other appointments in the Island.

That the twelve *Jurats* were believed to have existed long prior to the Charter of King *John*, which was only a confirmation of the privileges of the Island. That the third article of that Charter prescribed that the twelve *Jurats* should be elected from among the natives of the Island, "*per Ministros, Domini Regis et Optimates*

Patriæ." That the Court thus constituted had jurisdiction over all matters whatsoever arising within the Island, with the exceptions therein mentioned; that the Charter of King *John* so granted to the Island had, from time to time, been confirmed by successive Sovereigns, as also by various laws passed by the States, which had been sanctioned by Her Majesty in Council, and were still in force; that the mode of electing the *Jurats* had at various times been changed, sometimes according to the construction as it would seem put upon the words of the Charter "*per Ministros Domini Regis et Optimates Patriæ*," and at others by force of legislative enactments. That by an Order in Council bearing date the 19th of May, 1671, it was declared, that in the elections of *Jurats* and *Connétables* none be admitted to vote except those who contribute to public taxes and to the provisions made for the poor, and are masters of families; and in the Code of 1771 (pp. 168-9) the terms of the last-mentioned Order in Council were repeated; that at present the right to vote at elections was regulated by an Act of the States, dated the 14th of January, 1833, confirmed by Her Majesty in Council on the 15th of July, 1835, and was vested in all persons not under disability, who may be rated in respect of property either real or personal, as to real property of the value of £50, and as to personalty to the amount of £114 capital; that the *Jurats* received no salary for the performance of their duties, and the Court fees to which they were entitled were so small, that their services were, in fact, virtually gratuitous.

That the *Jurats*, besides being members of the Royal Court, were also members of the States or Legislative Assembly of the Island, which was composed of fifty members, namely: the twelve *Jurats*, twelve Rectors of the twelve parishes into which the Island is divided, and the twelve *Connétables* or Mayors, and fourteen Deputies. That the *Jurats* were elected for life by the whole of the ratepayers throughout the Island. The Rectors were appointed for life by the Crown; that the *Connétables* and Deputies were elected by the ratepayers of the parishes which they respectively represent, the *Connétables* irregularly every three years, as the tenure of office expired, or as a vacancy occurred, the Deputies triennially in the month of January, or whenever a vacancy occurred; and it was submitted by the States, that the prayer of the petition of the

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landowners beseeching Her Majesty to direct that all future elections for the post of *Jurat* be suspended until such measures should have been taken as Her Majesty might deem necessary for separating the judicial from the legislative functions, ought not to be granted or seriously entertained, as the simple issue was whether, having regard to the inability of the two *Jurats* any longer to perform the duties of their office, the Acts of the States of the 14th and 29th of January, 1864, ought not to be confirmed by Her Majesty in Council, and new elections directed. That it could not be disputed that the States had authority to originate all laws that they may think requisite for the due administration of justice or otherwise within the Island, and that by their *Actes* of the 14th and 29th of January, 1864, accepting the resignation of the two *Jurats*, they had not exceeded their powers. That the only legitimate question, therefore, was whether, looking at the constitution of the Royal Court as by law established, the Crown ought, in justice or on the ground of expediency, to withhold the Royal assent to the two *Actes* referred to. That in practice two different methods had been adopted where *Jurats* have desired to resign their office. In some instances the *Jurats* wishing to retire had made their applications by petition addressed immediately to Her Majesty in Council, and in others to the States. In cases, however, where petitions had been directed immediately to Her Majesty in Council, it had been usual, before granting an Order, to refer the application to the States, and the Orders in Council dated respectively 6th of March, 1837, 21st of October, 1839, and 3rd of April, 1840, confirmed this statement.

It was further urged that the Royal Court, according to the Charter of King *John*, is to consist of twelve *Jurats*, as expressed in the Charter "*Imprimis constituit duodecim Coronatores Juratos ad placita et Jura ad coronam spectantia custodienda;*" that in Article iii. of the Charter it is provided "*Ii debent elegi de Indigenis Insularum per Ministros Domini Regis et Optimates Patriæ, scilicet post Mortem unius eorum, alter fide dignus, vel alio casu legitimo, debet substitui.*"

That the right of the people to elect the *Jurats* was indisputable, and an Order in Council of the 15th of July, 1813, clearly established who were entitled to vote in the elections, no

law affecting a change in this respect having ever been made, whilst, on the contrary, as well by the various Charters since that of King *John* as by the laws and customs of the Island, the same number of *Jurats* had always been maintained; that it was true that in troublesome times the places of the *Jurats* had not immediately, on a vacancy occurring, been filled up, as during the civil war and on the return of King *Charles* the Second to the throne; but, as would be seen by their Letters Patent, both *Oliver Cromwell* and *Charles* the Second carefully desired to maintain the constitution of the Island with regard to the number of *Jurats*; and referring again to the Charter of King *John*, which provides for supplying the place of a *Jurat* dying or a vacancy occurring from some other legitimate cause, it was submitted that ill health had always been considered as a legitimate cause for a *Jurat* to ask to resign his office, and it was upon similar grounds that Messrs. *Ste. Croix* and *Nicolle* sought to resign; that the reasons given by them upon which their applications were grounded were not contested, and it would be harsh towards them if they were, under the circumstances and against their will, to have to continue in office.

The States by their case further maintained, that they conceived that the question of the alteration of the constitution of the Island, urged by the opposing petition, was not then before the Committee, and proceeded to shew how the proposed alteration had been viewed by the people of *Jersey*, stating the Royal Commissions of 1846 and 1859 to inquire into the state of the Criminal, Civil, Municipal, and Ecclesiastical Laws of the Island, and submitted that the allegation in the report of the Commissioners appointed in 1846, that the Royal Court neither possessed nor deserved the confidence of the people, was not founded on fact, for that very soon after that report had been published large public meetings of the inhabitants were held, and resolutions passed, entirely repudiating the conclusion at which the Commissioners had arrived, and solemnly protesting against any change by which the people should be deprived of the power of electing their own Judges; they also stated that on the 13th of December, 1860, after the report of the Commissioners appointed in 1859, a proposition, or rather a series of resolutions, was lodged *au Greffe*, relative to the course to

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be pursued for the consideration of the recommendations of the Commissioners, but considering that one of such recommendations involved the complete annihilation of the Royal Court, and the effecting of other fundamental changes in the constitution of the Island, the States on that day abstained from proceeding further in the matter, in order to afford the *Connétables* an opportunity to consult their constituents according to law upon the changes proposed; that, in the year 1861, the *Connétables* convened public meetings of their constituents, and the result was a unanimous decision of the twelve parishes, directing the *Connétables* to oppose the change in the constitution of the Island recommended by the Commissioners; that, on the renewal of the discussion by the States, that Assembly, on the 25th of May, 1861, unanimously resolved to reject the recommendations for altering the constitution of the Royal Court, but being of opinion that many of the other recommendations of the Commissioners for improving the laws of the Island might usefully be adopted, the States subsequently passed various *Actes*, embracing those recommendations and other subjects, and making considerable changes in their laws.

That, on the 25th of May, 1864, the States renewed the discussion of the Commissioners' Report of 1859, when it was unanimously resolved to reject the recommendation for altering the constitution of the Royal Court, but the States proceeded to pass *Actes*, carrying out some of the recommendations of the Commissioners; that, notwithstanding the unanimity expressed by the electors when consulted by the Constables in pursuance of the *Acte* of the States of the 13th of December, 1860, the States (in consequence of a representation which appeared to have been made to Her Majesty's principal Secretary of State for the Home Department, to the effect that the views of the people had undergone a change with regard to the alterations proposed in the constitution of the Royal Court), with the object of still more clearly and decidedly ascertaining the wishes of the electors, by an *Acte* of their Assembly of the 15th of December, 1864, determined again to consult the constituents on this important question, and accordingly ordered the Constables to collect the opinions of the ratepayers in each parish in the same manner as in public elections, upon the

question, whether they were of opinion to constitute paid Judges instead of the twelve *Jurats* of the Royal Court, and on the 2nd of January, 1865, the opinions of the electors were collected, and the following was the result:—Actually resident, 3989; against paid Judges, 2298; for paid Judges, 180. That, on the 12th of January, 1865, the States met to receive the returns of the Constables when that assembly adopted the *Acte*, thereby directing the Committee to whom the subject had been referred, to press the acceptance by Her Majesty in Council of the resignation of Messrs. *Ste. Croix* and *Nicolle*, and the States submitted, that the above statements demonstrated clearly that, so far from having a want of confidence in the Royal Court, the people of *Jersey*, as a body, had the strongest objection to the subversion of that Tribunal.

That, with regard to the alleged delays in the administration of justice, the States deeply regretted that any delays shoul l exist, but they asserted that it was far more attributable to the suitors themselves than to the Court; and they submitted that great inconvenience had been felt from the non-appointment of the two *Jurats*, as by the continued suspension of the election of *Jurats*, in the room of Messrs. *Ste. Croix* and *Nicolle*, the course of justice was impeded, and the States rendered incomplete; and the States finally submitted, that the course of proceeding proposed, to accept the resignation of the two *Jurats*, but to direct that their posts should not be filled up, would be a violation of the constitution of the Royal Court, and would indirectly operate as a repeal of the law of the Island, which directs that, upon a vacancy occurring in the office of *Jurats*, a new election shall be ordered by the Court, and prayed that their *Actes* of the 14th and 29th of January, 1864, might be confirmed by Her Majesty, and that the resignations of the *Jurats, Ste. Croix* and *Nicolle*, might be accepted, and an election of *Jurats* in their place directed.

The case on behalf of the Petitioners, the Merchants and landed proprietors, set forth that serious dissatisfaction with the present constitution of the Royal Court had for years existed, and had lately been increasing in the minds of the inhabitants of the Island, the causes of which were fully stated in the Reports of the Commissioners appointed in 1846 and in 1859, which unhesitatingly

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condemned the present constitution and character of the Royal Court, and recommended the creation of a new Tribunal, to be composed of three paid Judges. And with respect to the representation made by the States, that if Her Majesty should be pleased to accept the resignations of the two *Jurats*, but to direct that their places should not be filled; such a course of proceeding would be in direct violation of the constitution of the Royal Court as by law established, and that it would likewise in effect operate as a repeal of the law which, as contended by the States, directs that, upon a vacancy occurring, a new election to the vacant office should be ordered by the Crown; the Petitioners submitted and insisted, first, that the present constitution of the Court in no wise differed from its constitution in the year 1734; secondly, that when, upon cause shewn, His then Majesty in Council was pleased to remove and discharge from their office five of the *Jurats* of the Royal Court, without ordering any fresh elections in their places, as appeared by a letter dated the 11th of April, 1734, from the Lords of the Privy Council to the Bailiff and *Jurats* of the Royal Court, directing them not to proceed to any election of *Jurats* to replace the five who had thus been removed, until His Majesty's pleasure was made known, which was afterwards expressed by an Order in Council of the 9th of July, 1735, for the election of "three new *Jurats* only for the present;" which continued until an Order in Council of the 27th of December, 1739, directed the Royal Court to proceed to the election of six new *Jurats*, being the number of the then existing vacancies, and further directing that, as other vacancies should happen, the Court should proceed to the election of new *Jurats* to supply their places; thirdly, the Petitioners submitted that, even if it were the fact that on the death of a *Jurat* the custom had been for the Court to order a new election, yet it did not follow that there was any law which prescriptively directed that upon a vacancy occurring in the office of *Jurat*, except by death, a new election should be forthwith ordered by the Court, there being, as the Petitioners insisted, nothing in the Order in Council of 1739 which was intended to have or had any force or effect to restrain Her Majesty in Council from suspending at any time the election of new *Jurats*, should she see just cause for so doing. Fourthly, that by the two *Actes* of the States sought to be confirmed, Her Majesty in

Council was prayed not only to permit the resignations of the two *Jurats*, but also to appoint fresh elections; whereas the Petitioners submitted that no Order for fresh elections could be required if, as assumed by the States, a general law already existed providing in such cases for fresh elections to be ordered by the Royal Court itself.

That if it was contended, that it was not competent for the Crown, except on motion of the States, to accept the resignations in question, and at the same time to direct that, until further Order, no election should take place to supply the vacancies thereby caused; the Petitioners' answer was, that on several occasions the prerogative of the Sovereign in Council to legislate for the Island, *motu proprio*, had been recognised and acted upon; and the Petitioners submitted, that no limitation or restriction of Her Majesty's prerogative of legislation has since taken place, and, in particular, they denied that any such limitation was intended or effected by the Order in Council of the 28th of March, 1771, whereby His then Majesty was pleased to give effect to certain Ordinances, since called "The Code of 1771," the scope of which Order, as the Petitioners believed, was merely to take away from the Royal Court a power of making Ordinances, previously assumed by that body, independently of the States. They admitted, however, that this power of legislation, *ex motu proprio*, might be subject to some limitation, as, for instance, where taxation of the inhabitants of the Island is involved; but that no such ground of limitation existed in the present case. That should it appear to the Lords of the Committee that a fresh election must necessarily follow the acceptance of the resignation of a *Jurat*, the Petitioners would contend that the acceptance of such resignation was matter of grace and not of right; and would not merely deny that by such non-acceptance any wrong would be inflicted, as alleged by the States of *Jersey*, but would also urge that no inconvenience to the public service which might possibly therefrom arise could be tantamount to the injury which would be inflicted on the Petitioners and all litigants in *Jersey*, if, by the acceptance of the resignations, and by the consequent occurrence of fresh elections, the delay of the reconstitution of the Royal Court of *Jersey* were further and indefinitely postponed;

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and they expressed their belief that if, under existing circumstances, the Royal Court should be ordered to proceed to new elections of *Jurats*, such Order would by a considerable portion of the inhabitants of *Jersey* be taken as evidence of the approval by Her Majesty in Council, not only of the continuance of the present judicial system, but also of the conduct of the States of *Jersey* in relation to the present matter. They insisted that the whole course adopted by the States with regard to the repeated representations of Her Majesty's Government, shewed a determination to refuse, as long as possible, the origination of any measure calculated to remove the objections which are justly entertained against the continuance of the present judicial system. That the measures which the States had adopted as regarded criminal and civil procedure, might or might not be good in themselves, but in the words of the Commissioners of 1859, "the Island has so completely outgrown its judicature, that any reforms which shall leave the duties of the Superior Court in the hands of a numerous body without professional education, whose attendance is precarious, and for whose nomination no one is responsible to public opinion, will be absolutely nugatory."

With regard to the allegations contained in the representation of the Petitioners, the *Jersey* Reform Committee, as to the misappropriation of the revenues of the Island, and in particular of the harbour dues, the Petitioners stated that they did not then seek to urge the request contained in their representation for the appointment of a Commissioner to examine the state of the finances of the Island, nor to enter minutely into any complaints on the general maladministration of the revenues, although believing that, on a proper occasion, they could shew that great defects existed in their administration, owing very much to the circumstance that under the present constitution of the Royal Court, no independent tribunal existed in the Island which could be applied to successfully with the object of remedying such defects; that besides being members, with the Governor and Bailiff, of the Assembly which controls the *Impôt* (the chief source of the Island revenues), the *Jurats*, as members of the States, and, indeed, most frequently as members of particular standing Committees of that body, to whom the details of administration of the finances are entrusted, had a very

direct share in decisions which in their judicial capacity they might afterwards be called upon to review; nor did the Petitioners at present bring forward this part of the subject of their representation, except in illustration of the evils of the present system, being desirous rather of urging the former part of their petition, namely, that relating to the non-acceptance of the resignations of the two *Jurats;* and it was prayed that the confirmation of the *Actes* of the States of the 14th and 29th of January, 1864, and the acceptance of the resignations of *Philipe de Ste. Croix* and *Philipe Winter Nicolle,* Esquires, might not be recommended to Her Majesty in Council; or, if Her Majesty should be advised to accept such resignations, then that the confirmation of so much of the said two *Actes* of the States as related to the ordering of fresh elections in the room of the two resigning *Jurats* should not be recommended, but that it be recommended that during Her Majesty's pleasure no such elections to the two vacant places should take place.

No case was lodged by the *Jersey* Reform Committee.

Mr. *Rolt,* Q.C., Mr. *Bovill,* Q.C., and Mr. *W. W. Mackeson,* for the States of *Jersey:*—

According to the law and constitution of the Island, there must be the full number of twelve *Jurats.* The office is for life, but where there are sufficient reasons, as in the present instance, for *Jurats* tendering their resignations, it is expedient that such resignations should be accepted by the Crown. In the case of death of a *Jurat,* it is not in dispute that the Royal Court, consisting of the Bailiff and *Jurats,* can issue their warrant to fill up the vacancy, *Falle,* p. 146 [E l. by *Durell,* 1837], without any sanction of the Crown. [LORD CHELMSFORD:—If the Queen accepts the resignation of a *Jurat,* can the States proceed to a new election immediately?] Yes; the acceptance of such resignation involves a new election, but we do not dispute the power of the Crown to accept or refuse such resignation; that is within the Charter of King *John,* but we contend, on behalf of the States, that the resignation cannot be completed without the consent of both the legislative bodies, the Crown and the States. The Crown cannot legislate so as to affect internally the affairs of the inhabitants of the Island, except with

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the consent of the States, *In re the States of Jersey* (1). This doctrine was confirmed with respect to the Island of *Guernsey*, *In re the States of Guernsey* (2), where it was held, that an ancient office, the *Contrôle de la Reine*, could only be abolished by an Order in Council, with the consent of the States of that Island.

The Islands of *Jersey* and *Guernsey* are said by Lord *Coke*, in *Calvin's Case* (3), to be no parcel of the realm of *England*, 4 Inst., p. 286, and they are governed by their own laws. As to the rights of the Islanders to the benefit of the Charter of King *John*, that Charter must be taken not as the foundation, but the confirmation of rights which previously existed. The original Charter is lost, but the substance of it is to be found in an inquest taken in the reign of his son, *Hen. III.*, *Falle*, p. 222, after *Normandy* was alienated. This inquest recites and confirms the Charter. By the first clause twelve *Jurats* are appointed, whose offices are now in question. "I. *Constituit Duodecim Coronatores Juratos, ad placita et Jura ad Coronam spectantia custodienda.*" Their further duties are then defined in the second clause: "*Constituit etiam et concessit pro securitate Insularum, quod Ballivus de cetero per visum dictorum Coronatorum poterit placitare absque Brevi de Nova Dissèisinâ factâ infrâ annum, de Morte Antecessoris infrâ annum, de Dote similiter infrâ annum, de Feodo invadiato semper, et Incumbreio Maritagii,*" &c. The third clause is most essential: "*Ii debent eligi de Indigenis Insularum, per Ministros Domini Regis et Optimates Patriæ; scilicet post mortem unius eorum, alter fide dignus, vel alio casu legitimo, debet substitui.*" Now, the words "*debet substitui*" in this Charter, like our Great Charter, are a positive enactment, providing in the event of death, "*vel alio casu legitimo*," one shall be substituted. The Crown cannot at its pleasure suspend the operation of the Charter. It may inquire into the cause of the resignation. Here sufficient cause has been shewn. Age and infirmity is a legitimate cause. The Charter of *John* is confirmed by the Charter of *Edw. III.* in the largest terms. The Crown confirms to the Island "*Omnia privilegia, libertates, immunitates, exceptiones et consuetudines, in personis, rebus, monetis, et aliis.*" *Falle*, pp. 91, 357. So the Charter of *Eliz.* ratifies and confirms all

(1) 9 Moore's P. C. Cases, 185. (2) 14 Moore's P. C. Cases, 368.
(3) 7 Co. Rep. 21, a.

and singular the constitutions of the Island respecting the Bailiff and *Jurats*. Again, by an *Acte* of the Royal Court of *Jersey*, in 1564, one *Dumaresq* was appointed on a death to fill up the number of *Jurats*. Then the Order in Council of *Car. II.*, 9th May, 1671, recognises the right of election of *Jurats*. In the year 1734 there were proceedings by the Crown to remove some *Jurats* for corruption and misconduct, but the other *Jurats* declined to act, and in 1739 an Order in Council was made for the election of new *Jurats*. By the *Code* of 1771 the laws and privileges of the Island are confirmed. [LORD CHELMSFORD:—That Code appears to be an Order in Council registered by the States.] The States agreed to the Code. That may raise a question not now before this Tribunal, as to the powers of the Parliament to legislate for the Island of *Jersey*. [LORD CHELMSFORD:—Not so. It is with respect to the power of the Queen in Council to make laws for *Jersey*.] That very question arose: the case of *The States of Jersey* (1); there the Court refused to register the Orders in Council. It is true that by an Order in Council of the 8th of November, 1811, it is directed that all elections of *Jurats* should be suspended until certain Commissioners who were about to proceed there should examine the laws relating thereto. Then there is the Order in Council of July, 1813, directing all future elections of *Jurats* to be according to the Order in Council of the 10th of May, 1671. The history of these Orders in Council fully appears in *Le Quesne*, Const. Hist. of *Jersey*, p. 447. [LORD CHELMSFORD:—Is not the whole question this—whether it is expedient that the Crown should prevent a new election of *Jurats*?] It would be inexpedient and prejudicial to justice and the laws of the Island to accept the resignations without at the same time filling up the vacancies. In the case of ordinary Corporations in *England*, where there is a body, it is the right of the electors, and of every other persons, that the number should be full, and the Court of Queen's Bench will grant a mandamus to compel the Corporation to fill up an office so vacant.

The *Solicitor-General* (Sir *R. Collier*), Mr. *C. S. Perceval* with him, for the Petitioners:—

There can be no doubt of the power of the Crown to legislate

(1) 9 Moore's P. C. Cases, 185.

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by Order in Council for the Island, Rep. of *Jersey* Coms., 1859, p. v., and that the constitution of the Royal Court can be altered by an Order in Council. *Falle*, p. 157, a high authority, expressly states so. The Rep. of the *Jersey* Com., 1846, p. v., also says that by the Norman law the Duke of *Normandy* had supreme legislative power, and that the form that this authority now assumes is that of Orders of Her Majesty in Council, and that this has been the course for centuries. The case of *The States of Jersey*, as the report of their Lordships shews (1), does not determine that Her Majesty could not, consistently with the constitutional rights of the Island, legislate by Orders in Council, but only that in that particular instance it was expedient to revoke the particular Orders complained of.

First, then, with respect to the *Jurats*. The States rely upon the Charter of King *John*, but *Le Quesne*, in his Constitutional History of *Jersey*, p. 63, doubts whether there ever was such a Charter. It is not described as a Charter in the inquest of his son *Hen. III.*: *Le Quesne*, p. 60. [LORD CHELMSFORD:—How long did the Kings of *England* retain the title of Duke of *Normandy?*] King *John* gave it up. [LORD CHELMSFORD:—There is a confirmation of the fact of there being a Charter of King *John* in the Charter of *Elizabeth*, which speaks of privileges, &c., granted by former Kings of *England* and Dukes of *Normandy*.] It was not a Charter under the Great Seal, but a mere Ordinance, and had not the effect of conferring any legislative power. All it did was to give the Coroner a standing jury of twelve to determine certain cases. It did not confer the power the States contend the *Jurats* have. There can, however, be no question that Her Majesty, even if the resignations are accepted, may withhold the sanction for filling the vacancies, and that during pleasure. [The LORD CHANCELLOR:—Your argument is, that the Crown has undoubted legislative authority in all matters, and, therefore, must have with respect to the *Jurats*.] Yes. We contend that your Lordships ought to recommend that no election shall take place during Her Majesty's pleasure.

[The LORD CHANCELLOR:—We think that question is properly

(1) 9 Moore's P. C. Cases, 262.

before us, but that is not necessarily involved in the question of general legislation throughout the Island. If it were to be shewn that Her Majesty had an absolute power of legislating in the Island in the same way as the Queen, Lords and Commons can legislate in *England*, it would be idle to argue whether she could make a particular disposition with respect to *Jurats*, because Her Majesty can then do anything. But the question before us is not, whether there is a general power of legislating on all subjects whatever, and uncontrolled on the part of Her Majesty in Council, but whether there was a power in Her Majesty in Council to interfere in this particular instance of regulating the election of *Jurats*. Your argument must be confined to the expediency of the Crown exercising the undoubted power of accepting or refusing these resignations, and so impliedly sanctioning the elections, if accepted, of new *Jurats*.]

Supposing the Crown should think fit to accept the resignation, still there is the power to direct that no elections should take place to fill the vacancies. [The LORD CHANCELLOR:—The question really is the expediency of exercising that power.] Serious dissatisfaction with the present constitution of the Royal Court exists in the Island. The union of legislative with judicial functions in the persons of the *Jurats* of the Royal Court and the whole constitution of that Court have been repeatedly condemned by competent and impartial authorities. The Commissioners appointed in 1846 for the consideration of the Criminal Law, and in 1859 for inquiring into the Civil, Municipal, and Ecclesiastical Laws of the Island alike condemn the constitution of that Court. With respect to the *Jurats*, they are elected not by the *optimates patriæ* and *ministri domini regis*, but by the suffrage of the voters in the Island. Though they act as Judges and legislators they are not lawyers, many are tradesmen, and the only qualification for the office is that they must possess forty quarters of wheat per annum. They are not bound to attend to their judicial or legislative duties, and attend only when it is convenient for themselves; and the Commissioners of 1846, in their Report, p. xlii., express their opinion that "a Court so constituted is unfit, from want of legal knowledge, to

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administer the law." [LORD CHELMSFORD:—It is right on behalf of the *Jurats* to say that, although the constitution of the Court is condemned, and although many of the *Jurats* may have been elected for party motives, the Commissioners all say there is no imputation at all on their integrity.] That is so. The Report of 1859 states, that the practice of the Royal Court is, in fact, intolerably dilatory and vexatious, the chief magistrate being powerless, the actual Judges numerous, their attendance precarious, and their appointment without reference to judicial qualifications in themselves. The nature of such a Court is extremely inconvenient and objectionable, and it is absolutely necessary that a reform should at once take place, which would be interfered with if the vacancies in question are filled up and tend to perpetuate the Court. [LORD CHELMSFORD:—As long as the Royal Court exists, ought it not to be efficient to perform its functions?] An election in the present circumstances would not add to its efficiency, and no legislative action in the desired direction can be expected from the States, if their application for new elections be complied with.

The LORD CHANCELLOR interposed, and said, that the opinion their Lordships had formed, and the advice they would humbly tender to Her Majesty was, that though the Committee were strongly of opinion that a complete change in the constitution of the Royal Court was absolutely necessary for the welfare of the Island, yet as neither the refusal of Her Majesty—in the exercise of her undoubted right—to accept the resignations, nor the suspension of any new election of *Jurats* to supply the place of those resigning, would have any immediate effect in improving the present constitution of the Royal Court; and as Her Majesty would certainly desire that, until the constitution of the Court is effectually reformed by legislative interference, no course should be taken which might have a tendency to render it less efficient than it now is: therefore the Committee would humbly advise Her Majesty to accept the resignations, and to authorize new elections in the place of those resigning. This, his Lordship added, is the unanimous opinion of their Lordships to whom the matter has been referred.

As is customary in references of this nature no judgment

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was delivered. The following report of the Lords of the Committee was made on the Petitions:—

Her Majesty having been pleased, by Her General Order to refer unto this Committee the several Acts of the States of the Island of *Jersey*, and other documents hereinafter described, relative to the retirement of *M. Philipe de Ste. Croix* and M. *Philipe Winter Nicolle*, two of the *Jurats* of the Royal Court of the said Island, viz.:—Act of States, 14th of January, 1864; Act of States, 29th of January, 1864; Petition of the Landed Proprietors, Merchants, &c., of the Island; Act of States, 12th of January, 1865; Petition of the States of the Island, 14th January, 1865; Representation of the States, 7th of April, 1864; Petition of Committee for Reform in *Jersey*, 1st of October, 1864; Representation of Committee of Reform, 24th of June, 1865. The Lords of the Committee, in obedience to your Majesty's said Order of Reference, have this day (18th of January, 1866) taken into consideration the said Acts and the said Representations and Petitions; and having heard Counsel on behalf of the States, and of the Petitioners against the confirmation of the Acts of the States of the 14th and 29th January, 1864, their Lordships do agree humbly to report as their opinion to your Majesty that, although they are strongly of opinion that a complete change in the constitution of the Royal Court is absolutely necessary for the welfare of the Island, yet, as neither the refusal by your Majesty, in exercise of your undoubted right to accept the resignation, nor the suspension of any new election of *Jurats* to supply the place of those resigning, would have an immediate effect in improving the present constitution of the Court, and as your Majesty would certainly desire that, until the constitution of the Court has been effectually improved by legislative interference, no course should be taken which might have a tendency to render it less efficient than it now is, their Lordships, therefore, humbly advise that your Majesty may be graciously pleased to permit the said *Philipe de St. Croix*, Esq., and the said *Philipe Winter Nicolle*, Esq., to resign their offices of *Jurats*, and to allow them to continue during their lives all those privileges and distinctions which *Jurats* do now, or may hereafter, enjoy, as far as your

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Majesty may be enabled in law. And the Lords of the Committee are further of opinion, that your Majesty should authorize that new elections of *Jurats* should be made according to the laws and constitution of the Island of *Jersey* to supply the said vacancies.

The Order in Council made thereon, dated the 3rd of February, 1866, after setting forth the Committee's Report, proceeded in these terms:—"Her Majesty having taken the said Report into consideration, was pleased by and with the advice of Her Privy Council, to approve of what is therein proposed, and doth accordingly permit and allow the said *Philipe de St. Croix* and *Philipe Winter Nicolle* to resign their said offices of *Jurats* of the Royal Court of the Island of *Jersey*, and doth also allow them the continuance, during their lives, of all those privileges and distinctions which *Jurats* do now, or may hereafter, enjoy, so far as Her Majesty doth hereby order; that new elections be made of *Jurats* according to the laws and constitution of the said Island of *Jersey*, to supply the said vacancies; and Her Majesty doth further order, and it is hereby ordered, that the said Acts (copies of which are hereunto annexed), together with this Order, be entered upon the Registry of the Island of *Jersey*, and observed accordingly. Whereof the Lieutenant-Governor or Commander-in-Chief, the Bailiff and *Jurats*, and all others Her Majesty's officers for the time being in the said Island, and all other persons whom it may concern, are to take notice and govern themselves accordingly."

Solicitors for the States: *Jones, Blaxland, & Jones.*
Solicitors for the Petitioners: *Hancock, Saunders, & Hawksford.*

BARTOLOMEO CASSANOVA AND OTHERS . APPELLANTS; J. C.*
1866.
AND
THE QUEEN AND JOHN SHAW . . . . . RESPONDENTS. *Feb.* 12.

THE "RICARDO SCHMIDT."

ON APPEAL FROM THE VICE-ADMIRALTY COURT AT SIERRA LEONE.

Vice-Admiralty Court Act—Appeal to Privy Council—Time allowed for—Discretion in admitting.

Sec. 23 of the 26 & 27 Vict. c. 24, which limits the time for appealing from the Vice-Admiralty Courts abroad to six months, vests, by the same section a discretion in the Judicial Committee to admit an appeal notwithstanding six months have elapsed.

Circumstances shewing that there was no wilful laches in not lodging petition of appeal in the Registry of the High Court of Admiralty within the prescribed time, and that the delay arose from the parties waiting a decision on a pending appeal, which involved a similar question, held sufficient for the exercise of the discretion vested in the Judicial Committee, to admit an appeal under that section, upon payment of the costs of the application, and giving security for further costs.

BY the *Vice-Admiralty Court Act*, 26 & 27 Vict. c. 24, s. 23, it is enacted that "the time for appealing from any decree or order of a Vice-Admiralty Court shall, notwithstanding any existing enactment to the contrary, be limited to six months from the date of the decree or order appealed from; and no appeal shall be allowed where the petition of appeal to Her Majesty shall not have been lodged in the Registry of the High Court of Admiralty and of appeals within that time, unless Her Majesty in Council shall, on the report and recommendation of the Judicial Committee of the Privy Council, be pleased to allow the appeal to be prosecuted, notwithstanding the petition of appeal has not been lodged within the time prescribed."

The ship *Ricardo Schmidt*, with a cargo of ground nuts and palm

* *Present*:—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, SIR JAMES W. COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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oil, under the command of the Appellant, was seized in the harbour of *Freetown, Sierra Leone*, under the Statute, 5 Geo. IV. c. 113, as being equipped for and engaged in the Slave trade, and taken to the Vice-Admiralty Court at *Sierra Leone* for adjudication. By a decree, dated the 26th of September, 1864, that Court held that it was not proved that the *Ricardo Schmidt* was equipped for the Slave trade, and ordered the suit to be dismissed, but without costs or damages, as the Court considered there was probable cause for the seizure, as the owners of the vessel had not entered into a bond at *Genoa* for certain water casks on board, according to the provisions of the Treaty between *England* and *Sardinia*, and dismissed the case, without damages or costs. On the 4th of October, 1864, an appeal was asserted by the Claimant for damages and costs.

The owners of the *Ricardo Schmidt* resided at *Genoa*, and, after being informed of the result, they instructed Proctors in *London* respecting the advisability of appealing, but as at that time an appeal in the case of the ship *Laura*, was depending before the Judicial Committee, in which, as it was alleged, a similar claim for costs, losses, and damages was made, they were advised by Counsel to await the decision of their Lordships.

On the 14th of September, 1865, the Petitioners lodged a petition of appeal praying to be allowed to appeal from the decree of the 14th of September, 1864. As the petition of appeal was not lodged in the Registry of the Appeal Court within six months from the date of the decree, the time prescribed by the 26 & 27 Vict. c. 24, s. 23, it was now moved by the Appellants under that section that the Judicial Committee would be pleased to report to Her Majesty that the Appellants might be allowed to prosecute their appeal, and that the proceedings already taken for prosecuting the appeal whereby the process had been forwarded from *Sierra Leone*, might be ratified. This motion was supported by an affidavit of the Petitioner's Proctor, setting forth the above facts. The motion was opposed by the Crown.

Mr. *V. Lushington*, and Mr. *Bayford*, in support of the motion.

The delay in lodging the petition of appeal arose from the

Petitioners waiting for the decision of this Tribunal in the case of the *Laura*, similarly circumstanced. The time limited by the Statute, 26 & 27 Vict. c. 24, s. 23, which is six months for prosecuting appeals from Vice-Admiralty Courts abroad, including *Sierra Leone*, was overlooked, but the usual steps for prosecuting the appeal have been taken within twelve months, the period prescribed by the 5 Geo. IV., c. 113, the *Slave Trade Abolition Act*, under which the proceedings against the *Ricardo Schmidt* were had, and which time is still allowed for prosecuting appeals from the High Court of Admiralty of *England*, as well as from some of the Vice-Admiralty Courts abroad. Upon the merits we are entitled to indulgence; the owners are Foreigners, and the strict practice was not known at *Sierra Leone*. The fact of the Court releasing the vessel without awarding costs and damages involves an important question of law. We have sustained damages between £3,000 and £4,000.

The Queen's Advocate (Sir *R. Phillimore*, Q.C.), and Dr. *Swabey*, for the Respondents, *contrà*.

No doubt there is a discretion vested in the Judicial Committee by the 23rd section of the Statute, 26 & 27 Vict. c. 24, to recommend the allowance of an appeal, otherwise shut out, for non-compliance with that section, which requires the petition of appeal to be lodged in the Registry within six months from the date of the decree, but we submit that the section must be construed to mean "adequate" grounds. Here there does not appear to be any particular question of law raised to justify the indulgence asked for. The only ground accounting for the delay is the waiting till the decision of this Court in the *Laura*; that alone, we submit, is not sufficient.

THE LORD JUSTICE KNIGHT BRUCE:—

No ground really exists to entitle the Petitioners to the exercise of the discretion vested in their Lordships by the Statute, 26 & 27 Vict. c. 24, s. 23, to admit the appeal, notwithstanding six months have elapsed, except that the Petitioners, whom we believe intended to appeal, did not lodge their petition of appeal in the Registry until a similar case, the *Laura*, which was then before their

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Lordships, had been decided. As, however, there was a *bonâ fide* intention to appeal, their Lordships think, in the circumstances, that the appeal ought to be admitted and prosecuted upon payment of costs of the present application, and giving security for costs to the amount of £300. The proceedings that have already been taken for prosecuting the appeal will be ratified.

Proctors for the Appellants: *Rothery & Co.*

Proctor for the Respondents: *F. H. Dyke*, Her Majesty's Procurator-General.

J. C.* 1866 *Feb.* 21, 28; *March* 17.

TROTMAN'S PATENT.

Letters Patent—Prolongation of term—Patentee not the Manufacturer—Licenses—Profits—Remuneration—Accounts.

To entitle a Patentee to a prolongation of the term of Letters Patent, he must satisfactorily establish the amount of his profits.

A Patentee did not manufacture or sell the patented article (ship anchors), but granted licenses to Ironsmiths to manufacture, from whom he received royalties. On an application by him for an extension of the term of the Letters Patent on the ground of inadequate remuneration, the accounts produced of his own expenditure in carrying on the Patent being unsatisfactory, and no accounts given of the profits derived by the Licensees, a prolongation of the Letters Patent was refused, first, as the Patentee's accounts were unsatisfactory, and secondly, from the Patentee having so dealt with his patent rights as to deprive him of the power of shewing the amount of profit derived from the working of the patent.

Licensees stand, with respect to the profits, in the same position as an Assignee of the Patentee.

THIS was a petition by the Patentee, *Trotman*, for a prolongation of the term of Letters Patent, granted to him in April, 1852, for his invention of "Improvements in Anchors."

It appeared from the petition, that Letters Patent had been granted to one *Porter* in August, 1838, for improvements in anchors, but which Patent had been worked by his Assignee, *Honiball*. That the Petitioner's invention and improvements which were applicable

* *Present:*—LORD CHELMSFORD, SIR JAMES W. COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

to *Porter's* anchors consisted, "first, of forming or fixing the palm intermediately of the breadth of the arm; secondly, in forming the horn wider than the arm; and, thirdly, in forming or affixing the palm of *Porter's* at the back of the arm," and it was alleged, that by these improvements an anchor made in accordance with the Petitioner's invention was ensured to bite the ground immediately, without a possibility of the unopened fluke dragging along, as was the case sometimes with *Porter's* anchor, when the fluke did not open out by the action of the horn, and that in the improved anchor the cable was less likely to foul the horn in consequence of its peculiar formation, and by reason of the angles which the faces of the palm made to the faces of the arms, much greater holding power was obtained than in *Porter's*, or any other existing anchor, for which invention Letters Patent had been granted to the Petitioner for *England* on the 20th of April, 1852, and for *Scotland* and *Ireland* on subsequent dates. That shortly afterward the grant of the Letters Patent, trials were made under the Admiralty superintendence, of the relative value of anchors, and the result of the trials proved the Petitioner's anchor to possess superior advantages over the other anchors tested; but that, although extensively employed by the Merchant Marine, yet, with the exception of Her Majesty's Royal Yacht, "The Victoria and Albert," the anchor was not employed by the Royal Navy, notwithstanding it had been recommended by a Committee of the House of Commons sitting upon that subject.

The Petitioner further stated, that from the outset of his endeavours to bring his anchor before the public he had met with great difficulties, both from the peculiar nature of the trade of an Anchorsmith and other causes, and that the paucity of skilled labour among that trade had limited the production of his anchors, although the number of licenses he had granted to Anchorsmiths, at a certain royalty, had steadily increased. That not being a maker or dealer in anchors, he had derived no benefit from the manufacture or sale thereof, and no advantage, except in the way of royalties, and having no trade or goodwill in any trade for the manufacture of anchors, he could not receive any remuneration from his invention after the expiration of the Letters Patent. That he had expended large sums of money in connection

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with his improvements and in superintending the manufacture of the anchor by his Licensees, and in endeavouring to make his invention known, appreciated, and used by the public; and that the royalties received and to be received from the Licensees, would not afford a remuneration or reward adequate to the great labours which he had sustained, or commensurate with the benefits which the invention had conferred on the public, and he prayed for an extension of the English Patent for fourteen years.

There was no caveat entered or opposition.

Evidence was given shewing that the Patent was a most useful one, and extensively employed in the Merchant Marine, though not adopted in the Royal Navy. From the accounts produced by him it appeared that the Licensees had paid the Petitioner for royalties the sum of £15,000. Among the items of the expenditure of the Petitioner in reference to the profits of the Patent he deducted the sum of £4,900 for his personal allowance and subsistence money, in visiting and overlooking the Licensees' works while manufacturing the anchors during the fourteen years of the Patent.

Mr. *Webster*, Q.C., and Mr. *Henry James*, for the Petitioner:—

This case materially differs from other applications for extension of the term of Letters Patent. Here the Inventor is not the Manufacturer of the patent article, nor did he sell the same. He has granted licenses to Ironsmiths to manufacture his anchors on their own account upon a given royalty, and the royalties received by him have not remunerated him for what is confessedly a most useful Patent.

[LORD CHELMSFORD:—As the Patentee has adopted that mode of working the Patent, if not sufficiently remunerated, is he not bound by the consequence? The accounts are most unsatisfactory. The charge of £500 a-year for personally superintending the Licensees' manufactures is unheard of. There ought to have been a return of the profits of the Licensees, who are in the same position as an assignee of the Patentee.]

From the nature of the case, that is impossible. It is similar to

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a Patent for making bread, where licenses have been granted to Bakers. How could you ascertain the Bakers' profits? There is no means of ascertaining the Licensees' profits or loss in this instance. In *Perkins' Pat.* (1), a similar charge for personal superintendence of the Patent was allowed.

Mr. *Hannen*, for the Crown.

Such an application as the present is not a matter of course. The Patentee must, in addition to the public utility of the invention, shew, first, that he has not been adequately remunerated, and, secondly, that he has pushed on the Patent so as to obtain that object, which in this case he has not done, as he only granted licenses to manufacturers. The accounts are unsatisfactory. Among the items the deduction he makes from the profits for personal expenses for visiting and superintending the Licensees' establishments, amounting to £4,900, cannot be allowed. Again, no accounts have been filed by the Licensees, who are in the same position as Assignees of the Patentee. It is impossible to ascertain from the accounts filed by the Petitioner what have been the profits of the Patent.

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The consideration of the application was reserved. Their Lordships' judgment was now delivered by

LORD CHELMSFORD:—

This is an application for the extension of the term of a Patent for "Improvements in Anchors."

The Patent in question was taken out by the Petitioner shortly before the expiration of a Patent which had been granted to a Mr. *Porter* for "Improvements in Anchors," and which Patent had been worked by *Porter's* Assignee, Mr. *Honiball*, the uncle of the Petitioner, who assisted him in his business. It was to this anchor of *Porter's* that the Petitioner's improvements were applied. *Porter's* anchor had considerably improved upon the anchor in common use, but upon a trial for infringement of his Patent it was found that the principle of his improvement had been anticipated by a person of the name of *Logan*. That principle was, that instead of the arms being fixed as in an ordinary anchor, they moved upon axes, and

(1) 2 Webs. Pat. Cases, 17.

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the flukes were set upon them at an angle. It appears that by this arrangement greater biting and holding powers were obtained, and when the anchor was in the ground, by the upper fluke resting upon the shank it was more out of the way, and less likely to be caught by the cable while the vessel was swinging, and the anchor itself was capable of more compact stowage. The Petitioner, taking this anchor of *Porter's* as thus described, added the improvements for which he obtained his patent. These, according to his specification, consisted in making the horn or toggle for canting the anchor and opening the flukes wider than the arm, in affixing the palm of *Porter's* anchor intermediate of the breadth of the arms, and at the back of the arm instead of in front (it not being new to place the palm at the back of the arm of ordinary anchors), and in making the angles which the palms make to the shank, and those made by the arms, to be different. These variations from *Porter's* anchor, however slight and insignificant they may seem, were undoubtedly improvements upon it; and the Petitioner, without the exercise of any great inventive ingenuity, perfected an anchor which has proved highly efficient and useful.

This anchor has been very extensively employed by the mercantile marine, and has invariably been found upon trial to possess holding powers superior to all other anchors. For some unexplained reason it has not been introduced into the Navy. In 1853, an Anchor Committee appointed by the Admiralty to determine the relative merits of different descriptions of anchors, after submitting them respectively to various tests, reported most favourably of *Trotman's* anchor. The Report stated that this anchor "proved to have greater holding powers than *Porter's*," and that when it was subjected "to trials with anchors on the Admiralty plan of the respective weights of thirty, thirty-five, and forty cwt. (stock included), no doubt was left upon the minds of the committee that in regard to holding power with a steady equable strain, *Trotman's* anchors were fully equal to Admiralty anchors of at least twenty-four per cent. greater weight."

It was proved in evidence, that after this report *Porter's* anchors went entirely out of use, and that the demand was for *Trotman's* anchors instead of them. Although, therefore, the merit of the

improved anchor was originally due to *Porter* (or to *Logan*, who was before him in the field), the improvements introduced by the Petitioner have certainly tended to make the anchor practically more useful, and he has, therefore, upon this ground a claim to consideration in his present application.

But admitting the merit of the Petitioner, the question to be next considered is the sufficiency of his remuneration. There is this peculiarity in his case, that instead of becoming himself a manufacturer of his patented anchors, he has preferred to grant licenses to Ironsmiths to manufacture them on their own account, paying him a royalty. In all prior applications for the extension of the term of a Patent, the Patentee has himself made and sold the patented article, either exclusively or in common with other persons to whom he has granted licenses, or he has assigned away his Patent altogether, so as to substitute his Assignee for himself in all questions respecting his Patent rights. In these cases there is obviously no difficulty in ascertaining the profit which has been derived from the Patent. It is supposed, however, that the unusual manner of working the Patent in this case renders the application of a different principle necessary. This, however, is clearly a misapprehension. The question in all cases of this description is not what the Patentee has received, but what has been made, or by proper judgment and application might have been made, by the Patent. The Petitioner might, if he pleased, have become the Manufacturer of his patented anchor. If he had, it would then have been necessary to ascertain what part of the profits of the manufacturing business ought to be ascribed to the Patent. In arriving at this result the proper course would have been to deduct the original cost of the anchor, the ordinary amount of Manufacturer's profits in the particular trade, and probably an allowance for the time and labour of management, and the remainder would then have been the profit due to the Patent. But the Petitioner was unwilling to incur a large expenditure in erecting the proper plant for carrying on the manufacture, and preferred to leave the expense of the new machinery necessary for forging his anchors to the Licensees, being content to receive a royalty as his share of the profits of the Patent business. Under these circumstances, if this royalty alone were to be regarded, it is

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evident that we should not arrive at a knowledge of the whole amount realized by the Patent, but that the question would be changed from what the patent had produced to what it had yielded to the Patentee. It was necessary, therefore, for the favourable consideration of the Petition that the Patentee should bring into account the profits obtained by the Licensees in respect of the Patent. He has however not furnished any information upon this point; for although he has proved that the Licensees paid him royalties amounting to £15,000, being five per cent. upon the £300,000, the gross amount of their business, he has not enabled their Lordships to ascertain how much of this large sum is applicable to the cost of the manufacture, and what per-centage of it belongs to the Patent monopoly. In the course of the argument for the Petitioner, a case was supposed of a person patenting an invention of a particular kind of bread, and granting licenses for the sale of it to a very large number of Bakers, and it was asked whether in such a case it would be necessary for him, in applying for a prolongation of the term of his Patent, to prove the amount of the profits made by all the Licensees in respect of the patented article. The answer is, that he would undoubtedly be bound to furnish this proof. It must always be borne in mind that the extension of the term of a Patent is matter of favour, not of right; and that it is essential to the favourable consideration of the Patentee's application, that he should distinctly prove how much the public have had to pay, or, in other words, how much has been received on account of the Patent. If, therefore, the Patentee has dealt with his Patent rights in such a manner that when the time arrives for asking for a renewal of his term, he has put it out of his power to give the requisite evidence upon which his application must to a great extent be founded, his petition must fail, because it wants the proof which is essential to its success. This is the case with the present Petitioner. He has left in complete obscurity the actual amount of profits realized by the Patent, which may, for anything that appears, be more considerable than in any former case in which a Patent has been extended.

The uncertainty in which the Petitioner has left this part of his case would be fatal to his application, even if he were entitled to all the deductions for his own share of the profits which he has

claimed in his accounts. But their Lordships cannot forbear expressing their dissatisfaction with the manner in which these accounts have been prepared. The Petitioner was in the situation of a person receiving a rent or royalty, having nothing whatever to do with the manufacture of the article from which this rent or royalty was derived. He had a right under the licenses (a specimen of which has been furnished) to visit the works of the Licensees at any time, "to view and inspect the method there used and employed in manufacturing anchors, and the quantities and values thereof." This power was reserved to enable him to ascertain, from time to time, the nature and amount of the business carried on, so as to provide him with a constant check upon the accounts of the royalties. It is very doubtful whether his journeys to the different works, for the purpose of watching over his interests, and seeing that the anchors were properly made, ought to be debited to the Patent; and there are annually questionable items introduced into the accounts, for many of which there are no vouchers. But these sums are insignificant in comparison with the item for "Patentee's allowance and subsistence-money for fourteen years at £350 per annum, £4,900." The Patentee, in his examination before their Lordships, at first gave them to understand that this sum partly represented the expense of his maintenance which he claimed to charge against the Patent, but he afterwards stated, that it was an assumed sum which he considered himself entitled to for his trouble and labour in generally superintending the manufacture of his anchors by the different Licensees. Taking it for granted that this is the correct meaning of this large item, it is difficult to understand upon what principle it can be maintained. It was no part of the covenant with the Licensees that the Petitioner should superintend their operations; and if they required his assistance to instruct their workmen, they should have engaged him, and paid him for his services. If they had done so, this would have constituted a fair deduction out of the profits of the Licensees, and would have properly entered into the Patent account. But if an allowance for management were to be deducted from the royalty in ascertaining the amount of profit received by the Patentee, as the Licensees, in estimating their profits from the Patent, would be entitled to the deduction of an

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annual sum on the same account, the Patent would be debited twice with the same item of expense for management.

In the absence of all proof of the portion of the profits received by the Licensees, which the Petitioner was bound to adduce, and from the unsatisfactory nature of his accounts, their Lordships think that the Petitioner has not placed himself in a position which entitles him to their favourable consideration, and they cannot recommend any extension of the term of his Patent.

Solicitors for the Petitioner: *Watkins, Baker, & Baylis.*
Solicitors for the Treasury for the Crown.

GEORGE JONES SAXON PAGE . . . . . APPELLANT;
AND
COWASJEE EDULJEE . . . . . RESPONDENT.

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Feb. 2 & 3.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Sale of hull of stranded Ship by auction—Variation of conditions of sale—Payment of deposit—Repossession by vendor—Re-sale—Action to recover the difference between original price and sum realized upon re-sale—Roman-Dutch Law—Pleadings—Answer—Reconvention—Damages awarded to Defendant.

Action to recover the difference between the original price bid at public auction, and the sum realized upon a re-sale, for the hull of a stranded vessel, sold by the Master and purchased by the Defendant, upon conditions of sale, which were appended to the memorandum of purchase, and signed after the sale by the Defendant's agent on his behalf; which conditions differed materially from those appended to the catalogue of sale, and which were the conditions read out at the auction.

The Defendant paid the deposit upon the terms of the conditions of sale read at the auction, and took possession of the vessel, without having any formal transfer made to him. The vessel was laden with rice, and was soon afterwards by order of the Board of Health, destroyed as a nuisance. The Defendant having declined to complete the purchase, the vendor resumed possession of the vessel, and re-sold it at a loss.

The form of the action was by libel, according to the Roman-Dutch Law. The Defendant in his answer, among other defences, denied that he had purchased under the conditions appended to the memorandum of sale, and prayed the dismissal of the action with costs; and in reconvention, for payment of the amount of the deposit and damages he had sustained, to the amount of £1,000, for loss of profits and advantages from the vessel, her tackle and implements.

The judgment of the District Court was in favour of the Plaintiff, the Judge of that Court, being of opinion, that the Defendant purchased on the conditions of sale appended to the memorandum of purchase, and that, according to those conditions, the Plaintiff had rightly resumed possession and re-sold the vessel. The Supreme Court on appeal reversed that judgment, and ordered judgment to be entered for the Defendant, being of opinion, that the Plaintiff having founded his claim upon an agreement which gave, among other things, a right of re-sale, with conditions different from those read at the auction and having in consequence repossessed himself of the vessel and re-sold her, had thereby deprived himself of the right to recover from the Defendant, and awarded the Defendant the damages claimed by his answer:—

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Held by the Judicial Committee, (1), that though the merits of the case were with the Plaintiff, neither the judgment of the District or Supreme Court could be sustained, as there was no other agreement between the parties than the one founded on the conditions read out in the auction room at the sale; and that the Plaintiff having sued upon a different contract, was not entitled to recover, and ought to have been non-suited: and (2), that in the absence of any evidence of damage, the Defendant was not entitled to judgment for damages:—

Held further, that although the act of the Plaintiff in retaking the hull of the ship and selling her was wrongful and entitled the Defendant to bring an action of trover, it did not amount to a recission of the contract.

If before actual delivery, the vendor re-sells the property while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance which may be still due.

The rule applies where there has been a delivery, and the vendor afterwards takes the property out of the possession of the purchaser, and re-sells it.

THIS was an appeal against a decision of the Supreme Court of *Ceylon*, setting aside a judgment of the District Court of *Columbo* in an action brought in that Court by the Appellant, as Plaintiff, against the Respondent, as Defendant.

The Plaintiff was formerly the Master of the ship, *Nova Scotian*. The Defendant, a Parsee Merchant residing at *Columbo*, was the purchaser of the hull of the ship.

The libel of the Plaintiff stated, that the Defendant by a certain memorandum or agreement, which was annexed to the libel, had agreed to purchase the hull of the ship, *Nova Scotian*, for the sum of £1,020, according to certain conditions of sale annexed to the libel, by which it was stipulated, amongst other things, that the purchasers should pay to the Plaintiff a deposit of 10 per cent. on the purchase-money, on the transfer-deed being executed by the Plaintiff, but if from any cause whatever the remainder of the purchase-money should not be paid, then that interest at the rate of 10 per cent. should be paid by the Defendant until payment in full, but without prejudice to the right of the Plaintiff, in case the Defendant should fail or neglect to comply with the conditions, to treat the deposit money as forfeited, and to have the sale enforced, or to have the vessel re-sold at the option of the Plaintiff in terms of the conditions of sale; and the libel stated that, although the Defendant had paid £250, in respect of the

deposit of 10 per cent., and the Plaintiff had always been ready to carry out his part of the agreement, the Defendant refused to pay the balance of the purchase-money, and the Auctioneer's commission, and otherwise failed to comply with the terms of the agreement and conditions of sale, and that, therefore, the Plaintiff had caused the hull of the vessel to be sold at the risk of the Defendant, and at which re-sale no higher sum than £500, was offered, whereby the Plaintiff became entitled to recover from the Defendant a sum of £520, the deficiency on such re-sale, together with costs of the same as liquidated damages.

Annexed to the libel was the following memorandum of sale:—"That *Cowasjee Eduljee* declared the highest bidder for and purchaser of the ship, *Nova Scotian*, hereinbefore described, at the sum of £1,020, at which sum he, the said *Cowasjee Eduljee*, doth agree to become the purchaser thereof accordingly, and also doth agree on his part to perform the conditions of sale; and in consideration thereof the vendors do agree to sell and convey the said vessel unto the said *Cowasjee Eduljee*, his heirs and assigns, or as he shall direct according to the said before written conditions."

On the other side of the same paper on which the foregoing memorandum was printed and signed, were, partly written and partly printed, certain conditions of sale, which differed materially from the original conditions appended to the catalogue. The third condition required a deposit of 10 per cent. on the purchase-money, as pleaded in the libel, and the eighth condition gave a power of re-sale.

The Defendant by his answer pleaded as follows:—first, he denied that he purchased the vessel subject to the conditions of sale alleged in the libel, and stated that, on the contrary, the vessel was advertised for, and was ultimately put up for sale, on entirely different conditions, which conditions of sale he annexed to his answer. Second, he stated that when the vessel was put up for sale he offered the sum of £1,020, for the same, and the offer being accepted paid the deposit of £250, in part of the purchase-money, and tendered the balance of the purchase-money, but that the Plaintiff refused to convey the vessel or to furnish the Defendant with the necessary documents for the preparation of

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a legal transfer. Third, that the vessel was subsequently taken possession of by the Board of Health, and on the ground that the same was a nuisance, was broken up, destroyed and damaged. Fourth, that the Plaintiff had not at the time he offered the vessel for sale, and had never since, had the necessary power, right or authority to sell the vessel or to make a good conveyance thereof to the Defendant. Fifth, that the Plaintiff after the sale resumed possession of the vessel and offered the same for sale: Sixth, that the agreement for the sale was invalid and inoperative, and contrary to law: and seventh, that by reason of the Plaintiff's non-performance of his agreement he had become and was liable to pay to the Defendant the sum of £250; and in reconvention the Defendant pleaded, that he had sustained heavy loss and damage, having been deprived of the profit and advantage which would have accrued to him from the vessel when repaired and floated, her tackle, implements and other articles, which the Defendant had also purchased with a view of re-fitting the vessel, to the damage of £1,000.

The conditions of sale which were annexed by the Defendant to his answer, provided by the second condition for a deposit of 25 per cent. to be made on each lot, if required, at the time of the sale, but gave no power of re-sale and forfeiture of deposit in failure of compliance with the conditions.

The action was tried before Mr. *George Lawson*, the Judge of the District Court of *Columbo*, when the following facts were proved:—

Early in the month of December, 1862, the *Nova Scotian*, of which the Plaintiff was then Master, arrived at *Columbo*, and on the 18th of that month she was driven from her anchorage, and finally stranded near the harbour, a complete wreck. At the request of the Plaintiff, two surveys were held on the *Nova Scotian* by Captains of other ships then in port. Acting on their advice, the Plaintiff, as Master of the ship, advertised the ship for sale, for the benefit of all concerned. Catalogues and particulars of sale of the ship and stores were circulated in *Columbo* by the Auctioneers. Appended to the catalogues were certain printed conditions of sale, which were the same conditions as were filed with the Defendant's answer. The sale took place on the 2nd and 3rd days of January, 1863. Before the sale com-

menced, the Auctioneer read over the conditions of sale attached to the catalogue. The hull of the ship was sold for £1,020, to the Defendant's agent. The Defendant was present at the sale, and purchased several other lots put up for sale, consisting of tackle, stores, &c. After the sale, the Defendant's agent, in his presence, signed, at the request of the Auctioneers, a memorandum in the form annexed to the Plaintiff's libel. The conditions of sale were not those originally appended to the catalogue of sale, but were substituted for them. There was conflicting evidence as to whether they were read over in the presence of the Defendant and his agent, by the Auctioneer, or his Clerk, before the memorandum of the sale was signed. The Defendant paid the deposit of 25 per cent., as stipulated by the original conditions, and received from the Auctioneers authority to take possession of the wreck, which he accordingly did. Application was made to the Plaintiff by the Defendant for the Ship's Register, which the Plaintiff refused, having, on the advice of the Collector, sent the same to the Custom-house, to be transmitted to the Port of Registry in *England* for the purpose of being cancelled, pursuant to the provisions of the *Merchant Shipping Act*, 17th & 18th Vict., c. 104, sec. 53. On the 8th of January, 1863, the Defendant received a notice from the Board of Health, ordering him to discharge the cargo forthwith, or within a week, and on the next day he was informed that the Board of Health intended to destroy the ship, as a nuisance, on the following morning; and accordingly the ship was blown up on that day. On the 12th of January, the Auctioneers by letter of that date, applied to the Defendant for payment of the balance of the purchase money. The Defendant declined to pay the balance and claimed to have his deposit returned, upon the ground that the Plaintiff had failed to comply with his agreement, and was unable to carry it out as the ship was destroyed. The Auctioneers gave notice by letter to the Defendant that they should re-sell the ship at the Defendant's risk in terms of the conditions of sale, and the ship was accordingly re-sold by auction, and fetched the sum of £500.

The Judge of the District Court found, that as it appeared from the memorandum of sale that there was a plain and distinct reference to certain conditions written on the same paper, and as the Defendant's agent, in signing that document, must have learned that they

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were incorporated with the memorandum, or might have done so but for his own neglect, the Plaintiff had proved that the Defendant purchased the vessel subject to the conditions annexed to the libel: and he added, that there was no pretence for imputing fraud to the Plaintiff or his agents: he further found, that the Plaintiff had always been ready and willing to transfer the vessel, and that he was justified in refusing to furnish the Defendant with the Register: and he held, that the Plaintiff was not bound to prove his right to sell the vessel, as the Defendant had dealt with him as having authority to sell: that the Board of Health did not take possession of the ship or injure it until after the property had passed to the Defendant and was at his risk, and that the injury done to the ship by a third party after the property had vested in the Defendant, and possession had been delivered to him, was no ground for rescinding the contract. That the Plaintiff was justified in resuming possession of the ship by the conditions of sale; and that as to the contract being void and illegal because the vessel was a nuisance, there was no evidence that the ship was a nuisance at the time of the sale, and not sufficient to prove that she was so, when abandoned by the Defendant. The Court, therefore, found against the Defendant on all the pleas pleaded by his answer, and judgment was entered for the Plaintiff for £373. 1*s.* and costs.

The Defendant appealed from this judgment to the Supreme Court of the Island, on the following, amongst other grounds, first, that it was established that the vessel had been sold on the conditions appended to the catalogue of sale, and not on the conditions produced by the Plaintiff; and, secondly, that the Defendant having purchased the vessel on the conditions appended to the catalogue, could not be subsequently burdened with other and different conditions.

On the 24th of November, 1863, Sir *Edward S. Creasy*, the Chief Justice, delivered the judgment of the Court, whereby the judgment given by the District Court in favour of the Plaintiff was set aside, and judgment for the Defendant, with costs, ordered to be entered. The Chief Justice, in delivering the judgment of the Court, after stating the averments in the libel and answer, proceeded in these terms: "The hull of the *Nova Scotian* was sold by auction, and it appears to us to be quite clear on the evidence that the conditions

of sale, which were circulated before and during the auction, and which were read out by the Auctioneer at the commencement of the sale, were not the conditions relied on by the Plaintiff and annexed to his libel, but were a different set of conditions which the Defendant has annexed to his (the Defendant's) answer. These last-mentioned set of conditions contain nothing to give the vendor a power of re-sale in the event of the purchaser making default —they stipulate for a payment of 25 per cent. deposit. The Defendant was the highest bidder for the hull of the stranded ship and the lot was knocked down to him. In the ordinary course of auction sales he thereby became the purchaser, according to the conditions which the Auctioneer had read out, and subject to the necessity of complying with any statutory requisites as to such sales, whether imposed by the Imperial Legislature or by the Ordinances of this Colony. No point was made in the argument of the case, as to the non-compliance with the provisions of the *Merchant Shipping Acts*, as to the mode in which property in a ship can be transferred. We do not think it necessary to consider that point in this judgment, because it is a clear fact in the case, that no such formal transfer of the ship was here made at all. If such a formal transfer is indispensable in order to give validity to the sale, or to make it amount to at least a valid agreement for a sale, the Plaintiff is out of Court for default of such a transfer having been effected. After the sale, the Defendant paid the deposit of 25 per cent. stipulated in the conditions which had been read out, and this payment satisfied the requisitions of the Ordinance, No. VII. of 1840, sec. 21; and the sale and purchase of the ship's hull were thereby made valid and completed according to our Colonial laws, and unquestionably the sale and purchase were made, and the deposit paid, under the conditions of sale read at the auction, and not under those which the Plaintiff sets up, but of which not a word had been said in the transactions until after the deposit money was paid. After the payment of the deposit a set of conditions of sale, which do contain a clause of re-sale, and which are annexed by the Plaintiff to his libel, were signed by the Defendant's agent at the Auctioneer's office. The evidence of the parties as to the precise circumstances under which they were signed is not uniform. We have no doubt that the Defendant's agent signed them

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in full confidence that they were identical with those read out at the sale. But even if he knowingly signed conditions which imposed the new obligation on him of paying any loss arising from a re-sale, such fresh agreement would be insufficient to maintain an action, being entirely without consideration. It has been urged that the right of re-sale always exists, and that the vendor had it here independently of the stipulations in the signed set of conditions of sale. This is clearly shown not to be law by the case of *Martindale* v. *Smith* (1) and other authorities, cited in *Tudor's* Leading Cases on Mercantile and Maritime Law, p. 530, *et. seq.*"

The effect of this judgment was to condemn the Plaintiff to pay the Defendant the several sums of £250, the amount of the deposit, and £1,000, claimed in his answer for damages.

The Plaintiff appealed from this judgment to Her Majesty in Council.

Mr. *Mellish*, Q.C., and Mr. *Watkin Williams*, for the Appellant:—

This, though an action brought by the Plaintiff, as Master of the ship, *Nova Scotian*, to recover damages from the Defendant for the non-fulfilment of a contract for the purchase of the hull of that vessel, which had become a wreck, has been so dealt with and treated in the Court below as to have the effect of an action by the Defendant against the Plaintiff to repudiate the contract of sale upon the ground of fraud, no fraud being alleged or proved; and damages to the amount of £1,000, have been given against the Plaintiff, without any evidence of damage sustained, or materials from which it could be inferred, but simply upon the Defendant's claim in reconvention made by his answer. That is the consequence of the judgment of the Supreme Court, which did not simply reverse the judgment of the District Court, but actually gave judgment for the Defendant, with costs. It is as if the Defendant had originally brought an action against the Plaintiff, to repudiate the contract of sale, which the Plaintiff had sued on. This is irregular and cannot upon any principle of pleading be sustained, and on that ground alone we submit that the judgment of the Supreme Court cannot stand. But both the merits and the law are with the Appellant, and were rightly so held by the District Court. The vessel was a

(1) 1 Q. B. 389.

wreck, and the Master, in the circumstances, properly sold her; *Cambridge* v. *Anderton* (1); *Farnworth* v. *Hyde.* (2) The memorandum of sale, signed by the authorized agent of the Respondent, was, in the absence of fraud, the only admissible evidence of the terms upon which the Appellant sold and the Respondent purchased the ship; *Acebel* v. *Levy* (3); *Hochster* v. *De La Tour* (4). Up to the time of the signing of the memorandum of agreement there was not a complete contract of sale under the law of the Island. *Ceylon* Ordinance, No. VII., of 1840, which, by clause 21, part 3, requires either a written contract, signed by the parties making the same, or by some person thereto lawfully authorized by him, on the delivery of the whole or part of the thing sold, or on payment of the whole or part of the purchase money. The case of *Martindale* v. *Smith* (5), cited by the learned Chief Judge in the judgment of the Supreme Court, is not in point. That was an action of trover for goods sold but not delivered, after part payment of the purchase-money in pursuance of an agreement executed at the time of sale, which fact differs from the present case; *Milgate* v. *Kebble* (6). There is no implied warranty of title in the contract of sale of a personal chattel; that was held in *Morley* v. *Attenborough* (7), *Eichholz* v. *Bannister* (8). The evidence shews that the Appellant had been at all times ready and willing to carry out the terms of the contract, and that the Respondent had made such default as entitled the Appellant to proceed to a re-sale at his risk: *Hadley* v. *Baxendale* (9). According to the conditions of sale appended to the memorandum, the purchaser was bound by the contract executed, and the ship being a wreck, there was a right of re-sale without any special clause to that effect. *Chinerey* v. *Viall* (10) shews what may be the measure of damage. The re-sale of the vessel was not a rescinding of the original contract; *Stephens* v. *Wilkinson* (11); *Fitt* v. *Cassanet* (12); *Gillard* v. *Brittan* (13); *Greaves* v. *Ashlin* (14). A clause

(1) 2 B. & C. 691.
(2) 5 New Rep. 488.
(3) 10 Bing. 376.
(4) 2 E. & B. 678.
(5) 1 Q. B. 389.
(6) 3 M. & G. 100; 3 Sc. N.S. 358.
(7) 3 Ex. 500.
(8) 34 L. J. (C.B.) 105; 5 New Rep. 87.
(9) 9 Ex. 341.
(10) 5 H. & N. 258.
(11) 2 B. & Ad. 320.
(12) 4 M. & G. 898.
(13) 8 M. & W. 575.
(14) 3 Camp. 426.

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of re-sale is usual in sales in the *East Indies; Chitty* on Contracts, p. 391 (7th Ed.); *Blackburn* on Contracts of Sale, p. 329. With regard to the objection to the non-delivery of the Register, that was not requisite, as under the 53rd section of the *Merchant Shipping Act*, 17 & 18 Vict. c. 104, the certificate of a ship lost, or ceasing to be a British ship, must be delivered up to the British Consul of the nearest port, to be transmitted by him to the port of Registry: *Maclachlan* on the Law of Merchant Shipping, p. 80.

Mr. *F. Stiffe Everitt*, for the Respondent:—

First, the contract for sale was complete upon the purchase, the Respondent being declared the highest bidder, and that being so, the conditions appended to the printed catalogue, read at the auction, were the conditions subject to which the Respondent bought, and not the conditions substituted at the time of the signing of the memorandum of purchase by the Respondent's agent on his behalf. There was no right of re-sale in the conditions under which the Respondent purchased. All the Appellant was entitled to, if he had any remedy, was to affirm the contract, if it was one of sale, and bring an action for the balance of the purchase money; but even that remedy was abandoned by the Plaintiff's resuming possession of the hull of the ship and re-selling it; and the claim made to recover the difference of the original purchase money, allowing for the amount realized by the re-sale, cannot under any circumstances be supported. On the contrary, the Respondent was entitled, and was rightly so held by the Court below, not only to have the contract rescinded, as null andvoid, but to the damages claimed by him in his answer for the breach of it by the Appellant; *Hagedorn* v. *Laing* (1); *Martindale* v. *Smith* (2); *Maclean* v. *Dunn* (3). As to the general power of re-sale in case of repudiation of the contract, all the authorities are collected in *Addison* on Contracts, pp. 205-6 (5th Edit.). The sale of the ship by the Master, without the consent of the owner, could only be justified by proof of urgent circumstances, which proof is not afforded here. The "*Margaret Mitchell*" (4); The "*Bonita*" (5);

(1) 6 Taunt. 162. (2) 1 Q. B. 389. (3) 4 Bing. 722.
(4) Sw. 382. (5) Lush. 252.

Tudor's Leading Cases on Mercantile and Maritime Law, 530 *et sec.*

Secondly, the mode of pleading, though by the English procedure may be thought inconvenient, is in accordance with the practice prevailing in the Courts in the Colony, being founded on the Roman-Dutch law which is in force in *Ceylon*, and which law allows a counter claim by reconvention, such as is made by the Respondent's answer; the decree, therefore, is consistent with both the law and practice of the Colony. It is not necessary now to insist on the non-delivery of the Ship's Registry, because the whole transaction, with respect to the sale, was vitiated by the act of the Appellant.

Their Lordships' judgment was delivered by

LORD CHELMSFORD:—

This is an appeal from a judgment of the Supreme Court of *Ceylon* reversing a judgment of the District Court of *Colombo* in favour of the Appellant (the Plaintiff in the suit), and ordering judgment to be entered for the Defendant (the Respondent), with costs.

The action was brought in the District Court to recover the balance of a sum of £1,020, the amount at which a stranded ship called *Nova Scotian* was sold by the Plaintiff, the Master, and purchased by the Defendant under the following circumstances.

The *Nova Scotian* had arrived at *Colombo* in the month of December, 1862, and was lying there at anchor with a cargo of rice on board, when, on the 18th of that month, she was driven from her anchorage and stranded on the beach near the harbour.

Before her stranding the *Nova Scotian* appears to have been worth £9,000, and she was under insurance for £7,000, but the Plaintiff thought that her back had been broken by the stranding, and in his opinion it would have cost from £1,500 to £2,000, to get her afloat again.

Under these circumstances the Plaintiff caused two surveys to be held on the *Nova Scotian*, and acting upon the judgment of the Surveyors, and under their advice, he advertised her, with her tackle and apparel, for sale by auction on the 2nd and 3rd days of January, 1863.

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The sale took place on the days named. The property sold was arranged in sixty-eight lots, the vessel being the last lot in the catalogue, and was offered for sale separately from her sails, stores, spars, hawsers, and rigging, which were included in prior lots.

The catalogue of sale was headed "Catalogue and particulars of the sale of the ship, *Nova Scotian*, of *Liverpool*, 999 tons, built 1860, as she now lies stranded opposite the *Racket Court*, condemned on survey to be sold on account and for the benefit of the concerned, with all her sails, stores, &c."

The conditions of sale were printed at the foot of the catalogue, and were read out in the room by the Auctioneer before the sale commenced. By one of these conditions a deposit of 25 per cent. was to be made on each lot, by another, all goods were to be at the risk of the purchaser from the time of sale, and by a third, all customs' duty was to be paid by purchasers. The Defendant's son-in-law attended the sale, and by his authority bought several of the lots, consisting of the tackle, sails, spars, and other articles belonging to the vessel, and the vessel herself was afterwards knocked down to him at the sum of £1,020.

No memorandum was signed in the auction room either by the Auctioneer or by the Defendant's agent; but after the sale (whether on the same or a subsequent day does not appear) the Defendant's son-in-law, on his part, and the Auctioneer on behalf of the Plaintiff, signed a memorandum to the following effect. [His Lordship read the memorandum, *ante* p. 129.]

The conditions referred to in this memorandum, which were on the other side of the paper, varied from the conditions read out in the auction room in these particulars. Instead of a deposit of 25 per cent. the purchaser was to pay only 10 per cent. There was no condition that the goods were to be at the risk of the purchaser from the time of sale. The purchaser was to pay the Auctioneer's commission as well as customs duty, and this important condition was added:—"Should the purchaser neglect or fail to comply with these conditions, his deposit money shall be forfeited, and the sale may be enforced, or the vessel may be re-sold at the option of the vendors, and in case of a re-sale, the increase (if any) of the purchase money shall be retained by the vendors, and the deficiency (if any) and all costs and expenses shall be made good by the

defaulter at the present sale, and be recoverable as liquidated damages."

There is conflicting evidence as to whether these conditions were read out when the memorandum was signed. The Defendant's son-in-law, who signed for him, stated in his evidence that he "signed the memorandum while it was lying on the table, and did not know what was underneath." That "the only conditions which he knew anything about were those attached to the catalogue."

The Defendant undoubtedly thought the sale was to be completed by his signing a memorandum upon the conditions contained in the catalogue, as appears from the fact of his having paid £250 immediately before the memorandum was signed, being a deposit of 25 per cent. upon the purchase money, in accordance with those conditions. It was also proved that when the £250 was paid a receipt was asked for, and the Auctioneers replied that it was unnecessary, as the memorandum to be signed would be enough, a representation which would materially strengthen the belief of the Defendant that the conditions contained in the catalogue were those to which his purchase was subject.

The Defendant having received authority from the Auctioneers, went himself to take possession of the vessel, and directed two anchors to be put out, to prevent her drifting further on the shore. On the 8th of January he received a notice from the Board of Health to discharge the cargo of rice, which had become heated and was occasioning a nuisance. This not having been done, the Board proceeded to destroy the vessel by firing into her.

A bill of sale was prepared by the legal agent of the Defendant, but before it was tendered for the Plaintiff's signature, a demand was made upon him to deliver the certificate of Registry to the Defendant. The Plaintiff refused to comply with this demand, on the ground that the vessel having become a wreck, it was his duty to give up the certificate to the Collector of the customs for transmission to *England* under the provisions of the *Merchant Shipping Act*, 1854.

On the 12th of January, 1863, the Auctioneers, Messrs. *Ledward & Co.*, wrote to the Defendant the following letter:—"We have the honour to annex on the other side the particulars of the balance of our claim on account of the sale to you of the ship

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Nova Scotian, which we have been required to settle forthwith, and we must request you will enable us to do so this day. We hereby undertake, on account of Captain *Page* and ourselves, to complete the bill of sale when tendered."

To this letter the Defendant replied on the 13th of January: "In answer to your letter of yesterday's date, I beg to inform you that the Captain having failed to comply with his agreement, and having sold the vessel under circumstances which led to its subsequent destruction, and being now, as you are aware, unable to carry out the agreement, I decline to pay the balance of the purchase money, and shall look to you and the Captain for the repayment of my deposit, and the damages which have occurred to me by reason of your default."

On the receipt of this letter, Messrs. *Ledward & Co.* wrote to the Defendant on the 14th of January in these terms:—"As in your letter of yesterday you decline to pay us the balance of the purchase money for the hull of the *Nova Scotian* and other articles purchased by you at public auction, we beg to give you notice that the same, after due publication, will be re-sold at your risk in terms of the conditions of sale."

The ship was accordingly again put up to sale and sold for £500, and the Plaintiff brought his action to recover the difference between the original price and the sum realised upon the re-sale, together with the Auctioneers' commission, the balance claimed, after giving credit for the Defendant's deposit of £250, being £383. 11*s.*

The libel of the Plaintiff (to which was annexed the memorandum signed on the part of the Defendant and the conditions therein referred to, which the Plaintiff prayed might be taken as part of the libel) alleged, that the Defendant agreed to purchase the hull of the ship *Nova Scotian*, as she then lay stranded on the beach, for the sum of £1,020, according to certain conditions thereunto annexed, and amongst them the stipulation that the purchaser should pay a deposit of 10 per cent. in part payment of the purchase money and should pay the remainder on the transfer deed being executed; but if the remainder of the purchase money should not be paid, interest at 10 per cent. should be paid by the Defendant until payment in full, but without prejudice to the

right of the Plaintiff (in case the Defendant should fail or neglect to comply with the conditions) to treat the deposit money as forfeited, and to have the sale enforced or to have the vessel re-sold, at the option of the Plaintiff, in terms of the conditions of sale. The libel then alleged the payment by the Defendant of the deposit of £250, his failure to pay the remainder of the £1,020, and the re-sale of the vessel in terms of the conditions of sale, and claimed the deficiency of the re-sale, together with all costs and charges attending the same, as liquidated damages.

The Defendant's answer, in the only parts of it necessary to be noticed, consisted of—First, a denial that he purchased the vessel on the conditions in the libel mentioned, for that the vessel was put up for sale on entirely different conditions, to wit, the conditions appearing in the annexed document marked letter A. (being the catalogue and the conditions therein contained). Second, that although the Defendant was ready and frequently offered to pay the remainder of the purchase money, yet the Plaintiff would not convey the vessel nor furnish the Defendant with the necessary documents for the preparation of a legal conveyance. Third, that the Plaintiff had not at the time of the sale, and has never since had, the necessary power, right, and authority to sell the vessel or make a good conveyance thereof. Fourth, that the Plaintiff had since resumed possession of the vessel and offered the same for sale; and the Defendant prayed that the Plaintiff's suit might be dismissed with costs and the Plaintiff be condemned in reconvention to repay the deposit of £250, and to pay damages to the amount of £1,000, for the loss of the profit and advantage which would have accrued to him from the vessel when repaired and floated, as well as from the loss of the tackle, implements, and other articles belonging to the vessel, and which had since become useless for that purpose.

The case was tried in the District Court of *Colombo*, witnesses being examined on both sides, and the Judge of that Court ultimately decided all the issues in favour of the Plaintiff. He found that the Defendant purchased the vessel subject to the conditions annexed to the libel. That the Plaintiff had authority as Master to sell. That as the vessel was sold as a wreck, the Master was bound to forward her Register to the Collector of Customs for

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transmission to the port of Registry, and that it was not necessary for the Defendant to have the certificate in order to enable him to prepare the bill of sale; and that the Plaintiff was justified by the terms of the contract of sale in resuming possession of the vessel and selling her, and he ordered judgment to be entered for the Plaintiff for £373. 1s., being the amount which he claimed, less £10. 10s. said to have been paid by him to Counsel, which the Judge thought he was not entitled to recover from the Defendant.

Upon appeal by the Defendant from this judgment to the Supreme Court, it was set aside, and judgment ordered "to be entered for the Defendant with costs." It was stated at the Bar that there was no other record of this judgment than the one printed with the papers, and it was assumed on both sides that although it is in the general form just stated, it has the effect of entitling the Defendant to the return of his deposit and also to the damages of £1,000, which he prays by his answer.

The ground upon which the Supreme Court decided the appeal in favour of the Defendant seems to have been, that the Plaintiff having founded his claim upon an agreement with conditions varying from those in the catalogue, in respect of their containing a clause of re-sale, and the Court being of opinion that upon the facts proved, the Defendant did not enter into an engagement containing any such condition; the Plaintiff having wrongfully repossessed himself of the vessel and re-sold her, had deprived himself of his right to recover the price from the Defendant.

That this was the view of the case taken by the Court appears from the learned Chief Justice having adverted to the argument on behalf of the Plaintiff that the right of re-sale existed independently of the stipulations in the signed set of conditions of sale, which he showed not to be law by a reference to the case of *Martindale* v. *Smith* (1), and other cases referred to in *Tudor's* Leading Cases, p. 530.

As the District Judge decided in favour of the Plaintiff, there was no occasion for him to consider whether the payment by the Defendant of the £250, in part of the purchase money, did not bind the parties to the contract of sale as completely as if there had been a written memorandum. But the Supreme Court did

(1) 1 Q. B. 389.

take that fact into their consideration, and with reference to it the Chief Justice said: "After the sale, the Defendant paid the deposit of 25 per cent. stipulated in the conditions which had been read out, and this payment satisfied the requisitions of the Ordinance No. VII., 1840, section 21, and the sale and purchase of the ship's hull were thereby made valid and completed according to our Colonial laws, and unquestionably the sale and purchase were made and the deposit paid under the conditions of sale read at the auction, and not under those which the Plaintiff sets up."

The Supreme Court, therefore, must have been of opinion, that there was a binding agreement for the sale of the vessel between the parties. If, therefore, the Plaintiff had correctly stated his claim in his libel, and had founded it (as he ought to have done) upon a sale according to the conditions read in the auction room, he would clearly have been entitled to judgment, unless any of the objections contained in the answer of the Defendant would have been available as a defence.

Their Lordships agree with the Supreme Court in thinking, that there was no agreement substituted for the one commenced in the auction room and completed by the payment of the deposit, but they must express their dissent from the opinion expressed by the Chief Justice, that if the Defendant "knowingly signed conditions which imposed the new obligation on him of paying any loss arising from a re-sale, such fresh agreement would be insufficient to maintain an action, being entirely without consideration," as, under such circumstances, the relinquishment of the first agreement would undoubtedly amount to a sufficient consideration. Their Lordships do not doubt that the contract completed by the payment of the deposit might have been varied by the signature subsequently of a memorandum inconsistent with it. Their opinion is founded on the particular circumstances of this case—the acceptance of the deposit under the terms of the conditions read out in the auction room, the silence of the seller on the subject of any changes in the conditions, and the above mentioned conversation at the time of the receipt of the deposit. If the Plaintiff had properly framed his libel, precisely the same defences might have been set up as are now contained in the Defendant's answer, and, therefore, in order to

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prepare the way for a decision upon the real merits of the case, it is necessary to consider the objections which the Defendant has urged to the Plaintiff's right to recover in the present action.

Taking these objections a little out of the order in which they are stated in the answer, the first to be considered will be, whether the Plaintiff had power, right, or authority to sell the vessel. Upon this issue there seems to be no reasonable doubt that the Plaintiff could convey a good title to a purchaser as against his owner. The vessel was lying stranded upon the beach, without the possibility of getting her off, except by the expenditure of a large sum of money. The Plaintiff, not trusting to his own judgment alone, procured surveys to be made, and, proceeding upon the advice of the surveyors, determined to sell the vessel; a course which, it is reasonable to believe, the owner would have pursued upon a view of all the circumstances if he had been upon the spot. But supposing the Plaintiff to have acted upon a mistaken view of the necessity of the case, the Defendant could not insist upon there being any implied warranty of title. The Plaintiff sold the vessel in the special character of Master, and not as owner, and acted upon a *bonâ fide* belief of his authority to sell. The vessel was advertised as a stranded vessel, and the Defendant had every opportunity of examining her, and ascertaining whether she had been brought into such a condition as to give the Master authority to sell her as a wreck.

The next point to be considered in the Defendant's answer, is the allegation that the Plaintiff did not convey the vessel, nor furnish the Defendant with the necessary documents for the preparation of a legal conveyance. This relates to the refusal of the Plaintiff to deliver the certificate of Registry to the Defendant. According to the *Ceylon* Ordinance, No. V., 1852, the law to be administered in this case is the law of *England*. Now, by the 53rd section of the *Merchant Shipping Act*, 1854, where a Registered Ship is actually or constructively lost, the Register is to be sent to her port of Registry. The Defendant could not, therefore, be entitled to demand its delivery to him, and to refuse to execute the Bill of sale upon the non-delivery.

The next part of the answer which requires attention is that in which the Defendant justifies his refusal to perform his contract

in consequence of the Plaintiff having resumed possession of the vessel, and offered her for sale. It was upon this ground that the Supreme Court considered that the Defendant was entitled to their judgment. If the Plaintiff could have proceeded upon a sale on the conditions annexed to the libel, in which there was a power of re-sale, this defence would necessarily have been excluded; but even if he had rightly claimed upon the contract which took place in the auction room, it would not have been a sufficient answer to the action. In this case the vessel had been delivered to the Defendant, and he was in complete possession. The act of the Plaintiff in retaking and selling her was wrongful, and entitled the Defendant to bring an action of trover, but did not amount to a rescission of the contract. If, when the Defendant declined to pay the balance of the purchase money, and altogether repudiated the agreement, the Plaintiff had taken him at his word, and resumed possession without anything more being said, the case might have been different; but, instead of the Plaintiff agreeing to take the vessel back, and rescind the contract, he gave express notice to the Defendant that the vessel would be resold at his risk, "in terms of the conditions of sale." There is no case to be found in the Books where, after a sale and complete delivery of a chattel, and the price not paid, the vendor's taking the property out of the purchaser's possession has been held to amount to a rescission of the contract. *Martindale* v. *Smith* (1), and other cases, have determined that, where there is an agreement to purchase property, to be paid for at a future time, and the money is not paid at the day, the property remaining in the possession of the vendor, he has no right to sell it, and if he does the purchaser may maintain trover against him. There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price, after receiving express notice from the vendor that, if he fail to do so, the goods will be re-sold. But the authorities are uniform on this point, that if before actual delivery the vendor re-sells the property while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover

(1) 1 Q. B. 389.

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back any deposit of the price, or to resist paying any balance of it which may be still due. If this is the case where the possession of property sold remains with the vendor, *à fortiori* must it be so where there has been a delivery, and the vendor takes it out of the possession of the purchaser and re-sells it.

Their Lordships have entered thus fully into the various defences contained in the Defendant's answer, in order to shew that the merits of the case are entirely with the Plaintiff; and that, if he had rightly conceived his action, he would have been entitled to recover; but he unfortunately has chosen to proceed upon a different contract from that which he established by proof. The Supreme Court rightly overruled the decision of the District Judge, and held that there was no other agreement between the parties than the one which proceeded upon the conditions read out in the auction room. But, upon their view of the case, they ought to have directed a nonsuit to be entered, and not have given judgment for the Defendant, much less a judgment which, according to the admission of the Counsel on both sides, gave the Defendant the whole of the damages claimed in his answer. No evidence was given of any amount of damages having been sustained by the Defendant; and the claim, in respect of the assumed loss of the tackle, implements, and other articles belonging to the vessel, which were bought at the sale before the vessel herself was knocked down to the Defendant, cannot be entertained. It is impossible to sustain either the judgment of the Supreme Court or that of the District Judge. If the judgment of the latter were to be upheld, founded as it is upon the establishment by the Plaintiff of his right to re-sell the vessel under the power contained in the conditions of sale, the judgment would be an answer to any action which might be brought by the Defendant for the wrongful act committed by the Plaintiff in selling his property.

It is unfortunate that the Plaintiff should have brought forward his undoubted claim upon erroneous grounds, and their Lordships wish it to be distinctly understood that in their opinion the Plaintiff would be entitled, upon a libel properly framed, to recover the price of the vessel, less the deposit; and that none of the defences pleaded would be available to the Defendant in such an action. The Defendant, on the other hand, would be entitled

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to recover damages in an action of tort founded on the retaking of possession and re-sale of the vessel; and these damages would probably be measured by the price which the vessel realized on the re-sale. Their Lordships, therefore, trust that the parties will see the propriety of preventing further litigation by an arrangement, of which the fair and just terms must be obvious. As the matter stands before them, they are compelled to recommend to Her Majesty that the judgment of the Supreme Court, and that of the District Judge, be set aside, and a nonsuit be entered, and that there be no costs of this appeal on either side.

Solicitors for the Appellant: *Cotterill & Sons.*
Solicitor for the Respondent: *T. Clark.*

IN RE THE ATTORNEY-GENERAL FOR THE COLONY OF VICTORIA.

J. C.* 1866 June 16.

ON PETITION FROM THE SUPREME COURT OF VICTORIA.

Special leave to appeal—Appealable value—Consolidation of Appeals—Attorney-General—Security—Costs.

Several actions, in the nature of Petitions of Right, were brought against the Crown in *Victoria* under the *Colonial Act*, 28 Vict. No. 241, and judgments obtained against the Crown; but the Supreme Court of that Colony refused leave to appeal to *England*, in some cases, because the amount recovered was under 500*l.*, the appealable value prescribed by the Order in Council of the 9th of June, 1860, and in other cases, except upon terms of the Attorney-General in the Colony paying the amount of the verdicts with costs.

In giving leave to appeal, upon special petition for that purpose, the Judicial Committee refused to sanction the terms imposed by the Supreme Court on the Attorney-General of finding security for costs of the appeals, and admitted the appeals without security being given.

Appeals directed to be consolidated and heard as one case.

IN this case a petition was presented by the Attorney-General of the Colony of *Victoria*, for special leave to appeal from judgments in several actions, in the nature of Petitions of Right,

* *Present*:—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, and SIR EDWARD VAUGHAN WILLIAMS.

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brought in the Supreme Court in that Colony against Her Majesty, in which verdicts were obtained in favour of the Plaintiffs against the Crown.

It appeared from the statements in the petition, that in the year 1865, a number of petitions under the *Colonial Act*, 28 Vict. No. 241, "To consolidate the Law relating to the recovery of Crown property, and the enforcement of the Claims against the Crown," were filed in the Supreme Court of the Colony, by various parties as Plaintiffs, against the Crown, to recover sums of money paid by them and received on behalf of Her Majesty in respect of duties of customs authorized by a resolution of the Legislative Assembly, which resolution the Plaintiffs contended was unconstitutional, and the levy of the duties thereunder illegal, and upon which petitions verdicts were obtained by the Plaintiffs against the Crown. Leave was reserved to the Crown to move for nonsuits in all the cases, on the ground that the cause of action was not a claim or demand within the meaning of the 28th Vict. No. 241, as held by the Court on the trials. These rules were, after argument, discharged, and judgments given by the Court in favour of the several Plaintiffs, whereupon the Attorney-General applied to the Supreme Court for leave to appeal to Her Majesty in Council against such several judgments. The Supreme Court, however, refused such leave, except upon the terms of his paying the amount of the verdict and costs in each case (the Plaintiffs giving security to return the money in the event of the appeals being successful); and of consolidating all the appeals in such actions, and absolutely refused leave to appeal in two of the cases, on the ground that the amount of verdict was under £500, the prescribed appealable value (1). The Attorney-General of *Victoria*, on behalf of the Crown, offered to consolidate the appeals, but refused the other condition sought to be imposed, inasmuch as it indirectly interfered with the personal obligation imposed on the Governor of the Colony under Act, No. 241, and the provisions in sections 24 and 25 of the *Audit Amendment Act* of Vict. No. 86, of causing payment to be made of money for which a verdict may be obtained in a suit against the Queen under Act, 28 Vict. No. 241, and in his petition to the Queen in Council for leave to appeal, he submitted, that the

(1) See Order in Council, 9th June, 1860.

privileges of the Crown, and the duties of the Governor, were involved in the judgments and decisions of the Court, and that with respect to the two cases said to be under appealable value, the matter in issue indirectly involved a much larger amount than £500, and, therefore, brought the cases within the rule of the Privy Council, provided by the Order in Council, and he prayed for special leave to appeal from the judgments and decisions of the Supreme Court on the rules in all the several cases, and from the judgments on demurrer in such cases, as in his petition were set forth, and that he might prosecute such appeals.

The application was *ex parte*.

The *Attorney-General* (Sir *R. Palmer*), and *Mr. Kekewich*, in support of the petition, submitted, that the actions brought against the Crown in the Court below, being by parties who had been compelled to pay duties levied under a resolution of the House of Assembly, were improperly brought under the *Colonial Act*, 28 Vict. No. 241, which was not applicable to such cases, the remedy there given being expressly confined by the 25th and 27th sections to cases of contract made on behalf of the Crown. That the legality of the levy of the duties claimed involved a constitutional question of the right of the House of Assembly to authorize such levy by its single resolution; and that both as regarded the value of the subject matter at issue, as well as the terms proposed for the allowance of the appeals by the Supreme Court, Her Majesty's Attorney-General in the Colony ought not to be precluded from appealing on the ground of the pecuniary amount of the verdict being under £500, as the question at issue was of far greater value in the aggregate; that the Petitioner was ready to allow the consolidation of all the cases in one appeal. It was insisted also that the Petitioner ought not, as Attorney-General of the Colony, to be called upon to give security for costs of appeal: *The Attorney-General of Isle of Man* v. *Cowley* (1).

THE LORD JUSTICE KNIGHT BRUCE:—

Their Lordships think, in the circumstance of this case, there should be leave to appeal, and without giving any opinion as to

(1) 12 Moore's P. C. Cases, 27.

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the power of imposing terms, or the manner of enforcing them if imposed, they are of opinion that there should be no terms imposed, and that there should simply be leave to appeal, and that security for costs should not be required. The appeals in all the cases are to be consolidated.

Solicitors of the Petitioner: *Freshfields & Newman.*

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ELIZABETH WEBSTER AND OTHERS . . . APPELLANTS;

AND

HERBERT POWER AND ANOTHER . . . . . RESPONDENTS.

ON PETITION FROM THE SUPREME COURT OF VICTORIA.

Victoria—Appeal—Colonial Act, 15 *Vict. No.* 10—*Time for perfecting security for costs of appeal—Special leave to appeal.*

By an order of the Supreme Court of *Victoria* leave to appeal to Her Majesty in Council, pursuant to the *Colonial Act*, 15 Vict. c. 10, was allowed on condition of the Appellant giving security within three months for costs of appeal. The Appellant at first offered to deposit money to the amount of the security required, but afterwards a security Bond was approved by the Master of the Court, and, without objection by the Defendants, filed as of record; but in consequence of objections afterwards taken by the Defendants' Solicitors to the competeney of the proposed sureties, the Bond was not filed within three months. Upon a motion by the Defendants to set aside the leave to appeal upon that ground, the Supreme Court made an Order revoking the leave given.

In such circumstances their Lordships, upon petition, gave special leave to appeal on security being given for costs in *England*, with liberty for the Petitioners to apply to the Court at *Victoria* to cancel the security Bond.

THIS was a petition, by *Webster* and others, for leave to appeal from decrees of the Supreme Court, in its equitable jurisdiction, and also from an Order revoking the leave given to appeal to the Queen in Council granted by that Court.

It appeared from the petition, that a suit was instituted by the Petitioners in the Supreme Court of *Victoria*, and a decree made by that Court against the Petitioners, which decree was afterwards

* *Present*:—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, and SIR EDWARD VAUGHAN WILLIAMS.

confirmed by the Supreme Court in its appellate jurisdiction, and that the Petitioners obtained, on the 13th of June, 1865, leave to appeal therefrom to Her Majesty in Council under the *Colonial Act*, 15 Vict. No. 10, "For the better administration of Justice in *New South Wales*." That in accordance with the provisions of that Act the leave to appeal was granted upon condition, that the Petitioners gave security by Bond in the sum of £250, to the satisfaction of the Master in Equity, for the prosecution of the appeal and payment of the costs. That while the Petitioners' Solicitor was proceeding to carry out the Order allowing leave to appeal, he was, on the 6th of October, 1865, served by the Defendants' Solicitors with a notice of motion that the Court would be moved, on the 12th of October instant, that the Order made on the 13th of June last be set aside and rescinded, on the ground that the Petitioners had not given the security required by such Order within three months, the time limited by the 15 Vict. No. 10, from the date thereof, and upon the allegation that the appeal was not more forward then than at the date of the Order allowing it, excepting that the Master had settled the form of the Bond in blank for the names of the proposed sureties, and had directed the completion by the 2nd of October, but that the Petitioners had not complied with such directions. It further appeared from an affidavit filed by the Petitioners' Solicitor, that the delay in perfecting the securities had mainly arisen from the objections made by the Defendants' Solicitors to the sureties proposed. That an offer had been made by the Petitioners, and in the first instance accepted by the Defendants' Solicitors, for a deposit of the sum of £250 in Court, which consent was afterwards withdrawn, and that all the Petitioners, except one, were absent from the Colony, and their affairs managed by an Attorney, who had to obtain the requisite sureties, which occasioned delay, but that on the 11th of October, 1865, the bondsmen had attended the Master's Office, and were approved, and the Bond passed and entered as of record. That, notwithstanding this fact, the motion to rescind the Order giving leave to appeal was heard by Mr. Justice *Molesworth*, and by an Order made on the 13th of October, 1866, the original Order for leave to appeal was revoked.

The Petitioners submitted that, having regard to the above cir-

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cumstances, the Order revoking the previous Order granting leave to appeal was erroneous. That the security directed to be entered into by the Order allowing leave to appeal having been entered into with the approval of the Master, was still in force, and they prayed for leave to appeal against the original decree, the decree of affirmance, and also from the Order revoking the Order for leave to appeal, offering to give such security for costs as might be directed.

The petition was heard *ex parte*.

Sir *Hugh Cairns*, Q.C., and Mr. *Edmund F. Moore*, appeared for the Petitioners.

Their Lordships granted leave to appeal, upon terms of the Petitioners lodging in the Council Office the sum of £300, as security for costs, and gave liberty to the Petitioners to apply to the Supreme Court at *Victoria* to cancel the Bond for security for costs of appeal, which had been already lodged there.

Solicitors for the Petitioners: *Hancock, Sharp, & Hales.*

J.C.* 1866 Feb. 15.

EDOUARD SÉRANDAT . . . . . APPELLANT;

AND

JEAN SAÏSSE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Mauritius, Law of—Code Civil, Art. 1384—*Commettant and Préposé, definition of—Master and Servant—Negligence—Fire—Liability for Damage.*

By Art. 1384 of the *Code Civil*, the law prevailing in *Mauritius*, it is provided that "*Les Maîtres et les Commettants* [*sont responsables*] *du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés*:—

Held, that in order to make the "*Commettant*" responsible for damage occasioned by the negligence of the "*Préposé*," it is necessary to establish that the "*Préposé*," was acting "*sous les ordres, sous la directions et la surveillance du Commettant.*"

* *Present*:—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

"*Préposé*," in Art. 1384, means a person who stands in the same relation to the "*Commettant*," as "*Domestique*" does to "*Maître*"—namely, a person whom the "*Commettant*" has instructed to perform certain things on his behalf.

A. hired certain Indians, who were the heads of gangs of labourers, to clear a piece of land of weeds and brushwood at a job price, to be paid to their gangs. Through the negligence of the persons employed, the sparks of a fire kindled on *A.*'s land, set fire to and burnt down a house in the immediate neighbourhood belonging to *B.* It was proved in evidence that *A.* interfered with the work, and directed the Indians where to work :—

Held, affirming the judgment of the Supreme Court at *Mauritius*, that *A.* was the "*Commettant*" and the labourers "*Préposés*," within the meaning of the Art. 1384 of the *Code Civil*, and that as the fire was occasioned by the men employed by *A.*, he was responsible for their negligence, and liable to *B.* for the damage sustained by the fire.

THIS was an action brought by the Respondent against the Appellant to recover damages, by reason of the Respondent's house having been burnt down through the negligence of persons employed by the Appellant to clear his land of weeds and brushwood.

The Appellant owned a plot of land in the district of *Plaines Wilhems*, in the Island of *Mauritius*. The Respondent was possessed of a dwelling house opposite the Appellant's land. On the 17th of October, 1862, the Respondent's house was set on fire, and burnt to the ground, and damage was done to the trees surrounding it.

The Respondent by his declaration alleged, that the Appellant employed divers persons, as his servants and agents, to clear his plot of land, and to cut down and burn the brushwood and thorn trees growing thereon, and well knowing how his servants and agents were employed, did not carefully look after and watch them while so employed; that his servants negligently and improperly lit a large fire on the Appellant's land, very near to the main road, and just opposite to the Respondent's house, and did not watch the same with due care, but allowed the fire to flame up in such a manner that the sparks and burning particles of the fire were carried by the wind across the main road, and set fire to the house of the Respondent, whereby the house was burned to the ground, and all the trees which surrounded the house were so much injured that they had all since perished, and much furniture, moveable property, and jewelry, was injured, destroyed, and lost,

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and that the Respondent had suffered damages to the amount of 12,200 dollars.

The Appellant pleaded, first, that he was not guilty; secondly, that he did not employ any servant or agent to cut down the brushwood, &c., on the land as alleged, nor to burn the same or any other object on the land, nor did he give any order respecting the burning or destroying of any brushwood or straw, or anything whatever then being on the land; thirdly, that no fire was communicated from the land to the house of the Respondent, as alleged; and, lastly, that the Respondent had not suffered damage to the amount in the declaration mentioned.

Issue was joined upon all these pleas.

On the 30th of *October*, 1863, the case came on for trial in the Supreme Court of *Mauritius*, before the Hon. *Charles Farquhar Shand*, Chief Judge, and the Hon. *Barthelemy Gustave Colin*, Acting First Puisne Judge.

The proceedings were commenced by the taking of the personal answers of the Appellant, who stated that he had employed job contractors to clear the plot of ground at a certain price; that on the part of the plot where the burning took place, were five small sapans trees; that he gave no orders that the trees should be burnt; that he was absent from the plot of ground during the whole of the morning of the day on which the fire occurred; that after the fire he had visited the plot of ground, and found that the sapans had been burnt, but were still standing; that the field where the fire took place was five-and-a-half feet below the road; that the sapans were about the same height, and that there was no brushwood, and not much grass or weeds on the spot; that there were no marks of fire between the sapans and a wall which separated the field from the road; that the wall had been whitewashed three days previously, but bore no trace or stain of smoke; that the wind on the morning of the day when Respondent's house was burnt did not set from the burnt spot upon the Appellant's land to the Respondent's house.

The Respondent called witnesses at the trial to prove the allegation in his declaration that his house caught fire from sparks and burning particles carried by the wind from the fire made in the Appellant's field to the Respondent's house.

The Appellant also called witnesses to prove that he was not

responsible for the acts of the labourers on his premises, by whose negligence the fire was alleged to have happened; that he was neither a "*Maître*" nor "*Commettant*" within the meaning of Art. 1384 of the *Code Civil*, but was merely a *conductor operarum*, and that the job contractors were the parties, if any, who were liable, being, by Art. 1793 of the *Code Civil*, responsible for the acts of the persons they employed. Both these job contractors, *Joondine* and *Beesapa*, who were Hindoos, and unacquainted with any other language than their own, were examined on their solemn affirmation. Their evidence, however, did not shew a severance on the part of the Appellant from the control and superintendence of the work he had contracted with them to perform.

The Supreme Court, after reviewing the evidence, gave judgment on the 23rd of *December*, 1863, for the Respondent for the sum of 5000 dollars for damages, with costs. The following was the material part of the judgment of the Court, as set forth in the reasons transmitted by the Judges with the record:—"Article 1384 of the *Code Civil*, after enacting that every one is answerable for the damage caused by his own act, or by the act of those for whom he is responsible, proceeds to lay down that, '*les maîtres et les commettants*' are answerable, '*du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.*' There must meet two conditions to throw upon the Master, or *Commettant*, the liability of the servant, or *Préposé's*, wrongful act. First, the wrongdoer must be a servant or *Préposé*. Secondly, the act must have been done in the exercise of the duty, work, or charge, committed or entrusted to such persons. For instance, a workman hired by the day or by the job would not make the person for whom he works answerable for the wrong he may have done, the damage he may have caused whilst working on some other work, or for somebody else; but he would *primâ facie* be answerable if the act done were directly connected with the actual work he had undertaken. In this case, the respective position of *Sérandat* and the Indian labourers seem to have been this. *Sérandat* hired them to do a certain work. Whether they were to be paid *per diem*, or to receive a round sum for the job, is not clearly proved, but is perfectly immaterial in law; they were not his regular domestic servants; they were to be paid to clear a certain

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piece of land from weeds and brushwood. The contract seems to have been entered into not with one Indian, but apparently with the whole of them. One of them states they were all to have ten annas per day; another, that the job was to be done for seventy-five dollars, to be divided between them. On either view, they were hired to do the work, and clearing the land was the work which they had to do; hence the damage done to the Defendant, if done through the negligence of the Indian labourers whilst clearing the ground, would, we are perfectly satisfied, have been damage done by the act of '*Préposés*' in the exercise of their functions. The question of knowing whether an individual is the '*Preposé*' of another has often given rise, and may again, now that science and enterprise are progressing with such gigantic strides, give rise to many important decisions. It seems, however, well settled, that if a person hires a hackney coach from a livery-stable keeper, who seats his own coachman on the box, and, if an accident happen, the livery-stable keeper is answerable, and not the hirer of the vehicle, for the coachman is the *Préposé* of the livery-stable keeper. It is also held that if a householder employs a builder, and by the negligence of that workman an accident happens, the householder is answerable, for the workman is his *Préposé*. Whether the doctrine can be carried further, and be extended so as to make the first employer not only answerable for the negligence of his immediate *præpositus*, but also of those who are appointed by that *præpositus* to act under him, or with him, is a *vexata quæstio*, on which are to be found many conflicting authorities. But the true theory seems to us to be this,—to create the reciprocal rights and liabilities of *Commettants* and *Préposés*, and the consequences arising therefrom, it is necessary that the one—*i.e.*, the '*Commettant*'—should have chosen the other—*i.e.*, the '*Préposé*,'—and that the former should have the power to give the latter orders and instructions relative to the business or work confided to him; and if, in the discharge of such business or execution of such work, the '*Préposé*' is guilty of negligence, whereby a third party suffers, then the '*Commettant*' is *civiliter* answerable, for he has to impute to himself the blame of having given orders without providing that they be duly executed, or of having chosen careless and negligent agents. And this is the case, whether the agents be domestic servants or be

connected with the principals by the contract known as *locatio operarum*. In fact, most of the authorities, and we think justly so, which govern cases of this description, arise out of contracts of that nature. *Vide Toullier*, 11, No. 284; *Doublet, Caps. Dall.* p. 57, 1, 75; *Reygasse* v. *Plago*, C. C., 28 *June*, 1841; *Dalloz*, 39, p. 426. The Roman law, which had applied the same principles to particular cases without generalizing them, likewise made a party answerable who had chosen an inexperienced or imprudent agent. '*Non est facile*,' says the law, 1 *Dig. Lib. XLVIII.*, tit. iii., *l.* 14, '*tyroni custodia credenda: nam ea prodita, is culpæ reus est, qui eam ei commisit.*' And again, we read in the *Inst., Lib. IV.*, tit. v., pl. 3, on *Quasi delicto*: '*Cum enim neque ex contractu sit adversus eum constituta hæc actio, et aliquatenus, culpæ reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur.*' Art. 1384 of our Code has generalized those principles, well known, however, and acted upon in *France* previous to its promulgation; and we think, without entering into the question whether the Master's liability can be further extended, that the above are the conditions required to make such Master liable for the *quasi delictum* of his immediate *Préposé*. A judgment of Mr. *Baron Wilde*, in *England*, has been quoted in support of the Defendant's views. The law of *England* has certainly a good deal of similarity with our own on cases of this nature; the starting-point is the same, but it seems to us that the case cited, *Hole* v. *Sittingbourne & Sheerness Railway Co.* (1), is very far from supporting the view that the rule which applies to masters and servants does not find its application where the contract is one of *locatio operarum*, even supposing that the contract between a master and servant be not a *locatio conductio operarum*. That case was stated by the Lord Chief Baron to fall immediately within the opinion of Lord *Campbell* and the rest of the Court in *Ellis* v. *The Sheffield Gas Consumers' Co.* (2); and there the proposition, that in no case could a man be responsible for the act of a person with whom he has made a contract, was held to be absolutely untenable. Here it is not at all clear to us that the contract was with *Joondine* alone; the evidence leads us rather to believe that the contract was directly with all the Indians; and

(1) 6 H. & N. 488. (2) 2 E. & B. 767.

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if so, the mischief complained of would have been done, not by the contractors' workmen, but by the contractors themselves; but there is more—*Joondine*, supposing him to be the sole contractor, distinctly states that he himself set fire to the brushwood: on either hypothesis, therefore, the contractor alone would have done the wrong. Now was this burning of the brushwood part of the work which *Joondine* and the other Indians were employed to do? We have no doubt it was, for it is in evidence that for some days previously the same operation of burning weeds and grass, so as to facilitate the clearing of the land, had been carried on; the Defendant knew it, and suffered it to be done; he did not check a mode of proceeding which, perfectly harmless, no doubt, when properly attended to and watched, might become dangerous if left at the mercy of a set of idle, careless semi-barbarians. The Defendant may have a right of action, illusory, no doubt, against those Indians, but it is no answer to the Plaintiff to say, that the Defendant employed those men to do his work properly, and that they did not do so; and if the rule of law be binding upon the householder who employs a builder, an architect, men on whose skill and prudence he may *à priori* rely, assuredly must it be binding, and for reasons still more cogent, upon the proprietor who employs ignorant and careless day labourers. On the facts of this case, therefore, we have no doubt that, if it be proved that the Plaintiff's house was burnt down by or through the negligence of the Indians employed by the Defendant to clear his ground, the Defendant is in law liable to make good the damage proved to have thereby been suffered by the plaintiff. Another point of considerable importance in law arises here:—On whom does the onus lie to prove that the fire arose from the negligence and want of care of the *Préposés*? In questions between landlord and tenant the Articles 1733 and 1734 of the *Code Civil*, shew very clearly that the tenant's negligence is presumed; he must answer for the consequences of a fire, unless he prove certain facts pointed out in the Articles; it is for him to prove he is in possession of the premises he holds in lease; but this is a very special law, like all those which militate against the equitable principle on which justice rests, that the Plaintiff must make out his case; and accordingly it is *strictissimi juris*, and cannot be extended to cases not included

in the special enactment which created it. It has, therefore, been held that the legal presumption which prevails in cases of fire as between landlord and tenant does not in cases of a similar nature between neighbour and neighbour. Almost every decision of the Courts of *France*, and certainly the opinion of the ablest Commentators of the *Code*, agree in that doctrine, and chiefly on the ground mentioned above, that the exception to the general principle was not contemplated by the law to extend beyond the case that has been provided for; *vide, inter alia, Merlin, Rep. verb.* '*Incendie*,' § 2, Nos. 9 and 10. We are, therefore, of opinion, that the Plaintiff is bound to prove the fact that it is owing to the negligence of the Defendant or his *Préposés* that the fire was communicated from the Defendant's field to his house. This part of the case is certainly less free from difficulty than the legal points that have been examined and disposed of above." The Court then proceeded to examine the evidence, and after going through the evidence said: "On the whole, we have come to the conclusion that the fire which destroyed the Plaintiff's house was communicated to it from the Defendant's field, and that this was due to the negligence of the Indians employed by the Defendant to clear his ground. As to the question of damages, it often is the case, and we think in this cause it is the case, that much heavier damages are asked than, judging from the evidence, a Court of Justice is warranted to give. We think that in awarding £1000 damages, with costs, we shall meet the justice of the case."

The Appellant afterwards presented a petition to the Supreme Court for leave to appeal to Her Majesty in Council against this judgment, and leave to appeal was granted by the Supreme Court.

After the judgment of the Supreme Court, the Appellant brought forward additional evidence upon affidavit to shew that the fire by which the Respondent's house was burnt down was caused by the Respondent's own servants; and further, that the Appellant's attorney was taken by surprise at the trial with regard to the evidence adduced by the Respondent, which tended to shew that the fire on the Appellant's land had been resuscitated or fed between eight o'clock in the morning and the time when the fire broke out in the Respondent's house, and that, had he been aware

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that such evidence would be produced, he could have called evidence to prove the contrary.

On the 9th of February, 1864, the Appellant moved for a new trial, on the ground of material evidence, set forth in the above affidavit, having been obtained since the judgment of the 23rd of December, 1863, and on the ground of surprise; but the Court, upon reading the affidavits on both sides, refused the motion with costs.

The Appellant then presented a petition to the Supreme Court, praying for leave to appeal against the judgment of the 9th of February, 1864, which the Court, upon the 29th of March, 1864, refused, holding that in point of form the effect on the merits of the case would carry all subsidiary proceedings, and that it was useless to multiply appeals.

The present appeal was brought against the judgment of the Supreme Court of the 23rd of December, 1863, and also against the Order of the Court made on the 9th of February, 1864, whereby the motion for a new trial was dismissed with costs.

Mr. *Bovill*, Q.C., and Mr. *Charles E. Pollock*, for the Appellant:—

It may be assumed that the Respondent's house was destroyed by the sparks from the fire on the Appellant's land, but that alone does not make the Appellant liable. He is not responsible for the acts of the job contractors employed by him, or for the negligence of their servants. The *Code Civil* is the law in force in *Mauritius*, and the parties must be governed by its provisions. No doubt by that *Code*, as by the English law, a Master is liable for the negligence of a servant in his employ. Art. 1384 provides, that "*Les maîtres et les commettants*" are responsible for the damage "*causé par leurs domestiques et Préposés dans les fonctions auxquelles ils les ont employés*," but to make the Appellant liable for the negligence it must be shewn that the *Préposé* acted "*sous les ordres, sous la direction, et sous la surveillance du Commettant*," *Dalloz, Jur. Gen. verbo* "*Responsabilité*." To make the Appellant responsible for the damage, that position must be established by the Respondent, who here charges the negligence, and on whom the *onus probandi* lies. Now, there is no proof of any act of negligence on the part of the Appellant. The negligence, if any, was that of the contractors,

or those employed by them on the job. The Appellant had parted with all control and superintendence over the work and over the contractors, by whom the clearing of the land was to be performed. The question, therefore, turns upon this point, did the Appellant stand in the relation of "*Commettant*," and the Indians "*Préposés*," within the meaning of Art. 1384 of the *Code Civil*? The relative position of the parties was not properly understood by the Court below. The term "*Commettant*" properly translated means "Employer," and "*Préposé*," "Foreman or Overseer," and the French authorities establish this definition: *Sirey*, Comms. by *Gilbert*, note 32 (Ed. 1855). Here the contractors were paid a fixed sum to do certain work, and were the sole masters of the work, and the employer is, therefore, not responsible for the negligence of the contractors. This is illustrated by the following cases in the *Cour de Cassation*, referred to in *Dalloz, Jurisprudence Général*, pp. 372-3:—*Teston* v. *Salles and the Mining Company of the Grand Combe*; *Northern Railway of France* v. *Boisseau*; *Administration of Forests* v. *Martin*, *Dalloz, Jur. Gén.*, Part. I. p. 49, 1860, where a fire was caused in a Forest by the negligence of a Woodman, and he alone was held liable. So in the case of a fire from the negligence of a Cooper employed in a public warehouse: *Dalloz, Jur. Gén. Tom.* xxx. *verbo* "Hiring," ch. 3, sec. 6, p. 415. The labourers here do not answer the description given by *Sirey, Codes Annotés, Tom.* i., p. 665, as "*Ouvriers*."

The English law, in respect to the liability of a Master for acts of his servants, is analogous to the Art. 1384 of the *Code Civil*. The rule is laid down in *Addison's* Treatise on Torts, pp. 340-1 (2nd Ed.), that the party himself, who actually inflicts the injury through his own negligence, is responsible for the injurious consequences of his default. A person contracting with another for the performance of certain work, the work being proper to be done, and the contractor a proper person to do it, the employer is not liable for injuries caused by the negligence of the contractor. In *Butler* v. *Hunter* (1) it was determined that an employer is irresponsible for acts of his agent, whether contractor or otherwise, exercising an independent employment, provided the party was well chosen as being reasonably fit for such a position. *Reedie* v. *The London and North-*

(1) 7 H. & N. 826.

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Western Railway Co. (1); *Hole* v. *The Sittingbourne & Sheerness Railway* (2). Where a party comes to his particular *situs* by reason of the employment, the employer is only responsible if he could have abated the injury or nuisance between the wrongful act commenced and the damage resultant therefrom: *Gandy* v. *Jubber* (3). If a contractor selects workmen the employer is not liable: *Peachey* v. *Rowlands* (4); *Overton* v. *Freeman* (5); *Knight* v. *Fox* (6); *Steel* v. *South-Eastern Railway Company* (7): and it makes no difference if the labourer employed is paid by the job: *Sadler* v. *Henlock* (8). We submit, moreover, that the weight of evidence was against the finding of the Court below that the fire took place through negligence of the contractors, and that, therefore, there ought to be a new trial. We do not question the Order of the Court made on the motion for a new trial, and abandon that part of the appeal.

Mr. *Anderson*, Q.C., and Mr. *F. Philbrick*, for the Respondent:—

In point of law the Appellant, as held by the Court below, is responsible for the negligence of his servants in the course of their employment by him: *Code Civil*, Art. 1384. The Appellant must be considered as the "*Commettant*" or Master of the Indians employed by him to clear his land of the weeds and brushwood, and they, as his "*Préposés*" or servants, the proper received definition of those terms: *Toullier, vo.* "*Commettans*" *Table Général*; and he was liable for the damage caused by their acts in discharge of the duties of their employment. The evidence shews that the Appellant had not parted with the control of the works; he superintended the men, and ordered them where to work. This fact distinguishes the cases cited from *Dalloz*, relied upon by the Appellant, which were cases of contract. It is said that the *Code Civil* is the same as the English Law. It may be so, but that *Code* is certainly more comprehensive. The *Code Civil* is precise: Art. 1384 enacts, in terms, that every person shall be answerable for the damage caused by the act of those for whom he is responsible. "*Les*

(1) 4 Ex. 244.
(2) 6 H. & N. 488.
(3) 33 L. J. (Q.B.) 151.
(4) 13 C. B. 182.
(5) 11 C. B. 867.
(6) 5 Ex. 721.
(7) 16 C. B. 550.
(8) 4 E. & B. 570.

Maîtres et Commettants" are declared to be responsible for damage caused by their "*domestiques et préposés dans les fonctions auxquelles ils les ont employés.*" Here the Appellant was the Master, or "*Commettant,*" of the Indians employed by him to clear his ground, and they were his servants, or "*Préposés.*"

In the Court below it was contended by the Appellant that his position was merely that of hirer of the services of these Indian labourers as *conductores operarum;* that in fact they were independent contractors, and that neither could be a "*Commettant*" nor these men "*Préposés,*" within the meaning of Art. 1384 of the *Code;* but our contention is, that the Appellant was Master of these men, and as such the "*Commettant;*" and they, therefore, were his "*Préposés.*" Even assuming the contract to be a *locatio operarum,* the Appellant is still liable for the consequences of the negligent acts of his contractor. He selected and paid the Indians; whether they were paid by the piece or by daily wages is immaterial, and their relationship toward their employer is not affected thereby; indeed the Appellant personally superintended and directed the men when present. The liability imposed by the *Code* is not confined to servants, "*Domestiques,*" but extends to *Préposés,* namely, to those who are put forward by the employer and entrusted by him to do some particular work or to fulfil some particular function (*præpositi*), although they may not be "*Domestiques.*" Now, the two Indians were admittedly selected and engaged by the Appellant to clear his ground. They were his "*Préposés*" for the execution of that work; and if in the execution of that work they used fires to burn the rubbish and weeds, as it is clear they did, with the knowledge and sanction of the Appellant, he is liable, both on authority and principle, for the damage occasioned by such act. It is so by the English law. Thus in *Turberville* v. *Stampe* (1), the Defendant's servant had lighted a fire in his master's field in the due course of husbandry, but so negligently kept it that it extended to the Plaintiff's heath and consumed it, and the Court held that the Defendant was liable; and that case has been followed by *Filliter* v. *Phippard* (2); *Vaugham* v. *Menlove* (3); *Blaikie* v. *Steinbridge* (4); *Randleson* v. *Murray* (5); *Dalyell* v. *Tyrer* (6);

(1) Ld. Ray. 264.
(2) 11 Q. B. 347.
(3) 3 Bing. (N.C.) 468.
(4) 6 C. B. (N.S.) 894.
(5) 8 A. & E. 109.
(6) 5 Jur. (N.S.) 335.

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Pigott v. *Eastern Counties Railway Co.* (1). The same liability exists by the civil law: *Domat*, C. L., B. II., sec. iv. pp. 4 & 6; and the same principle was acted on by this Tribunal in the Canadian cases: *The Quebec Fire Assurance Company* v. *St. Louis* (2); *The Great Western Co. of Canada* v. *Braid and Fawcett* (3); and by the Courts in *Scotland*, in *Tennant* v. *The Earl of Glasgow* (4); *Mackintosh* v. *Mackintosh* (5); *Rankin* v. *Dixon* (6); *Nisbett* v. *Dixon* (7). The cases on this point are collected in *Smith* on "The Law of Reparation," p. 139. The case of *Reedie* v. *The London & North Western Railway Co.* (8), relied on by the Appellant, does not apply, for there the relationship of Master and Servant did not exist between the Defendants and the men who actually did the wrongful act. But taking the Appellant's case on the ground he puts it, as the negligent act directly arose in performance of the duty contracted for, the Appellant, as principal, would be personally liable. In *Hole* v. *Sittingbourne & Sheerness Railway Company* (9), Baron *Wilde* says, the loss there arose "from imperfectly doing the thing ordered to be done;" and, therefore, as well by the principles of Common Law of *England* as by terms of the *Code* itself, the Appellant is responsible for the act of his *Préposés* in the negligent making or watching the fire on his land.

No fresh trial ought to be granted on the ground of new evidence having been found. The Court of Chancery refused leave to file a supplemental bill in the nature of a Bill of review, where, as in this case, the proper means of searching for the evidence had not been used previously to the original decree: *Bingham* v. *Dawson* (10).

Judgment was delivered by

1866 Feb. 26.

SIR EDWARD VAUGHAN WILLIAMS:—

This was an appeal against a judgment of the Supreme Court of *Mauritius*, and also against an Order of that Court, whereby a

(1) 3 C. B. 229 & 240.
(2) 7 Moore's P. C. Cases, 286.
(3) 1 Moore's P. C. (N.S.) 101.
(4) 2 Court of Sess. Cas. 22 (3rd Ser.).
(5) 2 Court of Sess. Cas. 1357 (3rd Ser.).
(6) 9 B. M. & Y. 1048.
(7) 14 B. M. & Y. 973.
(8) 4 Ex. 244.
(9) 30 L. J. (Ex.) 81; 6 H. & N. 488.
(10) Jac. 243.

motion made by the Appellant for a new trial of the cause in which the first mentioned judgment was pronounced, was dismissed with costs.

On the argument before us, the latter branch of the appeal was, very properly in our opinion, abandoned by the Appellant's Counsel as hopeless.

The action was brought by the Respondent against the Appellant to recover damages for injuries sustained by the Respondent by reason of his house and furniture having been destroyed through a fire kindled on the Appellant's land by labourers employed by him to clear the ground for agricultural purposes, which fire was so carelessly made, that sparks and other burning particles were carried over and scattered upon the Respondent's premises, thus causing the fire which was the subject of complaint.

On the evidence adduced at the trial the Court below came to the conclusion that the fire which destroyed the Plaintiff's house and furniture was communicated to it from the fire kindled in the Appellant's field, as alleged, and that this was owing to the negligence of the men employed by him to clear his ground. And we think the Court was fully justified by the evidence in coming to this conclusion.

The only question, therefore, which remains is, whether the Appellant was responsible for the negligence of the men so employed by him.

The Respondent grounded his claim on the Article 1384 of the *Code Napoléon* (which is the prevailing law of *Mauritius*), and which is in these words: "*Les maîtres et commettants* [*sont responsables*] *du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.*"

The Respondent contended that the Appellant and the men he employed stood in the relation of *Commettant* and *Préposé* within the meaning of this Article. It is necessary, therefore, to ascertain what is the meaning of the word "*Préposé.*" It appears from *Napoléon Landais's* Dictionary that the meaning of the word "*Préposé*" is, "*qui est commis à quelque chose, qui en à la garde, le soin;*" and in the same Book the meaning ascribed to the verb "*préposer*" is "*commettre, établir quelqu'un avec pouvoir de faire quelque chose ou d'en prendre soin.*" And accordingly we think that, subject to the

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qualification hereafter to be mentioned, the word "*Préposé*" in the Article means substantially a person who stands in the same relation to "*Commettant*" as "*Domestique*" does to "*Maître*," *i.e.*, a person whom the "*Commettant*" has entrusted to perform certain things on his behalf. This construction of the word appears to be supported by a passage in *Dalloz, Rep., Tom.* xxxix. p. 440, No. 689, where he says, "*Les domestiques sont une classe particulière de préposés.*"

The French lawyers, however, in their interpretation of the Article, have qualified the above construction by the doctrine, that in order to make the *Commettant* responsible for the negligence of the *Préposé*, the latter must be acting "*sous les ordres, sous la direction et la surveillance du Commettant.*" This doctrine is certainly supported by the French authorities to which we were referred by the Counsel for the Appellant, viz. *Dalloz' Répertoire*, tit. "*Responsabilité*," ch. iii. sect. 2, article 5, and the three cases of *Teston* v. *Salles and the Mining Company of the Grand Combe*, and *The Northern Railway of France* v. *Boisseau*, and *Administration of Forests* v. *Martin*, which were decided by the *Cour de Cassation*, and are cited in *Dalloz' "Jurisprudence Générale,"* copies of which were supplied to us by Counsel.

Applying this doctrine to the present case, the Appellant's contention is, that the evidence shews he had parted with the control over the men he employed, and that they were not working under his orders, directions, and surveillance.

The evidence was, that the Appellant, in order to clear his ground of weeds and brushwood, employed two bands of Indian labourers, one of which was under an Indian named *Beesapa*, and the other band consisted of four men, who were under an Indian called *Joondine*, and included a man called *Beedhoo*, who appears to have been the author of the mischief, by setting fire to a heap of rubbish collected in the course of the work, so that the fire extended to some sapan trees. The object of setting fire to them was, as *Beedhoo* expressed it in his evidence, "to work more easily." The work was to be paid for by the piece, *i. e.*, so much per acre. The evidence leaves it doubtful whether the Appellant was to pay the price to *Joondine* alone, or to him and the other Indians in his band; indeed, the Court below said the evidence rather led them

to the conclusion that the contract was directly with all the Indians.

On this evidence, it was contended on the behalf of the Appellant that he is shewn to have severed himself from the execution of the work, and parted with all superintendence and control over the persons by whom it was performed.

But we are of opinion that this is not a conclusion which is warranted by the evidence. Having regard to the nature of the work, and the condition of the men employed, it appears to us unreasonable to infer that the Appellant had parted with the power of correcting, as the work went on, the mode in which it was to be performed, and of dictating what kind of brushwood and other growth was to be removed, and what was to be left standing, and how the weeds and brushwood which had been got up were to be dealt with, and where they were to be deposited; in other words, we think the evidence does not shew that the general control, direction, and surveillance of the operations was relinquished by the Appellant by reason of the agreement he had made with the Indians. It may be observed that these men do not at all answer the description given by *Sirey* ("*Codés Annotes*," vol. i. p. 665) of "*ouvriers d'une profession reconnue et déterminée*;" they were ordinary labourers, characterized by the Court below as "a set of idle, careless semi-barbarians."

The view we have thus taken of the relation established by the agreement between them and their employer is corroborated by the evidence, which shews that in point of fact the Appellant did interfere and control the men in the course of the work. For example it was said by *Joondine*, "Mr. *Serendat* told me not to put fire in the place where I was working;" . . . "he told me to put fire in another place which he pointed." Again, *Beesapa* says, "The previous day Mr. *Serendat* had come and told *Joondine* to leave that portion of ground which is fifty dollars, and go and work in the interior of the field." And the Appellant's answer states that he had given orders five or six days before to burn some weeds, but that he also gave orders that the fire should be carefully extinguished.

Looking, then, at the whole case, we are of opinion that the Appellant and the Indian whose negligence caused the fire stood

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in the relation of "*Commettant*" and "*Préposé.*" And, as it has not been disputed that the negligent act was done by the "*Préposé*" in the course of his employment, it follows that the responsibility of the Appellant is made out.

It remains to be observed that the declaration in this case is not framed at all with reference to the Article of the *Code*, but charges in the ordinary form that the servants and agents employed by the Defendant were guilty of negligence. But we think that the words "servants and agents" must be read in a sense which will support the declaration,—viz., servants and agents acting under the directions, orders, and surveillance of the Defendant.

For these reasons, their Lordships will humbly recommend to Her Majesty that the judgment of the Court below be affirmed, with costs.

Solicitors for the Appellant: *Parke & Pollock.*

Solicitors for the Respondent: *Morris, Stone, Townson, & Morris.*

HER MAJESTY'S PROCUREUR AND ADVOCATE-GENERAL . . . . . } APPELLANT;

AND

VIRGINIE BRUNEAU . . . . . RESPONDENT.

J. C.* 1866 Feb. 15, 16, 17.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Mauritius, law of—Bastard—Natural niece—Code Civil—Irregular succession—Arts. 765, 766, *construction of—Descendants—Postérité.*

The *Code Civil* of *France*, which is in force in the Island of *Mauritius*, *Liv.* III. Ch. IV. *tit.* i. "*Des successions irrégulières*," Art. 765, provides as follows:—"*La succession de l'enfant naturel décédé sans postérité est dévolue au père ou à la mère qui l'a reconnu; ou par moitié à tous les deux, s'il a été reconnu par l'un et par l'autre:*" and Art. 766 provides, "*En cas de prédécès des père et mère de l'enfant naturel, les biens qu'il en avait reçus, passent aux frères ou sœurs légitimes, s'ils se retrouvent en nature dans la succession; les actions en reprise, s'il en existe, ou le prix de ces biens aliénés, s'il est encore dû, retournent également aux frères et sœurs légitimes. Tous les autres biens passent aux frères et sœurs naturels, ou à leurs descendants:*"—

Held, that the word "*descendants*" in Art. 766, is not limited to legitimate descendants, so as to preclude the natural children of a natural brother succeeding to their natural uncle's property:—

Held, further, that there is no restriction with respect to the word "descendants" in Art. 766: that natural children are "*descendants*" within the meaning of Arts. 765 and 766, which constitute a special law for determining the succession of natural children dying without posterity; and that "*postérité*" and "*descendants*" in those Articles are convertible terms.

B., an illegitimate child duly acknowledged, survived his parents, and died domiciled in the Island of *Mauritius*, of which he was a native, intestate, leaving self-acquired property. He had no legitimate relations, but had two nieces, illegitimate daughters of an only illegitimate brother, who pre-deceased him, by whom they were duly acknowledged, as also by *B.* One of the nieces died shortly after *B.*, having previously constituted her sister *Légataire universelle*. The Government claimed the succession of *B.*: *Held*, that the surviving niece was entitled to succeed to *B.'s* property in preference to the claim of the Government on the ground of bastardy.

General principles by which Courts are to be governed in construing the *Code Civil*, as derived from the decisions of the *Cour de Cassation* and the leading Text writers of *France*.

THE question in dispute in this appeal related to the succession, or right, to a considerable property which belonged to *Pierre*

* *Present*:—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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Bruneau, who died intestate at *Mauritius*, of which Island he was a native. The Respondent claimed such property, according to the law in force in *Mauritius*, as to one moiety, in her own right as an illegitimate but duly recognised niece of the intestate, and as to the other moiety, as "*Légataire universelle*," under the Will of her sister, who was also illegitimate, and duly recognised. On the other hand, the Appellant, upon the part of the Government of the Colony, claimed the whole succession, in consequence of the intestate having left no legitimate survivor of his family.

The *Code Civil* is the law in force in *Mauritius*. The Articles of that *Code* which especially applied to the question raised by the suit and upon the appeal, and which were relied on, were the following:—

Art. 338. "*L'enfant naturel reconnu ne pourra réclamer les droits d'enfant légitime. Les droits des enfants naturels seront réglés au titre des successions.*"

Art. 723. "*La loi règle l'ordre de succéder entre les hérétiers légitimes; à leur défaut, les biens passent aux enfants naturels, ensuite à l'époux survivant; et s'il y'n a pas, à l'état.*"

Art. 756. "*Les enfants naturels ne sont point hérétiers; la loi ne leur accorde de droit sur les biens de leur père ou mère décédés que lorsqu'ils ont été légalement reconnus. Elle ne leur accorde aucun droit sur les biens des parents de leur père ou mère.*"

Art. 757. "*Le droit de l'enfant naturel sur les biens de ses père ou mère décédés, est réglé ainsi qu'il suit:*

"*Si le père ou la mère a laissé des descendants légitimes, ce droit est d'un tiers de la portion héréditaire que l'enfant naturel aurait, eue s'il eût été légitime; il est de la moitié lorsque les père ou mère ne laissent pas de descendants, mais bien des ascendants ou des frères ou sœurs; il est des trois quarts lorsque les père ou mère ne laissent ni descendants ni ascendants, ni frères ni sœurs.*"

Art. 758. "*L'enfant natural a droit à la totalité des biens lorsque ses père ou mère ne laissent pas de parents au degré successible.*"

Art. 759. "*En cas de prédécès de l'enfant naturel, ses enfants ou descendants peuvent réclamer les droits fixés par les Articles précédents.*"

Art. 765. "*La succession de l'enfant naturel décédé sans postérité est dévolue au père ou à la mère qui l'a reconnu; ou par moitié, à tous les deux, s'il a été reconnu par l'un et par l'autre.*"

Art. 766. "*En cas de prédécès des père et mère de l'enfant naturel, les biens qu'il en avait reçus, passent aux frères ou sœurs légitimes, s'ils se retrouvent en nature dans la succession: les actions en reprise, s'il en existe, ou le prix de ces biens aliénés, s'il est encore dû, retournent également aux frères et sœurs légitimes. Tous les autres biens passent aux frères et sœurs naturels, ou à leurs descendants.*"

Art. 767. "*Lorsque le défunt ne laisse ni parents au degré successible, ni enfants naturals, les biens de sa succession appartiennent au conjoint non divorcé qui lui survit.*"

Art. 768. "*A defaut de conjoint survivant, la succession est acquise à l'Etat.*"

The facts were these:—

Pierre Bruneau died in February, 1863, domiciled in *Mauritius*, intestate, and without leaving any parent, widow, or issue surviving him. He was one of a family of four illegitimate children, namely, himself and another son named *Urbain*, and two daughters, all of whom had been acknowledged as such by their parents. Both the two sisters of *Pierre Bruneau* died in his lifetime without leaving issue, and his brother, *Urbain Bruneau*, also died in his lifetime leaving two illegitimate daughters, the Respondent, *Virginie Bruneau*, and *Elodie Bruneau*, both of whom had been acknowledged as such illegitimate daughters by their father, and by their uncle, *Pierre Bruneau*. These two natural nieces of *Pierre Bruneau* were living at his death. One of them, namely, *Elodie*, died shortly afterwards, leaving *Virginie*, the present Respondent, her universal legatee. *Pierre Bruneau* was possessed at his death of considerable property acquired by himself; and upon his death the Curator of vacant estates at *Mauritius* was placed in official possession of the estate of the deceased, in trust for the person or persons beneficially entitled thereto.

On the death of *Pierre Bruneau*, the Respondent claimed, in her own personal right as his natural niece, and also in right of being the universal legatee of her deceased natural sister, the succession to his estate; but in this claim she was opposed, first, by the Curator of vacant estates; secondly, by the Appellant, in his official capacity as *Procureur* and Advocate-General, acting on behalf of Her Majesty; and, thirdly, by one *Sidonie Bruneau*,

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who also claimed to be a natural niece of *Pierre Bruneau*, and as such beneficially entitled to the succession in question.

Whereupon a suit was commenced in the Supreme Court of *Mauritius* by the Respondent as Plaintiff against the Curator, the Appellant and *Sidonie Bruneau* as Defendants; and the Respondent thereby claimed to be let into possession of the estate.

The cause was heard before the Chief Judge, the Hon. *Charles Farquhar Shand*, and the Hon. Mr. Justice *Colin*, when the Defendant, *Sidonie Bruneau*, appeared, and by her Counsel, elected to abide by the decision to which the Court should arrive; and the Appellant, according to the practice of the Supreme Court, moved that he, instead of the Respondent, be let into possession of the estate.

On the 24th of March, 1864, the Supreme Court delivered the following judgment:—"This is a case of importance, and also of difficulty. It is important both to the parties and to the law, for it involves at once the succession to a large estate, and the decision of a very nice point of legal principle. Of the difficulty of the case we have the proof in the fact that the most eminent Commentators have arrived at opposite conclusions in interpreting the meaning of this part of the *Code Civil*. We have unfortunately no decisions of the French Courts to assist us here, as the matter has never come before them for determination. The real question, however difficult of solution it may be, lies in a narrow compass. The only point is, to ascertain the meaning of the word '*descendants*,' as used by the Legislature in the close of Art. 766 of the *Code Civil*. Does that word mean only legitimate descendants of the natural brothers and sisters of the bastard who dies, having survived his father and mother, or does it include also the illegitimate descendants of the brothers and sisters? If the former is the meaning of the article, the door is shut against the claim of *Virginie Bruneau*; if the latter, she must gain her case. The question which we have to consider appears to be, therefore, simply this: What meaning did the framers of the law attach to the word '*descendants*' when they used it in Art. 766 of the *Code*? With the policy of the Legislature we have nothing to do. When we record the commentaries of some of the eminent writers in this branch of the *Code Civil* it may be thought that occasionally

the individual feelings of the author have exercised some influence on his conclusions. In truth, in dealing with questions of this nature, it is quite possible that the impressions of the moment may somewhat influence the judgment. If we allow our sentiments of respect for the marriage relation and the interests of society to predominate for the time, we are apt to look with disfavour on the claims of illegitimate children. On the other hand, if we reflect on the sad position in which such offspring are frequently placed, by no fault of their own, we may feel inclined to lean to that interpretation of a doubtful law which might be most beneficial for their interests. It is our duty to divest ourselves, as far as we can, of all such feelings. We must also endeavour to throw aside all impressions derived from all other legal systems, with which we may be more or less familiar, and consider the question as one simply of interpretation. We have to ascertain the legal meaning of the word '*descendants*' in the Article in question. By the old law of *France*, prior to the first revolution, natural children, except in a few districts of the Kingdom, had no right of succession, even to their father and mother. All they could insist for was an aliment, or an allowance for their support. The law of the 12 *Brumaire, An.* 2 (1794), went to the other extreme. It put them, in respect of succession, on the same footing as lawful children '*Leurs droits de successibilité sont les mêmes que ceux des autres enfants*' (Art 2). The authors of the *Code Civil* appear to have studiously followed a middle course. While they enacted that an illegitimate child should not have the *status* of an heir, or be admitted as a member of the family as to rights of succession generally, a certain portion of the property of his parents, varying in amount according to circumstances, is awarded to him when he is acknowledged as their child; but this portion is always less than he would have received had he been an heir, *i. e.* of lawful birth. Various other regulations are introduced, and the succession of illegitimate children is classed among the '*Successions irrégulières*' and the rules on the subject, form the first section of the chapter so entitled (*Code Civil, liv.* III. c. iv.) The object of the great men who framed the *Code* was to preserve the respect due to marriage and the rights of legitimate children, and, at the same time, to make some provi-

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sions for the unhappy offspring of irregular connections. It was no easy task to harmonize two rights of succession so widely different, and some of the Articles of this chapter of the law have given rise to much discussion, and to a wide difference of opinion among authors of reputation. Among other enactments in this Chapter of the law, we have the Articles 765 and 766. The decision of the present case rests, as we have seen, in the meaning to be given to the word '*descendants*' in the latter Article. Now, in ascertaining the meaning of a law, the precise words of the text must, in the outset, be carefully considered. In the present case, it is to be remarked that the word '*descendants*' grammatically includes both legitimate and illegitimate offspring. In the text the words stand without limitation or qualification. Of course, there is no question here except as to natural children who have been duly acknowledged by their parents. All the persons of the two generations of the *Bruneau* family have been so acknowledged. Accordingly, the Claimant is within the class of natural children to whom the right of succession is open, if the law otherwise does not shut her out. The word in the text having thus, grammatically, extension enough to include the Claimant, let us next inquire if it has a legal meaning so restricted as to exclude her. Under the ancient jurisprudence of *France*, when, as we have seen, there was, speaking generally, at least no right of succession open to bastards, the term '*descendants*' occurring in the law would naturally enough have been confined to lawful offspring; but, under the intermediate law which prevailed between 1794 and the promulgation of this part of the *Code Civil* in 1803, while legitimate and illegitimate children were on the same footing as to rights of succession, the same interpretation could scarcely have been given to the word '*descendants*,' standing alone in matters of succession. Well then, when the framers of the *Code Civil* were at work, the term '*descendants*,' if no qualification were added to it, would have had the broad, and not the narrow legal meaning. If they used it without limitation, is it not a fair and reasonable presumption that they used it in the ordinary legal sense of the epoch at which they wrote? No doubt, in the parts of the *Code Civil* which regulate the succession of legitimate families and of heirs, it may reasonably be inferred

that the word '*descendants*' would naturally include only lawful children and their lawful progeny; but here we are in a different field of inquiry altogether. We are considering the right of succession under the chapter of '*Successions irrégulières*, in a family where all parties are illegitimate. Can it be supposed that, in framing the section of the *Code* which deals with the succession of bastards, the Legislature could have used the general word '*descendants*,' standing by itself alone, as meaning only legitimate offspring, and not also including illegitimate descendants. We think that this would be a presumption scarcely admissible. But again, in the section itself the framers of the *Code* had the two classes of persons, legitimate and illegitimate, before their eyes clearly distinguished; the succession, according to its origin, is thrown into different lines of descent altogether, the legitimate and the illegitimate. The distinction of legitimacy and illegitimacy is prominently before the Legislature in the very section itself. Had the framers of the *Code* intended that the succession given to the illegitimate line should, failing natural brothers and sisters, immediately change its quality and pass only to lawful children, we do not think they would have used the mere general words '*leurs descendants*,' following immediately after the words *frères et sœurs naturels*.' Had they intended that the property should go only to the lawful descendants of the natural brothers and sisters, we think they would have said so, and would have added the word '*légitimes*' to '*descendants*.' They have not done so. But we are now called upon to do this for them, for that is precisely the result of the argument for the Crown. It contends, that the Court should virtually add the word '*légitimes*' to the end of the Article, and interpret it exactly as if that word had its place in the text. It does not appear to us that we have any authority for so doing. While we are alluding to the form in which this article of the *Code* is drawn, we may notice another argument in favour of the Claimant's views, which was put forward during the discussion. It was stated in this way:—In the first section of the Article a certain part of the succession is given '*aux frères ou sœurs légitimes*.' Nothing is said of their '*descendants*.' In the second section of the Article, the remainder of the succession is given '*aux frères et sœurs naturels*,' and the words are added '*ou à leurs*

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descendants.' Why this difference; why this marked contrast in the two sections? The answer was this:—In the former case, as the right of representation was open to the '*descendants*' of the lawful brothers and sisters (*Code Civil*, Art. 742), it was unnecessary to add the words '*ou à leurs descendants;*' while in the latter case, there being no right of representation among natural relations who are expressly declared not to be heirs, it was necessary to give it expressly, and this was accordingly done in the text, with the plain intention of letting in the illegitimate descendants of the illegitimate brothers and sisters. At first sight this is a plausible argument, but we must take leave to question its soundness. No doubt by the usual rule of representation in legitimate successions, the lawful descendants of the legitimate brother or sister would take the goods of his pre-deceasing parent, but so would the lawful descendants of the illegitimate brother or sister. As to the illegitimate descendants of either class of collaterals, they would not succeed except by special provision of the law. But we think the argument on the words of the Article may be put in this way:—In the first section the right of succession is to stop with the legitimate collaterals, and not to go to their heirs; in the latter, it is to go to the illegitimate collaterals and their descendants generally, whether legitimate or illegitimate. Special provision as to descendants is contained in the latter section, which regards illegitimate succession alone; it is not to stop at the first degree. There is no risk of introducing bastards among a legitimate family; the succession is that of a bastard, and a bastard line is called to succeed. In the former section, which has to do solely with the succession of legitimate parties, the succession is to stop at brothers and sisters; their descendants are not called in default of their own existence. This view would appear to be confirmed by the decision quoted at the Bar, and reported in *Sirey*, S. V. 53, 1, 481. It was there held, '*Que le droit de retour établi par l'Art.* 766 *en faveur des frères et sœurs légitimes, et l'enfant naturel en cas de prédécès de ses père et mère, ne doit pas être étendu aux descendants des frères et sœurs légitimes.*' The reasoning of the Court in support of its judgment, points out very clearly that there is no legal connection between the bastard and the legitimate connections of his father; that the enactments of Art. 766

are entirely exceptional, and that in the Article itself there is a marked contrast between the limited succession given in the first part to legitimate collaterals, and the wider and broader succession opened to the natural collaterals and their descendants. The views which we have indicated above necessarily point at the success of the Claimant, *Virginie Bruneau*, in this case. But we are quite aware of the formidable arguments on the other side. The great stress of the case of the Crown is laid on Article 756 of the *Code*, particularly on the words '*la loi ne leur accorde de droit sur les biens de leur père ou mère décédés.*' This, it is contended by the Crown, and the Commentators who support that side of the question, is a fixed principle in the law of illegitimate succession, enunciated in the opening and leading section of the chapter, and pervading the whole enactments of the law. If this view of the Article is correct, there is of course an end of the case. But it appears to us that in framing Article 756, the Legislature had in view the existence of legitimate connections of the parents of the bastard, between whom and the bastard the law was solicitous that no connection should be established. The law, therefore, provided that a bastard should not be intruded as an heir or a proper member of the legitimate family. It appears to us that in Article 766, this general rule is derogated from, and is so far set aside. The whole argument is entirely exceptional. This was very well pointed out in the argument for the Claimant. In violation of one of the fundamental rules of the *Code* (Art. 732), that neither the nature nor origin of the property left by a bastard, whose parents have died before him, shall be divided according to the source from whence it sprung. It is ordered that everything derived from his parents shall go to their lawful children, his legitimate brothers and sisters. Everything else shall go to his own illegitimate brothers and sisters and their descendants. The whole of the law, in both its parts, is opposed to the ordinary rule of succession. It appears to us that the general principle of Article 756 is set aside, and in the face of it natural brothers and sisters are called on to succeed; and their descendants, without limitation. No one can doubt that Article 766 is so far at least an exception to the general principle that a bastard shall have no right to the property of the relations of his father and mother, for

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it expressly gives a right of succession to illegitimate brothers and sisters, and their descendants, the ultimate question in this case being, what persons does the word '*descendants*' include? It is argued, that if the general word '*descendants*' is not read '*descendants légitimes*,' we shall arrive at the singular result, that while a bastard grandchild could not succeed to his grandfather, a bastard nephew or niece could succeed to an uncle. To which we must answer, that if it be law that the grandchild in the case supposed is always excluded, we must take the law as we find it, whatever anomalies it may be thought to produce in its results. But after all, is it more extraordinary to admit the succession of an illegitimate nephew, where there is no conflict, not even contact, if we may be allowed the expression, with legitimate relations, than to admit a bastard son to introduce himself into a lawful family, and take his place, though not an heir, among those who are to share the succession of the father and husband? The whole succession of illegitimate children is exceptional, and consequently the ordinary argument from anomalies, and the results of the law, are less applicable than when we are considering the rules of legitimate succession. But even there, as every one knows, anomalies, and very startling anomalies, are by no means wanting. The plain object of the *Code* was, we think, to benefit illegitimate children, according to certain rules, with this general caution, that they were not to be classed among heirs, or be introduced as such into legitimate families. Again, it was argued that all the leading Commentators, even *Chabot* himself, the champion, as he was styled, of the rights of the Claimant under Article 766, have held, under a previous Article of the same Chapter (Art. 759), that '*descendants*' means only legitimate descendants. It is true that *Chabot* and some others are of this opinion, but on the other side we find many names of great reputation, such *Delvincourt*, *Maleville*, *Delaporte*, *Favand*, distinctly teaching that the word includes both legitimate and illegimate posterity. *Duranton* hesitates to give an opinion either way. But even if *Chabot* and some other leading Commentators are of opinion, that the word '*descendants*' in Article 759, should have a more restricted sense than in Article 766, this would only shew the care with which they had studied the subject, and it may be, looking at the context, that they are right in their view.

But why should the opinion of those writers be of decisive weight when found to be in favour of the Crown, and of no importance when against the Crown's views on the Article of the law actually under discussion. *Chabot* himself was the person who drew up the Report on the Law of Succession to the Tribunal in 1803, and few persons had better opportunities of knowing what the meaning of the Legislature was when it used the word '*descendants*' in Article 766. The learned Counsel for the Crown have attempted to shew, from the words of that Report, that *Chabot* himself was of opinion that a bastard who leaves no descendants has no lawful relations. But the words relied upon do not support the position, and at all events we are here not dealing with the meaning of that Preliminary Report, but with that of Article 766 of the *Code*. In the interpretation of the *Code Civil*, when difficulties arise as to the meaning of the law, it is an established practice to resort to the preliminary discussions which it underwent in the Council of State before the Tribunal, with the view of discovering the true meaning of the Legislature, as ultimately expressed in the text of the law; we find from the *Procés Verbal* of the Second *Nivose, An.* 11 (1802), *Conference du Code Civil, Tom.* ii. p. 37, that there was some discussion as to the meaning of the word '*descendants*' in this Article 759. '*Le Consul Cambacérès, demande si l'enfant naturel du bâtard jouira du bénéfice de cet article? Le C. Berlier observe, que l'Article ne peut s'appliquer dans toute sa latitude à un tel enfant, puisqu'on a décidé,* 1, *qu'il n'était pas héritier, mais simplement créancier;* 2°, *que cette créance, reduite à une qualité des biens et droits du père, ne les représente conséquemment point en entier. La Consul Cambacérès objecte, que quoique l'enfant naturel ne soit pas héritier, il a cependant droit à un tiers d'une part héréditaire dans la succession de son père; l'article transmet ce droit à ses descendants; or, s'il n'a que des enfants naturels, ils auront un neuvième d'une part héréditaire dans la succession de leur aïeul. L'Article est adopté.*' From this discussion some writers have inferred that the meaning of the Legislature clearly was, that the natural descendants of the bastard should take the succession on the death of their father. But we do not think that the text of the *Procés Verbal* supports this conclusion. It appears to us that the record of the debate leaves matters exactly as they were, and that no deci-

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sion was given on the question raised by *M. Cambacérès*. In the Article of the *Code* immediately preceding Article 766, *viz.* Article 765, it will be noticed that the word '*postérité*,' applied to the descendants of a bastard, occurs without any qualication whatever. It does not appear to us that there is in the language of the *Code* any real difference between the meaning of '*postérité*' and '*descendants*.' No one seems to have doubted that the term '*postérité*' here includes illegitimate children. The Crown concedes that all the Commentators are opposed to the restriction of the meaning of '*postérité*' to legitimate children, but alleges that the term '*descendants*,' like the word '*ascendants*,' when found alone in the *Code*, invariably means legitimate relations. This may be true in the parts of the law which treat of legitimate successions; but if this were invariably the case, why, we think, it may be fairly asked, has the Legislature added the qualification of '*légitimes*' to the word '*descendants*,' occurring in Article 757 of this very chapter of Irregular Successions. If '*descendants*' is a *vox signata*, always meaning legitimate descendants, why was it necessary to add the word '*légitimes*' in that Article. Was not the reason that the general word '*descendants*,' naturally and grammatically meaning both classes of children, lawful and illegitimate, required a qualification when it was necessary to restrict it to one of the classes? We may observe, in conclusion, that the circumstances of the case generally are very favourable for the claim of *Virginie Bruneau*. This may not affect the law of the case; but when the question is one of nicety and doubt, such considerations may not be without value. It will be observed that no other person, in any way connected with the *de cujus*, contests the succession. She stands alone as the only person claiming propinquity of any kind with the deceased. The sole opposition to her demand arises from the claim of the Public Treasury, or *Fisc*, to which estates absolutely vacant from want of owners, and having no one to claim them, fall as caduciary. But it is a rule of our law that the public can only succeed to the estates of private persons when no successor of any kind appears; or, as it is usually expressed, *Fiscies post omnes*. So the *Code* enacts, Article 723. [*Ante*, p. 170.] Again, the social relations which, by the former law of the Colony, may be said to have been almost forced upon

many members of the community, are worthy of notice. Till a comparatively late period all marriages between certain classes of the population were prohibited; and, undoubtedly, partly as a consequence of such a state of the law, there is still a very large number of persons of illegitimate birth in the class in life of the late *Pierre Bruneau* and his relations. The Claimant is the acknowledged daughter of his only brother. Her father died. She and her sister were taken into her uncle's family as his acknowledged nieces. They were treated by him, and all who knew them, as his children. They were brought up and educated by him as such. There can be no doubt that he intended that she and her late sister should be his heirs. Probably relying on the succession falling to them by law, he thought it unnecessary to make a Will in their favour, for this is, we believe, the first time the Crown has interfered in *Mauritius* to claim a succession on the ground of bastardy. Such considerations will not, as we have already said, make the law; but if we had found ourselves obliged to take a view adverse to the pretensions of the Claimant, her case assuredly would have been a very hard one. For the reasons above stated, we send the Claimant, *Virginie Bruneau*, into the possession of the estate of the late *Pierre Bruneau*, without costs."

The appeal to Her Majesty in Council was from this judgment.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *C. Parke*, for the Appellant:—

There is no dispute in this case as to the facts. The sole question is one of construction, whether "*descendants*" in Art. 766 of the *Code Civil* includes illegitimate descendants, and does not mean legitimate descendants exclusively. Now, we maintain that the latter construction is the true one, because, *primâ facie*, the word "*descendants*" in that Article means the class qualified by law to take, that is by representation for successors who predecease the opening of the succession. By our law, under the term "children" or "issue," natural children or their issue are excluded, and can only take as *personæ designatæ;* and if this be so, of which

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there is no doubt, of the word "issue," which imports a mere natural *exitus, â fortiori*, is it true of the word "*descendants*," which in the *Code* refers to succession according to law. Again the *Code Civil* nowhere permits a bastard to represent any one, a bastard may take in his own individual right, by force of special provision, but never *quà* representative. Arts. 331 to 338 of the *Code*, on the legitimation of natural children, *per subsequens matrimonii*, clearly shew that to be the law. The word "*descendants*" in the 332nd Art. is restricted to the legitimate descendants of a natural child; for by Art. 338 (1) a natural child, though acknowledged, cannot claim the rights of a legitimate child. This Article is an express recognition of the inferior *status* of a natural child. It is true that in the Articles 343 and 351, relating to adoption, the words "*descendants légitimes*" occur; but no argument can be derived from the omission of the word "*légitimes*" in the other Articles; the expression "*descendants légitimes*" being a mere redundancy, equivalent to, and used in the same sense, as we say "lawful children." The law relating to successions, *Liv.* III. *tit.* 1, Articles 723 and 724, and Articles 731 to 735, inclusive, shew that "representation" under the *Code Civil* is confined to legitimates; and although the word "*descendants*" is used over and over again, it is used as a word of art, and means no other than legitimate descendants. The subject-matter of that part of the *Code* is legitimate successions, and though the word "*descendants*" occurs in *Liv.* III. Ch. IV. on Irregular Successions, yet the *onus* lies on the Respondent to shew that it is used there in a different sense. In Art. 736 the direct line of descent is defined, and illegitimates are plainly excluded. In Chapter III. of the *Code Civil*, on Successions, Articles 745, 747, 748, 749, 750, and 753, it is clear that the word "*descendants*" there used can only mean lawful descendants: Article 745 clearly shews this, for it speaks of children succeeding although they be issues of different marriages. To come, then, to the Articles in the *Code Civil* relating to irregular successions—namely, Articles 756 to 766. The very commencement of the Art. 756, "*Les enfants naturels ne sont point hérétiers*," is enough to disable a bastard from taking as an heir, he cannot, therefore, be a successor except so

(1) See Art. *ante*, p. 170.

far as he is specially and exclusively made such, he cannot take under any mere general provisions. Natural children are not heirs: they take an appanage which the law gives them, but they do not take as heirs by descent. Art. 757 defines what it is that the law gives to natural children, and draws a careful distinction between the hereditary portions of the lawful child and the share of the natural child, who is to take one-third of the hereditary portion which he would have had if he had been legitimate. It is quite clear that the word "*descendants*," in the latter part of this Article, means the lawful (*légitimes*) descendants spoken of in the former part of the Article. But the 759th Article raises the very question at issue; for if "*descendants*" does not in this Article include illegitimate descendants, neither can it mean such in Art. 766, as it was held to do by the Supreme Court in the *Mauritius*. That the construction we contend for is the true one has been settled by authority, *Billard* v. *Billard*, decided on appeal by the *Cour de Cassation* on the 12th January, 1851, with the assent of *M. Troplong*. That case apparently was not known to the Court below, as it is not mentioned in the judgment. It is reported in *Le Journal du Palais*, A.D. 1851, p. 261; and it was there held, that a natural granddaughter, the daughter of a bastard, cannot succeed to her grandfather. That decision, it is true, is upon Art. 759, but the principle there decided applies equally to Art. 766 of the *Code*, for it is absurd to suppose that a natural niece can, but that a natural granddaughter cannot, succeed to the same *de cujus*; and this view is adopted by *Marcadé*, *Explication du Code Napoleon*, *Tom.* iii. pp. 111, 125 [5th Ed.]; *Demolombe*, the highest authority in *Europe*, in his Treatise on Successions, *Code Civil*, Arts. 759 & 766, pl. 88 B. and pl. 160 B.; and *Dalloz*, *Rep. Meth. et Alph. Jur. verb.* "*Succession*;" Discussions on the *Code*, *Procés Verbal* of the 2nd *Nivose*, *An.* 11 (1802), and *Conférence du Code Civil*, *Tom.* ii. p. 37. The construction put by the Appellant harmonizes the whole legislation of the *Code*. Any other construction would lead to all kinds of contradictions and difficulties. Suppose a natural brother left two families, one legitimate, the other illegitimate, are each to take *pari passu*? Such a case is unprovided for by the *Code Civil*. Art. 757 does not apply to representative succession, and Art. 338 forbids equality of suc-

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cession between two such Claimants. Such omission in the *Code* shews that the Respondent here is not intended to participate at all. Besides, what limits are you to put on the word "*descendants?*" Are you to have an illegitimate pedigree of infinite length? Again, it is clear that natural children of natural children cannot succeed as heirs to their father's or grandfather's estate, Art. 756; and yet it is said they are to succeed to their father's brother. The prefix of "*légitimes*" to "*descendants*" in the earlier part of Art. 757, does not assist the Respondent's case. It is used there for a special purpose, required by the context, and the word "*descendants*" is twice repeated afterwards in the very same sense, but without the word "*postérité,*" which is the word used in Art. 765, and means "issue," a more flexible term than "*descendants.*" It is rightly used there, since a natural child is qualified to participate in his own parents' succession: Arts. 757, 758.

The radical fallacy in the view taken by the Court below is, that it assumes that "*descendants*" in Art. 766 is large enough to include illegitimates, unless its meaning be expressly cut down by the context; whereas, as we contend, it is too small to include illegitimates, regard being had to the terms of Art. 756. The word "*Descendants,*" in Art. 766 is not rendered insensible by excluding illegitimates from its meaning; for a bastard, though himself incapable of representing, may form a source of descent to legitimate descendants, and it is with reference to them that the term is used throughout the chapter on "*Successions Irrégulières.*" There is, therefore, no pretext for construing the word in a new and non-technical sense. This interpretation is not only supported by the established canons of construction, but is in accordance with the view taken by all the leading Commentators in *France: Toullier, Le droit Civil Français* "*Successions,*" *Tom.* XV., p. 160; *Borleux, Mourton Ad.*, Art. 759, 766; *Zachariæ*, II., 2, 555, 670; *Demante,* "*Successions,*" Nos. 74 and 78. We contend, therefore, that the Respondent, being the natural niece of *Pierre Bruneau,* was not entitled by the law prevailing in *Mauritius* to succeed to his estate; and that in such circumstances the Crown alone became entitled to the succession, and that the judgment of the Court below, holding to the contrary, is erroneous and ought to be reversed.

Mr. *Coleridge*, Q.C., Mr. *D. R. Blaine*, and Mr. *Cookson*, for the Respondent:—

The Respondent claims to be entitled to the succession of her deceased uncle, *Pierre Bruneau*, as to one moiety of the estate in her own right, and as to the other moiety as *Légataire universelle* under the Will of her sister. We admit that the whole question depends on the true construction of that portion of the Art. 766 of the *Code Civil*, which provides for the passing of property to natural brothers or sisters, or their descendants. Our construction has been ratified by usage in the Island for sixty years, and there is no decision to the contrary in the French Courts. The term "Descendants" is to be interpreted according to its ordinary meaning, and in accordance with the principles of construction laid down in our Courts: *Broom's* Leg. Max., p. 532; *Vattal's* Law of Nations, B. 2, ch. xvii., sects. 271, 307. It is insisted on behalf of the Appellant that "*descendants*" is a legal term, which can only mean "legitimate issue," and the argument derived from the reference made to the use of the word in other Articles of the *Code*, so copiously referred to by the learned Counsel for the Appellant, is entirely founded on that assumption. But not one of the Articles of the *Code Civil* referred to in support of this doctrine is in point; and the case of *Billard* v. *Billard*, relied upon by the Appellant, is a decision upon Art. 759, and not upon Art. 766, which is the only one to be dealt with here. The analogies of English law do not apply. There is no direct authoritative interpretation of the word "*descendants*" in the French Courts. To ascertain, therefore, the intention of the framers of the *Code Civil* in the provisions made for irregular succession, we must look to the *status* and condition of illegitimates at the time of the promulgation of the *Code*. This is referred to by the learned Judges below in their judgment; and their reasoning is based on considerations of equity and humanity: *Demolombe, Traité des Successions, Tom.* ii., pp. 4, 12, 28, 32. Now, by Art. 338, the rights of natural children are to be settled under the title "*des Successions.*" Art. 723 establishes the principle as to such rights, and affords the key to the details contained in the Chapters as to Successions, both regular and irregular. This is illustrated by *Chabot*, in his *Commentaire*

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sur la Loi des Successions, &c., Tom. i., s. 3, p. 35. It is clear that the intention of the *Code Civil* is to keep not only both the legitimate and illegitimate branches of the family distinct, but their fortunes also, and to allow bastards to take, in some circumstances, as hereditary successors: *Code Civil*, Art. 758; *Chabot, Tom.* i., p. 560; *Demolombe, Tom.* ii., pp. 4, 5, 28—32. In the chapter of the *Code Civil* on Irregular Succession, the two main objects provided for are—first, what illegitimate children may take, and secondly, what transmit. In no case do they take as heirs. "*Postérité,*" in Art. 765, and "*descendants,*" in Art. 766, are synonymous terms, they include both legitimate and illegitimate children: *Dict. de la Académie Fran.* [Ed. 1811]; *Chabot, Tom.* i., p. 64; *Sirey's Les Cod. Annot.*, Art. 765, n. 1; *Demolombe, Tom.* ii., p. 215—216; *Toullier*, "*Le droit Civil Français,*" *Tom.* iv., p. 262. These authorities, many of which are referred to by the Judges of the Supreme Court in their judgment, fully establish the identity between the two descriptions of successors in this chapter of the *Code Civil.* The same view is taken by a modern French author not much known in this country, M. *G. J. Favard de Langlade,* in his work entitled "*Repertoire de la Nouvelle Legislation, Civile, Commercial, et Administrative,*" *Tom.* v. (Ed. *Paris,* 1823 and 1824), tit. "*Succession,*" *Code Civil,* Art. 766.

The issue, however, is not a mere question of construction, as contended for by the Appellant, but involves the fortunes and interests of a large portion of the population of the Island. The *status* of natural children in the Island of the *Mauritius* is peculiar. They are for the most part the offspring of the intercourse between the natives and the slave population. At the time the *French* were in possession of the Island slavery was established, and by the 5th Article of an Edict passed in the 9th of *Louis* XV., promulgated in that Island in the year 1724, marriage between whites and the slave population was forbidden: *Codes des Isles de France et Bourbon,* p. 248. The *Code Civil* was promulgated in *Mauritius,* and became law in the Island soon after 1803, when it was decreed at *Paris.* The Island was captured by the English in 1810, and by the 8th article of capitulation the inhabitants were to preserve their laws and customs. This article was confirmed by proclamation in 1810: *Clark's* Col. Law, p. 585. A claim similar

to the present has never been put forth by the Government; the coloured population have had no notice of such claim. This case, upon the construction of Art. 766 of the *Code Civil*, is the first that has ever been brought into Court. Here the Respondent is an orphan, the last survivor of all her family; the amount in litigation is her whole sustenance. The Supreme Court, after mature deliberation, refused to put the construction contended for by the Appellant; they held that the word "*descendants*" in Art. 766 includes illegitimate as well as legitimate descendants, and their judgment is consistent as well with the law as the justice of the case. It has been received by the Colonists as a just and satisfactory exposition of the law; and, we maintain, ought to be upheld and confirmed by this Tribunal.

Mr. *Parke*, in reply:—

It is insisted on the other side, that the history of the particular legislation, and the fact that the law of the 12 *Brumaire*, 1794, was in force when the *Code Civil* was promulgated, are to be regarded in considering this case. I admit the full force of the observation; but the *Code Civil* must be construed according to the plain and unambiguous meaning of its actual context. Nothing but the erroneous ingenuity of the early Commentators cited in the judgment of the Court below and on behalf of the Respondent, has given occasion to the present question. The Respondent's Counsel admit that '*descendants*' mean exclusively legitimate descendants in those parts of the *Code* which relate to legitimate succession, and also in the first part of the chapter "*Des successions irrégulières*;' but they insist that the latter part of the Art. 766 of the same chapter has a different and wider signification. This is contrary to the established canon of construction, that the same word is to retain the same meaning throughout an instrument, unless a special contextual cause is shewn to the contrary: *Hawkins* v. *Gathercole* (1). The *onus* to prove the exception lies on the party asserting such a distinction; accordingly it has been urged on behalf of the Respondent, that the Chapter on "*Successions irrégulières*" divides itself into two distinct parts—first, the transmission of a succession to a bastard; and, secondly, the transmission of a succession from a

(1) 6 D. M. & G. 21.

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bastard, and that a different construction of the word "*descendants*" ought to be applied to these two distinct parts; that, therefore, the case cited of *Billard* v. *Billard* may be good law as applied to Art. 759, but bad as applied to Art. 766; but to shew how untenable that construction is, I will put the following cases—First, a legitimate dies, leaving no relation or *quasi* relation other than a natural granddaughter, she cannot take any part of his succession, for Article 756 is express on that point, the whole, therefore, goes to the *Fisc*, notwithstanding that (*ex hypothesi*) there is no competition between the natural granddaughter and any legitimate family of the *de cujus*. Second, an illegitimate dies leaving no relation or *quasi* relation, other than a natural granddaughter, she cannot take, for Art. 759, as construed in the case of *Billard* v. *Billard*, expressly rules this; therefore, here too, the whole succession goes to the *Fisc*, notwithstanding the same hypothesis, and that the succession may have consisted exclusively of property acquired by the *de cujus* himself. In the absence of the authority of *Billard* v. *Billard*, there is no difference as regards the principle between these two illustrations. Then again, thirdly, an illegitimate dies leaving no relation, or *quasi* relation, other than a natural granddaughter or a natural niece, the former, as we have seen, cannot take, but it is argued that the latter can, that is that the lineal and near relation is excluded, and the collateral and more remote relation admitted. This is a *reductio ad absurdum*, fatal to the Respondent's case. This third illustration is evidently within the principle of the two former, and the whole property must go to the *Fisc*, that is the Crown. Great stress has been laid by the other side on the proposition, that the whole Chapter "*Des successions irrégulières*" is exceptional legislation. Let it be so admitted; it is, however, a fixed canon of construction that exceptions are not to be extended beyond their necessary limits. It is the essence of an exception that it does not extend itself. The word "*descendants*," therefore, cannot be enlarged beyond its primary signification merely because it occurs in connection with "*frères ou sœurs naturels*." Even if unenlarged it is not insensible. It is material to mark that Art. 766 is not a substantive rule, it is a mere exception on a previous Article, 756, which lays down the general rule, "*Les enfans naturels ne sont par hérétiers*." The

word "*Postérité*," in Art. 765, includes natural children, but not natural grandchildren: *Billard* v. *Billard*; but even if it did include the latter class, the Respondent is not a member of it, or in any sense posterity of the *de cujus*. She is a niece, and, therefore, not within the exception sought to be attached to the enactment of Art. 765. The words "*ou à leurs descendants*," do not occur in Art. 766, in connection with the legitimate brothers and sisters, and, therefore, if these die in the lifetime of the *de cujus*, their legitimate descendants do not represent them, for the rule of representation in Art. 742 has no application as between legitimate and illegitimate collaterals, and the property which the legitimate brethren and sisters would have taken if they had survived the *de cujus* goes at once to the *Fisc*. The fact that the privilege of representation is conceded to the illegitimate brothers and sisters, in regard to the property secured to them, is probably due to the benevolent consideration that this class is ordinarily less well provided for than the legitimate class. Be the reason, however, what it may, it affords no argument in the event of the natural brother predeceasing the *de cujus* and having no legitimate representatives, why the property in question should not go to the *Fisc*, The construction claimed by the Crown ought to be upheld, because it harmonizes the whole legislation of the *Code* on the subject of succession; that insisted on by the Respondent leads to all sorts of contradictions and absurd anomalies.

1866
18 *June*.

Judgment was reserved, and now delivered by

THE LORD JUSTICE TURNER:—

This case has come before us upon an appeal brought on behalf of the Government of the Island of *Mauritius* from a decision of the Supreme Court of that Island. The question decided by that Court, and which is raised by this appeal, relates to the right of succession to the property of *Pierre Bruneau*, deceased.

Pierre Bruneau was a natural child of his father and mother, recognised by them. He had a brother and two sisters, also natural children of the same father and mother, and also recognised by them. His father and mother had no legitimate descendants. His father and mother, and his brother and sisters, all

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died in his lifetime. His sisters had no descendants; his brother had two natural children, *Virginie Bruneau* and *Elodie Bruneau*, who were recognised by their father, but he had no lawful descendant. Upon the death of the brother, his two natural children, *Virginie Bruneau* and *Elodie Bruneau*, went to live with their uncle, *Pierre Bruneau*, and they continued to live with him down to the time of his death. He had been married, but he had no legitimate descendant, and his wife had predeceased him. He died intestate, leaving the two natural children of his natural brother him surviving. *Elodie Bruneau*, one of these children, has since died, having duly constituted her sister, *Virginie Bruneau*, her universal legatee. Upon the death of *Pierre Bruneau* the question arose whether the natural children of his natural brother were entitled to succeed to his property, or whether the right to succeed to it belonged to the Government of the Island. This question formed the subject of the proceedings which have led up to this appeal. It was decided by the Supreme Court of the Island in favour of *Virginie Bruneau*, the surviving natural child of the natural brother, and it is from this decision that the appeal before us is brought.

This question is purely one of French law, depending upon the provisions of the *Code Civil*, which is in force in the Island of *Mauritius*, and constitutes the law of that Island. It is admitted on all hands to be a question on which there has been no recorded decision in the Courts of *France*; and as it is one of importance and of great difficulty we cannot but regret that means have not been provided for enabling us to obtain the decision of the French Courts upon it, as they must be more familiar than the Judges of this Country can be with the language and provisions of the *Code Civil*. We have, however, endeavoured to obtain—and, from our own resources, and through the kind assistance of a gentleman of the French Bar, have, as we believe, obtained all the materials which can enable us, or which could have enabled the French Courts, to form a judgment upon the subject; and we have given the case our most deliberate and anxious consideration. We proceed, therefore, to state the conclusion at which we have arrived, and the reasons on which that conclusion is founded.

Before entering upon the consideration of the particular Articles

of the *Code* on which this question must ultimately depend, it is, as it has seemed to us, important to consider the general principles by which the Courts are to be governed in the construction of the *Code*. These principles, as laid down by the Court of *Cassation*, and the leading text writers of *France*, are conveniently collected in the 3rd section of *Sirey's* note upon Article 1 of the *Code;* and we select the following Articles of that note as bearing more particularly upon the question before us:—

111. "*Les tribunaux ne peuvent, là où la loi ne distingue pas, créer des distinctions qui en altèrent le sens.—Ce principe est élémentaire en droit: une foule de décisions en ont fait l'application.*"

112. "*Ils ne peuvent non plus, lorsque le sens de la loi est positif et certain, se dispenser de l'appliquer telle qu'elle est: il ne leur appartient pas de la modifier ou restriendre par aucune considération, quelque puissante qu'elle soit.*"

112 *bis.* "*Et bien qu'une erreur se soit glissée dans le texte d'une loi, les tribunaux n'en doivent pas moins appliquer la loi telle qu'elle a été publiée: il ne leur appartient pas de rectifier l'erreur.*"

113. "*On ne peut se prévaloir des motifs d'une loi contre le texte de sa disposition.*"

114. "*L'application spéciale d'un principe général à un cas particulier, n'emporte pas dérogation virtuelle à ce principe pour tous les autres cas.*"

119. "*Les lois spéciales doivent être entendues selon leur propre système, sans y ajouter les règles du droit commun.*"

It results, we think, from these principles, that in determining this question we are to be guided by the plain sense of the law which applies to the question; that we are to make no distinction which can alter that sense; that, assuming the sense of the law to be positive, we are not to modify or restrict the law; that we are not to weigh the reasons of the law against the words of it; and (which, perhaps, is more pertinent in its bearing upon the present case) that if the law applicable to the case be special, we are to understand it according to its particular scheme ("*propre système*"), without adding to it the rules of what is called the common law.

Guiding ourselves then, by these principles, let us first consider the Chapter of the *Code* on Irregular Successions, on which this question principally, if not wholly, depends. This Chapter, it is to

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be observed, deals with two distinct subjects—the rights of natural children in the property of their Father and Mother, and the succession to natural children dying without posterity. Articles 756 to 764, inclusive, apply to the former of these subjects; Articles 765 and 766 to the latter of them.

We pass by, for the present, the consideration of the Articles 756 to 764, and proceed to consider the Articles 765 and 766, as they stand by themselves. These two Articles are in these terms:—

765. "*La succession de l'enfant naturel décédé sans postérité est dévolue au père ou à la mère qui l'a reconnu; ou par moitié à tous les deux, s'il a été reconnu par l'un et par l'autre.*" [L. 2, § 1, ff. *ad. Senat. Tertull.*; LL. 2, 4, 8, ff. *Undè cognati.*]

766. "*En cas de prédécès des père et mère de l'enfant naturel, les biens qu'il en avait reçus, passent aux frères ou sœurs légitimes, s'ils se retrouvent en nature dans la succession: les actions en reprise, s'il en existe, ou le prix de ces biens aliénés, s'il est encore dû, retournent également aux frères et sœurs légitimes. Tous les autres biens passent aux frères et sœurs naturels, ou à leurs descendants.*"

We have here, therefore, a distinct and positive law that, in such a case as the present, that of a natural child dying without posterity, and of the father and mother of the natural child having died in his lifetime, the property of the natural child not received from the father and mother shall go to his natural brothers and sisters—"*ou à leurs descendants.*" There is no restriction or limitation on the word "*descendants.*" We are not here dealing with a law which, like our own law says, that an illegitimate child is "*nullius filius.*" The law we have to deal with is a law which admits certain claims of illegitimate children when recognised by their parents, and which acknowledges the relation between illegitimate children and their parents, and between the illegitimate children themselves. *Primâ facie*, therefore, it is difficult to see upon what ground a limit ought to be put upon the meaning of the word "*descendants*," or why those who are recognised by their parents as their children, and whom the law recognises as their children, should not be held to stand in that character, or be deemed to be "*descendants*" of their parents within the meaning of these Articles. The context of the Articles does not appear to

us to support any such view. It cannot, we think, be disputed that the words "*postérité*" and "*descendants*" are used in these Articles as convertible terms; and it cannot surely be denied that recognised illegitimate children, according to the provisions of the French Code, fall within the description of posterity of their parents. But what is more remarkable in these Articles is this: that, except as to property derived from the Father and Mother, legitimate brothers and sisters are wholly excluded from the succession to the property of a natural child, and are so excluded in favour of the natural brothers and sisters of the natural child, and we cannot but think it would be a strange construction of these Articles to hold that, although legitimate brothers and sisters are thus excluded in favour of natural brothers and sisters, the word "*descendants*" should be so construed as to apply only to legitimate descendants, and thus exclude natural descendants in favour of legitimate descendants. Yet this is the length to which the Appellant's argument must be carried in order to maintain this appeal.

Taking, then, the case to depend upon these two Articles alone, we think there could be little, if any, doubt that natural children ought to be considered as "*descendants*" within the meaning of these Articles. It was said, indeed, on the part of the Appellant, that the word "*descendants*," *ex vi termini*, signifies those who are capable by law of succeeding; that it of necessity refers to the known legal course of inheritance; but however this may be, when the word is applied to a settled and recognised course of descent, it cannot, we think, be so when it is applied to a line of succession newly created by law, and created in favour of persons not falling within the settled and recognised course of descent. At all events we think that this position on the part of the Appellant cannot be supported against the opposing *indicia* of intention to which we have referred. The argument on the part of the Appellant, however, was mainly rested upon the other portions of this Chapter on Irregular Successions, and upon other Articles of the *Code*. We shall presently refer to these arguments; but before doing so we think it right to observe that, in our opinion, too much weight ought not to be attached to arguments derived from these sources. We are not disposed to go the length of saying that one part of the

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Code cannot be resorted to for the purpose of explaining another part of it; but Articles 765 and 766 may well be considered to constitute, and, in our opinion, do constitute, a special law for determining the succession to natural children dying without posterity; and looking to the rules laid down for the interpretation of the *Code*, we think that special laws ought, as far as possible, to be construed according to the terms in which they are expressed, without either the general laws or the terms of other special laws being called in aid for the construction of them. We should hesitate, however, to dispose of this appeal upon this ground alone, or without referring to the very able arguments which were urged at the Bar in support of it.

These arguments were partly founded upon Article 756 of the *Code*. That Article is as follows:—

756. "*Les enfants naturels ne sont point héritiers; la loi ne leur accorde de droit sur les biens de leur père ou mère décédés, que lorsqu'ils ont été légalement reconnus. Elle ne leur accorde aucun droit sur les biens des parents de leur père ou mère.*" [*Inst. l.* 3, *t.* 4, § 2; *L.* 2 *et* 8, *ff. Undé cognati: Nov.* 89, *cap.* 2.—*C. c.* 334 *et s.* 908.]

This Article is relied upon as establishing two points: First, that natural children have not the character of heirs; and, secondly, that they cannot, by law, take any part of the property of the relations of their father or mother. But although natural children have not the character of heirs, the law nevertheless accords to them certain rights and interests (which are defined by Articles 757 and 758) in the property of their parents, even as against the legitimate descendants of those parents, and still greater rights and interests against the other relations of those parents. It makes a wide and marked distinction between legitimate and natural children, attaching to the former the character of heirs, and refusing that character to the latter, but it by no means treats the latter as having no connection with, or no claim upon the property of their parents; and this we think tends much to elucidate the provisions against natural children taking the property of the relations of their father or mother. Such property may well have been considered as family property to which natural children, not being regarded as members of the

family, had no right to succeed. We do not, therefore, feel ourselves much pressed with the arguments founded upon Article 756.

The main stress of the Appellant's argument, however, rested upon the 759th Article of the *Code*, and upon the interpretation put upon it in the case of *Billard* v. *Billard*, and upon the opinions of the great majority of the Commentators upon the *Code* in conformity with that decision. This Article is in these terms:

759. "*En cas de prédécès de l'enfant naturel, ses enfants ou descendants peuvent réclamer les droits fixés par les Articles précédents.*" [*L.* 4. *ff. Undé cognati.*]

Looking to the decision in *Billard* v. *Billard*, and to the opinions of the Commentators to which we have referred, it would not, we think, be right for us to suggest any doubt upon the meaning of the word "*descendants*" in that Article. We think that the word, as used in that Article, must be taken to mean "*descendants légitimes*," and that natural children could not claim the benefits given by this Article. The argument founded upon this Article is therefore well deserving of consideration; and perhaps it might be held to decide this case if this Article and Article 766 had reference to the same subject and to the same state of circumstances. But not only do these Articles constitute distinct laws, but they refer to wholly different states of circumstances. The one refers to the property which natural children have taken from their parents; the other, to the property of the natural children themselves not derived from their parents. The one deals only with the substitution of the children or descendants of pre-deceased natural children for the natural children themselves, it refers, as we understand it, to property which has never come to the natural children themselves, and involves, therefore, no other question than this: Whether the children or descendants taking by substitution are to be legitimate children or descendants only? The other extends to the disposition, and, as it seems to us, to the complete disposition of the property of the natural children themselves, and gives it to their natural brothers and sisters, "*ou á leurs descendants*," thus providing for what has not, so far as we can see, been before provided for—the devolution of the property of natural children dying without legitimate or illegitimate descen-

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dants. These circumstances are, we think, sufficient to prevent the construction of the word "*descendants*" in the latter of these Articles being governed by the construction which has been put upon it in the former of them.

The provisions of the Chapter on Representation were also referred to on the part of the Appellant in support of the argument upon the 759th Article; but what we have already said upon the principal argument meets this argument also. It was further attempted on the part of the Appellant to draw some argument from the 767th and 768th Articles of the *Code*, but these Articles do not seem to us to refer to irregular successions. They refer, as we think, to the regular order of succession, taking it up after the failure both of legitimate and illegitimate children, and after the exhaustion of the rules applicable to succession in such cases.

Another argument, which was much relied upon on the part of the Appellant, was, that the construction contended for on his part would render the whole *Code* uniform and consistent; whereas the construction on which the decision appealed from proceeds, would, as it was said, render the different parts of the *Code* conflicting and inconsistent. But this argument in favour of uniformity is, we think, entitled to but little, if any weight, when it is attempted to be applied to different parts of the *Code* having reference to wholly different states of circumstances, more especially having regard to the rules of construction to which we have referred. Even upon the construction contended for by the Appellant, the *Code* would be by no means uniform in its effect; for, supposing legitimate children only to take under the 766th Article (which is what the Appellant contends for), they would not take in the same manner or to the same extent as they would take under the other Articles. They would, as it seems to us, take under the 766th Article only property not received by the natural brother or sister from his parents. The property received from the parents would be subject to the *droit de retour*.

The difficulties which would arise upon the construction which the Courts of the Island have adopted were also much relied upon on the part of the Appellant. We are by no means unaware of these difficulties. If there be legitimate children, the illegitimate children may take nothing, or they may take equally with the

legitimate children, or they may take the portions prescribed for them by Article 757. But these are not the questions before us, and we give no opinion upon them. If the natural children are descendants within the meaning of Article 766, they are not less qualified to take because in certain events they may take nothing, or may take equally with the legitimate children, or may take only a portion of the share to which they would have been entitled had they been legitimate. The true question in this case is, whether, as between them and the State, they are entitled to take; and we are of opinion that upon the true construction of the *Code* they are so entitled. We think so, both for the reasons we have assigned, and for the reasons which are assigned in the very able judgment of the Court in the Island, to which the following observations may be added.

It is clear, from Article 723, that in the case of regular succession the State takes only after failure both of legitimate and natural children. It is equally clear that, under Article 766, the natural brothers and sisters, if surviving, would have taken, and the question, therefore, is in fact a question of succession to or substitution for a natural brother or sister. Could it have been intended that the State should be put in a better position against natural children, whose parents would have taken, by a construction to be put upon the word "*descendants*" confining it to legitimate children? We think that, had there been any such intention in favour of the State, it would have been clearly and definitively expressed. We admit the case to be one of great difficulty, and that the opinions of the Commentators upon the question are conflicting, and to such a degree that it can hardly be said to which side the greater weight is due; but upon the whole we think that the better reasons are in favour of the Respondent, and we agree in the judgment appealed from. We shall, therefore, humbly recommend her Majesty to dismiss this appeal, and to dismiss it with costs.

Solicitors for the Appellant: *Parke & Pollock.*
Solicitors for the Respondent: *R. Comyn.*

J. C.* 1866 June 18, 19, 21.

VICTOR ROLET, BEN ROBERT, AND THOMAS WILSON . . . . . } APPELLANTS;

AND

THE QUEEN AND JOHN SHAW, ACTING COLLECTOR OF CUSTOMS FOR THE PORT OF SIERRA LEONE . . . . . } RESPONDENTS.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SIERRA LEONE.

Sierra Leone Ordinances—Harbour dues—Seizure of goods and boats—Onus probandi—Condemnation—Reversal of sentence with damages and costs.

Sentence of the Vice-Admiralty Court of *Sierra Leone*, condemning goods and boats seized for breach of the Customs Ordinances of the Colony, reversed, with damages and costs: it being proved that the vessel from which the goods were unshipped, though off the harbour of *Freetown*, was not within three miles (the limit of jurisdiction) from the shore at the time of the unloading, and consequently not liable to the harbour dues payable under the the Customs Ordinances.

Where goods were unshipped in the immediate precincts of the harbour, the *onus* of proving that the vessel was not actually within the harbour, lies on the party claiming exemption from harbour dues.

THE appeal in this case was brought from a decree of the Vice-Admiralty Court of *Sierra Leone*, whereby certain goods belonging to the Appellant, *Rolet*, were, with two boats belonging to the other Appellants, held forfeited to the Crown, and their respective owners condemned in costs. The goods for having been illegally unladen and unshipped from a vessel while at anchor within the harbour of *Sierra Leone*, contrary to the provisions of certain local Ordinances of that Colony; and the boats for having been illegally used in the removal and conveyance of such goods.

The following are the sections of the Order in Council and Ordinances, referred to and relied on in the pleadings and judgment:—

By the 6th section of the Order in Council of the 13th February, 1849, it is provided:—"That no goods shall be laden,

* *Present*:—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, and SIR EDWARD VAUGHAN WILLIAMS.

or water-borne to be laden, on board any ship, or unladen from any ship, in the said Colony, until due entry shall have been made of such goods, and warrant granted for the lading or unlading of the same; and the person entering any such goods shall deliver to the Collector of the Customs, or other proper officer, a bill of the entry thereof, fairly written in words at length, containing the name of the exporter or importer, and of the ship, and of the master, and of the place to or from which bound, and of the place within the port where the goods are to be laden or unladen, and the particulars of the quality and quantity of the goods, and the packages containing the same, and the marks and numbers on the packages, and setting forth whether such goods be the produce of the British possessions or not; and shall also deliver at the same time one or more duplicates of such bill, in which all sums and numbers may be expressed in figures, and the particulars to be contained in such bill of entry shall be written and arranged in such form and manner, and the number of such duplicates shall be such as the Collector or other principal Officer shall require."

The 21st section of the same Order in Council is as follows:— "It is further ordered that all vessels, boats, carriages, and cattle made use of in the removal of any goods liable to forfeiture under this Order, or under any Act or Order relating to the customs, or to trade or navigation, shall be forfeited; and every person who shall assist or be otherwise concerned in the unshipping, landing, or removal, or in the harbouring of such goods, or to whose hands or possession the same shall knowingly come, shall forfeit the treble value thereof, or the penalty of one hundred pounds, at the election of the Officers of the customs, and the averment in any information or libel to be exhibited for the recovery of such penalty, that the Officer proceeding has elected to sue for the sum mentioned in the information or libel, shall be deemed sufficient proof of such election without any other or further evidence of such fact."

By the 4th section of the Colonial Ordinance, dated the 31st December, 1849, it is enacted, that the importer of any goods shall pay down all duties due thereon at the time of making the entry of the same, previous to the unlading thereof, directed by

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the 6th section of the Order in Council of Her Majesty (13th February, 1849), and the Collector or other proper Officer shall thereupon grant his warrant for the unlading and landing or transhipment of such goods. By the 11th section of the same Ordinance, it is enacted, that no goods that shall be subject to the payment of any duties of Customs upon importation, shall be unladen from any ship or vessel in the Colony until due entry shall have been made of such goods, and warrant granted for the unlading of the same, in conformity with the provisions of the 6th section of the Order in Council (13th February, 1849), and if any such goods shall be unladen contrary thereto, by the regulations of the same section of the said Order such goods shall be forfeited. The 13th section enacts, that goods subject to the payment of duties of Customs shall not be unladen at any other place than the port of *Freetown*, or landed at any other place than the public wharf at *Freetown*, unless a warrant or sufferance be first granted expressly for the same, and unless in the presence of an Officer of Customs, except when the Officer granting the warrant states therein that the presence of an Officer is unnecessary. Goods landed contrary to this provision are to be forfeited.

By the 2nd section of the *Sierra Leone* Ordinance, dated 19th July, 1854, it is enacted, that if any goods liable to the payment of duties shall be unshipped from any ship or boat in the Colony of *Sierra Leone* (Customs' or other duties not being first paid or secured), the same shall be forfeited; and by the 8th section of the same Ordinance it is enacted, that all ships and boats, or other means of conveyance made use of in the removal or conveyance of goods liable to forfeiture, shall be forfeited.

By another Ordinance of the Colony, dated 9th August, 1850, section 1, it is enacted, that every ship or vessel that shall arrive at any port or place of or belonging to, or shall come within the jurisdiction of the said Colony, shall pay certain light-house dues as therein mentioned.

The facts of the case were as follows:—

The Appellant, *Rolet*, the owner of the goods seized (a French subject, resident in *France*), had a mercantile establishment at *Freetown*, in the Colony of *Sierra Leone*, where he carried on business through his agent, *Honorè Lecomte*, under the title of

"*Malfilatre & Co.*" The other Appellants, *Robert* and *Wilson*, the owners of the two boats seized, were *Kroomen* and licensed boatmen, both residing at *Sierra Leone*.

On the evening of the 11th April, 1865, *Lecomte* received information that a French vessel, the *Belus*, consigned to Messrs. *Broadhurst & Co.*, of *Fouricaria*, near *Mellicourie*, a distance of about one hundred miles from *Sierra Leone*, and out of its jurisdiction, was at anchor about four miles outside *Cape Sierra Leone*, and beyond the jurisdiction of the Colony; having on board some goods belonging to the Appellant, *Rolet*.

Barlatt, a native clerk, employed by *Lecompte* to assist him in carrying on the business of the firm of *Malfilatre & Co.*, hired boats for that firm, and caused the goods in question to be transhipped from the *Belus*, so lying outside *Cape Sierra Leone*, into such boats; but before the usual entries could be passed at the Custom House for the goods, and the duties paid on them, and permission obtained to land them, the Customs Office had closed. Meanwhile the boats, with the goods, some of which were perishable, being in transit to *Freetown Harbour* and a tornado threatening; *Lecompte*, in order to prevent the goods from remaining in the boats and getting spoilt, obtained a temporary permit (it being after business hours) from the Acting Collector, at his private residence, for liberty to land the goods and deposit them in the Customs shed until the entries could be passed and duties paid on them on the following day. On the same day, and after the temporary permit had been obtained, a portion of the goods was landed at the wharf from the boats. On the following day, the 13th of April, 1865, *Barlatt*, before the remainder of the goods were transhipped from the vessel, passed the usual entries before the acting Collector for the whole of the goods, which were described in such entries as having come from *Mellicourie*; the duties on that portion of the goods which were to be sold in *Sierra Leone* being secured by a Bond given to the acting Collector, who received cash for the wharfage.

From the evidence it appeared to have been the practice of the Custom House authorities at *Freetown*, for many years, to permit goods which had been transhipped into boats from vessels lying at anchor three miles outside *Cape Sierra Leone*

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(which is beyond the limits of the Colony) to be imported into the Colony, and to describe such goods in the entries passed for them at the Custom House, as coming from *Mellicouris* or elsewhere.

The whole of the goods for which entries were thus passed at the Custom House, were transhipped by the boats on the 12th and 13th of April, 1865, and none afterwards. Such of the goods as were for exportation remained in charge of the Custom House authorities; whilst those for sale in the Colony were delivered, upon the Customs' duties being secured, to the firm of *Malfilatre & Co.*, who took part of them away; but before the remainder could be removed to the store of the Appellant, *Rolet*, they were seized by the acting Collector, along with the two boats belonging to the Appellants, *Robert* and *Wilson*, upon the ground that the *Belus* was at anchor within the jurisdiction of the Colony, and that the goods had been illegally removed from her before the Customs' duties were paid or secured, and that the interim permit was obtained upon a misrepresentation that the goods were from *Mellicouris*.

After the *Belus* had left *Sierra Leone*, and on the 9th of May, 1865, a Monition was granted in pursuance of an affidavit of seizure at the suit of Her Majesty, by His Honour *John Carr*, the Chief Justice and Judge of the Vice-Admiralty Court of *Sierra Leone*, against the Appellant, *Rolet*, which Monition was served on *Lecomte* as his agent. By this Monition penalties amounting to £2,450 were sought to be recovered against the Appellant, *Rolet*.

The suit was commenced by Mr. *Dougan*, a private Proctor, although Mr. *Huggins*, Her Majesty's Advocate, and a Proctor in the Vice-Admiralty Court, was then in *Sierra Leone*.

On the 20th of May, 1865, the Chief Justice *Carr* embarked for *England*, having first appointed, in pursuance of the power conferred on him by his Commission, and with the concurrence of the acting Governor of the Colony, Mr. *Skelton* to be Deputy Judge of the Vice-Admiralty Court, for the purposes specified in the Commission.

Mr. *Skelton* died shortly after his appointment, whereupon Mr. *Huggins*, Her Majesty's Advocate, being then acting Chief Justice in the Colony during the absence of the Chief Justice, by an instrument dated the 23rd of May, 1865, with the concurrence of the acting Governor, appointed *George William Nicol*, the then Colonial Secretary of *Sierra Leone*, to be Deputy Judge of the Vice-

Admiralty Court, who, in such character, assumed jurisdiction in the case.

A claim was brought in on behalf of the Appellants for the restoration of the boats and goods, with damages, costs, charges, and expenses, by reason of such illegal seizure and detention. This claim was supported by an affidavit stating, among other things, that the *Belus* was out of the jurisdiction of the Colony when the goods seized were removed from her, that the Customs' duties had been fully paid on them, and that the circumstances alleged in support of the seizure were wholly incorrect.

Upon this claim Mr. *Nicol*, acting as such Deputy Judge, ordered the Seizor's Proctor to bring in a Libel, and proceed by plea and proof.

A Libel was brought in on behalf of the Seizor, but the same was objected to by the Claimants' Proctor, who urged that, assuming the circumstances set forth in the Libel to be true, they were insufficient in law to warrant the Seizor's prayer; whereupon the Seizor's Proctor abandoned the claim for penalties, but supported the seizures of the boats and goods; and the Deputy Judge decreed the Libel to be reformed by striking out the claim for penalties, and admitted the Libel so reformed. This Libel did not include the Appellants, *Robert* and *Wilson*.

A responsive allegation was brought in on behalf of the Claimants, in which, by the first four articles, the Claimants protested to the jurisdiction of the Court so constituted, and alleged that Mr. *Nicol* was not the lawful Deputy Judge and Commissary of the Vice-Admiralty Court of *Sierra Leone*, as alleged in the Libel. The plea traversed the facts alleged in the Libel as to the seizure, and set forth, among other things, that the firm of *Malfilatre & Co.* did not remove any other goods from the *Belus* than those set forth in the entries passed at the Custom House for the firm; that there was no attempt to conceal anything from the acting Collector, or his officers, or to commit any fraud; and that the Appellant, *Rolet*, did not make untrue entries at the Custom House, and did not unship and assist in the unshipping of any of the goods from the *Belus* in the manner set forth in the Libel: that it was by *Lecomte's* authority and responsibility that *Barlatt* ordered the goods to be removed into boats, but that the

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vessel *Belus*, from which they were removed, was then more than four miles outside *Cape Sierra Leone*, and out of the jurisdiction of the Colony, and that *Barlatt* had paid all the duties of Customs, and did every other matter and thing that was usually done in like cases at the *Sierra Leone* Custom House.

The Seizor's Proctor objected that the Claimants (having in the first four articles of the plea excepted to the jurisdiction of the Deputy Judge) should appear under protest; whereupon an appearance under protest was ordered to be given in, and the Seizor's Proctor moved that the first four articles of the plea be rejected, which motion was opposed by the Claimants' Proctor.

On the 26th of June, 1865, the Deputy Judge made a decree, and ordered the plea to be reformed by striking out the first four articles respecting the jurisdiction; and on application for leave to appeal against such decree, the Deputy Judge refused to grant such leave, as being premature.

The Claimants' Proctor then moved that the evidence in the case be taken *viva voce* in open Court, but the Deputy Judge rejected the application, and ordered the evidence to be taken before the Registrar.

On behalf of the Seizor, *Pike*, the Harbour Master, was examined. He stated that the *Belus* was, in his opinion, within the jurisdiction on the 14th of April, 1865, which was the day after the goods had been unladen and the Customs' duties paid on them. He stated, that he went to *Cape Sierra Leone* on the previous evening, the 13th, with the intention of boarding the *Belus*, but it was so dark he did not do so, but that he had every reason to believe the vessel was in the same position when he was on board on the 14th of April as she was on the previous evening, namely, on the day the goods were removed from her; and that he thought that the vessel had not shifted her berth between the 13th and 14th of April, because from *Freetown* he could perceive no change in her position, but that this was only his supposition. *Hanson*, the Landing Surveyor of Customs, who was with Mr. *Pike*, the Harbour Master, on the 14th of April, when he boarded the *Belus*, and also on the previous day, stated that he could not swear positively that the *Belus* was in the same position on the 13th as on the 14th of April, but he had every reason to suppose she

was, as the only difference he should allow for would be her swing to the tide. He further stated, on cross-examination, that it was the practice at the Custom House to allow goods taken from ships at anchor off *Cape Sierra Leone*, and without the jurisdiction, to be imported on payment of the duties, and to allow any place out of the jurisdiction to be inserted in such entry as the place they came from, although the Custom officers well knew the goods were transhipped outside the Cape. *Johnson*, the lighthouse-keeper, also deposed that the *Belus* was at anchor, to the best of his knowledge, one mile from *Cape Sierra Leone;* but when cross-examined, he declared that he could not positively swear that the vessel was at anchor less than three miles off *Cape Sierra Leone*. Three witnesses were called on behalf of the Claimants, *Coker*, the Captain of one of the boats into which the goods were removed from the *Belus* on the 12th and 13th of April, 1865, and two boatmen, who proved that the vessel was at anchor, when the goods were removed from her, more than three miles off *Cape Sierra Leone*.

Judgment was pronounced by the Deputy Judge on the 17th of August, 1865; after observing that the question of the goods unladen from the *Belus* while out of the jurisdiction of the Colony was the real issue, and that it was incumbent upon the Appellant, *Rolet*, to prove that the goods were unladen from the *Belus* while out of the jurisdiction, that is, three miles from the Colony, or three miles from a line running from point to point, decided that the goods, being liable to payment of duty, were unladen from the *Belus* while at anchor within the Colony before due entry of such goods, and also before any warrant or sufferance had been granted for the unlading thereof, contrary to the Ordinances of the Colony of the 31st December, 1849, sections 4, 11, and 13; the Order in Council of the 13th February, 1849, section 6; the Ordinance of the 19th July, 1854, sections 2 and 8; and the 21st section of the Order in Council of 13th February, 1849. He also held, that the vessel being within the jurisdiction, lighthouse dues became payable under the 1st section of the Ordinance, 9th August, 1850; and the fact that the acting Collector did not demand the lighthouse dues, shewed he was not aware of the incorrectness of the statements made by *Leconte* and *Barlatt*, but gave credit to them. His Honour further observed, that this cir-

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cumstance, independent of others, went to shew that the account given by the Seizor of conversations between himself, *Lecomte*, and *Barlatt*, contained the true version of the transaction with these parties. The *Belus* having, in His Honour's opinion, been clearly proved to have at one time been within the jurisdiction of the Colony, and the lighthouse dues not having been paid for her, was, in his opinion, another ground for the forfeiture of the goods, under the 2nd section of the Ordinance of the 19th July, 1854, whether the vessel was or was not within the jurisdiction of the Colony at the time the goods were unladen from her. The Deputy Judge considering, therefore, that the goods which were unladen and unshipped from the *Belus* into the boats, and landed at the wharf at *Freetown*, were illegally removed from her, held that the goods and boats were forfeited to the Crown, and condemned the Claimants in the costs of the prosecution.

The Appellants appealed from this decree, as also from the interlocutory decree of the 26th of June, 1865.

Mr. *Edmund F. Moore*, Mr. *Rainy*, and Mr. *Pater*, for the Appellants:—

We appeal as well from the interlocutory decree of the 26th of June, 1865, by which the pleas to the jurisdiction of the Vice-Admiralty Court, as then constituted, were rejected and ordered to be struck out; as from the final decree condemning the goods and boats. Our application to appeal from the interlocutory decree was refused, as premature, but we are entitled to question that decree now, since it has been held in this Court that the hearing of a cause is one continuous act: *Barry* v. *Butlin* (1); *Handley* v. *Edwards* (2); and that it is not necessary to assert an appeal against an interlocutory decree, even though by so doing the whole question involved in the ultimate appeal might have been raised: *Cameron* v. *Fraser* (3); *The Queen* v. *Belcher* (4); *Williams* v. *The Bishop of Salisbury* (5); *Jones* v. *Gough* (6). The objection taken as to the jurisdiction of the Deputy Judge was well founded, Mr. *Nicol* having no jurisdiction. His appointment

(1) 1 Moore's P. C. Cases, 98.
(2) 4 Ibid. 407.
(3) 4 Ibid. 1.
(4) 6 Moore's P. C. Cases, 471.
(5) 2 Ibid. (N.S.) 375, 391.
(6) 3 Ibid. (N.S.) 1.

as Deputy Judge was invalid. The commission to Chief Justice *Carr* appointing him Judge of the Vice-Admiralty Court, in pursuance of the Letters-Patent, dated the 26th of May, 1859, gave him power, under certain circumstances, to depute and surrogate a deputy; that power he exercised in the appointment of Mr. *Skelton*, upon whose death he might, had he been in the Colony, have exercised the same power again, by making a fresh appointment, but being absent from the Colony, and the office of Judge of the Vice-Admiralty Court vacant, the Statute, 26 & 27 Vict. c. 24, s. 4, provides that the acting Chief Justice for the time being shall be such Judge; and Mr. *Huggins* being the then acting Chief Justice, was, under that Statute, the Judge of the Vice-Admiralty Court during the Chief Justice's absence. He had, however, no power under that Statute to surrogate or depute a deputy. The Statute controlled the commission, and under it the Chief Justice *Carr*, or Mr. *Huggins*, as acting Judge, were precluded from naming a deputy. Power to surrogate a Deputy Judge can only be by Act of Parliament. In the case of *The Queen* v. *Dulwich College* (1), Lord *Campbell* says, "the Crown cannot enable a man to appoint Magistrates:" *Jewetson* v. *Dyson* supports the same position (2). The commission granted by *Huggins* to *Nicol* was, therefore, *ultra vires*, and illegal. Such was the plea to the jurisdiction, which we submit was well founded, and ought to prevail.

With respect to the principal appeal, we contend that the decree of the 17th of August, 1865, besides being pronounced by a Judge without jurisdiction, was unwarranted by the circumstances disclosed in the evidence, improperly and irregularly obtained, and bad in law. The seizure, in the first instance, was illegal and unjustifiable; the burthen of proof to justify the seizure of the boats and goods of the Appellant was on the Seizor, who failed to establish any case to justify such an extreme act. But the proceedings were as irregular as they were illegal; they were not properly instituted. The Monition ought to have been extracted by Her Majesty's Advocate, who was practising in the Colony: Order in Council, 13th of February, 1849, sec. 29; *Sierra Leone* Ordinances, Vol. ii. p. 205. A similar enactment exists in revenue cases, Statute 16 & 17 Vict. c. 107, which, by section 186,

(1) 17 Q. B. (N.S.) 615. (2) 9 M. & W. 585.

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provides that no suit shall be commenced for the recovery of any penalty or forfeiture except in the name of some Officer of the Customs or Navy, or of Her Majesty's Advocate or Attorney-General for the place where such suit shall be commenced. Now, it appears from the Monition that it was extracted by *Dougan*, who was not an Officer of the Crown, nor does it upon the face of it state that it was extracted at the instance of any such Officer; it states only the seizure of the goods by *Shaw*, the acting Collector of Customs. It moreover alleges *Rolet* to be the owner of the boats, which, being numbered, were well known to *Dougan*, as well as every one connected with the harbour, must belong to the registered boatmen, whose names were on the harbour-books. They ought, therefore, to have been separately monished and served; again, there was no proper service of the Monition; being for penalties, by the Rules of practice framed pursuant to the Statute, 2 & 3 Will. 4, c. 51, personal service was absolutely necessary (Rules and Regulations of the Admiralty Courts Abroad, § 27, p. 20): *Hocquard* v. *The Queen* (1). These rules have been held by this Tribunal to have the same force and effect as the Act itself, in virtue of which they were framed: *The Queen* v. *Jose Alves Dias* (2). Now, these rules require that if the Monition contain the names of the owners or others from whom penalties are sought to be recovered, it must be personally served on the parties; while the 27th section of the same Rules also requires that where the Monition specifies the names of the parties cited, it must be personally served on them. Here, the service, instead of being on *Rolet*, was on *Lecomte*, who is there stated to be the Attorney for *Rolet*, which he never was, being but his managing clerk in the Colony; but the suit being a penal one, no appearance of *Lecomte* could bind *Rolet*, even if *Lecomte* had been his Attorney. Even consent of the Defendant cannot give jurisdiction: *Lawrence* v. *Wilcock* (3); *Andrews* v. *Elliot* (4). The Monition having been extracted and served thus irregularly, the claim was brought in, according to the usual practice. Such claim was on behalf of *Rolet* for the goods, and by the Boatmen for the boats. The claim was supported by affidavit, nevertheless the Libel filed on behalf of the Seizor ignored the Boatmen, whose boats had been

(1) 11 Moore's P. C. Cases, 175.
(2) 6 Ibid. 107.
(3) 11 Ad. & El. 941.
(4) 5 E. & B. 502.

seized altogether, and proceeded only against *Rolet*, claiming penalties as well as forfeiture of his goods. There was the same irregularity in the Libel as in the Monition, though it purported to be on behalf of the Crown, it was brought in by *Dougan* on behalf of *Shaw*, who was himself but a substitute for the Collector of Her Majesty's Customs, and was described only as the acting Collector. Although the Appellants, the owners of the boats, put in a claim, the Libel made no mention of these parties, yet by the decree the boats are forfeited, and the owners are condemned in costs, and this in a case of penalties! A Libel is similar to a declaration at Common law, and no judgment could be given against any party not named in the declaration. The Libel pleaded the breach of the same Orders in Council and Ordinances as were set out in the Monition, which was objected to, as insufficient in law to warrant the Seizors' prayer; but such objection was overruled, and the Libel ordered to be admitted, the Deputy Judge, *ex mero motu*, ordering it to be reformed by striking out the penalties sued for. This, we apprehend, was also irregular, and beyond his authority.

Then upon the merits we contend that, upon the evidence of *Pike* and *Johnson*, the *Belus* was, on the 12th and 13th of April, 1865, when the goods were unshipped from her into the boats, at anchor more than three miles from *Cape Sierra Leone*, and, therefore, out of the jurisdiction of the harbour of *Sierra Leone:* but that, even if she had been unladen within the jurisdiction of the Colony, the Appellants, not being the owners or consignees of the *Belus*, and ignorant of the fact, could not be held liable for her alleged default, the goods having been reported to the acting Collector, who had granted a permit for landing them, and subsequently permitted entries for them to be passed, and the wharfage paid to him, and the duties on the goods secured by the usual bond to the Crown, before any portion thereof were delivered by the Customs to the owners. Therefore, even if the *Belus* was within the jurisdiction, the Seizor was estopped from shewing the contrary. It was proved, moreover, that there was no fraud or attempted fraud in describing the goods as consigned to a place without the harbour of *Sierra Leone*, such description being mere matter of form, and not requisite. No advantage could accrue to the Appellant, *Rolet*, from such a statement. With regard to the alleged breach of the

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Customs' laws, we contend that is equally untenable. The Monition, the Libel, and the decree, all proceed upon an alleged breach of the Order in Council and Ordinances which are severally pleaded, and relied upon in the judgment. In the first place, the Order in Council of the 13th of February, 1849, applies only to ships in the Colony—that is, within the harbour, which we proved the *Belus* never was. The sections relied on are the sixth and the twenty-first, but neither are applicable, unless the goods were liable to seizure, which we deny. As far as they require a permit and entry of goods landed in the harbour, those provisions were complied with, and a permit granted for the unlading and landing of the goods from the *Belus*; but the fact is, the parties instigating these proceedings wanted to obtain penalties, and that was the reason they laid their charge under that Order in Council. The abandonment of the penalties made the provisions of the Order in Council inoperative, even if we had come within their operation. The Ordinance of the 31st of December, 1849, refers to, and, so far as is requisite, enacts the same penalties; but, independent of the inapplicability of its provisions to the case, the sections relied on—namely, the fourth, eleventh, and thirteenth—have been repealed by the Ordinances of the 16th of March, 1852, 16th of January, 1856, and 12th of July, 1853. The 6th section of the Order in Council of the 13th of February, 1849, imposes no penalty for anything prohibited by it to be done. The 1st section of the Ordinance of the 9th of August, 1850, and the 2nd section of the Ordinance of the 19th of July, 1854, have no bearing on the case, being no longer in force. There was no breach on our part of the Ordinance of the 19th of July, 1854, or of that of the 9th of August, 1850, regarding the light-house dues, for in neither case were any dues claimed or demanded which were not paid; and, even if demanded, they were not payable by *Rolet;* the Master of the vessel alone was liable for those dues. There is no such penalty as the seizure of goods and boats for their non-payment, even if evaded or resisted.

The *Queen's Advocate* (Sir *R. Phillimore,* Q.C.) and Mr. *Hannen,* for the Respondents:—

Two preliminary questions have been argued on this appeal,

the first, as to the jurisdiction of the Vice-Admiralty Judge, and the second, as to the regularity of the process. With regard to the first point, we contend that the exceptions taken in the Appellant's plea in the Court below to the jurisdiction of the Deputy Judge were not tenable, and were rightly overruled by the Court. The original commission from the Crown to Mr. *Carr* gave authority to him to depute or surrogate one or more deputy or deputies. It is admitted that he rightly exercised that power in the appointment of Mr. *Skelton* in the first instance; but it is urged that the subsequent appointment of Mr. *Nicol*, rendered necessary by the death of Mr. *Skelton*, was invalid, because made by the acting Chief Justice, Mr. *Huggins*, who, as such acting Chief Justice, was at the time the *locum tenens* of the Chief Justice, as well as Judge of the Vice-Admiralty Court, and it is contended that Mr. *Huggins* himself was, by virtue of the Statute, 26 & 27 Vict. c. 24, s. 4, the actual Judge of the Vice-Admiralty Court, and had no power to appoint a deputy. But the fallacy of that argument lies in the assumption that the office was vacant, which it was not, Mr. *Huggins* having, by the commission to Mr. *Nicol*, executed the power incident to his appointment as acting Chief Justice, and delegated his authority as Judge of the Vice-Admiralty Court to Mr. *Nicol*. That Statute contemplated an actual vacancy in the office, and then, there being no Judge of the Vice-Admiralty Court, constitutes the Chief Justice such Judge *pro hac vice*.

Secondly, as regards the process and pleadings. The objection to the Monition is not tenable. That instrument is in the usual form. The object of it is simply to bring the party into Court. It was properly extracted. *Dougan* being a Proctor of the Court, and *Shaw*, on whose behalf it was extracted, being the Seizor, and at the time the acting Collector of Customs in the Colony, he was, therefore, an Officer of the Crown properly qualified under the Rules and Regulations of the Vice-Admiralty Courts, to institute the suit: Statute, 49 Geo. 3, c. 107. The boats having been seized for breach of the Customs Ordinances by *Rolet*, being at the time employed on his behalf, were properly described as his, and as no separate penalties were sought against the Boatmen, there was no necessity to monish them separately; and although *Rolet* was not in the Colony, he was answerable

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for the acts of his servant. *Attorney-General* v. *Siddon* (1). The chief objection urged, however, is as to the service of the Monition, it being insisted that the rules of the Vice-Admiralty Court, where penalties are sought, require personal service as indispensable. This, however, cannot be maintained, for were it the inflexible rule, no process for penalties could be enforced where the owner of the goods seized was not within the jurisdiction of the Court: such a rule, therefore, would defeat, and, in fact, in many cases repeal, the Ordinance; but we need not rely on that ground of defence, for the appearance and claim by *Leconte* on behalf of *Rolet* was a waiver of all such objections, even if they could have been taken. The objection to the frame of the Libel is equally unsustainable. It was no defect that the Boatmen were not libelled: no penalties were sought against them, and if no breach of the Ordinances was proved, and the goods were wrongly seized, the boats would have been restored with the goods. Moreover, it does not appear that these objections were taken in the Court below.

Then the question finally resolves itself into one of evidence, and we submit there was amply sufficient to justify the seizure. The temporary permit was obtained on a false representation. It was that misstatement that led to the allowance of the subsequent removal of the goods. The evidence of *Pike*, the Harbour Master, as to the position of the *Belus* was decisive, and was confirmed by *Hanson*. The Boatmen would, of course, consider the vessel beyond the jurisdiction, for their boats had been seized. We insist that, upon a fair examination of the evidence, there was amply sufficient to justify the seizure. It is not necessary that there should be *mala fides* to subject to forfeiture, because an irregular importation made under ignorance or error works a forfeiture: The *Adams* (2). The *onus* of proving that the *Belus* had not violated the Custom Ordinances lay upon the Claimants: Order in Council, 13th February, 1849, sec. 30; *Sierra Leone* Ordinances, Vol. ii. p. 206; The *Beaver* (3). They had misrepresented the ship's destination, and that was sufficient of itself to justify the seizure: The *Vixen* (4); The *Reward* (5);

(1) 1 Cr. & Jer. 220.
(2) 1 Edw. 298.
(3) 1 Dods. 152.
(4) Ib'd. 151.
(5) 2 Dods. 270.

Reg v. *Dean* (1); and to throw the *onus* of proof of exemption from the dues on the Appellants.

The consideration of the case was reserved. Judgment was now (4th August, 1866) pronounced by

THE LORD JUSTICE TURNER:—

After stating the nature of the appeal, his Lordship proceeded: —The Appellant, *Victor Rolet*, is a Frenchman, residing in *France*, and he has a mercantile establishment at *Freetown* in the Colony, where he carries on business through an agent, *Honoré Leconte*, under the title of *Malfilatre & Co.* The goods in question were sent by him from *France* to his mercantile establishment at *Freetown* on board a brig called the *Belus*, which was consigned to some Merchants at *Fouricaria*, near *Mellicourie*, a place which lies to the southward of *Sierra Leone*, and about one hundred miles distant from it. On the 11th of April, 1864, the *Belus*, in the course of her voyage to *Mellicourie*, came to anchor off *Sierra Leone*, and her Captain communicated to *Leconte* that she had goods on board for *Malfilatre & Co.*, and that she was anchored out of the jurisdiction of the Colony. *Leconte* thereupon directed boats to be sent out to bring in the goods. Four boats were accordingly dispatched to the *Belus* for that purpose early in the morning of the 12th of April. These boats had not returned from the *Belus* when the Custom House was about to close on the evening of that day. Application was in consequence made, in the first instance by *Barlatt*, a clerk of *Malfilatre & Co.*, and subsequently by him and *Leconte* to *Shaw*, the acting Collector, to allow the goods when they arrived to be placed in the Custom House shed for the night. *Shaw* appears at first to have refused, but afterwards to have acceded to the application. He gave a permit for the goods to be received in the shed, and in the course of the evening they were landed and stored accordingly. On the following morning, the 13th of April, *Barlatt* went to the Custom House and made a report inwards of the boats and the goods. This report described the boat as a *British* boat of *Sierra Leone*, of which *Daniel Coker* was master for this present voyage from

(1) 12 M. & W. 39.

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Mellicourie. It set forth the particulars of the goods, and purported that the entry was a just report of the name and particulars of the ship, and contained a true account of her lading; and further stated that bulk had not been broke, nor any goods delivered out of the ship, since her loading in *Mellicourie.* The report was signed by *Coker*, who was Master of one of the boats which had been sent out for the goods, and was declared by him in the presence of *Shaw*, by whom it was also signed.

Barlatt at the same time made two entries inwards of the goods, some of them being for consumption in the Colony, and others for exportation, and requiring a separate entry. Each of these entries purported to be "an account of merchandize imported by *Malfilatre & Co.*, in a *British* boat from *Mellicourie.*" These entries were also declared before *Shaw*. The wharfage dues were paid, and the usual bonds given for payment of the duties. Some of the goods intended for sale in the Colony were then removed from the Custom House shed to the store of *Malfilatre & Co.* On the morning of the same 13th of April, the boats had again been dispatched to the *Belus*, for the purpose of bringing in some more of the goods; and these goods were brought in, as to some of them, in the evening, and as to the rest, in the night of the 13th of April. They were landed at the Custom House, and stored in the Government sheds. In the meantime *Shaw* had taken steps for ascertaining whether the *Belus* was or was not within the jurisdiction of the Colony, which appears to extend three miles seaward from the Cape of *Sierra Leone.* On the morning of the 13th of April he sent out *Hanson*, the Landing Surveyor at the Custom House, to the *Belus*, and other vessels which were lying off the Cape, and *Hanson* went on board the *Belus.* He returned in the afternoon, and reported that he thought that the vessel was within the jurisdiction.

Pike, the Harbour Master, was then sent out, but he did not reach the vessel that night. He went out, however, again to the vessel on the morning of the 14th of April, and then took her bearings, and found her to be within the jurisdiction. On this same morning of the 14th of April, the goods which remained in the Custom House sheds, and two of the boats which had been employed in bringing them in, were seized by *Shaw.* Two or

three days after the seizure had been made, the *Belus* left the Colony, and on the 9th of May following, a Monition was issued calling upon the Appellants to shew cause why the goods and boats should not be condemned. On the 23rd of May, 1865, the Appellants brought in a claim for the goods and boats.

The Libel in the cause was filed on the 1st of June, 1865, and on the 23rd of June following the Appellants filed their Plea or responsive allegation. Witnesses were then examined, both on the part of the Seizor and of the Claimants; and upon the hearing of the cause on the 17th of August, 1865, a decree was made by the Deputy Judge of the Court rejecting the claim, holding the libel to be sufficiently proved, and condemning the goods and boats. It is from this decree the appeal before us is brought.

Upon the opening of the appeal a great number of points were insisted upon on the part of the Appellants having reference to the competency and regularity of the proceedings in the cause, and to the validity of the appointment of the Deputy Judge, and his power and authority to deal with the cause; but in the view which we have taken of the case it is not necessary for us to give any opinion upon these points. In order, however, to avoid any possible question in other cases, we think it right to say that we have no doubt whatever that the Deputy Judge was duly appointed, and had full power to adjudicate upon the questions in the cause. With this exception we lay these preliminary points out of consideration.

The real question in this case seems to us to be whether these goods and boats were liable to seizure and condemnation upon any of the following grounds: either, first, that the goods, being liable to the payment of duty, were unshipped from the *Belus*, at anchor within the Colony, before due entry had been made of the goods, and before any warrant or sufferance had been granted for the unloading thereof; or secondly, because the goods, being subject to the payment of duty, they were unladen from the *Belus*, at anchor, as aforesaid, at a place other than the Port of *Freetown*; or thirdly, because the goods, being liable to the payment of duties, were unshipped from the *Belus* while in the Colony, customs and other duties not being first paid or secured. These are points which appear to us to arise upon the Ordinances and

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the Order in Council referred to in the libel, and which were considered by the Deputy Judge to be the real points in the case, and they are the points which were mainly, if not solely, relied upon on the part of the Respondents in the course of the argument before us.

We proceed, therefore, to consider these points. It is to be observed, in the first place, that the third ground of seizure above referred to rests upon the non-payment not only of the Customs' duties but of other duties also; but the seizure in this case clearly proceeded upon the non-payment of Customs' duties only; and upon examining the Ordinances and Order in Council we do not find that any forfeiture could arise upon the non-payment of other duties. The case, therefore, must depend upon the goods having been unshipped, as they undoubtedly were, before the payment of the Customs' duties. In considering this question, it is not, in our opinion, necessary to enter into the details of the Ordinances and Order in Council. It is sufficient to say that, in our opinion, if the *Belus* was within the jurisdiction of the Colony when the goods were unshipped, the goods and boats were liable to seizure and condemnation, but that they were not so liable if the *Belus* was not within the jurisdiction of the Colony when the goods were unshipped.

The material question, therefore, which we have to consider is a mere question of fact, whether the *Belus* was within the Colony when the goods were unshipped. We have carefully examined the evidence upon this question, and considered the collateral facts bearing upon it, and the conclusion at which we have arrived is that the *Belus* was not in fact within the jurisdiction of the Colony when the goods were unshipped. First, as to the testimony of the witnesses. Upon the witnesses on the part of the Seizor being first examined, not one of them ventures to swear that on the 12th and 13th, when the goods were unshipped, this vessel was not beyond the three miles which form the limit of the jurisdiction of the Colony. The only witnesses who speak directly to this point are *Hanson* and *Johnson*, and each of them, upon cross-examination, declines to swear that the vessel was within the three miles on either of those days. The evidence of *Pike*, the Harbour Master, however, goes to shew that the vessel was within the three

miles on the 14th, and that she was then in the same position as she had been on the two previous days, but on cross-examination he admits that the fact of the vessel having been in the same position on the 14th as on the 12th and 13th, was no more than supposition on his part, and it is most remarkable that *Hanson*, who was on board the vessel both on the 13th and 14th, and must therefore have known whether she had changed her position or not, is upon his first examination wholly silent upon that point.

There can be no doubt, therefore, that this evidence was insufficient to support the Seizor's case, but it was insisted on his part that the *onus probandi* rested upon the Appellants, and that it was upon them to shew that the vessel was not within the jurisdiction of the Colony when the goods were unshipped, and this argument on his part appears to us to be well founded. We must consider, therefore, the evidence on the part of the Appellants upon this point, and we think it quite sufficient to establish their case. The testimony of the Boatmen, no less than five in number, clearly shews that the vessel was beyond the three miles when the goods were unshipped, and we find nothing to displace this evidence, for the rebutting evidence on the part of the Seizor is, as it seems to us, quite insufficient for the purpose. It goes no further than this: that *Hanson*, on his further examination, says he has every reason to believe that the vessel was in the same position on the 13th and the 14th, but he assigns no grounds for this belief. Taking the case, therefore, to rest on the testimony of the witnesses, we think that there was no sufficient case to warrant the sentence condemning these goods and boats.

Then, how does the case stand upon the collateral facts. They seem to us to be strongly in favour of the Appellant's case. It is clear from the evidence that the goods in question might have been sent on to *Mellicourie*, and thence imported into *Sierra Leone* on payment of duties, and we cannot but think it in the highest degree improbable that *Lecomte* should have ventured to incur the risk of seizure for the mere purpose of saving the expense of bringing back the goods from *Mellicourie*, which, so far as we can see, was the only benefit he could gain by unshipping the goods at *Sierra Leone*. Again, notwithstanding what is said by *Shaw*, we

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consider it to be sufficiently proved that it was customary to admit the importation of goods from vessels outside upon the payment of duties, and it is admitted by *Shaw* that he saw the vessels outside on the 12th. It is surely most improbable that he should have granted the permit on the evening of that day, should have received the report and entries on the following morning, and should even have allowed some of the goods to have been removed from the Custom House sheds on that morning, if he had then believed the vessel to be within the jurisdiction. Such conduct on his part goes far to shew that he did not then entertain any such belief, whatever he may have thought afterwards.

The excuse which is made for this course of conduct on his part is, that he was told that the goods came from *Mellicourie;* but it is clear from the evidence that it was the custom to insert *Mellicourie* and other places in the entries at the Custom House when the goods came from vessels outside; and we cannot readily believe *Shaw* to have been ignorant of this practice, to say nothing of there being two witnesses (*Barlatt* and *Macrae*), who distinctly state that they told him that the goods were coming from the outside. There are also these further facts in favour of the Appellants' case; that the character of the boats was of itself almost, if not fully, sufficient to shew that the goods had not come from *Mellicourie;* that no Custom House officer was put on board the *Belus* on the 13th, which, as we apprehend, would have been the ordinary, if not the necessary course, had she been within the jurisdiction; and that the Monition was not issued till so long a time after the *Belus* had left the Colony, and the Appellants had lost the benefit of testimony which they might otherwise have been able to adduce.

We think it right to add that we desire to give no encouragement to the practice of importing goods from vessels outside, and thus evading payment of duties which would otherwise be payable; and that where such a course is pursued, the parties adopting it must expect to be strictly dealt with; but looking to the evidence, and to the conduct of the Custom House officers in this case, we are satisfied that this vessel was not within the jurisdiction of the Colony when the goods were unshipped; and we shall therefore humbly recommend Her Majesty to reverse this sentence, with

costs in the Court below and of the appeal, and to condemn the Respondent, *Shaw*, in damages and costs. J. C. 1866 ROLET v. THE QUEEN.

Solicitors for the Appellants: *Hampton & Burgin.*

Proctor for the Respondents: *F. H. Dyke*, Her Majesty's Procurator-General.

ARTHUR BURTON PEASE AND OTHERS . . APPELLANTS;

AND

JEAN MARIE GLOAHEC . . . . . RESPONDENT. J. C.* 1866 *June* 15, 16, 23.

THE "MARIE JOSEPH."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Bill of lading—Fraudulent possession of—Transfer for value without notice of fraud—Goods—Vendor—Stoppage in transitu.

A Bill of lading for the delivery of goods to order and assigns, is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of the unpaid vendor to stop them *in transitu.*

The indorsee may deprive the vendor of this right by indorsing the Bill of lading for valuable consideration, although the goods are not paid for; even if Bills have been given which are certain to be dishonoured, provided the indorsee for value has acted *bonâ fide* and without notice.

A firm (*M. & D.*) in *France*, sold, through their agent in *England*, to *S. & T.* a lot of linseed cake, payable by Bill at three months' date, and shipped the same. A Bill of lading, signed by the Master and indorsed by *M. & D.*, was delivered to *S. & T.* in exchange for their acceptance at three months' date. Afterwards the Bill of lading was redelivered to *M. & D.'s* agent to hold as security against the acceptance. *T.*, a member of the firm of *S. & T.*, subsequently obtained the Bill of lading from *M. & D.'s* agent, by a fraudulent misrepresentation, and indorsed and delivered it to *P. & Co.* for value, without notice of the fraud. Before the goods arrived in *England*, *S. & T.* became insolvent. Upon appeal, *Held* by the Judicial Committee (reversing the judgment of the Court of Admiralty):—

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* This appeal was twice argued. Present on the first hearing, the 15th and 16th of June, 1866:—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, and SIR EDWARD VAUGHAN WILLIAMS.

Present on the second hearing, the 23rd of June, 1866, Lord CHELMSFORD (subsequently LORD CHANCELLOR):—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, SIR JOHN TAYLOR COLERIDGE, and SIR EDWARD VAUGHAN WILLIAMS.

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First, that the firm of *S. & T.* acquired no new title to the goods by the fraud of *T.*, as it merely invested them with the temporary power of transferring their property in the goods; and

Secondly, that the right of *M. & D.*, the vendors, to stop *in transitu* was gone, as the transfer to *P. & Co.* was *bonâ fide*, and for a valuable consideration, in ignorance of *T.*'s fraud.

An ownership which was at the time perfect in law, though voidable as to part, namely, the possession, cannot in principle be treated differently from an ownership voidable as to the whole, but is in the interim protected by the interposition of a *bonâ fide* purchaser for valuable consideration.

IN this appeal the suit was instituted by the Appellants, the assignees of a Bill of lading of a cargo of linseed meal, against the ship, *Marie Joseph*, and also against the Respondent, the Master and owner of that vessel.

The facts were these:—

Messrs. *Maxwell & Dreossi*, of *Bordeaux*, in *France*, Merchants, by *Stericker*, their agent at *Hull*, in the month of February, 1864, agreed with Messrs. *Scarborough & Tadman*, of *Kingston-upon-Hull*, for the sale to them of sixty tons of linseed cake, *Scarborough & Tadman* to pay for the same by their acceptance at three months' date. The cake was shipped on board the *Marie Joseph*, at *Bordeaux*, on the 11th of February, 1864, by *Maxwell & Dreossi*; and a Bill of lading, promising to deliver the same at *Hull* unto order of *Maxwell & Dreossi*, or to assigns, he or they paying freight for the same, was signed by the Respondent, and given by him to *Maxwell & Dreossi*. The Bill of lading was indorsed by *Maxwell & Dreossi*, and a Bill of Exchange for the purchase-money was drawn by them on *Scarborough & Tadman*, and *Maxwell & Dreossi* forwarded such Bill of lading and Bill of Exchange to *Stericker*.

On the 16th of February, 1864, *Stericker*, as agent of Messrs. *Maxwell & Dreossi*, took the Bill of Exchange, together with the Bill of lading and Policy of Insurance of the linseed cake, to the office of *Scarborough & Tadman* at *Hull*, and the Bill of Exchange was then accepted by *Scarborough*, on behalf of his firm, and handed by him to *Stericker* in payment for the linseed cake, and *Stericker* thereupon delivered the Bill of lading, indorsed by Messrs. *Maxwell & Dreossi*, and the Policy of Insurance to *Scarborough*.

After this had been done, it appeared that a conversation took place between *Stericker* and *Scarborough* respecting the affairs of a Mr. *Moore* with whom the firm of *Scarborough & Tadman* had dealings, and whose affairs were considered to be in a doubtful position, and the result of that conversation was that *Stericker* requested *Scarborough* to let him (*Stericker*) have the the Bill of lading, which *Scarborough* did, and the following memorandum was given and signed by *Stericker* for the same:—"*Hull*, 16th February, 1864. Memorandum that I have received of Messrs *Scarborough & Tadman*, of *Hull*, a Bill of lading and Policy of Insurance for about sixty tons linseed cake, shipped *ex Marie Joseph*, dated at *Bordeaux* the 11th of February, 1864, and which I hold as security against their acceptance of Messrs. *Maxwell & Dreossi's* draft for 427*l.* 1*s.* 4*d.*, due on the 14th of May, 1864, until the cakes are sold, or the vessel arrives."

On the 18th of February, 1864, *Tadman* went to *Stericker* and stated to him that his firm had sold the linseed cake to a Mr. *Croysdale*, who would accept a Bill of Exchange against the Bill of lading which *Tadman* asked for, and which *Stericker* handed to him. The representation made by *Tadman* was untrue, as his firm had not sold the linseed cake at the time when the Bill of lading was so returned to him. On the same day that *Tadman* obtained the Bill of lading, but subsequently thereto, the Appellants, who were Bankers at *Hull*, to whom *Scarborough & Tadman* were largely indebted, applied to them to reduce their debt.

Tadman then offered the Appellants, as security for their debt, the Bill of lading of the linseed cake, the Policy of Insurance effected thereon, and some warrants for some sacks of rib grass. The Appellant, *Pease*, on behalf of his firm, accepted the same, and *Tadman* then, on behalf of his firm, indorsed the Bill of lading to them, and delivered such Bill of lading, and also warrants for some sacks of rib grass, as security for advances then made, or which might thereafter be made, by the Appellants to *Scarborough & Tadman*, with power to sell the linseed cake.

Scarborough & Tadman were at this time indebted to the Appellants in an amount exceeding the value of the linseed cake, but the Appellants were not aware that *Scarborough & Tadman* were then in insolvent circumstances. The Appellants, who had

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no notice or knowledge of the Bill of lading having been handed to *Stericker*, nor of the means by which it had been obtained back from him, retained possession of the Bill of lading, and advanced further moneys to Messrs. *Scarborough & Tadman*. On the 4th of March, *Moore* stopped payment, and on the 7th of that month *Scarborough & Tadman* also stopped payment. The Bill of Exchange for the price of the linseed cake was in circulation at this time, but in consequence of the stoppage of *Scarborough & Tadman* it was not paid.

On the 5th of April following, the *Marie Joseph* arrived at *Hull*, with the linseed cake on board. The Appellants claimed delivery of the linseed cake from the Master of the *Marie Joseph*, and *Stericker*, who had in the interim received from *Maxwell & Dreossi* a Bill of lading indorsed to himself, claimed on their behalf the right to stop the same *in transitu*. Ultimately the linseed cake was delivered by the Master of the *Marie Joseph* to *Stericker*.

The Appellants then instituted this suit against the *Marie Joseph*, her tackle, apparel, and furniture, and the Respondent, her Master and owner, under the provisions of the 24 Vict. c. 10, s. 6, for the recovery of damages in respect of the breaches of duty and of contract on the part of the Respondent in not having delivered the linseed cake to them.

The case was heard on the 1st and 2nd of August, 1864, and on the 10th of November, 1864, the learned Judge, the Right Hon. Dr. *Lushington*, pronounced against the claim of the Appellants, on the ground that the Bill of lading having been obtained back from *Stericker* by *Tadman*, upon false representations and by fraud, it was negotiated without *Stericker's* consent, or the consent of the vendors of the linseed cake, and contrary to the understanding between *Scarborough* and *Stericker;* and that the fraudulent conduct of *Tadman* invalidated the indorsement of the Bill of lading to the Appellants, though they became holders for valuable consideration, in ignorance of the fraudulent act of *Tadman*. The learned Judge, in support of this view, referred to the observation of Lord *Campbell* in *Gurney* v. *Behrend* (1), that it is not enough that the Plaintiffs shew they became *bonâ fide* holders of the indorsed Bill of lading for valuable consideration.

(1) 3 El. & B. 633.

Mr. *Mellish*, Q.C., and Mr. *E. C. Clarkson*, for the Appellants:—

There being no dispute as to the facts, the question is narrowed to a single point of law, whether *Maxwell & Co.*, the shippers, had, under the circumstances, a right to stop *in transitu* the goods shipped by them to *Scarborough & Tadman*. The Court below was mistaken in thinking that this case was governed by *Gurney* v. *Behrend* (1). The facts are essentially different. There it was laid down by Lord *Campbell* that, *primâ facie*, the Defendants had a right to stop certain wheat, the subject of the action, as it was still *in transitu*, the vendors being unpaid, and that *G.*, with whom the Bill of lading had been pledged by a third party for valuable consideration, was not entitled to the cargo, unless the party pledging the Bill had not merely possession of the Bill, but the right to transfer it. Here the facts are widely different. The Bill of lading, indorsed by the vendors, was, by their authority, and with the intention of transferring the property therein to a purchaser, delivered by *Stericker*, their agent. It is true the Bill of lading was subsequently returned to *Stericker*, yet, when handed back by *Scarborough & Co.* to *Stericker*, he was acting within the authority originally conferred upon him by his principals, and, from the first, intended to deal with their right in the Bill of lading. The Appellants were *bonâ fide* holders of the Bill of lading for valuable consideration, without notice of fraud. The transfer to them was valid, and the Appellants, therefore, entitled to the goods. The learned Judge, in the Court below, did not distinguish between obtaining goods by fraud, or obtaining them without authority; or that a transfer of property obtained by fraud is voidable only and not void. If a contract of sale be obtained by fraud on the part of the purchaser, it may be voidable at law upon the authority of *Gurney* v. *Behrend* (2), but it is not absolutely void as against a purchaser for value. It is void only at the election of the vendor, and it is too late to declare such election after the goods have passed into the hands of a *bonâ fide* purchaser without notice: *White* v. *Garden* (3); *Parker* v. *Patrick* (4); *Kingsford* v. *Merry* (5); *Stevenson* v. *Newman* (6), where all

(1) 3 El. & B. 622.
(2) Ibid. 633.
(3) 10 C. B. 919.
(4) 5 T. R. 175.
(5) 11 Ex. 577; S. C. 1 H. & N. 503.
(6) 13 C. B. 285, 302.

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the cases are collected. *Barrow* v. *Coles* (1); *Patten* v. *Thompson* (2); *In the matter of Westzinthus* (3); *Dyer* v. *Pearson* (4). [LORD CHELMSFORD:—Messrs. *Scarborough & Tadman* having parted with the Bill of lading, could not recover it in trover.] No. Although there may not be any direct decision to be found which is on all fours with the present case, yet the principle which we rely upon is to be deduced from those authorities. Our proposition is, that, admitting the right to stop *in transitu*, in case of the vendee's insolvency, yet that that right may be defeated by indorsing and delivering the Bill of lading to a *bonâ fide* indorsee for a valuable consideration without notice of fraud: *Lickbarrow* v. *Mason* (5). Again, the Appellants are entitled by Statute, 5 & 6 Vict. c. 39, s. 1, to the Bill of lading.

Dr. *Deane*, Q.C., and Dr. *Swabey*, for the Respondent:—

Possession of the Bill of lading having been obtained from the vendors' agent, by the fraudulent representations of *Tadman*, the transfer by him to the Appellants by indorsement and delivery of the Bill of lading, conveyed no title to the goods, as the transfer was tainted with fraud. There is a great distinction between *Kingsford* v. *Merry* (6), *White* v. *Garden* (7), and other cases of that class cited by the Appellants, and the present case. It makes no difference that *Tadman* once had, with his partner *Scarborough*, a property in the Bill of lading, for it was handed back by them to the vendors' agent, from whom it was obtained by fraud. *Newsom* v. *Thornton* (8) is a strong case in support of this position. There it was held that a Factor could not pledge the goods of his principal by indorsement and delivery of the Bill of lading any more than by the delivery of the goods themselves, though an indorsee knew not that he was Factor; and though the goods were consigned on the joint account of the consignors and consignee and a Bill of lading was sent to deliver the goods to the consignee or his assigns, who afterwards indorsed and delivered it to the Defendants, upon condition of their making an advance to him on it, which they failed to do, but claimed to regain it as

(1) 3 Camp. 92.
(2) 5 M. & S. 350.
(3) 5 B. & A. 817.
(4) 3 B. & C. 38.
(5) 2 T. R. 63, and see Smith's Leading Cases, note 431. [Ed. 1841.]
(6) 11 Ex. 577; S. C. 1 H. & N. 503.
(7) 10 C. B. 919.
(8) 6 East, 17.

security for prior advances; and it was determined that such indorsement and delivery of the Bill of lading did not divest the consignor's right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them; and this ruling is approved of in *Blackburn* on Contract of Sale, p. 291: *Cuming* v. *Brown* (1). In *Spalding* v. *Ruding* (2), Lord *Langdale* held, that in equity, a transfer of goods for valuable consideration by a consignee for a limited purpose, did not destroy the consignor's right of stoppage *in transitu, ultra* the particular lien of the transferree.

Mr. *E. C. Clarkson*, in reply:—

Kingsford v. *Merry* (3) is a good authority at law, and applies to this case. There it was laid down by the Exchequer Court that, although a vendee has made a false misrepresentation in order to effect the contract or obtain possession of a chattel, yet the property vests in the vendee, and, if he has transferred the interest in the chattel to an innocent transferree, it is good against the vendor. It is true that this decision was reversed by the Exchequer Chamber (4), yet it was upon grounds which do not affect the principle thus enunciated. It is similar to the case of an equitable mortgage by deposit of deeds. If the mortgagor obtain possession of the deeds and convey the estate it would give a good title to a purchaser. *Newsom* v. *Thornton* (5), relied upon by the Respondent, is not in point. In that case, although the Bill of lading was indorsed, and delivered by the consignee to parties on condition of their making an advance to him on it, which they failed to do, but claimed to regain it as a security for prior advances; in such circumstances, it was properly held that it did not divest the consignor's right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them.

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The case stood over for consideration. Their Lordships' judgment was now pronounced by

THE LORD CHANCELLOR (who, after stating the nature of the appeal, proceeded):—

The question raised by the suit is the right of the shippers of

(1) 9 East, 505. (2) 6 Beav. 376. (3) 11 Ex. 577.
(4) 1 H. & N. 503. (5) 6 East, 17.

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the linseed cake to stop the same *in transitu*, under the following circumstances.

In February, 1864, Messrs. *Maxwell & Dreossi*, of *Bordeaux*, through their agent, *Walter Stericker*, sold to Messrs. *Scarborough & Tadman*, of *Hull*, sixty tons of linseed cake at 7*l.* 12*s.* 6*d.* per ton, payable by Bill at three months from the date of the Bill of lading. On the 11th of February the goods were shipped on board the *Marie Joseph*, at *Bordeaux*, by *Maxwell & Dreossi*, and a Bill of lading for the same was signed by the Respondent, the Master. *Maxwell & Dreossi* indorsed the Bill of lading to order and assigns, and drew a Bill of Exchange for the price on Messrs. *Scarborough & Tadman*, and sent the Bill of lading and Bill of Exchange to their agent, *Stericker*. On the 16th of February, *Stericker* took the Bill of lading and the Bill of Exchange to *Scarborough & Tadman*, when the Bill was accepted by *Scarborough*, and *Stericker* thereupon indorsed the Bill of lading, and delivered it to *Scarborough*, together with a policy of insurance which had been effected upon the goods. A conversation then ensued between *Stericker* and *Scarborough* respecting the dealings of *Scarborough & Tadman* with a person named *Moore*, whose circumstances were supposed to be embarrassed, and *Stericker* asked *Scarborough* whether he had any objection to his holding the Bill of lading. *Scarborough* told *Stericker* to take it, and delivered back the Bill of lading to *Stericker*, who thereupon signed the memorandum of the 16th of February, 1864 [*ante* p. 221].

On the 18th of February, *Tadman*, the other partner in the firm of *Scarborough & Tadman*, called upon *Stericker* and stated to him that his firm had sold the linseed cake to a Mr. *Croysdale*, who would accept a draft against the Bill of lading. The linseed cake had not been sold to *Croysdale*, nor to any other person. Trusting to this misrepresentation, *Stericker* returned the Bill of lading and the Policy of Insurance to *Tadman*. On the same day, after thus obtaining the Bill of lading, in consequence of a message received from the Appellants, Messrs. *Pease & Co.*, Bankers in *Hull*, to whom *Scarborough & Tadman* were largely indebted, *Tadman* went to the Bank, and Mr. *Pease* called his attention to the state of his account and to the amount of the Bills under discount, and asked him for security. *Tadman* thereupon endorsed the Bill of lading

in the name of his firm, and delivered it, together with the Policy of Insurance, to Mr. *Pease*, and gave Messrs. *Pease & Co.* an unsigned memorandum, authorizing them to sell the linseed cake and to place the proceeds to the credit of *Scarborough & Tadman* on account. *Moore*, in whose transactions *Scarborough & Tadman* were supposed to be involved, became Bankrupt on the 4th of March, and on the 7th of March, *Scarborough & Tadman* stopped payment. On the 5th of March a telegram was sent from *Maxwell & Dreossi* to *Stericker* directing him to stop the delivery of the linseed cake, and on the 7th of March he received from *Maxwell & Dreossi* a Bill of lading indorsed to himself. The *Marie Joseph* arrived at *Hull* on the 5th of April. The linseed cake was demanded on behalf of the Appellants upon the Bill of lading indorsed to them, but *Stericker* afterwards went on board and presented his Bill of lading and obtained possession of the goods under an indemnity from *Maxwell & Dreossi* to the Respondent.

Upon these facts the learned Judge of the Court of Admiralty was of opinion that the Bill of lading having been obtained from *Stericker* by the false representations and fraud of *Tadman*, and having afterwards been negotiated without the consent of *Stericker* or of his principals, and contrary to the understanding between *Stericker* and *Tadman*, the fraudulent conduct of *Tadman* invalidated the indorsement to *Pease & Co.*, and he accordingly pronounced against them.

The question is one of nicety and difficulty, and, as was stated by the Counsel in argument, no direct authority is to be found by which it can be decided. Principles, however, may be extracted from previous decisions, which will serve as guides to its right determination. A Bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee subject only to the right of an unpaid vendor to stop them *in transitu*. The indorsee may deprive the vendor of this right by indorsing the Bill of lading for valuable consideration, although the goods are not paid for, or Bills have been given for the price of them which are certain to be dishonoured, provided the indorsee for value has acted *bonâ fide*, and without notice. Although a Bill of lading is a negotiable instrument, it is so only as a symbol of

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the goods named in it, and as was said by Lord *Campbell* in *Gurney* v. *Behrend* (1), "although the shipper may have indorsed in blank a Bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority; and if it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods." This *dictum* is very carefully confined in its terms to the original transfer of a Bill of lading deliverable to the assigns of the shipper. In the cases which it supposes, there could be no lawful assigns of the shipper, and consequently the Bill of lading could have no existence as a negotiable instrument. But in the present case the shippers of the goods, having obtained a Bill of lading, indorsed it to order and assigns, and forwarded it to *Stericker* for the express purpose of its being indorsed by him, and handed over to *Scarborough & Tadman*. By the indorsement and delivery to *Scarborough & Tadman* they acquired the complete property in the goods and control over the Bill of lading, subject only to the right of *Maxwell & Dreossi* to stop *in transitu* as long as it remained in their hands. This is not denied by the Respondent; but his case is that *Scarborough & Tadman* having, after the indorsement and delivery of the Bill of lading, returned it to *Stericker* to retain as a security for the payment of the Bill of Exchange accepted for the price of the goods, and having afterwards obtained it from him by a misrepresentation, they had no power to pass a title in it to *Pease & Co.*, at least without being subject to the lien created by the deposit with *Stericker*, and consequently that the right to stop *in transitu* against *Pease & Co.*, though *bonâ fide* indorsees for valuable consideration, still subsisted.

There can be no doubt that, although the vendors had parted with the property in the Bill of lading, by the indorsement to *Scarborough & Tadman* they acquired a title to hold it by the terms of the agreement under which it was deposited with *Stericker*. These terms do not include any stipulation that the vendees should not so deal with the Bill of lading as would, in the event of their insolvency, defeat the right to stop *in transitu*.

(1) 3 E. & B. 634.

It is not even stipulated that the vendors should hold the Bill of lading till the sub-vendees should give them a Bill of Exchange or other security for payment. The Bill of lading was not made subject to any new condition or limitation, but was merely deposited with the vendors till the arrival of the ship, or the sale of the goods.

Scarborough & Tadman had power to sell, not by reason of any authority arising out of the agreement, but by virtue of their ownership in the goods. The power to sell of course included a power to pledge. The vendors, by keeping the Bill of lading in their hands, might have prevented *Scarborough & Tadman* from dealing with it. They chose to deliver it back to them, induced to do so, indeed, by the fraudulent representation of *Tadman*, but still consenting to their possession of it. The indorsees acquired no new title from the vendors by the fraud which *Tadman* practised, but merely obtained their own property and the means of effectually disposing of it. The vendors had not, strictly speaking, a lien, which means a right to retain property against the will of the owner of it, and which is lost when the possession is parted with. They had, by the agreement of the indorsees and owners, a right to hold a Bill of lading as a security. As in the case of lien so in this case, as long as the Bill of lading remained with the parties who had fraudulently obtained it, the vendors who had been cheated out of the possession might have reclaimed and recovered it. But the moment it passed into the hands of *Pease & Co.*, to whom it was pledged and indorsed for valuable consideration without notice, the right of the vendors to follow it was taken away. This is a much stronger case than that put by *Abbott*, C. J., in *Dyer* v. *Pearson* (1), of the real owner of goods who suffers another to have possession of his property, and of those documents which are the evidence of property, being bound by a sale which he has thus enabled the other person to make; for here the person entitled to retain the possession of the instrument which represented the goods against the real owners, relinquished the possession of it to them, and enabled them to deal with the property in their true characters of owners. In the case of *Kingsford* v. *Merry* (2), it was held that, "When

(1) 3 B. & C. 42. (2) 11 Ex. 577.

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a vendee obtains possession of a chattel, with the intention, by the vendor, to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction, and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

Although this case was reversed in the Exchequer Chamber (1), yet it was upon a ground which did not affect the rule of law above laid down, but made it inapplicable, because in the judgment of the Court the relation of vendor and vendee did not exist between the owner of the goods and the fraudulent possessor. Here the possession was not only united to the previous ownership, with the consent (however obtained) of the person temporarily entitled to it, but transferred for the express purpose of giving to the owner absolute dominion over his own property.

An ownership, which was at the time perfect at law, though voidable as to part, viz., the possession, cannot in principle be treated differently from an ownership voidable as to the whole, but in the interim protected by the interposition of a *bonâ fide* purchaser for valuable consideration.

For these reasons their Lordships will humbly recommend to Her Majesty that the decree appealed from be reversed, with costs.

Proctors for the Appellants: *Clarkson, Son, & Cooper.*
Solicitor for the Respondent: *J. C. Dalton.*

(1) 1 H. & N. 503.

EDWARD WILLIAM OHRLOFF AND OTHERS APPELLANTS;

AND

THOMAS BRISCALL AND OTHERS . . . . RESPONDENTS.

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1866
June 13, 14, 15, 20.

THE "HELENE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Bill of lading—Cargo of oil—Memorandum declaring shipowner not liable for leakage—Negligence—Improper stowage—Liability of shipowner for——Pleading—Leave and license—Bills of lading Act, 18 & 19 *Vict. c.* 111.

Under a charter-party the shippers put a cargo, consisting of casks of oil, wool, and rags, on board the chartered vessel, and personally superintended the stowage of the cargo in the hold of the vessel. In the margin of the Bill of lading of the casks of oil there was this memorandum, "weight, measurement, and contents unknown, and not accountable for leakage." The Bill of lading was indorsed in blank by the shippers and assigned to *B. & Co.* In the course of the voyage the oil casks became heated by the action and contiguity of the wool and rags, and a very large portion of the oil was lost:—

Held, in a suit against the ship under the provisions of the *Admiralty Act*, 1861, for damages occasioned by the shipowners' negligence:

First, that ignorance of the shipowners as to the latent effect of heat, in storing the casks of oil with wool and rags, did not, in the circumstances of the shippers superintending the stowage, amount to such negligence as to make them liable to the holders of the Bill of lading for the loss occasioned by the leakage of the oil; and,

Secondly, that the limitation of liability by the memorandum in the Bill of lading, that the shipowners were not to be accountable for leakage, was not restricted as to the quantity of leakage, and protected the shipowners, in the absence of proof that the leakage was occasioned by their negligence.

Whether the conduct of the shippers as to the stowage, was not such as by the *Bills of Lading Act*, 18 & 19 Vict. c. 111, would support a plea of leave and license in an action by the indorsees of the Bill of lading, *quære*.

THIS was a suit instituted in the High Court of Admiralty, under the provisions of sect. 6 of the 24 Vict. c. 10, the *Admiralty Court Act* of 1861, by the Respondents, the owners and assignees of the Bills of lading of forty-seven casks of olive oil, proceeding *in rem.* against the *Helene*, a foreign ship, in which the casks of oil

* This appeal was argued twice, first on the 13th, 14th, and 15th of June, 1866, before THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, and SIR EDWARD VAUGHAN WILLIAMS; and secondly, on the 20th of June, before LORD CHELMSFORD, THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, SIR JOHN TAYLOR COLERIDGE, and SIR EDWARD VAUGHAN WILLIAMS.

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had been carried from *Leghorn* to *Liverpool*, and also against the Appellant, *Ohrloff*, a subject of *Prussia*, the Master, and others the owners of the *Helene*, intervening, to recover damages for loss incurred by the leakage of the oil on the voyage, occasioned, as alleged by the Respondents, by the negligence and breaches of contract and duty of the Appellants.

The principal facts, as appeared from the evidence, were as follows:—

By a charter-party, dated the 16th of July, 1864, entered into by the Master of the *Helene*, then lying at the port of *Leghorn*, with the firm of *Lloyd & Co.*, of the same place, Merchants and shippers of oil, it was stipulated that the ship was to proceed with a cargo of goods to *London* or *Liverpool*, at the charterer's option, and to deliver the same agreeably to Bills of lading on being paid £285 in a lump sum.

Under this charter-party, *Lloyd & Co.* loaded the vessel with various goods, consisting of rags and wool, and forty-seven casks of olive oil, for the latter goods the Master of the ship gave a Bill of lading in the usual form, and on which was this memorandum: "Weight, measurement, and contents unknown, and not accountable for leakage."

The Bill of lading was indorsed in blank by the shippers, and assigned to the Respondents, who became the owners of the forty-seven casks of oil. *Lloyd & Co.*, under the charter-party, appointed one *Tilo Mirandohe*, the regular Stevedore of ships at *Leghorn*, to superintend the stowage of the ship, who superintended the stowage of the cargo, and certified that he had paid particular attention, and taken every possible precaution, to protect the same from damage. Among the goods received on board and stowed, were 111 bales of wool, and 34 bales of rags, which were stowed in the same hold with the casks of oil.

The ship sailed from *Leghorn*, and, in the course of her voyage, encountered bad weather, and heavy seas, and, in consequence, pitched, and a considerable quantity of oil leaked from the casks and was pumped up. She arrived at *Liverpool*, and, on delivering her cargo, it was found that a large quantity of the oil had leaked out, and that many of the casks were wholly or partially empty. At the hearing of the suit in the Court below, it was contended

on behalf of the Respondents, that this leakage was not leakage within the meaning of the Bill of lading, but that it arose in consequence of the bales of wool and rags being stowed in the same hold with, and near the oil, and that the wool and rags, in the course of the voyage, having become heated, the staves of the casks were thereby dried up, and the casks rendered leaky. On the part of the Appellants, it was, however, contended that the leakage had been occasioned by the slackness and badness of the casks; but that, even if it had been occasioned, as alleged by the Respondents, by the stowage, the Appellants were not responsible, inasmuch as *Lloyd & Co.*, the Respondent's agents, had not complained of such stowage, and the Respondents could not be in any better position.

The evidence of the Respondents shewed that, upon the arrival of the *Helene* at *Liverpool*, many of the casks were wholly or partially empty, causing a loss of 2,001 gallons out of about 4,888 gallons of the oil, and that the usual percentage of leakage was about one per cent. only. And they examined witnesses to prove that unwashed wool and rags, stowed in the hold of the vessel, being in juxtaposition to the oil, without any attempt made to secure ventilation, was dangerous, and that the loss of the oil would be occasioned by heat, arising from the wool and rags having slackened the casks. They proved that the casks were good, and that they had not been disturbed by the motion of the ship in her voyage. The Appellants insisted that the loss of the oil was occasioned by the perils of the sea, and the inferiority of the casks, and not by the heating influence of the wool and rags, as deposed to by the Respondent's witnesses.

The learned Judge (the Right Hon. Dr. *Lushington*), by his judgment, after stating the effect of the evidence, and holding that though the leakage might have been occasioned by the defective state of some of the casks, yet that the stowage of the wool in the hold was the cause of the leakage, proceeded in these terms:— "Assuming, then, that the loss was occasioned by reason of improper stowage, by want of sufficient separation of the oil and wool by bulkheads, or otherwise by want of ventilation, the question arises, have the Plaintiffs a right of action against the ship in this Court? This is denied on the part of the Defendants. Their

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argument, if I understand it aright, is as follows:—By the first section of 18 & 19 Vict. c. 111, the Plaintiffs, as indorsees of the Bill of lading, to whom the property in the goods has passed by reason of the indorsement, have had transferred to and vested in them all rights of suit and liabilities in respect of such goods, as if the contract contained in the Bill of lading had been made with themselves. Then by the 6th section of the 24 Vict. c. 10, of the *Admiralty Court Act*, 1861, practically, the Plaintiffs acquire the same rights against the vessel itself; consequently, the Plaintiffs have no better right than *Lloyd & Co.*, who shipped the oil. Then it is argued that *Lloyd & Co.* would have had no right; and, therefore, that the Plaintiffs have none. The ground on which it is contended that the shippers, *Lloyd & Co.*, would have had no rights, is, that they, and not the Master, were responsible for the defective stowage; for it is said *Lloyd & Co.* were the charterers; by the terms of the charter they furnished the whole cargo, that is, not only the oil sold to the Plaintiffs, but the rags and wool also; and by the charterer also, the cargo was to be taken alongside, and from alongside the ship by the Merchants at their own risk and expense, and to be received and stowed by the Master as it might be presented for shipment. But though this was so, and although the shipping of oil with wool is, as, I think, it is proved by the evidence, a hazardous measure; yet if the Master of the vessel will take them both together, I apprehend he is bound to take extraordinary precautions to prevent mischief, and cannot protect himself by shewing that both the kinds of goods were sent on board by the same person; for an authority by the shipper or charterers to stow the goods, clearly does not amount to an authority to stow them in a careless or negligent manner, for which I cite *Hutchinson* v. *Guion* (1). Again, it is said that the whole cargo was, in accordance with the charter-party, stowed by a head Stevedore appointed by the charterers, and, therefore, that the Master could not be liable for bad stowage. But on reference to the charter-party it appears that the terms were, 'the charterers being allowed to appoint a head Stevedore at the expense, and under the inspection and responsibility, of the Master, for proper stowage.' These words appear to me to answer the objection, and

(1) 5 C. B. (N. S.) 149—162.

remove the case out of the authority of *Blakie* v. *Stembridge* (1), where similar words were not contained in the charter-party, and where the Court held the true construction of the charter-party to be, that the cargo was to be brought alongside at the risk and expense of the charterer, and that it was to be shipped and stowed by his Stevedore, and consequently at his risk, though at the expense of the shipowner, and subject to the control of the Master, on behalf of the shipowner, to protect his interests. There seems, therefore, no reason for saying that *Lloyd & Co.* would have been estopped from suing the Master for damages on account of improper stowage. But even if they would have been estopped, why should it follow that the Plaintiffs would be estopped also? The shippers and the Assignees of the Bill of lading do not stand to each other as agent and principal, but as vendor and purchaser. The rights and the liabilities which the Assignee of the Bill of lading, under the first section of the 18 & 19 Vict. c. 111, hastransferred to him, are the same rights and liabilities in respect of such goods as if the contract contained in the Bill of lading had been made with him; but in these cannot be included the rights and liabilities as between the shipper and the Master *dehors* of that contract in respect of other goods, or of the charter-party. If so, the Bill of lading would always incorporate the charter-party, which it never does unless expressly stated: *Chappel* v. *Comfort* (2). I think the rights of the Plaintiffs, as Assignees of the Bill of lading, could not be curtailed by any liability of the Charterers towards the Master, not being a liability imposed upon the Plaintiffs under the Bill of lading. The objection, therefore, to the Plaintiffs' right of action, I think, fails on every ground; and there must be judgment for the Plaintiffs, with costs."

The present appeal was brought from the decree founded on this judgment, and was argued by

Mr. *Edward James*, Q.C., and *G. R. Williams*, for the Appellants; and

Mr. *Brett*, Q.C., and Mr. *V. Lushington*, for the Respondents.

The principal questions raised by the Appellants were:—

First, that the loss of the oil was *primâ facie* a loss by leakage,

(1) 6 C. B. (N. S.) 894. (2) 10 C. B. (N. S.) 802.

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for which, by the Bill of lading, the Appellants, as shipowners, were not responsible; the *onus probandi*, therefore, was upon the Respondents to show affirmatively that such loss was occasioned by the negligence of the Appellants, or their servants, and not upon the Appellants to negative any such negligence, or to shew affirmatively how the loss had been occasioned. That the Respondents' evidence was insufficient to establish such negligence, and, at all events, was rebutted by the evidence of the Appellants; and that the judgment was against the weight of evidence.

Secondly, that as the only negligence alleged by the Respondents was the stowing of the wool and rags in the same hold with the oil, evidence ought to have been given by them to shew that such stowage was negligent and improper, since it was proved that such mode of stowage had been adopted by oil Merchants of long standing in *Leghorn*, and that a cargo such as that shipped on board was an usual cargo.

Thirdly, that the stowage complained of was no breach of the contract contained in the Bill of lading, and that there was no evidence that the Master knew that there was any risk in stowing oil and bales of wool and rags together, or that there was any usual or reasonable precautions which they might have taken to prevent the loss in question which the Appellants did not take, and that there was no such negligence as would render them liable for the damage in law: *Phillips* v. *Clark* (1). That the cargo was stowed under the superintendence of a Stevedore appointed by *Lloyd & Co.*, and that the leakage occurred in consequence of the badness of the casks, and the stress of weather.

Fourthly, that as *Lloyd & Co.*, the shippers, being the agents for the Respondents for the shipment of the oil, had themselves approved the shipment and stowage of the oil, wool, and rags together, and as the Respondents were bound by the acts of their agents, and they had, in fact, approved of the manner in which the oil and cargo was stowed, they could not recover for any loss occasioned thereby, and that such conduct would by the *Bills of Lading Act*, 18 & 19 Vict. c. 111, support a plea of leave and license in an action brought by the indorsees of the Bill of lading. They cited on these

(1) 2 C. B. (N. S.) 156.

points: *Hutchinson* v. *Guion* (1); *Hovill* v. *Stephenson* (2); *Major* v. *White* (3); *Grill* v. *General Iron Screw Collier Company* (4).

For the Respondents it was urged, first, that the negligence imputed to the Appellants was the improper stowage of the casks of oil, and that the exemption by the memorandum in the Bill of lading, that the shipowners were not to be liable for leakage, meant, according to the custom of the trade, ordinary leakage, which is taken to be 1 per cent., but not, like the present case, an extraordinary leakage, amounting to a deficiency of 2,000 out of 4,880 gallons.

Secondly, that if the stowage was bad, even if *Lloyd & Co.*, the shippers, assented to the stowage of the oil, wool, and rags in the same hold of the vessel, such consent did not affect the Respondents, the holders of the Bill of lading: *Foster* v. *Colby* (5); and constituted no defence to the action by them, as it could not include leakage caused by the negligence of the shippers or the perils of the sea. The cases of *Alston* v. *Herring* (6), *Gillespie* v. *Thompson* (7), *Blaikie* v. *Stembridge* (8), *Sack* v. *Ford* (9), *Davis* v. *Garrett* (10), *Brown* v. *North* (11), *Brass* v. *Maitland* (12), were referred to.

1866
Aug. 4.

Judgment was delivered by

THE LORD JUSTICE TURNER:—

This is an appeal from a judgment of the High Court of Admiralty in an action brought by the Respondents, under the provisions of the *Admiralty Act*, 1861, as owners and Assignees of the Bill of lading of forty-seven casks of oil against the *Helene*, of which the Appellants were owners, and in which the oil had been carried from *Leghorn* to *Liverpool*. When the ship arrived there many of the casks were partially empty, and this action was brought to recover damages for this leakage of the oil, as having been occasioned by negligence and breach of contract, and breach of duty on the part of the Appellants.

The great question in the action was one of fact, viz., what was

(1) 5 C. B. (N. S.) 149.
(2) 4 C. & P. 469.
(3) 7 Ibid. 41.
(4) 35 L. J. (N. S.) C. P. 321.
(5) 3 H. & N. 705.
(6) 11 Ex. 822.
(7) 6 E. & B. 477.
(8) 6 C. B. (N. S.) 894.
(9) 13 C. B. (N. S.) 90.
(10) 6 Bing. 716.
(11) 8 Ex. 1.
(12) 6 E. & B. 470.

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the cause of the leakage which was the subject of complaint? The learned Judge of the Court of Admiralty decided this question, after a most complete and able examination of the evidence, and we see no reason to find fault with his decision. The evidence, in his opinion, established that the leakage was caused, not by the perils of the sea, not by the defective quality of the casks, but by their being stowed in the same hold with some rags and wool, which formed part of the cargo that was taken on board at the desire of the charterers.

Assuming that this was the cause of the leakage, the Appellants, the shipowners, deny that they are responsible for it, because, by the Memorandum in the margin of the Bill of lading, the shipowners are not to be accountable for leakage.

On the argument different views were suggested by Counsel as to the meaning of this word "leakage." For the Respondents it was contended that the word means only ordinary leakage (which, according to the evidence, amounts to 1 per cent.), and does not extend to extraordinary leakage, such as that in question, amounting to an alleged deficiency of 2,000 gallons.

On the part of the Appellants it was denied that, according to the natural and ordinary meaning of the words employed, the amount of leakage was at all limited in quantity; but it was conceded that, in accordance with the case of *Phillips* v. *Clark* (1), the words in the margin did not protect the shipowners from responsibility for leakage occasioned by their own negligence.

It was, however, contended, on behalf of the Appellants, that the Plaintiffs must, in order to entitle themselves to the action, give satisfactory proof of such negligence, and that they had failed to do so; and, after a careful consideration of the case, we have come to the conclusion that this contention on behalf of the Appellants is well founded.

Notwithstanding the evidence of the notoriety at *Liverpool* of the deleterious consequences of the collocation of oil in casks with rags and wool, or other matters tending to generate heat, we do not believe that either the shippers or the shipowners in this case were aware of them. If the shippers knew of them, they also knew that the wool and rags which they made a part of the cargo

(1) 2 C. B. (N. S.) 156.

must [necessarily be stowed, and were in fact stowed, in the single hold of the ship, and with this knowledge we think it impossible that they should have abstained from mentioning the inevitable leakage in the then condition of the ship, and from requesting some means to be applied to prevent it, such as dividing the hold by bulkheads. Nor do we think the shipowners were in a better state of knowledge on the subject. Had they been so, it is inconceivable, as it seems to us, that they should have received a cargo so composed without some remonstrance with the shipper for selecting such mischievous companions to form part of the cargo with the oil.

If the shipowners were ignorant of the consequences of taking such a cargo, we do not think it amounted to culpable negligence on their part to stow, in the only place they could be stowed, the goods which, under the charter-party, the Charterers had a right to insist, and did insist, should form a part of the cargo.

On this question it is, in our opinion, very material to consider not only that the Charterers so insisted, but also that the cargo was, according to the terms of the charter-party, received on board, and stowed as it was presented for shipment by them, and that they were shewn to be very frequently on board as the stowage progressed, and were well acquainted with the mode of stowage (which was effected in a masterly way), and never made any complaint of or objection to it.

Nor do we think the ignorance of the shipowners in itself amounted to negligence. It can hardly be imputed as misconduct that the shipowners should be ignorant of latent mischief of this nature, when *Lloyd & Co.*, who are proved to have had very great experience as Oil merchants, were in the same state of ignorance.

But even if the Appellants knew, or ought to have known, what the consequences of such stowage must be, we are not prepared to say that they were guilty of negligence in not putting up bulkheads. Assuming that they could have been so constructed as to protect the part of the hold where the oil was stowed from the influence of the heat generated by the wool and rags, still this could not have been done without much trouble and considerable expense, which we cannot concede that the shippers had a right to throw on the shipowners, because the shippers chose to load the ship they had chartered with a cargo of such a nature. And to

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this we may add that, even supposing the shipowners to have been aware of the usual consequences of stowing such a cargo in the same hold, they might have well come to the conclusion that the shippers were also aware of them, and would not have put such a cargo on board unless they had been assured, that the casks were of such extraordinary strength and goodness, as to be capable of resisting the usual influence of a heated temperature.

For these reasons we think the Respondents failed to prove, that the leakage was caused by the Appellants' negligence.

It may be observed that the learned Judge of the Admiralty Court appears to have adopted the construction of the word "leakage," contended for by the Respondents, viz., that it means "ordinary leakage" only, and consequently the judgment adverts but little, if at all, to the question whether negligence on the part of the shipowners had been proved.

But we do not think such a construction allowable. The condition that the shipowners are not to be accountable for leakages does not, in its ordinary and grammatical sense, put any limit to the quantity of leakage; and on principle, therefore, we do not think it would be justifiable to add any such limit to its terms Nor are we aware of any authority for doing so. It follows that, in our judgment, the Memorandum in the Bill of lading protects the shipowner as to all leakage except that caused by negligence, and, therefore, if no negligence is shewn, there is no cause of action.

Another point was raised and argued before us, viz., that the conduct of the shippers as to the stowage was such, that it would support a plea of leave and license by the shippers if the action had been brought by them. But it was contended on behalf of the Respondents that, by reason of the *Bills of Lading Act*, 18 & 19 Vict. c. 111, such a plea was not allowable in an action by the indorsees of the Bill of lading. It is unnecessary, however, to decide this point, as our opinion is against the Respondents on the question of negligence.

On these grounds their Lordships will humbly advise Her Majesty that the judgment of the Court of Admiralty should be reversed, with costs, both in the Court below and on this appeal.

Proctors for the Appellants: *Deacon, Son, & Rogers.*

Solicitors for the Respondents: *Chester & Urquhart.*

RICHARD KIRBY AND OTHERS . . . . . APPELLANTS;

AND

THE OWNERS OF THE "SCINDIA," AND HER CARGO . . . . . } RESPONDENTS.

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June 13, 25, 26.

THE "SCINDIA."

Salvage—Appeal for insufficiency of sum awarded—Deviation of vessel's course in performance of salvage services rendering Policies on salving vessel void—Derelict vessel, salvage of—Sum awarded for salvage services by a Vice-Admiralty Court abroad, increased on appeal.

The Judicial Committee is always reluctant to review cases of salvage, which involve the exercise of the discretion of the Judge of the Court below, but, being a final Court of appeal, will, if the justice of the case requires, increase the amount.

The question how far a deviation in a vessel's course, in the performance of salvage services to life or property, may be the voidance of a Policy of Insurance is not satisfactorily settled, though the risk of such may operate on the Judge's mind in determining the amount to be awarded for salvage services.

A moiety of the value of the vessel and cargo, in a case of the salvage of a derelict, was formerly the amount awarded, but the Maritime Courts now give only such amount as is fit and proper with reference to all the circumstances of the case, having regard especially to the value of the property salved.

In a case where the vessel was derelict, and her value, with the cargo on board, exceeded £30,000, was salved by two vessels, one of which, with her cargo on board, was worth £150,000, and the other above £3,000, and a tender of £2,000 for salvage services had been refused, which sum was awarded by the Vice-Admiralty Court: the Judicial Committee, looking at the respective values, and taking into consideration the additional risk to the salvors from having to make a deviation in their course, held that sum insufficient, and increased the amount of salvage by £1,000.

Admission of fresh evidence on appeal

Leave to adduce fresh evidence upon appeal refused: it appearing that the matters to which such evidence referred regarded, first, the loss of insurance by reason of the deviation of a vessel from her course in effecting the salvage services, which fact was sufficiently before the Court below to enable it to

Present:—DR. LUSHINGTON, THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, and SIR EDWARD VAUGHAN WILLIAMS.

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apportion the amount of salvage: and, secondly, that the further evidence went to meet a charge affecting character, which might have been met by an application to the Court below: their Lordships being of opinion that, if requisite, sufficient opportunity would be afforded the parties to produce such evidence at the hearing of the appeal.

THIS was an appeal from an Interlocutory decree of the Vice-Admiralty Court of the *Cape of Good Hope*, in a cause of salvage, brought by the Appellants, the owners, and the Master and crew of a brig called the *Alicia Annie*, and the Master, owners, and crew, of the ship *Aminta*, against the *Scindia*, and the Respondents, the owners of her cargo, in respect of services rendered by the Masters and crews of the above-named vessels to the *Scindia*.

The *Alicia Annie*, a brig of 312 tons, was, at the time of the salvage services in question, on a voyage from *Batavia* to *Liverpool* with a general cargo; she was manned by *Kirby*, the Master and owner, and a crew of eleven hands. The *Aminta*, a ship of 1,132 tons, was in prosecution of a voyage from *Calcutta* to *London*, laden with a general cargo, and having a crew of twenty-six men. It appeared that the *Scindia*, a ship of about 893 tons measurement, sailed from *Calcutta* in July, 1864, with a cargo of saltpetre, sugar, &c., bound for *London*, calling at *Saint Helena*. On the 13th of September, 1864, the *Scindia* was abandoned off *Algoa Bay*. When so abandoned she had lost her mainmast and her mizen topmast; she had one of her foretopsails split, and her lower foretopsail, spanker, jib, or foretopmast staysail, set; a portion of her main deck had been torn up by the fall of her mainmast, her scuppers fore and aft were cut, and her pump was choked by a piece of wood. In such condition, the *Scindia* was, on the 15th of September, 1864, fallen in with by the *Alicia Annie*. When so fallen in with, she was about twelve or fourteen miles off *Cape Receif*. The weather at the time was fine, with a faint breeze blowing from the south-west, having the effect of neutralizing the current, which runs off *Cape Receif*, in a north-easterly direction, at the rate of about one knot per hour. The *Scindia* was boarded by the Master and crew of the *Alicia Annie*. At about 3 P.M., the *Aminta* also came up with the *Scindia*, and her Master immediately sent his second officer to the *Scindia*. An agreement was come to between the Masters and crews of the *Aminta* and

Alicia Annie that they should join together in taking the *Scindia* into *Algoa Bay*, and that the salvage to be earned by so doing should be divided in equal moieties between them. The *Scindia* was brought, by their joint aid, to anchor in *Algoa Bay* at about 4 P.M. of the following day, when the salvage service terminated. The aggregate value of the *Scindia*, her cargo, and freight, amounted to the sum of £30,281. 18*s.* 2*d.* The Appellants, the owners, with the Master and crew of the *Alicia Annie*, together with the owners, Master, and crew of the *Aminta*, joined together in instituting a cause for salvage in respect of their joint services, and in their petition stated the services performed, and the agreement which they had made, that they should divide the salvage equally.

The Respondents, the owners of the *Scindia* and her cargo, in their responsive plea, made a charge against the Master and crew of the *Alicia Annie* of having wrongfully taken divers articles from the *Scindia*, for the purpose of converting them to their own use, but they made no charge of misconduct against the *Aminta*. The Respondents tendered to the owners, Master, and crew of the *Aminta* and *Alicia Annie*, in respect of all their joint services, the sum of £2,000, which sum they brought into Court.

On the 16th of March, 1865, the Judge of the Vice-Admiralty Court, the Hon. *Sydney J. Bell*, by an Interlocutory decree, pronounced the tender of £2,000 to be sufficient, and held that the same ought to have been accepted by the salvors, and he further expressed his opinion that the charge of pillage made against the Master and crew of the *Alicia Annie*, had been made out, and that he was disposed to withhold from them their portion of the sum tendered.

An appeal was asserted by the Appellants, the Masters, owners, and crew of both the *Alicia Annie* and the *Aminta*, and a motion made on their behalf for payment of the money out of Court. This, however, the Judge refused, observing that the cause was not in a position in which such an order could be made, inasmuch as all that had been done on the 16th of March was to find that the tender was good, and ought to have been accepted without going further. The Court thereby intending to give the salvors and Respondents an opportunity of considering what their future course

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should be, after sufficient time had elapsed to enable their advisers, or the parties in the Colony, to communicate to their constituents in *England* what had fallen from the Court.

Before this decree was pronounced, the *Alicia Annie* went to *England* in charge of *Fraser*, and *Kirby*, her Master and owner, was himself absent, having left the Colony some time previous, and ignorant of there being any allegation against himself or his ship's crew of pillage of the *Scindia*. Two days after the hearing of the cause, and before judgment was delivered, an affidavit was made by *Fraser* and delivered to the Judge, which alleged that certain articles were found by him on board the *Alicia Annie*, which bore the name of the *Scindia*, and appeared to have belonged to that vessel. This affidavit was the only evidence in support of the charge against the *Alicia Annie*, and *Kirby* being absent from the Colony, the Judge offered to suspend his judgment in order to give him an opportunity of answering it, but such offer was declined by Counsel on his behalf.

It further appeared that the *Alicia Annie*, in charge of *Fraser*, on her voyage to *England*, had, in entering the harbour at *Queenstown*, struck on the wreck of a sunken vessel, and was taken into harbour in a sinking state, and became a total wreck, and that the underwriter refused to pay the insurance in consequence of the deviation the vessel had made in rendering salvage services to the *Scindia*, from which, as it was alleged, a loss resulted to the Appellant, *Kirby*, of £3,150, the amount of the insurances on the *Alicia Annie*, her freight and cargo.

Under these circumstances, an application was made by the Appellant, *Kirby*, to the Judicial Committee, for liberty to adduce further evidence in the cause in contradiction of the charge of pillage, and that the loss of the insurance should be taken into account in estimating the salvage services. In his case, the Appellant, *Kirby*, denied the charge of pillage, and accounted for the articles found on board his vessel which were alleged to belong to the *Scindia*, and he verified these statements by affidavit.

Mr. *Manisty*, Q.C., and Mr. *Butt*, in support of the motion:—

The loss of insurance on the *Alicia Annie* is a material fact, which could not have been known to the Court below at the

hearing of the cause, as the vessel was wrecked after the decree. The possibility of it might, perhaps, be inferred from the circumstance that it appeared from the pleadings that the *Alicia Annie* had, in performing the salvage service, deviated from her course. That was probably the very reason that induced the Judge of the Vice-Admiralty Court to refuse to distribute the amount paid into Court until the parties had the opportunity of communicating with *England*. The question of the effect of deviation in such circumstances is one of doubt, and requires the decision of the highest Court of appeal: *Lawrence* v. *Sydebotham* (1); The *Jane* (2); *Park* on Marine Assurance, p. 647. We ask, therefore, for the admission of evidence to raise the question for argument on the hearing of the appeal. But the strong reason we urge for this motion is, that the character of Captain *Kirby* has been assailed, and a judgment given against him upon evidence produced after the hearing of the cause in his absence, and without his knowledge, and which, as far as it affects to charge him with pilfering the *Scindia*, is false and unfounded, and he desires, in vindication of his character, to be allowed to contradict such a scandalous imputation.

The *Queen's Advocate* (Sir *R. Phillimore*), and Mr. *E. C. Clarkson*, against the motion:—

This application is, in effect, made for the purpose of varying the amount of salvage, that is the sole object of the appeal, and the same point must be discussed on this motion, which is an indirect mode of obtaining the opinion of the Appellate Court upon that point. The risk of loss of insurance on the *Alicia Annie* was a matter put forward by the Appellants, and taken into consideration by the Court below in estimating the degree of merit attributable to each of the salvors, and an actual loss of insurance is not a material fact, or one which ought in any way to be taken into consideration; the insurance is not void by deviation to assist a vessel in distress: The *Orbona* (3). The decree made by the Court below was simply a decree pronouncing for the sufficiency of the tender of £2,000, and it does not appear that that decree was, as it at present stands, in any way arrived at, or affected by, the charge against

(1) 6 East, 45. (2) 2 Hag. Ad. Rep., 338. (3) 1 Ec. & Ad. Rep. 161.

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Kirby. There is no ground for supposing that the nature of the charge against *Kirby* was unknown to him previous to his departure from the Colony, and his Counsel having elected to take the judgment of the Court, without waiting to communicate with his client in *England*, is conclusive against such an application as this being entertained.

THE LORD JUSTICE TURNER:—

Their Lordships have considered this application, and they are of opinion that no order ought to be made upon this motion.

The application is for the admission of fresh evidence, before the hearing of the appeal, now pending before this Court, of matters which have occurred since the hearing of the cause in the Court below.

Now, where parties have gone to a trial of the question at issue upon the evidence which they have at the time, and which they were able then to adduce, and have made no application to the Court below to suspend the trial until further evidence can be brought forward, it evidently requires a very strong case to induce any Court of appeal to admit further evidence, in order to adjudicate upon that question which has been determined in the Court below.

The evidence now proposed to be adduced is upon two points. First, it is said that since the trial of this case in the Court below, the insurers of the *Alicia Annie*, by reason of her having deviated from her course with a view to save the *Scindia*, which is the subject of the suit, have refused to pay the insurance, and that a loss of £2,000 has in consequence been sustained by one of the salvors which salved the *Scindia*, and the evidence which is proposed to be offered is to shew the loss of that sum of £2,000.

The question whether there was a danger of the loss of the insurance was distinctly put in issue in the Court below. It was a question which the Judge had to consider in determining the amount which he would award for this salvor's services, and certainly we cannot say that because the Judge has not in terms stated that he has taken that into consideration, it did in fact form an element in the judgment which he delivered, and in the amount which he awarded to the salvors. It is obvious that the conse-

quence of admitting fresh evidence of the amount of the salvage, to be adduced upon the hearing of the appeal, would be this, that no question upon the amount to be awarded for salvage services could be entertained until it had been determined whether the insurance had or had not been forfeited in consequence of a deviation of the course of the vessel for the purpose of effecting the salvage.

Now, that is a consequence which this Court cannot look at without considerable alarm; and certainly, upon that ground, if these parties had thought that the deviation might vitiate the insurance—as they did think, for they brought it before the Judge—if it was desirable that this matter, whether the insurance had or had not been forfeited, should be determined before the trial of the cause, their course was very plain: to apply to the Judge to suspend the trial until that point had been determined; and as they have not thought fit to take that course, their Lordships do not see their way to relieving them from the consequences of their own omission.

The other point upon which evidence is proposed to be adduced, as affecting the amount of salvage, is, that a charge has been brought forward against *Kirby*, the Captain of one of these vessels which effected the salvage, of having pilfered goods from the vessel that was salved.

Whatever view their Lordships might have taken of this case, if it had not been in any manner dealt with by the Court below, this is clear, that the charge was distinctly brought forward by an affidavit of *Fraser*, made in the cause after the hearing of the cause. The Judge noticed that affidavit, and received it evidently without any objection on the part of the parties who are now moving for the admission of additional evidence to meet the charge it went to establish; and the parties, with the knowledge of that affidavit, and with the opportunity offered them by the Court below of meeting the charge which was so made, elected to take the judgment of the learned Judge upon the case as it then stood.

We think, in this state of circumstances, to relieve the Appellants would be in effect to do that which this Court is certainly not in the habit of doing—relieving parties against their own election, and against a miscarriage on their part in the course of the conduct of the cause. On neither of these grounds, therefore,

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do we think that it is necessary, or that it would be right, that any order should be made upon this motion.

It may be possible that when the question of the amount of the salvage, which is the real subject of this application, is determined by this Court, an application may be made to this Court—we cannot tell whether such application will be made or not—to distribute the amount awarded between the two salvors; if any such question should arise, if any application like the present should be made, we shall then see whether, upon the evidence before us, there is sufficient to enable us to dispose of that question; and it will be quite in our power, if we think there is not sufficient evidence to enable us so to dispose of the question, to remit the case to the Court below for further inquiry upon that point.

We think, therefore, that that furnishes another reason against granting the present application, as it evidently shews that it is premature, inasmuch as it is quite unknown whether any such question can or will arise upon the hearing of the appeal.

On these grounds their Lordships think this motion must be refused, and with costs.

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The appeal now came on for hearing on the facts and circumstances above stated.

Mr. *Manisty*, Q.C., Mr. *Butt*, and Mr. *V. Lushington*, for the Appellants:—

This case lies in a very narrow compass. The *Scindia* was a derelict, and, with her cargo, of the value of above £30,000, was preserved from total loss by the Appellants under circumstances which entitle them to a liberal compensation for their services. The sum of £2,000 was wholly inadequate as remuneration for the salvage service rendered by the Appellants. It is clear that the loss of £3,150 sustained by *Kirby*, in consequence of the policies of insurance on the ship *Alicia Annie* and her cargo being avoided by deviation in her course, ought to be taken into account in considering the sum awarded for salvage. As also in respect to the owners of the cargo for breach of contract, *Wilson* v. *The Newport Dock Co.* (1).

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(1) 1 L. R. Ex. 177.

The *Queen's Advocate* (Sir *R. Phillimore*), and Mr. *E. C. Clarkson*, for the Respondents:—

This Court, like the former Courts of Delegates in Admiralty cases is averse to interfere with the discretion of inferior Courts in varying the amount of salvage service. This is not a case of appeal on the question of distribution, that question has yet to be settled by the Court below; but it is an appeal for the purpose of increasing the sum decided by the Court below to be amply sufficient remuneration for the services performed. We submit that the tender of £2,000, and the subsequent award of that sum by the Judge of the Vice-Admiralty Court, was an abundant recompense for the salvage services performed by these two vessels.

Their Lordships, at the conclusion of the argument, desired to hear the following case, The *True Blue*, which involved the same principle, namely, the increase of the sum awarded by the Court below for salvage services; before giving judgment.

Proctors for the Appellants, the owners, &c., of The *Aminta*: *Pritchard & Sons.*

Solicitors for Appellants, the owners, &c., of The *Alicia Annie*: *Gregory, Rowcliffe, & Rowcliffe.*

Solicitors for the Respondents: *Walton & Bubb.*

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GEORGE MICHAEL PAPAYANNI AND OTHERS . . . . . } APPELLANTS;

AND

CHARLES HOCQUARD AND ANOTHER . . . RESPONDENTS.

THE "TRUE BLUE."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF MALTA.

Derelict, salvage of—Appeal for insufficiency of sum awarded allowed and salvage increased.

In a case where a derelict vessel and cargo of the value of £1,452 was salved by a steamer, which, with her cargo, was of the value of £30,000, the Vice-Admiralty Court awarded £300 for salvage:—*Held*, by the Judicial Committee that, under the circumstances, that sum was not sufficient, and the same increased to £450.

THIS appeal was brought from a judgment of the Vice-Admiralty Court of the Island of *Malta*.

The cause from which the appeal was brought arose out of a claim for salvage, brought by the Appellants, the owners, Master and crew of the steamship *Laconia*, against the schooner *True Blue*, of which the Respondent was the Owner and Master; for services rendered in towing the *True Blue* into the harbour of *Malta*. The *True Blue*, a schooner of ninety-six tons burthen, bound from *Ancona*, with a cargo of wheat, to *Cork* or *Falmouth*, had been abandoned by her Master and crew through stress of weather; and on the morning of the 14th of February, 1865, was fallen in with by the *Laconia*, at a considerable distance from the Island of *Malta*. The *Laconia* was a screw steamer, of 782 tons burthen, of 200 horse-power, and of the value of about £30,000, and at the time was on a voyage from *Alexandria* to *Liverpool*, laden with a valuable cargo, intending to call at *Malta*, and did not change her destination, though she deviated from her course, for the purpose of salving the *True Blue* and

* *Present*:—DR. LUSHINGTON, SIR JOHN TAYLOR COLERIDGE, and SIR EDWARD VAUGHAN WILLIAMS.

her cargo. She commenced to tow the *True Blue* at about noon on the 14th of February, and towed her to *Malta*, where she arrived at about 2 A.M. on the 16th of the same month. The total value of the property salved was £1,452. 15*s*.

A suit was brought in the Vice-Admiralty Court of *Malta*, and the *True Blue* arrested; appearance was entered for the Respondent; whereupon the Master of the *Laconia*, on behalf of the Appellants, filed a protest in the Court of Commerce of *Malta*, and desired, under the authority of that Court, to declare the particulars of his voyage, and the vessel found by him abandoned at sea; but the Judge of the Vice-Admiralty Court (Sir *Antonio Micalef*), acting under the rules and regulations for the several Courts of Vice-Admiralty abroad, established by the Order in Council of the 27th of June, 1832, in pursuance of the 2 Will. 4, c. 51, and further enforced by the 26 & 27 Vict. c. 24, s. 24, ordered the Appellant to bring in his petition without prejudice to the Respondent's right to object at the hearing to the jurisdiction of the Vice-Admiralty Court of *Malta*. The Appellants accordingly brought in an Act on petition, setting forth the above facts, and the circumstances under which the *True Blue* became a derelict, and the nature and particulars of the salvage service rendered by the *Laconia*; and praying that such sum might be decreed to them for salvage service rendered and losses sustained. The Respondents, in their reply, admitted the particulars of the services pleaded to be substantially true. The cause was heard on the 3rd of April, 1865, when the Judge of the Vice-Admiralty Court, on the preliminary exception to the jurisdiction of the Court, considering the 26 & 27 Vict. c. 24, and the rules and regulations in force under that Act, and the Orders in Council of the 27th of June, 1832, and 6th of July, 1859, and that, according to the 10th section of the 26 & 27 Vict. c. 24, Vice-Admiralty Courts have jurisdiction in respect of claims relative to salvage of ships or goods therefrom, and that according to section 2 of that Act the term "Vice-Admiralty Court" meant any of the Vice-Admiralty Courts enumerated in the schedule annexed thereto, among which was *Malta*; and that Courts in *Malta* have hitherto exercised jurisdiction in salvage cases, decided, that, notwithstanding there was another Court (the Court of Commerce),

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having power to take cognizance of similar questions, the present cause was subject to the jurisdiction of the Vice-Admiralty Court of *Malta*, and upon the merits decreed the sum of £300 to the Owners, Master and crew of the *Laconia*, for salvage service rendered by them to the *True Blue* and her cargo, with costs.

The Appellants appealed from this decree, and prayed that a larger sum than £300 might be awarded to them in the circumstances, as salvage services.

Mr. *Brett*, Q.C., and Mr. *Cohen*, for the Appellants :—

We do not impeach the decision of the Court below on the question of jurisdiction; we think, whether or not there may be a concurrent jurisdiction in the Court of Commerce at *Malta*, the Vice-Admiralty Court established there had jurisdiction under the 26 Vict. c. 24, and the Orders in Council referred to in the judgment below. We are aware also of the difficulty of inducing a Court of appeal to vary the amount of salvage services given by the Court below, but under the peculiar circumstances of this case we submit that the sum of £300 is too small for the risk we incurred, and the service we performed, in salving this derelict vessel. First, it is clear from the evidence, and is admitted on the pleadings, that at the time when the *Laconia* came up to the *True Blue* she was not only a derelict, but in such a condition that the total loss of the ship and cargo would have been inevitable but for the salvage service we rendered. In performing such services the *Laconia* was delayed on her voyage during a period of not less than twenty-three hours; the expenses incurred by such delay, with the wear and tear of the vessel, exceeded £100. The value of the *True Blue*, with her cargo, is admitted to be £1,452. 15*s.*, without her *pro rata* freight, which we say ought to be added. There was, besides, the extra labour of the Master and crew of the *Laconia*, the fatigue and exertion they were compelled to undergo to be taken into consideration. Added to which, it must be borne in mind that in rendering such salvage services the *Laconia*, to some extent, deviated from her voyage, and the Master took upon himself a heavy and anxious responsibility, as well on account of such deviation, as of the great peril and loss to which he was obliged to expose his ship and cargo. On these grounds, and upon the

principle of the decided cases, we submit that we are entitled to a larger sum than £300. The principles on which Courts of Admiralty proceed lead to a liberal remuneration for salvage services: *Arnould* on Marine Insurance, p. 477; The *Sarah* (1); The *William Beckford* (2). The *Inca* (3), which is similar to the case here, was one of derelict; and in this Court the Judicial Committee, in a case where the salvage awarded by the High Court of Admiralty was £250, increased the amount to £500: *The Medora Caledonian Steam Company* v. *Stutton and others* (4).

Mr. *Aspinall*, Q.C., and Mr. *E. C. Clarkson*, for the Respondents:—

There has been ample remuneration for the services performed. Looking at the value of the ship and cargo of the *True Blue*, and the circumstances under which the salvage was effected, there was no such risk incurred as is insisted on by the Appellants, who were fully remunerated by the sum of £300 awarded them by the Judge of the Vice-Admiralty Court of *Malta*. This Court is unwilling to interfere with the amount of salvage awarded by the Court below: The *Neptune* (5), The *Clarissa* (6). There was no such deviation from the course by the *Laconia* as would entitle her to an increase of salvage. The only inconvenience sustained by her was the delay of a few hours on her voyage.

DR. LUSHINGTON:—

In these appeals the same question arises, and upon which similar arguments have been used, though the circumstances and the value of the property concerned in each case are totally different.

It is perfectly true, as it has been argued on behalf of the Respondents in these two cases, that this Court is always very reluctant to review cases of salvage, either coming from the Court of Admiralty or from the Vice-Admiralty Courts, on the sole ground of the pecuniary reward which has been bestowed in those Courts being deemed to be insufficient; because it is manifest that in all these cases there is the exercise of individual discretion, and that exercise of individual discretion almost always differs among dif-

(1) 1 Rob. 313 note.
(2) 3 Rob. 355.
(3) 12 Moore, P. C. Cases, 189.
(4) 5 Notes of Cases, 156.
(5) 12 Moore, P. C. Cases, 346.
(6) Ib. 340; S. C., Sw. 129; Ad. Rep. 129

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ferent persons. Still, however, if they think that the justice of the case has not been attained, it is the duty of this Court, sitting as a Court of appeal, to remedy any grievance which may appear to exist, and to do that which under the circumstances they may consider to be right.

Having made this observation, the first point to which we will refer is that which has been very much argued, the question of deviation. In both these cases that question arises. There is no doubt whatever that in the strict sense of the term the vessel in each case was guilty of a deviation; and the consequences of being guilty of a deviation may be of the utmost importance.

In the first place the consequence of a deviation may be the voidance of the policies of insurance altogether, or, as was argued, the consequence might be that actions might be brought by the owners of the cargo against the owners of the ship.

Now with regard to the present state of the law upon this subject, it undoubtedly is left in an undecided state. Their Lordships will state all that they know about it; but they are satisfied, from having formerly made as narrow an examination into the authorities as they possibly could, and again since yesterday, that it never has been directly decided by any Court in this country what is the effect of a deviation, where the object of that deviation has been the performance of salvage service with reference either to life or to property.

All that we know of the law upon the subject (having looked to the cases referred to as authorities) is to be found in the last edition of Mr. Justice *Park's* book on Marine Insurance, in which (p. 647) there are the following words: "And a ship may go out of her regular course in order to afford assistance to another ship in distress, without being guilty of a deviation." And, whoever may have used those words, he cites as authorities in support of that assertion, 6 East, p. 54, and 3 Rob. Ad. Rep. p. 294. There is also cited the case of The *Jane*, in 2 Hag. Ad. Rep. p. 338.

Now with regard to The *Jane*, that case leaves the question exactly where it was before; it says nothing beyond expressing a doubt whether the law goes to the full extent of saying that in every case a policy of insurance would be vitiated under such circumstances. Nor does the case cited from 6 East, and the

observations which fell from Mr. Justice *Le Blanc* in that case, appear to us to support the passage which has just been read from Mr. Justice *Park's* book. The American authorities are well known to have taken a distinction between risk incurred in life salvage and in the salvage of property (*Kent's* Comms., vol. iii., p. 16); but it is also known (though it is impossible to refer to it, because it was merely the *ipse dixit* of a very learned person) that a Judge used this argument, he said it would be exceedingly injurious to the mercantile marine of *England* if in every case in which assistance should be rendered to another merchant vessel, the policy of insurance should become void; and he expressed a doubt whether, under such circumstances, it would not be an exceedingly injurious thing to lay down an universal rule that policies shall always be vitiated, and that if the cargo be lost or damaged, an action will always lie against the owners of the vessel.

Now in these cases, their Lordships have been invited to solve that question. Their Lordships beg leave to decline that invitation. If we could have given it a direct solution at once, without taking time for consideration, we should have been very glad so to have done; but we are of opinion that this question ought to be raised, not incidentally before this Tribunal, but directly before another tribunal, as the great question at issue, and there receive the most careful deliberation, until at last it comes to a final solution and is set at rest.

We will only add that in all these cases where the Judge considers in his own mind what he ought to do with respect to the amount of salvage to be given, he can never forget that there was possibly a risk incurred by those on board the salving vessel in respect to the vacation of policies of insurance, and in regard to actions which might be brought against the owners of the vessel by owners of cargo.

So much for that point. The next point to which their Lordships must very briefly advert—which has been very much enlarged upon—is the question of derelict: that is, how far a case of derelict differs from one which is not derelict. On this point there are some very important observations in one of the earliest judgments of Lord *Stowell*. It is in the case of The *Aquila*, which is among the very first of his judgments, and is to be found in

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1 Rob. Ad. Rep. p. 37. In that case, after a research into all the authorities which could be found upon the question, Lord *Stowell* considered what was the amount of salvage proper to be awarded in cases of derelict; whether or not there was an ancient usage of giving a moiety to those who rescued the vessel: whether there was any fixed proportion, or whether the fit and proper rule was not to look at all the circumstances, and give what, in the judgment of the Court, was the estimate of the proper amount; and he stated that the result to which he had arrived was, that, though there was an ancient custom of giving a moiety of the value, which custom had lasted down to the time of *Charles* II., since that reign it had fallen into desuetude. He then goes on to state what had occurred from time to time, and comes to the conclusion that the proper mode of considering the question is, what is the fit and proper amount, with reference to all the circumstances, including the value of the property salved, and the risk to the property of the salvors?

Now, in truth and in fact, when the Court comes to consider the question of derelict or not, it takes into consideration the danger to the property; and so it does where the vessel is not derelict: the property may be in infinite danger though it is not derelict: but the Court always considers that one of the material ingredients, upon which it gives a large salvage, is the danger to the property; and the danger may be (we do not say it is, but the danger may be), and in certain cases of salvage it is, as great to the property which is not derelict as it is in other cases where the property is derelict. Therefore, the proper course to pursue in all these cases is to consider the fact of derelict as being, as it were, an ingredient in the degree of danger in which the property is.

Now, having said that, and disclaiming altogether the notion that there ought to be any particular proportion awarded in a case of derelict—though of course, from the very principle we have stated, in the case of derelict a larger proportion of salvage would be given than in other cases—we now come very briefly to notice the cases which have been argued before us.

It appears that in the case of the *True Blue*, the vessel which effected the salvage was the *Laconia*, a steam-vessel, the value of which was £30,000. £300 was given by the Court below. The

value of the property salved was £1,452. The vessel was taken possession of about 240 miles from *Malta*, at noon on the 14th of February, and reached *Malta* on the 16th of February.

Now that the vessel was in danger when she was so taken possession of, having been so many days before abandoned by her own crew, there can be no doubt whatever; but there was nothing in the particular state of the weather at that time, nothing in the particular locality where the vessel was, to shew there was any immediate danger of absolute destruction to the vessel. Every vessel when abandoned at sea, left without any one on board, is, of course, in considerable degree of danger, because, perhaps, in a short time it is almost absolutely certain that the vessel will come to entire destruction.

Then, with regard to the salvors themselves, this is a case in which the salvage was effected by a steamer, consequently there was no great degree of labour to those on board the vessel. A certain degree of additional labour there might be, but nothing to any great extent. Danger to the salvors there was none whatever. The vessel was afterwards detained at *Malta* for a certain length of time; as far as it is to be collected from the evidence of the Master and crew, it was for about eleven or twelve hours. Now the question is whether regarding the value of the vessel salved, viz., £1,452, their Lordships ought to approve of the decree of the Court below for £300: and we are all of opinion that it is not sufficient. We are of opinion that there ought to be a certain increase; we all think the sum which ought to have been given is £450, including the £300 already given.

We now proceed to consider the case of the *Scindia*.

The salvors in this case, are the *Aminta* and the *Alicia Annie*, and the property salved is very considerable. The value, as near as we can make out, is admitted to be about £31,000. There is a difference in the statements of the value; one case states it at £30,281, the other at £31,281, but probably about £31,000 is a fair statement of the value.

Well, then, the next consideration is, what is the value of the salving ships and their cargoes? We are not able to fix it exactly. We are not at all aware what the value of the *Alicia Annie* was, though probably it was very considerable.

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The other vessel and cargo were certainly of very large value, worth £140,000 or £150,000; it cannot be fixed more nearly, nor is it important that it should be done in this case. The number of salvors on board the two salving ships was no less than about forty men. Now the sum of money which was tendered was £2,000, and that sum the Judge of the Vice-Admiralty Court at the *Cape of Good Hope* deemed adequate. He deemed £2,000 to be sufficient, and there left the case. It appears he left the case there without doing anything more, because having pronounced his opinion that £2,000 was sufficient for both ships, he may have thought that application would be made to him to wind up the case. We understand that is what he meant, though he does not express himself very definitely. He expected applications would be made to him on behalf of the two Appellants, with regard to the agreement which was made between them with reference to the division of the salvage.

The circumstances of this case are soon told.

The derelict vessel was at a certain distance from the shore, of course there is a difference in the evidence as to what that distance was; if there had been no difference in the testimony at all, it would have been the most surprising case their Lordships ever had to consider; however, there is a difference, though it is a matter of no great importance—it was at a distance of something like twelve or fourteen miles; but they say, with great truth, the vessel was in great danger, and so, beyond all doubt, she was at that period, with her port-holes open, her scuttles open, three feet of water in her, and the quantity of water increasing every hour, because that would be a matter of course even in calm weather, and if the weather had come on to blow she would have been in very imminent danger indeed. As to all the discussion about "immediate danger," if it is meant that she was in "immediate danger" at that moment of going down and sinking, she certainly was not; but she was in "immediate danger" in another sense of the word, namely, unless some one came to her rescue in a very short time she would have been lost and destroyed altogether. Therefore, upon this point the question turns upon the effect of the word "immediate." When the *Alicia Annie* came to the assistance of the *Scindia*, she certainly was not strong enough,

looking at the number of her crew, to perform the work of salvage successfully in a short time; and when the *Aminta* comes up she makes an agreement with her that they shall share the salvage equally, the *Aminta* being a much larger vessel, and having a much larger crew, so that they could put on board the *Scindia* a sufficient number of sailors to effect the rescue of the vessel. That was done, and the vessel was, without much labour, conveyed safely into port. The distance signifies nothing; a few hours' sailing accomplished the whole distance, and the vessel was brought safely into port.

Now a tender having been made of £2,000, and that having been deemed by the Judge of the Court below sufficient, the question comes to us shortly in this shape—Was this a sufficient tender? That is the whole question, looking at the values, and taking into consideration (that which it is impossible for any one to define) the additional risk from having to make a deviation, is not the actual event, but the possible event, of the cargo being lost or damaged, an event which must, to a certain extent, not be forgotten in estimating the amount of salvage to be awarded.

Now we are all of opinion that £2,000 was not sufficient, and we shall pronounce for an additional £1,000, which will make £3,000.

But there is another matter remaining behind, and that is with regard to the *Alicia Annie*. What their Lordships will do will be this: of course the costs must be paid, because we reverse the judgment of the Court below. According to the agreement, £1,500, a moiety of the salvage, must be paid over to the owners of the *Aminta;* but with regard to the other £1,500, there is a difficulty as to what was going to be decreed by the learned Judge of the Court below. We shall do this: we shall require £1,500 to be left in the Registry, and then either the owners of the *Aminta*, or the owners of the *Alicia Annie*, may make an application to their Lordships, and they will decide, according to the justice of the case, what ought to be done with that £1,500.

Their Lordships, however, propose to distribute the £1,500, awarded to the *Aminta* in this way: to give £1,000, to the owners, the salvage having been in reality chiefly performed by the vessel; £200, to the Master for the responsibility he incurred; and £300, among the crew.

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With regard to the *Alicia Annie*, this will be the course: those who represent the *Alicia Annie* will present a petition that the £1,500 may be paid to them. The Respondents may appear on that petition, and deny the right of the *Alicia Annie* altogether, and pray it may be paid over to them wholly or in part.

Proctors for the Appellants: *Pritchard & Sons.*

Proctors for the Respondent: *Clarkson, Son, & Cooper.*

J. C.* 1866. *Nov.* 3.

IN THE MATTER OF LAURENCE McDERMOTT AGAINST CERTAIN ORDERS OF THE SUPREME COURT OF BRITISH GUIANA.

ON PETITION FROM BRITISH GUIANA.

Contempt of Court—Comments in Newspaper on administration of justice—Order committing Publisher to gaol—Charter of Justice of British Guiana, 20th June, 1831—Appealable value.

Leave to appeal given from an Order of the Supreme Court of Civil Justice of *British Guiana*, committing the publisher of a local journal to prison for six months for an alleged contempt of Court, in Publishing in such journal comments on the administration of justice by that Court, with liberty to the Judges of the Supreme Court to object to the competency of such appeal at the hearing.

THIS was a petition for leave to appeal from an Order of the Supreme Court of *British Guiana* committing the Petitioner, *Laurence McDermott*, the publisher of the *Colonist* Newspaper, to gaol for six months, for an alleged contempt of Court in publishing in that Newspaper two articles supposed to reflect on *James Crosby*, Esq., one of the Judges of the Supreme Court in that Colony, and on Mr. *Ross*, a Barrister practising in that Court.

The petition stated that for some time past great dissatisfaction had existed, and much discussion been raised respecting the judicial proceedings of the Supreme Court of Civil Justice of the Colony, and especially with regard to certain proceedings taken against Mr. *Campbell*, one of the Officers of that Court, who, by

* *Present*:—LORD WESTBURY, SIR EDWARD VAUGHAN WILLIAMS, and SIR WILLIAM COLVILE.

reason thereof, had been compelled to resign his office; that the Petitioner, in reporting the particulars of such proceedings, allowed them to be commented on, and their nature and legality to be discussed in two Articles in the *Colonist* Newspaper.

That the Petitioner had intimation that an *ex parte* Order dated the 2nd of April, 1866, had been issued by the Supreme Court against him, in the following form:—"Upon the information and motion of *Edward Charles Ross*, Esq., Barrister-at-Law, this day made to me in non-session of this Court, and upon reading the affidavit of *James Burford*, dated and sworn this day, and filed in this matter; and upon reading a certain copy referred to in such affidavit of a printed Newspaper called the *Colonist*, appearing to have been published by one *Laurence McDermott*, at his office, Lot 26, *Water Street, New Town*, on the 29th day of March last, wherein are printed and published divers scandalous and libellous articles and statements reflecting on the administration of Justice in this Colony by the Supreme Court thereof; and in particular certain scandalous and libellous passages and statements as to His Honour *James Crosby*, Esq., one of the Judges of the said Supreme Court, maliciously abusing and threatening the said Judge, and tending to the great obstruction of the course of justice, and being in contempt of this Court, I do hereby order and direct that the said *Laurence McDermott* do personally attend this Court at its sitting, in *George Town*, on Wednesday next, the 4th day of April instant, at half-past ten A.M., and further that he then and there shew cause why an attachment should not be issued against him for such contempt as aforesaid, or why he should not be committed to prison or otherwise dealt with in respect of such contempt according to law, and as the Court shall think fit to order. *J. Beaumont*, C. J."

That this Order was not personally served on the Petitioner, but was left at the registered office of the *Colonist*, and was handed to the Petitioner by one of his servants; and the Petitioner having such notice, and the same purporting to affect the personal liberty of the Petitioner, he appeared in Court on the 4th of April, 1866. That the Court, consisting of Chief Justice *Beaumont*, and Mr. Justice *Beete*, thereupon and without proceeding in the matter

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of the Order, or hearing the Petitioner's Counsel, who were then in attendance, prepared to urge legal objections both to the Order itself and the proceedings taken against the Petitioner, adjourned the matter of the Order to the 6th of April then next, when the Petitioner was further ordered to attend the Court at its sitting, to answer in respect of the contempt alleged against him, and to shew cause why an attachment should not issue against him, or why he should not be committed to prison or otherwise dealt with according to law, and as the Court might think fit to order in respect thereof. That accordingly the Petitioner again appeared on the 6th of April, 1866, and Mr. Attorney-General and Mr. *Gilbert*, his Counsel, having been heard to shew cause on his behalf, the following proceedings took place, as appeared upon the Minutes of the Court:—"The Court taking notice of and having reference to a certain Newspaper called the *Colonist*, purporting to have been printed and published on the 5th day of April instant, by the Petitioner, at his office, Lot No. 26, *Water Street, New Town*, City of *George Town*, and of certain scandalous matter printed and appearing in such Newspaper, reflecting improperly upon the proceedings of the Court had and taken therein, and reflecting improperly upon *Edward Charles Ross*, Esq., Barrister-at-Law, for having informed and moved the Court therein, such scandalous matter being contained in the leading article printed and published in the said Newspaper, and being so printed and published in contempt of the authority and jurisdiction of this Court, and tending to prejudice and obstruct the administration of justice; and the Court also taking notice of, and having reference to, a certain declaration in writing made by the Petitioner, in pursuance of the provisions of Section 1 of Ordinance No. 26, 1839, before *E. H. G. Dalton*, sworn Clerk and notary public of the Registrar's Office of *Demerary* and *Essequebo*, and bearing date the 3rd of August, 1863, and now remaining recorded in the office of the Registrar: it is pleased to order and to direct the Petitioner, he being personally here before the Court, that he do attend the Court personally at its sitting on Tuesday next, the 10th of April instant, and do then further answer, as well for the contempt alleged against him as in the aforesaid Orders mentioned, as for such further contempt as now alleged in

respect of the aforesaid matter contained in the *Colonist* Newspaper, printed and published on the 5th of April instant, and do then shew cause why, for such contempts as aforesaid, an attachment against him should not issue, or why he should not be committed to prison, or otherwise dealt with in respect thereof according to law, and as the Court may think fit to direct."

That the Petitioner, on the matter being called on the 10th of April, 1866, again appeared personally in the Court, which again consisted of the Chief Justice *Beaumont* and Mr. Justice *Beete*, in pursuance of the Order of the 6th of April then last, when the following proceedings, as appeared from the Minutes of the Court, took place:—"The Petitioner, being called on to shew cause, as directed by such Order, Mr. Attorney-General and Mr. *Gilbert*, of Counsel for him, objected and declined so to do, alleging that such Order was irregular, and ought not to be proceeded on; but that the Court ought, without reference thereto, to adjudicate on and dispose of the matters alleged against the Petitioner, and as to which he was called on to shew cause by the Orders of the 2nd and 4th of April instant made therein. The Court, having heard and considered such objection, overruled the same, and considered that the Order of the 6th instant made therein was regular, and that the Petitioner was bound to shew cause as thereby directed. And further (inasmuch as his Counsel objected to the Order now being proceeded upon, that it was pronounced *ore tenus*, and that no minute or written copy thereof had been served on him), the Court considered that the Petitioner having been present personally and by his Counsel in Court when such Order was made, it was not necessary to serve him with any minute or copy thereof; but intimated that, nevertheless, if he or his Counsel desired to be further advised of the same, or the terms or effect thereof, the Court would allow a further time to shew cause thereunder. Mr. Attorney-General having, on behalf of the Petitioner, declined to shew cause thereunder, Mr. *E. C. Ross*, the informant of the Court in this matter, was heard in answer to what was alleged on behalf of the Petitioner herein on the 6th of April instant. Mr. Attorney-General having declined to reply, the Court reserved its decision until Friday next, the 13th of April instant, and, he being personally present before

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the Court, ordered the Petitioner to appear therein personally at the sitting of the Court on that day, and intimated that, notwithstanding his refusal to shew cause therein, as directed by the Order of the 6th of April instant, the Court would allow him, should he be so advised, to shew cause thereunder upon that day before pronouncing their decision herein."

That, on the 13th of April, 1866, the Supreme Court, consisting of the Chief Justice *Beaumont* and Mr. Justice *Beete*, gave judgment, and therein expressed their opinion that the Petitioner had been guilty of a contempt of Court, and on the same day pronounced the following Order:—"The Court having asked Mr. Attorney-General, of Counsel for *Laurence McDermott*, whether he desired to shew cause in this matter in pursuance of the liberty to that effect given and reserved to him by the Order therein of the 10th instant, he declined so to do, and thereupon and upon referring to the several Orders therein made on the 2nd, 4th, 6th, and 10th of April instant, the affidavit of *James Burford*, sworn and filed in this matter on the 2nd of April instant, the copy of a Newspaper called the *Colonist*, dated the 29th of March last, referred to in such Affidavit, and also to the copy of the *Colonist* Newspaper dated the 5th of April instant, and the declaration of the said *Laurence McDermott*, dated the 3rd of August, 1863, both referred to in the Order of the 6th of April instant; and upon considering this matter, the Court doth adjudge and determine that *Laurence McDermott* hath committed a high contempt of this Court in and by having printed and published in the *Colonist* Newspaper of the 29th of March last, an Article commencing, 'It is rumoured that that valiant gentleman Mr. Acting Justice *Crosby's* advice;' and also in having printed and published in the *Colonist* Newspaper of the 5th of April instant, an Article commencing with the words, 'It is now an undoubted fact that we have to perform our duty as Journalists;' such Articles respectively containing divers matters scandalously reflecting upon this Court, and in particular upon His Honour *James Crosby*, one of the Judges of the Court, and improperly reflecting upon *Edward Charles Ross*, Esquire, the informant of the Court herein, and tending to defame and obstruct the administration of justice: and doth order that for such contempt he, *Laurence McDermott*, be imprisoned in

Her Majesty's gaol of *George Town* for the term of six calendar months, to be computed from this date, or until he shall be sooner discharged therefrom by the further Order of this Court."

That the Petitioner was delivered into the custody of the Keeper of Her Majesty's Gaol, at *George Town*, under a Warrant of commitment made on the same day, by the Chief Justice *Beaumont*, to undergo the term of six months' imprisonment, so imposed by the Court.

That the Petitioner, feeling deeply aggrieved by the Order of commitment for such alleged contempt of Court, and being advised that the same was wholly illegal and irregular, applied to the Court before he was taken into custody by the Provost Marshal, and afterwards by petition, for leave to appeal from the Order of commitment to Her Majesty in Council. That, in his petition for leave to appeal against the Order of Commitment, he stated and insisted that the Order had the effect of a final or definite sentence, involving a civil right, namely, the Petitioner's right to liberty for six months, which was of more value to him than the sum of five hundred pounds, the sum limited by the Order in Council, of the 20th June 1831, regulating appeals from the Supreme Court to Her Majesty in Council. That by the aforesaid Order in Council it is expressly provided, that if the party or parties Appellant shall establish to the satisfaction of the Court that real and substantial justice requires that, pending such appeal, execution should be stayed, it shall be lawful for such Court to order the execution of any judgment, decree, order, or sentence to be suspended pending such appeal, if the party or parties Appellant shall give security for the immediate performance of any judgment or sentence which may be pronounced or made by Her Majesty in Council upon any such appeal; and the Petitioner submitted that real and substantial justice required that, pending such appeal, execution should be stayed, inasmuch as the Petitioner, by the Order or sentence of the Supreme Court, had been condemned to be imprisoned in Her Majesty's gaol of *George Town* for the term of six calendar months from the 13th of April, 1866, and unless the execution of the sentence was stayed pending the appeal, to Her Majesty in Council, the Petitioner, in the event of the appeal being decided in his favour,

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would in all probability, before the decision of the Privy Council could be given and made known in the Colony, have undergone the whole period of such imprisonment, and be without remedy or redress for having suffered the same. That by a judgment pronounced by the Chief Justice *Beaumont*, on the 4th of May, 1866, that Judge refused to grant your Petitioner leave to appeal, on the ground that it was not an appealable case within the provisions of the before mentioned Order in Council of the Colony.

That the Petitioner then petitioned Her Most Gracious Majesty praying for inquiry and relief in the matter of his imprisonment, and was advised by the Lieutenant-Governor of the Colony and Her Majesty's Secretary of State for the Colonies, that the only redress the Petitioner could obtain was by an appeal to be heard by the Judicial Committee of Her Majesty's Most Honourable Privy Council.

That the several orders and proceedings of the 2nd, 4th, 6th, 10th, and 13th days of April, 1866, were irregular, illegal, and void, contrary as well, to the practice prevailing in the Supreme Court of *British Guiana*, as to that of all other Courts within Her Majesty's dominions, and that they are especially contrary to the Local Ordinances in force in the Colony of *British Guiana*; and inasmuch as the Petitioner had been deeply injured and aggrieved as well by the illegality of the proceedings as by the enforcement of such illegal and irregular Orders, and desired, as well for the sake of his own character and reputation, as for the right and due administration of justice, that the Orders and proceedings should be cancelled and declared void, he prayed for leave to appeal from the Order of the 13th of April, 1866, and the judgment of the Supreme Court of the 4th of May, 1866, refusing him leave to appeal, and to have reversed, rescinded, and cancelled the Orders and proceedings of the 2nd, 4th, 6th, 10th, and 13th of April, 1866, respectively.

Mr. *Coleridge*, Q.C., and Mr. *Edmund F. Moore*, for the Petitioner, now moved for leave to appeal.

Although the appealable value is limited by the Order in Council of the 20th of June, 1831, to £500, yet we submit that, in a case such as this, where the liberty of the subject is involved, an appeal will lie irrespective of any money value. If the *rule*

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were otherwise, the grossest injustice on the liberties of British subjects resident in the Colonies, might be perpetrated at the caprice of the Judges in the Colonies. It is essential, therefore, for the liberty of the subject that such an appeal should be allowed. It has been admitted in several cases: *Smith* v. *The Justices of Sierra Leone* (1); *Rainy* v. *The Justices of Sierra Leone* (2). In this country, the Petitioner would have had his remedy by writ of *Habeas Corpus*, but in a case like this, that writ could not be obtained from the Colonial Court, and since the Statute, 25 & 26 Vict. c. 20, s. 1, it cannot be applied for here. [LORD WESTBURY:—Suppose a contempt at *Nisi prius* and a fine inflicted, would an appeal lie?] Perhaps not in *England*, but in the Colonies it is different; thus, in *Rainy* v. *The Justices of Sierra Leone* (2), an appeal from an Order imposing fines and imprisonment on a practitioner of the Court was allowed; and though that case broadly lays it down that, in the case of contempt, the Court making the Order is the sole judge of what constitutes the contempt, the appeal was admitted by this Court on the ground of the illegality of the Order, and the alleged contempt was inquired into.

LORD WESTBURY:—

Their Lordships regard this case as one of great importance, and one that may lead to important consequences. On the one hand it is essential to preserve a Court from all obstruction to the course of justice; on the other hand, it is very desirable that there should be a check upon any arbitrary exercise of the powers of the Court. But at present, having regard to the distinction between things done by Practitioners of Colonial Courts, and things done *in curia*; things done directly leading to interference with the administration of justice, and things which do not come within either of these categories, their Lordships are disposed to give leave to appeal, but without prejudice to the question, whether there is a right of appeal or not, our object is, that of necessity this important question should be fully argued when it comes before us.

By an Order in Council, made on the above Petition, it was ordered that the Petitioner should be allowed to enter and pro-

(1) 3 Moore's P. C. Cases, 361. (2) 8 Ibid. 47.

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secute his appeal from the Order of the Supreme Court of the 13th of April, 1866, and the judgment of the 4th of May, 1866, without prejudice to the question of the competency of Her Majesty in Council to entertain an appeal from an Order of a Court of Record, inflicting punishment, by fine or imprisonment, for a contempt of Court, which question was to be open to argument on the hearing of the appeal, and a copy of the Order was directed to be served on the Judges of the Supreme Court, with leave to put in their answer to the appeal.

Solicitors for the Petitioner: *Whitakers & Woolbert.*

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BARTOLOMEO CASANOVA . . . . . APPELLANT;

AND

THE QUEEN AND LIEUTENANT DUNLOP . RESPONDENTS.

THE "RICARDO SCHMIDT."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SIERRA LEONE.

Seizure of a Foreign vessel for violation of Slave Trade Act, 5 Geo. 4, c. 113—Restoration of by Court below, without damages and costs—Presumptive evidence—Application of the rule of evidence in Act, 5 & 6 Will. 4, c. 60, not admitted.

Seizure of a Foreign vessel in an English harbour for violation of the provisions of the 5 Geo. 4, c. 113, having been admitted, and proceedings taken thereon, the Judicial Committee held themselves not required to give an opinion whether such construction of the Statute was right or not, but that Statute having provided (s. 35) that costs and damages shall be given where it shall appear to the Court that the capture, seizure, or prosecution, shall not be justified by the circumstances of the case, the Court below is not at liberty to use the rule of evidence introduced by the Statute, 5 & 6 Will. 4, c. 60, contained in Arts. VI. 6° and VII. of the Treaty between *Great Britain, France,* and *Sardinia,* embodied in that Statute, as a ground for refusing, on the restoration of a vessel seized under the Statute, 5 Geo. 4, c. 113, to decree damages and costs.

Where, therefore, a Foreign vessel had been seized and afterwards decreed

* *Present:*—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

by the Vice-Admiralty Court of *Sierra Leone* to be restored, but without damages and costs, the Judge of that Court being of opinion, that there was probable cause for the seizure, from having an apparently unusual number of empty water-casks found in her (which articles are by the above Treaty specified and made conclusive as a ground sufficient to warrant detention, and to preclude compensation, even if no sentence of condemnation has been pronounced), and that as a Judge of a Foreign Court, had she been taken there, would have been precluded, under the circumstances, by the terms of the Treaty, from awarding costs and damages, the Court was precluded from giving such:—It was *Held* by the Judicial Committee, that though the Judge of the Vice-Admiralty Court was at liberty to use the circumstances relied on as a ground to justify the seizure under the Statute, 5 Geo. 4, c. 113, yet it was not competent for the Court, after a satisfactory explanation of the purposes for which the casks were used, to apply the rule regarding the refusal of damages and costs enacted in the Statute, 5 & 6 Will. 4, c. 60, to a vessel seized under the 5 Geo. 4, c. 113, and his sentence in that respect overruled.

A vessel of 600 tons, capable of carrying 900 tons, lying in the harbour of *Sierra Leone*, having been examined and released by the Custom House Officers, was afterwards hauled over and seized by *D.*, a Lieut. in H. M. Navy, accidentally at *Sierra Leone*. She had on board a cargo fit for the purpose of trading upon the African coast, with some thousand gallons of palm oil stored in casks on board. Of 111 casks found empty, sixty-five were clean new casks, and the others had been used for carrying oil. The ship's papers were delivered up to the Seizor, and every information regarding the history and ownership of the vessel afforded him. At the time of the seizure her Captain was engaged on shore in the sale of the residue of the outward cargo, and was in the act of purchasing a return cargo. The alleged suspicious circumstances of the vessel having a second deck, and more than the requisite quantity of cooking utensils, was satisfactorily accounted for, by the fact of the size of the vessel requiring for stowage a second deck, as, when loaded, she was not safe or insurable without such, and the evidence that the amount of the ship's vessels for cooking was less than requisite for the wants of the Captain and crew. Under such circumstances, it was *held* by the Judicial Committee, that there was no *probabilis causa* for seizure; that so much of the sentence of the Vice-Admiralty Court as held that there was probable cause should be reversed, and that the vessel ought not only to have been restored, but with damages and costs, which their Lordships awarded on appeal, together with costs of the appellate Court.

THIS was an appeal from so much of a judgment of the Vice-Admiralty Court of *Sierra Leone*, as refused to give damages and costs on the restoration of a vessel which had been seized in the harbour of *Sierra Leone* by the Respondent, Lieutenant *Dunlop*, for an alleged breach of the Statute, 5 Geo. 4, c. 113, for the abolition of the Slave trade.

The Appellant was the Master of the vessel, the *Ricardo*

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CASANOVA v. THE QUEEN.

THE "RICARDO SCHMIDT."

Schmidt, claiming in the Court below on behalf of himself and the owners, *G. Gambolata*, a Merchant residing and carrying on business at *Genoa*, and a subject of the King of *Italy*, and *E. G. Schmidt*, the Prussian Consul at *Genoa*, a subject of the King of *Prussia*.

The Judge of the Vice-Admiralty Court of *Sierra Leone* (Mr. *Carr*) in his judgment held, that there was probable cause of seizure, as it was admitted that the vessel at the time of her detention had on board 111 empty casks, without, as he considered, any certificate that security had been given that they should only be used for the reception of palm oil, or be employed in other lawful trade; and that she, as an Italian vessel, was bound under the Treaty between *Great Britain* and *Sardinia*, embodied in the Statute, 5 & 6 Will. 4, c. 60, to have such a certificate; and he held, that as, by the VIIth Article of the Supplemental Treaty between the same powers, of the 22nd of March, 1833, contained in the same Statute, it is expressly provided "that no compensation shall in any case be granted, either to the Master or to the owner, or to any other person interested in the equipment or lading of a merchant vessel in which any of the particulars in the preceding Article (the VIth) shall be found, even if the Tribunals should not pronounce any condemnation in consequence of her detention;" that as, if the vessel had been seized under the above Treaty, and taken to *Genoa* for adjudication, the Court at *Genoa*, under the circumstances, would have been precluded by the terms of the Treaty from awarding costs and damages; therefore he was precluded from giving such, and he referred for the principles by which the Court ought to be guided in construing the Statute, 5 Geo. 4, c. 113, to the cases of The *Winwick* (1), and The *Newport* (2).

It appeared, from the evidence in the cause, that the vessel cleared from the city of *Genoa* on the 9th of December, 1863, with a cargo of general merchandize, bound for the coast of *Africa* on a trading voyage, and sailed on the same day. That she put in at several places, and disposed of portions of her cargo before arriving at *Sierra Leone*, where she reported herself at the Custom House on the 28th of July, 1864, having on board at that time the residue of her cargo shipped at *Genoa*.

(1) 2 Moore's P. C. Cases, 30. (2) 11 Moore's P. C. Cases, 155.

It also appeared that on her arrival in the harbour of *Sierra Leone* she had on board 14,000 gallons of palm oil, with the residue of her outward cargo, consisting of 52 puncheons of rum, 108 cases of absinthe, 42 cases of olive oil, 140 empty casks, and a few other articles. The 140 casks were empty in consequence, as was stated, and uncontradicted, of the Master not having been able to find sufficient oil to fill them, as it was early in the season for palm oil. Some of them were new casks, but others had been already used for holding palm oil. On the day after her arrival the Master consigned the residue of the outward cargo to Mr. *Heddle*, a Merchant at *Sierra Leone*, and a Member of the Council in that Colony; and evidence was produced shewing that he had been informed by letters received by him of the ship's voyage and business, and had opened a credit in favour of the Master; and that after the seizure he submitted the whole of the ship's papers to Mr. *Shaw*, the acting Officer of the Customs in the harbour of *Sierra Leone*, and offered every information respecting the vessel; and that, in consequence, a permit was given, in pursuance of which forty-two of the empty puncheons were landed, in order to be sold.

After her examination and release by the Custom House officers, the seizure of the vessel was made at the instance of Lieutenant *Dunlop*, an Officer of Her Majesty's Navy, then accidentally in the harbour of *Sierra Leone*, on behalf of *Shaw*, who was at that time the acting Collector of Customs.

After the examination of witnesses, and the production of written evidence, a decree was pronounced by the Judge of the Vice-Admiralty Court (Mr. *Carr*), whereby the vessel was ordered to be restored to the Claimants (the Appellants), [together with the goods, wares, and merchandize on board, but without damages and costs.

Among the papers produced in evidence was a certificate of the Chamber of Commerce of *Genoa*, addressed to the Appellant as owner and Master of the ship, which certified as follows:—"That M. *G. Gambolata* is an honest and confidential person, and incapable of making any other use of the casks, merchandize, and other articles, shipped on board the *Ricardo Schmidt*, flying the Italian flag, Captain *Casanova*, and bound to *Goree* and other

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ports on the coast of *Guinea*, than those named: that is to say, to use them for lawful commerce; and the casks to be filled with palm oil or cocoa-nut oil."

The Appellant being a Foreigner, and unacquainted himself with the practice and proceedings of the British Vice-Admiralty Courts, and his Proctor ignorant that under the recent Statute, 26 & 27 Vict. c. 24, sec. 23, only six months was allowed for an appeal to Her Majesty in Council against the decree of the Vice-Admiralty Court of *Sierra Leone*, instead of a year, the limit under Statute, 5 Geo. 4, c. 113, omitted to assert an appeal from the above decree in due time, but having presented a special petition for leave to appeal, the Judicial Committee, under the circumstances, permitted the same (1).

The appeal now came on for hearing.

Dr. *Deane*, Q.C., and Mr. *V. Lushington* for the Appellant:—

There are two grounds upon which we object to the judgment of the Court below. First, there was no sufficient proof to warrant the Judge of the Vice-Admiralty Court in certifying that there was probable cause for seizure; and, secondly, that the Statute, 5 & 6 Will. 4, c. 60, in which the Supplemental Treaty between *Great Britain* and *Sardinia* is incorporated, the seventh Article of which was relied on by the Judge below as conclusive against his restoring the vessel, with costs and damages, is not applicable to a case of a Foreign vessel seized in a British harbour under the provisions of the Statute, 5 Geo. 4, c. 113, and was most improperly imported by the Judge, and applied to a case with which it had nothing to do. With regard, then, to the first point, namely, that there was probable cause for the seizure, we submit that the evidence entirely negatives such a presumption. There was, in fact, no pretence for the seizure of this vessel; she was lying in a British harbour, having entered without concealment or suspicion; and though taken possession of by the Custom House officers, she was, after a strict examination by them, released and restored to her owners. Her appearance and her cargo all indicated the nature, as well as the honesty of her trade,

(1) See case reported upon this point, *ante*, p. 115.

and satisfied the really responsible persons in the harbour of her *bona fides*. The boarding and seizure by Lieutenant *Dunlop* was a wanton and officious act, not justified by the character or appearance of the vessel, and entirely unwarranted by her papers. At the very time she was seized by Lieutenant *Dunlop* she was openly negotiating a sale of her cargo, and was consigning the same to one of the most respectable Merchants in the Colony. All the articles on board were deposed to by the witnesses as articles of commerce used in the African trade, in which she was engaged; and the only ground for alleging a breach of the *Slave Trade Act*, or even of the Sardinian Treaty, which had no bearing on the case, was there being on board 111 empty casks, which were satisfactorily proved to have been used and intended for the ordinary trade of the vessel. With such cogent and conclusive proofs of her innocence before him, it was impossible for the Judge of the Vice-Admiralty Court to do otherwise than restore the vessel; and it was a grievous hardship upon the Captain and owners of the vessel, who are Foreigners, engaged in a legitimate trade, that their vessel, on entering a British harbour, should be subjected, first to suspicion by the Custom House authorities on shore, and then, when that was removed, she should be seized by an Officer in Her Majesty's Navy who happened to be accidentally there; and, after being subjected to the indignity and inconvenience of a trial, and the Judge compelled by the force of the evidence to acquit and restore her, yet that notwithstanding he should declare there was probable cause for the seizure, and then import a rule from another and entirely different Statute as precluding him from giving damages and costs.

Now, there is no mention in the Statute, 5 Geo. 4, c. 113, of empty water-casks. They may be, from their number, not requisite articles, and if not duly accounted for, form an ingredient of suspicion sufficient to warrant the examination of a vessel; but in the only Treaty in which they are mentioned, in the Statute, 5 Geo. 3, c. 113, namely, the additional Article explanatory of the Treaty of the 31st of December, 1822, with the *Netherlands*, though enumerated with various other articles, as forming a *primâ facie* evidence of suspicion against the vessel, such evidence, it is expressly enacted, may be rebutted by satisfactory proof that the casks were intended

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for legal and legitimate use. Here the appearance of the casks themselves, their partial use, and the certificate of the Chamber of Commerce of *Genoa*, were amply sufficient proofs to rebut all presumption of the intended illegal use of the casks; and the Statute, 5 Geo. 4, c. 113, under which the seizure was made, and the proceedings below taken, expressly provides (sect. 35) for the restitution with costs and damages, for unwarrantable seizure or prosecution. It is in these words: "Provided always that nothing herein contained shall prevent the said Courts," (namely, the Vice-Admiralty Courts,) "or any of them, having jurisdiction in the principal cause, from adjudging and decreeing the Captors, Seizors, or Prosecutors in any such cause as aforesaid, to pay out of their own proper monies such sums in the nature of costs and damages as the said Court shall decree, when it shall appear to such Court that the capture, seizure, or prosecution, or the appeal thereon on the behalf of the Captor, Seizor, or Prosecutor, shall not be justified by the circumstances of the case." This section is conclusive, and ought to have governed the case.

Secondly, the Statute, 5 & 6 Will. 4, c. 60, has no reference to a case of this nature: it was passed for the carrying into effect a Treaty with the King of the *French* and the King of *Sardinia*, for suppressing the Slave trade, and contains the Treaty and subsequent Conventions. It is sufficient to observe that the right of search and capture there given applies only to the waters therein described, and which are exclusively high sea ways, and do not include the harbours of either Power. Now, this is most important, for the *Ricardo Schmidt* was seized in harbour, and was not only seized, but proceeded against under the Statute, 5 Geo. 4, c. 113, and not under the Statute, 5 & 6 Will. 4, c. 60. It is true that the Treaty contained in the latter Statute, in the Article cited by the Vice-Admiralty Judge, among the particulars enumerated, does specify, Art. VI. 6°, an unreasonable number of water-casks, but they may be accounted for, and are here, even if the Statute applied, satisfactorily explained; and the certificate given by the Chamber of Commerce at *Genoa* is, if such were requisite, evidence that sufficient security had been given for the proper use of the casks. The nature of the security is not defined, and if the Statute had any application, which we contend it has not, the certificate pro-

duced in evidence from the ship's papers, was, we insist, amply sufficient to satisfy the requirements of the Statute, and to entitle us to damages and costs. The cases of The *Winwick* (1) and The *Newport* (2), referred to by the Judge below, were both cases under the *Slave Act*, 5 Geo. 4, c. 113, and ought to have led, upon the principles there laid down, to a diametrically opposite conclusion from that the Judge of the Vice-Admiralty Court arrived at.

The *Queen's Advocate* (Sir *R. Phillimore*, Q.C.), and Mr. *Hannen*, for the Respondents:—

The allowance of costs and damages is one entirely of discretion: the Judge being of opinion that there was probable cause for the seizure, was right in his application of the Statute, 5 & 6 Will. 4, c. 60, having reference to the Supplemental Treaty with *Sardinia*, and the absence of proper security regarding the 111 empty casks found on board the *Ricardo Schmidt*. There is no question that the vessel was duly, and we say properly, seized. Lieutenant *Dunlop* acted under the 43rd sect. of the Statute, 5 Geo. 4, c. 113, and the whole question resolves itself into one of sufficiency or insufficiency of evidence. We submit that, upon examination of the evidence given by the witnesses who were examined, as well as the ship's papers and correspondence relating to the ship and cargo, there was sufficient ground of suspicion to justify the Vice-Admiralty Court in requiring satisfaction of the legitimate trading of the vessel, and that though there might not be, and was not, in the opinion of the Judge of the Court below, sufficient to justify her condemnation, or retention, there was probable cause, sufficient for her seizure, to justify the qualified restoration which the Judge decreed. The Article VI. of the Supplemental Treaty of the 22nd of March, 1833, between the King of the *French* and *Sardinia*, and which is incorporated with, and enacted by the Statute, 5 & 6 Will. 4, c. 60, declares that "any Merchant vessel of either of the two nations, visited and detained in pursuance of the Convention of the 30th of November, 1831, and of the provisions therein-before recited, shall, unless proof be given to the contrary, be held and taken of right to have been engaged in the Slave

(1) 2 Moore's P. C. Cases, 19 & 30. (2) 11 Moore's P. C. Cases, 155.

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trade, or to have been fitted out for the purposes of such traffic, if any of the particulars thereinafter specified shall be found in her outfit or equipment, or on board of her;" and then cl. 6° of Art. VI. specifies as follows: "Having on board an unreasonable number of water-casks or other vessels for holding water, unless the Master shall produce a certificate from the Custom House from the place at which he cleared outwards, stating that a sufficient security had been given by the owners of such vessel that such casks or other vessels, should only be used for the reception of palm oil, or be employed in any other lawful trade." Now, how is this requirement met? The certificate of the Chamber of Commerce of *Genoa*, is a certificate, if of anything, only of character; the above Article requires, that in such case security shall have been given, which, whether it means a Bond with sureties, or merely personal security, does not mean a simple expression of the good opinion of the honest intentions, or general confidence in the integrity of the Master, such as is expressed only by this document. Looking, therefore, at the undoubted fact that there were on board this vessel 111 empty casks capable of holding water, and that there was no certificate that security had been given that they should only be used for the reception of palm oil, the Judge of the Vice-Admiralty Court had no discretion in the matter, but was bound by the VIIth Article of the Treaty embodied in the Statute, 5 & 6 Will. 4, c. 60, to refuse damages and costs.

LORD WESTBURY:—

This is a case of a Foreign vessel, an Italian merchant ship, seized in the English harbour of *Sierra Leone*, on the ground of having violated the provisions of the Statute, 5 Geo. 4, c. 113. It has been assumed throughout that this Statute authorizes the seizure of a Foreign ship in British waters, if its provisions have been violated. That having been admitted, and taken as the basis of the whole of the proceeding, their Lordships do not think themselves under the necessity of giving any opinion on the point whether that construction of the Statute be right or not.

It is necessary to bear in mind that this seizure can be justified only on the grounds that are furnished by that Statute. The learned Judge in the Court below has decided, and very rightly,

that there was no cause for the condemnation of the vessel; but he has refused to award damages or costs under the power given to him by the 35th section of the Statute, because in his judgment the seizure and the prosecution were, under the circumstances of the case, justifiable. Whether there was, or was not, a probable ground for seizure must depend upon the state of the law as it stood at the time of that Statute, and as it is embodied therein. By a subsequent Act, 5 & 6 Will. 4, c. 60, which is not applicable to the seizure of Foreign vessels in British harbours, but applies to the capture of Foreign vessels on the high seas, a particular rule of evidence is given, viz. that the fact of there being on board the vessel an unreasonable quantity or number of water-casks, shall be considered as furnishing such a *presumptio juris* that the vessel was intended to be employed in the Slave trade, as to require the Judge, even if the vessel be not condemned, to refuse any damages or any costs to the owner of the vessel as against the Captor; provided, however, that the effect of the circumstance to which I have referred shall be neutralized or annulled if the ship have a certificate stating that security has been given that the casks should be only used for the reception of palm oil, or employed in some other lawful trade. Now, the learned Judge refers to that Statute as enabling him to arrive at the conclusion that the existence on board this ship, the *Ricardo Schmidt*, of an unusual quantity of water-casks, is a circumstance of such grave suspicion as to justify the seizure. The learned Judge was not at liberty to use the rule of evidence introduced by that subsequent Statute as applicable to the case before him. It was perfectly competent to him to refer to that Statute as an Act that recognized the fact of having an unusual number of water-casks on board as a circumstance of suspicion; but the learned Judge was not at liberty to take the circumstance *per se*, as a Judge applying the Act, 5 & 6 Will. 4, c. 60, might have done. He was bound to take it in conjunction with all the other circumstances of the case; for the rule that he had to abide by, the law which he had to administer, namely, the 5 Geo. 4, c. 113, provides distinctly, that damages and costs shall be given when it shall appear to the Court that the capture, seizure, or prosecution, shall not be justified by the circumstances of the case. All the circumstances, therefore, were

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to be taken into consideration, and no peculiar weight or force ought to have been borrowed from the Act, 5 & 6 Will. 4, c. 60, and attributed to the circumstance of this unusual number of water-casks.

The *bona fides* of the employment of the ship in trade is a thing established by the judgment; and this *bonâ fide* employment of the ship was also, we think, manifest, or might have been manifest, to any person going on board the vessel. The vessel is a very large ship, of a registered tonnage of about 600 tons, but capable of actually carrying a cargo of 900 tons. Such vessels are not of the class commonly engaged in the Slave trade. The vessel, at the time she was seized, had previously been examined, and for some time detained by the Custom House authorities at *Sierra Leone*. They were satisfied, by the result of their examination, and they accordingly released the vessel. In that state of circumstances, Lieutenant *Dunlop*, an Officer apparently accidentally at the harbour of *Sierra Leone*, not holding any official position, or having any official employment there, takes upon himself to visit the vessel and to seize her. When he visited the vessel, what did he find on board her? He found on board the remainder of a considerable outward cargo, a cargo fit for the purpose of trading upon the African coast. He found upon and within the vessel evidence of the fact that she had been engaged in such trade. He found the actual results of a *bonâ fide* commerce in the shape of some thousand gallons of palm oil, which had been already stored on board the vessel. He found plainly that the casks which had been used for the oil on board the vessel were of the same general description and character with the casks that were empty. Of the 111 casks that he found empty, 65 appear to have been clean new casks; the others appear to have been previously used for the purpose of carrying oil. He received from the mate of the vessel (the Captain at that time being on shore) the ship's papers. He, immediately after the seizure, had an interview with the Captain, and obtained from him satisfactory intelligence with regard to the history of the ship, the ownership of the ship, and letters were produced to him that could have left in no reasonable man's mind any doubt of the ship having been originally fitted out for, and employed in, the ordinary purposes of commerce. He

afterwards received from the Custom House the other papers of the ship. He had, from the Captain, information that at the time of the seizure he was engaged on shore in the sale of the residue of the outward cargo to a gentleman of the greatest respectability in the Colony, Mr. *Heddle*, to whom the Captain had brought letters of recommendation, and also in purchasing from Mr. *Heddle* 40,000 bushels of ground nuts, which the letter of the owner shews it was his original intention, and part of his instructions to the Captain, to buy for the purpose of filling up the ship with a return cargo.

In face of all these circumstances, Lieutenant *Dunlop* detained the ship; and the question is whether, as the law stands under the Statute, 5 Geo. 4, c. 113, the mere fact of these empty casks being found in the hold of the ship is sufficient to weigh down at once all the other external manifest appearances of the ship being a *bonâ fide* trader, of her having gone forth as such, and been employed as such up to the time of her arrival in the harbour of *Sierra Leone*.

But in addition to the water-casks, Lieutenant *Dunlop* says, that there were other suspicious circumstances. One of them is, that the vessel had a second deck, which, he says, might have been used for a slave deck. Now, the vessel is one of very considerable depth, and the evidence shews (what no man acquainted with the subject can doubt) that a vessel of that depth, carrying 900 tons, could not be loaded without the additional deck in question. The evidence is distinct that vessels of this size are furnished with a second deck. The evidence of one of the witnesses is even more positive, that a vessel of this size, inasmuch as if loaded she would not be safe without a second deck, could not obtain insurance if she had not that second deck. The second deck, therefore, instead of tending to create suspicion, tends to give confirmation to the conclusion that the vessel was *bonâ fide* intended to be engaged in trade, and to be used as an ordinary ship of burden in commerce.

Lieutenant *Dunlop* further refers to the existence of a considerable quantity of cooking utensils on board the ship beyond what, in his judgment, the crew would require; but there is evidence upon that point, that in the opinion of two or three disinterested witnesses the amount of the ship's vessels for cooking was less than

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the ordinary wants of the Captain and crew of such a vessel rendered necessary.

We have, therefore, no circumstances here to which any particular weight or force is to be given by law, as under the 5 & 6 Will. 4, c. 60, would be the case, but we have a case to be judged of under all the circumstances, whether any person going on board a ship lying in the harbour of *Sierra Leone*, and examining her—going over her—could, from the mere circumstance of the number of water-casks, be warranted in arriving at the conclusion that this ship was intended to be engaged in the Slave trade.

I need not point out, what was very well commented upon by one of the Counsel for the Appellant, that there may be great necessity for laying down clear and definite rules, as they are laid down in the Statute, 5 & 6 Will. 4, c. 60, for the purpose of guiding Captors at sea, for there the transaction is of necessity a hurried one, admitting of no very minute examination; and the Legislature, therefore, defines certain things in that Statute which, if they are not plainly accounted for, shall constitute an amount of *probabilis causa* sufficient to exempt the Captor from consequences even if the vessel be not condemned. But when you come to the case of a ship quietly lying at anchor in a British harbour, and having been there for some time; not manifesting the smallest indication of anxiety to quit the harbour, but actually and plainly engaged in *bonâ fide* trade within the harbour; the obligation on a Seizor to justify what he has done is a very strict obligation, and one that cannot be discharged by a reference to circumstances which, *per se*, have not an overpowering weight on the mind at the time when the seizure was made. It appears that on the very day on which this seizure was made, not only was the Captain on shore bargaining for cargo for his vessel, but some of these very casks, being no longer required for the ordinary requisitions of the trade in palm oil, were being sold, and had been sent on shore for the purpose of sale by the Captain of the vessel.

With regard to the casks, there was another circumstance which ought to have been looked to before the Seizor ventured upon such an act as the seizing of the vessel; we mean, an inquiry whether the casks upon which his suspicion lighted were or were not to be found in the manifest of the vessel, and whether that manifest was

accompanied or not by any proof that the ship had sailed with the knowledge of the proper Italian authorities that part of her stores consisted of these empty casks. Now, without deciding that the documents produced would, if the case had arisen under the Statute, 5 & 6 Will. 4, c. 60, have amounted to a certificate of security having been given, yet it is clear, and it is a proof of the *bona fides* of the Master of the ship, that he had drawn the attention of the authorities of his country to the fact of part of his lading consisting of these water-casks, and that his ship had been cleared by the authorities with a knowledge that these empty casks were on board. These papers were produced to Lieutenant *Dunlop* at or immediately after the time when the seizure was made. There was the fullest desire to give him information. The history of the vessel's proceedings he might have read from the log. The nature of her ownership was manifested by the documents that he received; the character of her antecedent employment was evidenced by the palm oil she had on board; the desire of carrying on *bonâ fide* commerce was evidenced by the very employment in which he found her, the Captain being at that time engaged in procuring cargo on shore.

Now, we would ask, how is it possible for any merchant ship to visit the coast of *Africa*, and a British harbour on the coast of *Africa*, for the purpose of legitimate commerce, if under circumstances such as these she is liable to be seized merely upon the ground of her having certain articles on board, actually required for the purposes of the trade in which she professes to be engaged, and in which it is proved that she had for some time previously been actually engaged?

Their Lordships are, therefore, of opinion, that, as to the existence of the water-casks, that circumstance is weighed down, explained, and its force entirely taken away by the other circumstances that were manifest and apparent; and that under the Statute, 5 Geo. 4, c. 113, that simple fact, adding to it the alleged slave deck, adding to it the cooking utensils, did not, under the circumstances, constitute a reasonable *primâ facie* case for concluding that the vessel must be condemned unless those things were explained. There was no *probabilis causa* for seizure.

Therefore, taking all the circumstances of the case, as they

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appeared, or might and ought to have appeared, to the Seizor at the time, there was nothing that justified the seizure, and on these grounds their Lordships will humbly advise Her Majesty to reverse so much of the sentence as holds that the seizure and prosecution were justified by the circumstances, and to declare that the vessel ought to have been restored, together with damages and costs; and they will recommend Her Majesty to make the usual reference to the Admiralty Registrar, together with Merchants to be associated with him, for the purpose of ascertaining the nature and amount of damages which, under the circumstances, ought to have been awarded to the Appellant.

Their Lordships are glad to find that the Officers of the Crown have been directed to attend in support of the case of the Respondents. They think, however, that the national honour requires that damages and costs in this case should be given to the owner of the ship, and to them must, of course, be added the costs of this appeal.

Proctors for the Appellant: *Rothery & Co.*

Proctor for the Respondents: *F. H. Dyke,* Her Majesty's Procurator-General.

IN THE MATTER OF THOMAS JAMES WALLACE, AN ATTORNEY AND BARRISTER.

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ON APPEAL FROM THE SUPREME COURT, HALIFAX, NOVA SCOTIA.

Contempt of Court—Order suspending Attorney and Barrister for Contempt.

An Order suspending an Attorney and Barrister of the Supreme Court of *Nova Scotia* from practising in that Court, for having addressed a letter to the Chief Justice, reflecting on the Judges and the administration of justice generally in the Court, discharged by the Judicial Committee, as it substituted a penalty and mode of punishment which was not the appropriate and fitting punishment for the offence.

The letter, though a contempt of Court, and punishable by fine and imprisonment, having been written by a Practitioner in his individual and private capacity as a suitor, in respect of a supposed grievance as a suitor, of an injury done to him as such suitor, and having no connection whatever with his professional character, or anything done by him professionally, either as an Attorney or Barrister, it was not competent for the Supreme Court to go further than award to the offence the customary punishment for contempt of Court; or to inflict a professional punishment of indefinite suspension for an act not done professionally, and which, *per se*, did not render the party committing it unfit to remain a Practitioner of the Court.

THIS was an appeal from an Order of the Supreme Court at *Halifax*, in the Province of *Nova Scotia*, suspending the Appellant from practising in that Court as an Attorney and Barrister, made under the following circumstances.

The Appellant was admitted an Attorney and Barrister of the Supreme Court, *Nova Scotia*, and practised therein up to the period of his suspension, as hereinafter mentioned; he also practised as an Advocate and Proctor in the Court of Probate of that Province. The Appellant had been Defendant in two suits (*Dunphy* v. *Wallace*, and *The City of Halifax* v. *Wallace*) depending in the Supreme Court, and he had also been Plaintiff in another suit before the same Court, *Wallace* v. *Connolly*, and was likewise, from time to time, engaged on other matters before the Court in his capacity of Attorney and Barrister. In the suit of *Dunphy* v. *Wallace*, a

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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decision was given by the Supreme Court adverse to the Appellant, and leave to appeal therefrom to Her Majesty in Council was refused by the Court in a judgment delivered by the Chief Justice. As the Appellant intended to petition Her Majesty in Council for leave to appeal from this refusal, the Chief Justice was requested by the Appellant, with a view to such petition, to file the judgment delivered by him in that case. The Chief Justice thereupon filed a written judgment, differing, as it was alleged by the Appellant, materially from the judgment actually delivered in Court; proceeding upon grounds not mentioned in that judgment, and containing additional statements, which the Appellant conceived were calculated to prejudice his intended application for leave to appeal. In the course of the other suit, *Wallace* v. *Connolly*, a decision was likewise given adverse to the Appellant. Such decision was pronounced by the Chief Justice after hearing both the parties upon affidavits in open Court, and after taking time to consider; but the Chief Justice, in his judgment, stated that he had received from a Mr. *Smith*, out of Court, information which differed from the statements made by the Appellant in one of the affidavits; the Appellant not having been present at the alleged interview with Mr. *Smith*.

Previously also to the month of January, 1865, the Appellant had been informed that, in reference to other proceedings in which he was interested before the Supreme Court, observations prejudicial to him had been made to one of the parties by the Chief Justice out of Court, and that certain proceedings against him had been recommended by the Chief Justice in an interview with one of the parties; and in certain matters also in which the Appellant was professionally engaged before him at Chambers, the Chief Justice had, as the Appellant conceived, acted in a manner which he deemed unusual and oppressive, and which induced him, as he alleged, to avoid Chamber business before the Chief Justice.

On the 10th of January, 1863, an Order was made by Mr. *Sutherland*, the Judge of the Court of Probate at *Halifax*, declaring that the Appellant had been guilty of a contempt of the Court, and suspending him from practising therein as an Advocate and Proctor. The Appellant appealed from the Order of the Judge of Probate to the

Supreme Court, conceiving that he was entitled to such appeal under the provisions of the Revised Statutes of *Nova Scotia*, c. 127, s. 77.

The appeal came on for hearing before the Supreme Court in the month of December, 1864, when judgment was given to the effect, that the appeal, having been taken under the Provincial Statute, and not by *Certiorari*, was not judicially before the Court and could not be entertained. In the month of January, 1865, the Appellant moved the Chief Justice, at Chambers, to allow an appeal from that decision to Her Majesty in Council. The Chief Justice refused leave to appeal from the decision of the Supreme Court against the Order of suspension made by the Judge of the Court of Probate. The judgment of the Supreme Court, both upon the main question of the appeal from the Order of suspension, and the application of the Appellant for leave to appeal therefrom to Her Majesty in Council, was reduced to writing by the Chief Justice, and filed.

The Appellant being desirous to petition Her Majesty in Council for leave to appeal from the last-mentioned judgment of the Supreme Court, and being, as he stated, apprehensive that additions might be made to the written judgment, as he alleged was done in the case of *Dunphy* v. *Wallace*, as well as aggrieved at the course pursued by the Chief Justice in the cases of *Dunphy* v. *Wallace* and *Wallace* v. *Connolly*, and feeling injured by the observations and the recommendations of proceedings which it had been reported to him, as already stated, had been made with reference to him by the Chief Justice; on the 26th January, 1865, sent the following letter to the Chief Justice:—"The Honourable the Chief Justice. Sir,—I shall feel obliged by your filing the judgment given in Court, in my case with Mr. *Sutherland*, without any additions. I say without any additions, because in the case of *Dunphy* v. *Wallace*, I had much reason to complain of the decision there filed, as very material additions were made to it, and much said with a view, as I and others thought, of meeting me at *England*. I must, I think, decline sending to *England* the decision given on my petition for an appeal, in consequence of a statement made therein, to the effect that other modes were pointed out by the Court by which the matter might have been removed; but I remember

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only one way mentioned, that by *Certiorari*, and this certainly is not modes. Now, as regards one's position after the removal of a cause by *Certiorari*, I think I can safely say that no Practitioner at our Bar understands it. In the case of *The City of Halifax* v. *Wallace*, according to the decision of the Court, I would not have been allowed to try the cause, only for the defects in the affidavits produced on the part of the City. Remembering this case, I was a good deal surprised to hear the Court say that, had the cause with Mr. *Sutherland* been removed by *Certiorari*, that it would have been sent to a jury; leaving the impression on my mind that the party so removing a cause has a right, as a matter of course, to a trial, the very reverse of what was decided in the case of *The City of Halifax* v. *Wallace*. It was in that case I good-naturedly remarked, that the decision would likely be different when it fell to my lot to be on the other side. And I venture to say, had my case with Mr. *Sutherland* been removed in the first instance by *Certiorari*, a course, however, which never occurred to the Honourable Mr. *Johnston* (then my Counsel), I would have been met with a thousand objections, resulting in my defeat, as on the appeal.

"I may be wrong, but I can't help thinking, that I am not fairly dealt with by the Court or Judges, and that the well-beaten track is often departed from for some bye-way to defeat me. Even in that little case of *Wallace* v. *Connolly*, the case was not decided upon the affidavits, but a person was spoken to out of doors, and the case decided upon what he said, not under oath, while the rule is, that a Judge can't use even knowledge within his own mind, much less obtain it from others, but must decide upon the affidavits. Better tell me at once to bring no affidavits into Court; for if Mr. *Smith*, or any such person, shall even state to me that there is a different impression of the facts on his mind, you must fail as a matter of course. I could also recall cases where the decision was, I believe, largely influenced, if not wholly based, upon information received privately from the wife of one of the parties by the Judge. Is this justice? I think a Judge in *England* would be a little startled to hear that a Judge in *Nova Scotia* listened to, much less decided upon, information obtained in this way.

"I was on more than one occasion almost tempted to bring these things to the notice of the Legislature, but I overlooked them, as I trust you will overlook anything in this, should there be anything in it not strictly within allowable limits.—Your very obedient servant—*T. J. Wallace.*"

The Appellant stated, in the affidavit he afterwards made, that in writing this letter he had no intention whatever to impugn the conduct of any of the Puisne Judges of the Supreme Court, and no intention whatever of offending or insulting either them or the Chief Justice, his only object being to state in temperate language the grievances of which he felt he had reason to complain; but fearing afterwards that the course—taken under some degree of irritation—might be considered irregular or offensive, he had availed himself of an opportunity of meeting the Chief Justice to disavow any intention to offend or insult him, and offered to him a full apology.

Notwithstanding such apology, however, a rule of the Supreme Court was, on the 18th of July, 1865, without any motion to that effect by Counsel, drawn up on reading the letter, adjudging it a contempt of Court, and calling upon the Appellant to shew cause why he should not be suspended from practice as an Attorney and Barrister until he should make a suitable apology in writing, to be read in open Court, for such his contempt.

On the 22nd of July, 1865, the Appellant appeared in person, and being called upon by the Court, shewed cause against the rule *nisi*, upon an affidavit in which he related the circumstances under which the letter was written, and the fact that he had made an apology to the Chief Justice.

On the 29th of July, 1865, the rule was made absolute by the Supreme Court to suspend the Appellant from practice as an Attorney and Barrister of the Court, without fixing any period for such suspension, or annexing any condition thereto.

The Chief Justice, the other five Judges being present, delivered the following judgment of the Court (1):—"The judgment I am about to pronounce is to be taken as the judgment of the whole Court; and having been submitted to my brother Judges,

(1) As the Judges did not appear upon the appeal, it is deemed right to set out *in extenso* their judgment, giving the reasons for the Order of suspension.

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and met their approval, it is to be received as the unanimous expression of our opinions. The Judge of Probate at *Halifax*, having passed an Order on the 10th of January, 1863, declaring that *Wallace* had been guilty of a contempt, committed by him in the face of that Court, and suspending him from practice therein as Advocate or Proctor, Mr. *Wallace* appealed from that Order to the Supreme Court, and the appeal was heard before us in December last, when we decided, for the reasons assigned in a written judgment now on file, that the appeal having been taken under the Provincial Statute, and not by *Certiorari*, could not be entertained. That Mr. *Wallace* had mistaken his course, and that the contempt, therefore, was not judicially before us. In January last, having taken charge of the business for that month, Mr. *Wallace* moved me at Chambers to allow an appeal from the above decision to Her Majesty in Her Privy Council. As a matter of this kind, whoever the mover might be, affected more or less the privileges of the Bar, I thought it advisable to consult such of my brethren as were in town, all the Judges, in fact, being here, except Mr. Justice *Dodd*, then in *Cape Breton*, and they concurred with me in thinking, as the main question of a contempt had not been considered, and as the case on that account was not ripe for an appeal, that the appeal ought not to be allowed. The reasons for that decision were expanded in the written judgment already referred to, which was filed on the 24th of January, in Mr. *Wallace's* presence, the instant it was delivered. On the 26th of the same month, Mr. *Wallace* thought fit to send to me the letter which has led to these proceedings. In that letter he not only impugns, in very offensive terms, my decision of the 24th of January, which appeared on the face of it to have been concurred in by the other Judges, but he assails also the judgment of the whole Court, on his appeal in December from the Court of Probate. He then makes a general charge against the Judges, in language too insulting to be repeated, and winds up with a criticism, in the same style, on some of the pettier matters which I had decided at Chambers. A letter of this character from a Practitioner to a Judge of an English Court is an outrage which probably was never perpetrated before, and which it was impossible to pass over in silence. Neither was it a fit matter to be dealt with by any one Judge, and, therefore, I

contented myself with stating, in the presence of Mr. *Wallace* and of the Bar at the next Chamber day, that I had received a letter of this extraordinary kind, and that, on the first day of the ensuing Trinity Term, Mr. *Wallace* would be called upon to answer it. While the utmost boldness and liberty of speech and action are fully and freely conceded to every member of the Bar, as belonging to his position, and as essential to the rights of his Clients, no less than to his own, and none on this Bench would attempt or desire to restrain them, on the other hand, a gentlemanly conduct, and a decorous and respectful treatment of the Judges of the land, in all intercourse between them and the Bar, must necessarily be observed by the latter. If the Judges can be insulted by language or letter addressed to them, and such a contempt of their persons and authority committed with impunity, their weight and influence would be lost, and, failing to vindicate the dignity of their office thus outraged, they would forfeit, and deserve to forfeit, the public respect and confidence so necessary to their character and the due administration of justice. It was this feeling, and the necessity thus imposed on us by the letter of Mr. *Wallace*, rather than any personal consideration, which has compelled us to take steps against him. On the 18th instant his letter was accordingly verified and filed, and we passed a rule *nisi*. By the terms of this rule, the offence of which he was guilty and the consequences to which it would subject him, were stated, and the mode by which he might atone for the one and avoid the other. To any well-regulated mind, the opportunity so afforded for consideration and apology would have been all that was required. If through ignorance, or want of judgment, or the absence of proper feeling, in a moment of irritation, from infirmity of temper, or any other cause short of a deliberate intention to insult, such a letter had been hastily penned, time and reflection would have enabled the delinquent to see his error, and to make such reparation for it as was in his power. Let us see what course Mr. *Wallace* has pursued. On the 22nd instant he appeared in person to shew cause, and was heard patiently and at length, upon several objections to our proceedings. He urged, among other things, that the Court had no authority to move in this matter, except at the instance of a Barrister; that there was no evidence of the letter

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having come into my possession, or how it had gone out of the possession of the writer; that the letter could not be construed into a contempt; that if it were a contempt it would not vindicate a suspension; and on these and other grounds of a technical kind, he insisted that he ought not to be called upon. But Mr. *Wallace* entirely misapprehended his position. This was not a contempt for the non-payment of money, or for disobeying some Order of the Court in the progress of a suit, but a contempt levelled at the Court itself, and which the Court has the authority and the *right* to adjudicate upon of its own motion, without invoking the aid of any Barrister, upon the production of the obnoxious letter by the Judge to whom it was addressed. In *Lechmere Charlton's Case* (1), Lord *Cottenham*, then Lord Chancellor, pursued the course we have adopted here. Letters having been addressed by Mr. *Charlton*, a Barrister and Member of Parliament, to one of the Masters of the Court of Chancery, and to the Lord Chancellor, of a highly objectionable kind, and reflecting upon the proceedings of the Master in an inquiry then before him, his Lordship, after directing copies to be served upon the parties concerned (here there are no parties to be served), took notice thereof in open Court, and after declaring that the letter to the Master contained scandalous matter, and that the conduct of Mr. *Charlton*, in writing the two letters, was a contempt of the Court of Chancery, passed an Order that he should shew cause on a certain day, why he should not be committed to the *Fleet Prison* for his contempt. Mr. *Charlton* having failed to shew cause, the Chancellor, after remarking that every writing, letter, or publication, which has for its object to divert the course of justice, is a contempt of the Court, and that every *insult* offered to a Judge in the exercise of the duties of his office, is a contempt, concluded by ordering Mr. *Charlton's* committal. This was effected at a subsequent day, and the House of Commons having refused to interfere, and Mr. *Charlton* having made a suitable submission, and expressed his contrition for the offence he had committed, he was discharged, after having been in prison for three weeks. It will be seen, therefore, that we have guided ourselves by a precedent of high authority, while our right to substitute a suspension from practice for imprisonment is too clear to

(1) 2 My. & Cr. 316.

be disputed. It is proper also to add, that we have looked into the cases of *Smith* v. *The Justices of Sierra Leone* (1), *In re Downie and Arrindell* (2), in the Privy Council, cited from 3rd and 7th of *Moore's* P. C. Cases, as well as several others to be found in 1st *Knapp's* Reps., and 1st and 8th *Moore's* P. C. Cases. In addition to the technical and other grounds we have thus disposed of, in the place of the apology, which, as I have said, this Court might reasonably have expected, and which any judicious adviser would certainly have recommended, Mr. *Wallace* produced an affidavit made by himself, which aggravates his offence, and is an accumulation of fresh insults. Had we thought fit, we would have been justified in refusing to receive this affidavit, or in interrupting him while reading it. As we had already pronounced his letter to be a contempt, it was not competent for him to attempt a justification, and he could shew cause only by denying, if he could, or, if possible, explaining away or extenuating his offence. But we preferred affording him a full hearing, and as no letter or affidavit of his could touch the reputation of this Bench, or any member of it, we allowed him to go on without interfering. This affidavit is the more inexcusable because in the nature of things it could not be answered. Parts of it are founded upon hearsay, which is not evidence, and in the most trifling matters is not admissible in this Court. Parts of it rest upon the mere assertion of Mr. *Wallace*, at variance with all our impressions and recollections, but in which he must pass of course uncontradicted. And much of it relates to recent transactions in the knowledge of one or other of the members of the Bar, or of the Officers of the Court, and which are represented in a manner quite inconsistent with the facts, and with the papers on the file. We content ourselves with these general observations, for it is obvious that to descend into details, and stoop to a vindication of this Court, would be a complete surrender of its independence and its dignity. If Judges forget their duty, if they lay themselves open to imputation, and are amenable to censure, adequate remedies are provided by the law and constitution of the country. A single Judge at every step is subject to control. Every charge he delivers to a jury, every Order he signs at

(1) 3 Moore's P. C. Cases, 361; and 7 Moore's P. C. Cases, 174.
(2) 3 Moore's P. C. Cases, 414.

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Chambers, every taxation of costs, every judicial action, and every refusal to act, may be appealed from to his brethren; and for the higher breaches of duty by one Judge, or by all the Judges, there are the means of constitutional redress. But this is the first time that Judges have been assailed in their own Court by a Practitioner, when invited to atone for a contempt, putting on the files an affidavit which in every paragraph is a new offence. It is evident that no Court, having a just regard to its position, could permit such an affidavit to remain among its records, and, therefore, we direct this affidavit to be taken off the file. In conclusion, we have only to repeat that we would willingly have been excused from moving in this matter. We have not been actuated by personal resentment, nor by any apprehensions that Mr. *Wallace's* actions or censure in any shape could possibly excite. We have looked only to what was required for the due administration of the law, and while there has never been any difference of opinion or doubt among ourselves as to what was necessary and proper to be done, we have taken care that ample time should be afforded to the party to reflect upon his position, and avert the consequences he has drawn down upon himself. We have no alternative now but the performance of an imperative duty in directing the following rule to be filed."

The rule *nisi* was then made absolute in pursuance of the judgment, suspending the Appellant from practice as an Attorney and Barrister in that Court.

The Appellant applied to the Supreme Court for leave to appeal to Her Majesty in Council, when the following judgment of the Court, giving leave to appeal, was delivered by the Chief Justice, the other five Judges being present:—"Mr. *Wallace* having moved in person for leave to appeal to Her Majesty in Her Privy Council, from the rule made on the 29th *ult.*, suspending him from practice as an Attorney and Barrister of this Court, for a contempt thereof; we have referred to the Order of Her Majesty in Council, of the 20th of March, 1863, making provision for appeals to Her Majesty in Council from this Court; and from the terms in which that Order is drawn, as well as from the cases decided in the Privy Council, we are of opinion, that the Order in Council does not extend to such cases, and that it is incumbent on Mr. *Wallace* to apply to Her Majesty, in the first instance,

to admit his appeal. But, inasmuch as Mr. *Wallace* has applied to us for such leave, complaining of the injury and delay to which our refusal would subject him, we have decided on giving him such leave, so far as we have power and authority so to do, not requiring from him any security for costs, but leaving him to act as he may be advised therein, or as Her Majesty may see fit to order."

The Appellant brought the present appeal, but in consequence of the Judges of the Supreme Court announcing that they would not appear, the appeal was heard *ex parte*.

Sir *Roundell Palmer*, Q.C., and Mr. *T. D. Archibald*, for the Appellant:—

The Order making the rule absolute suspending the Appellant from practising as an Attorney and Barrister in the Supreme Court at *Halifax*, until he should have made a suitable apology, is illegal as well as oppressive. The contempt, if any, committed by the Appellant in writing the letter of the 26th of January, 1865, to the Chief Justice, was not committed by him in his professional character as an Attorney or Barrister, nor was it a contempt committed in open Court. It was a private letter written by him in his character of a suitor, and is in no respect a public document; and if anything unguarded and disrespectful was contained in it, nevertheless the apology, contained in the letter, begging the Chief Justice to overlook anything, if there should be anything in it not strictly within allowable limits, ought to have satisfied the Chief Justice; but the subsequent verbal apology made, as sworn to by the Appellant, was an ample expiation of the supposed offence. This was not a case of professional misconduct, coming within the decision of this Court in *Bunny* v. *The Judges of New Zealand* (1), nor is it similar to *Lechmere Charlton's Case* (2), relied upon by the Judges in the Court below, as the letter there, besides being intemperate and insulting, contained a threat against an Officer of the Court. *Smith* v. *The Justices of Sierra Leone* (3), *In re Downie and Arrindell* (4), *Smith* v. *The Justices of Sierra Leone* (5), as well as *Rainy* v. *The Justices of Sierra Leone* (6), and the earlier case

(1) 15 Moore's P. C. Cases, 164.
(2) 2 My. & Cr. 316.
(3) 3 Moore's P. C. Cases, 361.
(4) 3 Moore's P. C. Cases, 414.
(5) 7 Moore's P. C. Cases, 174.
(6) 8 Moore's P. C. Cases, 47.

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of *The Justices of the Court of Common Pleas at Antigua* (1), which were referred to and relied on by the Court below, do not warrant the Order made in this case; for they, for the most part, are reversals by this Tribunal of Orders similar to the one we complain of. But we submit that, there is an absolute denial of justice in this case, for the rule absolute allows the Appellant no means of purging his contempt; but, without disbarring him, or striking him off the rolls of the Supreme Court as an Attorney, improperly suspends him from practice, indefinitely, and during the pleasure of the Court. The practice is to fine for contempt of Court: *The King* v. *Clement* (2); *In re Pater* (3). The demand for a written apology to be read in open Court, which the rule *nisi* required, was unprecedented and unusual; the only instance of such a requirement was in *Carus Wilson's Case* (4), which was under totally different circumstances, and was decided by the law of *Jersey*, and not the law of *England* and the practice of our Courts, which prevails in the Supreme Court at *Halifax:* that Court having the same powers as are exercised by the Courts of Chancery, Queen's Bench, Common Pleas, and Exchequer in *England*: Revised Statutes of the Province of *Nova Scotia*, 3rd Ser. Tit. 34., ch. 123, sect. 1.

LORD WESTBURY:—

The Appellant in this case is an Advocate, and also an Attorney, admitted to practice in the Supreme Court of *Nova Scotia*. It appears that he was also a suitor in that Court. In two or three cases in which he was such suitor he seems to have supposed that he had reason to complain of the conduct of the Judges of the Court, and he accordingly wrote a letter, addressed to the Chief Justice, reflecting on the Judges, and on the administration of justice generally in the Court; which undoubtedly was a letter of a most reprehensible kind.

This letter was a contempt of Court, which it was hardly possible for the Court to omit taking cognizance of.

It was an offence, however, committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor; and it had no

(1) 1 Knapp's Rep. 267.
(2) 4 B. & Ald. 218.
(3) 33 L. J. (N. S.) M. C. 142.
(4) 7 Q. B. Rep. 984.

connection whatever with his professional character, or anything done by him professionally, either as an Advocate or an Attorney. It was a contempt of Court committed by an individual in his personal character only.

To offences of that kind there has been attached by law and by long practice a definite kind of punishment, viz. fine and imprisonment. It must not, however, be supposed that a Court of Justice has not the power to remove the Officers of the Court if unfit to be entrusted with a professional *status* and character. If an Advocate, for example, were found guilty of crime, there is no doubt that the Court would suspend him. If an Attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the Roll.

But in this particular case there is no *delictum* brought forward or assigned, except that which results from the fact of addressing an improper and contemptuous letter to the Chief Justice of the Court, in respect of something supposed to have been done unjustly to the writer in his private capacity as a suitor. We think, therefore, there was no necessity for the Judges to go further than to award to that offence the customary punishment for contempt of Court. We do not find anything which renders it expedient for the public interest, or right for the Court, to interfere with the *status* of the individual as a Practitioner in that Court. In that respect, therefore, we think that the Judges departed from the course which ought to have been pursued, by adopting a different description of punishment from the ordinary punishment for offences of this nature.

When an offence was committed which might have been adequately corrected by that punishment, and the offence was not one which subjected the individual committing it to anything like general infamy, or an imputation of bad character, so as to render his remaining in the Court as a Practitioner improper, we think it was not competent to the Court to inflict upon him a professional punishment for an act which was not done professionally, and which act, *per se*, did not render him improper to remain as a Practitioner of the Court

On this ground, therefore, we do not approve of the Order. At the same time we desire it to be understood that we entirely concur

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with the Judges of the Court below in the estimate which they have formed of the gross impropriety of the conduct of the Appellant. But we are still of opinion, that his conduct did not require and did not authorize a departure from the ordinary mode and standard of punishment; and upon that ground, and that ground only, we shall advise Her Majesty to discharge the Order, in respect of its having substituted a penalty and mode of punishment which was not the appropriate and fitting punishment for the case in question.

Solicitors for the Appellant: *H. R. Hill & Son.*

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IN THE MATTER OF LEITH'S ESTATE.

GEORGE HENRY CHAMBERS . . . APPELLANT;

AND

PATRICK DAVIDSON, AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE COURT OF THE COMMISSIONERS FOR SALE OF ESTATES IN THE WEST INDIES.

West India Estates—Consignee and Mortgagee—General lien, extent of.

The right of a Consignee of a *West India* Estate gives him a lien on the Plantation in respect of the balance due to him, and is an exception to the general rule which applies to Principal and Agent. Such lien not being the result of an express contract, but given by implication of law, if created by written contract, is excluded.

Therefore, if a Consignee takes an express security, such security being the stipulation and agreement of the parties, it excludes his general lien. So *held* by the Judicial Committee, where the party claiming a general lien as Consignee, was also a Mortgagee of certain estates, and had, by deed, stipulated for the consignment of their produce, as well as that of other Plantations, subject to the rights and interests of existing Mortgages then subsisting thereon.

IN this case the appeal was brought from an Order of the Commissioners for sale of incumbered estates in the *West Indies*, disallowing the claim of the Appellant to priority under a

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, AND SIR EDWARD VAUGHAN WILLIAMS.

consignment deed. The ground of the decision was, that the consignment deed was, by its terms, subject to prior Mortgages to the Respondents.

The circumstances were these:—

On the 27th of January, 1856, *John Leith*, since deceased, and *James Leith*, both of the Island of *Tobago*, Planters, were indebted to the Respondents as Executors and Trustees of their late father, *Duncan Davidson*, in the sum of £10,000.

By Indentures of Mortgage, dated the 26th and 27th of January, 1856, the *Leiths* mortgaged to the Respondents certain estates in the Island of *Tobago*, called *New Grange*, *Old Grange*, and *Grafton*, and an estate called *Kendal Place*, and other estates in the same Island, together with the live and dead stock then and thereafter to be upon the same, to secure the £10,000 and interest. By the same Mortgage deed the £10,000, was covenanted to be paid by instalments, and the *Leiths* covenanted to ship and consign to the Respondents fifty hogsheads of sugar, on or before the 15th of July in every year.

James Leith was himself seised of other estates in the Island of *Tobago*, called *Charlotte-Ville*, *Telescope*, and *Fairfield*; and by an Indenture of Mortgage, dated the 23rd of January, 1860, he mortgaged these estates to the Appellant in fee, to secure the amount of his then debt and future advances, not together to exceed the sum of £2,500.

By another Indenture of Mortgage, dated the 23rd of January, 1860, the *Leiths* mortgaged a town lot in *Scarborough*, in *Tobago*, in fee, to secure the Appellant's debt and further advances, not in the whole to exceed £800.

James Leith was also seised of other estates in *Tobago*, called *Speyside* and *Runnymede*; and by an Indenture, or covenant for consignment of produce, dated the 15th of March, 1860, made between the *Leiths* of the one part, and the Appellant of the other part, after reciting the two last-mentioned Mortgages, and the seisin of the *Leiths* of *New Grange*, *Old Grange*, and *Kendal Place*, subject to certain Mortgages or charges affecting the same, or some of them, and also an agreement for consignment of two-thirds of all the produce from the estates, so long only as possession should not be adversely taken by the parties holding the

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respective Mortgages or charges aforesaid; and reciting that two accounts were intended to be kept by the Appellant, one with *James Leith* alone, and the other with both the *Leiths*; and reciting that the first mentioned Indenture of Mortgage of the 23rd of January, 1860, should be a security for both accounts current, not exceeding £2,500, and further reciting that the accounts had been balanced, shewing £806. 1*s.* 3*d.* due by *James Leith*, and £1,217. 19*s.* 0*d.* due by the *Leiths*, as of the 31st of December, 1859; it was witnessed, that the *Leiths* covenanted with Appellant that during five years, and so long as the mortgages of the 23rd of January, 1860, should continue, to consign to the Appellant not less than two-thirds of all the sugar, rum and other produce, made in *Charlotte-Ville, Telescope, Speyside, Runnymede, Old Grange, New Grange, Grafton*, and *Kendal Place*, and on their leaving the Island to nominate the Appellant's nominee as Manager of the estates, and to send to the Appellant lists of supplies for the estates, which the Appellant was to have the option of supplying; and by the same deed the application of the proceeds of the consignments was to be for payment as follows:—first of interest on the Mortgage debts due to the Appellant; second, of the costs of supplies by the Appellant; third, of drafts for Island contingencies, or for discharging any of the before mentioned Mortgages on the plantations or estates; fourth, of insurances and incidental consignment expenses, but so long only as the shipments of each year shall exceed the expenses of the same year; and lastly, of the principal Mortgage debts of £2500 and £800; and the Appellant thereby covenanted so long as the *Leiths*' covenant to consign lasted, to receive and sell the consignments and apply the proceeds for the purposes above mentioned, and, as long as the annual consignments should yield a surplus above the annual expenses, act as Consignee and Factor of the *Leiths*. There was also in the deed a covenant for stay of proceedings by the Appellant for five years.

No notice of the Appellant's consignment deed or claim was given either by the *Leiths*, or the Appellant, to the Respondents, nor were the Respondents aware of the existence of the same previous to the claim of the Appellant being filed in this matter.

The Respondents never took possession of the mortgaged estates under their mortgage, but left the management and cultivation of

the estates, as usual, in the hands of the *Leiths*; the Mortgagees relying on the performance by the *Leiths* of their covenant to consign.

John Leith died on the 19th of April, 1862, intestate, leaving *James Leith*, his partner, and *George Leith*, his eldest brother and heir-at-law, whereby the equity of redemption of the mortgaged premises became vested either in *James Leith* or *George Leith*, in fee simple.

In the month of October, 1862, arrangements were made with *James Leith*, by Mr. *Gillespie*, a West Indian Merchant in *London*, on behalf of the Respondents, by which he was to have all the produce of the mortgaged estates consigned to him on behalf of the Respondents, and at the same time Mr. *Gillespie* arranged to supply the means of cultivation of the same, upon the understanding that *James Leith* was to apply the means so supplied in such cultivation.

The last mentioned consignment transactions resulted in a balance against *James Leith*, on account of the estates, of the sum of £581. 12*s*. 8*d*. at 31st of December, 1863, and of £328. 10*s*. 11*d*. at 31st of December, 1864. The estimated produce of *Old Grange*, *New Grange*, and *Grafton*, and *Kendal Place*, in the year 1862, was about 250 hogsheads of sugar.

On the 8th of January, 1864, the Respondents filed their petition in the *West India* Incumbered Estates Court, stating their mortgage debt, and praying for a sale of the mortgaged premises comprised therein; and after the usual conditional order, and notice for Claimants, and the appointment of a Receiver, the estates were sold on the 21st of February, 1865, and one of the Respondents, *Alexander Davidson*, was declared the purchaser of *New Grange* for £1,510; *Old Grange*, £2,010; and *Grafton*, £1,010.

On the 2nd of June, 1865, the Appellant made a claim in the Incumbered Estates Court, stating that for some years before the 31st December, 1859, and from that time during the period shewn by the account filed therewith, he was the Consignee of the produce of *New Grange*, *Old Grange*, and *Grafton* estates, and *Kendal Place*. That there was due to him on the balance of the account on the 31st December, 1864, the sum of £2,859. 8*s*. 2*d*., which he claimed, with interest at £4 per cent. per annum from that day,

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out of the sale moneys of the estates, and out of any moneys to arise by the intended sale of *Kendal Place*, in priority to all persons whomsoever. That as such Consignee he had accepted and paid Bills of Exchange, drawn on him by the *Leiths* for the purposes of the estates, and had shipped stores and supplies for the estates, and made other payments and advances to the *Leiths* for the cultivation and working of the estates, and that by reason of such consignments and such shipments, payments, and advances, there was an account current between them relating to the estates.

The account current filed commenced on the 31st December, 1859, and ended on the 31st December, 1864, and the first item therein was, "1859, 31st December. To balance of account current rendered, £1,217. 19*s.*"

The account only purported to cover advances during the years 1860 and 1861, and to give credit for partial consignments during the years 1860, 1861, and 1864. Some produce from other estates was included in the account, amounting to £466. 11*s.* 7*d.*, which was balanced by a payment of the same amount on the other side, it was a general account, not purporting to be confined to any particular estate.

An affidavit was filed on behalf of the Respondents, by Mr. *Gillespie*, in which he explained the difference between a Consignee of *West India* estates and his duties in regard to advances and returns; and accounts of the produce on the one hand, and the mere account current of a Merchant receiving partial consignments and making advances against produce without keeping any accounts of the estate, or being the Consignee thereof on the other hand, giving instances of Consignee accounts properly so called; and he stated, that the account of the Appellant was not a Consignee account, but a mere account current. The Respondent, *Alexander Davidson*, filed his affidavit stating such of the facts hereinbefore set forth, as related to the Mortgage of the Respondents, and especially that no consent, express or implied, was given by them for the consignment deed of the Appellant, and that they were ignorant of its existence until the claim was made by Appellant, and submitting that the Appellant's claim ought to be dismissed.

The Appellant filed an affidavit in answer, in which he stated the origin of his claim under the deed of the 15th of March, 1860. That he had for several years, prior to 1859, been the Consignee of a portion of the crops of the *Old Grange, New Grange, Grafton,* and *Kendal Place* estates, and that he had been applied to by the *Leiths* at the close of that year for further advances to maintain the cultivation of those estates, which he declined to make without some specific arrangement, which resulted in the consignment deed. That there were other estates, and also some stores, belonging to *James Leith,* for which he (the Appellant) had made advances, but that all these advances were contained in a separate account, kept in the name of *James Leith* only, on which account there was a balance due to him of £900 and upwards, exclusive of the balance of £2,859. 8*s.* 2*d.* on the joint account of *John Leith* and *James Leith;* and that the crop entries of £466. 11*s.* 7*d.* had been only introduced into the account for convenience.

The Appellant's claim was heard before the Commissioners in the month of July, 1865, and on the 15th of August, 1865, the Chief Commissioner (Mr. *Fleming,* Q.C.,) delivered the judgment of the Court, disallowing the Appellant's claim to priority over the Mortgagees on the ground that the rights of the Appellant must be governed by the provisions of the consignment deed, and that, according to the true construction of that deed, the Appellant's rights were taken and made subject to the prior title and interest of the Mortgagees; that the deed stated that the estates were subject to the Mortgages, and that the grantors must be held to have granted only according to their interest as mentioned in the deed, that is, as affected by the Mortgages and the rights of the Mortgagees, and that the consignment was to continue only until possession was taken by the Mortgagees, and was determinable by their act, and that, according to the true construction of the deed, the Appellant's agreement was to take subject to the prior rights of the Mortgagees, and that the Court could not relieve him from the effect of that agreement. The Court also suggested other grounds which appeared to lead to the same conclusion.

The present appeal was from this judgment.

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The *Attorney-General* (Sir *John Rolt*), and Mr. *Archibald Smith*, for the Appellant:—

We submit that the judgment of the learned Chief Commissioner is erroneous, that it is founded on a mistaken view of the duties and rights of a Consignee of a West Indian Estate. The Appellant in his dealings with Messrs. *Leith*, in furnishing supplies, and accepting the drafts for cultivation, acted according to the general usage of Merchants and Consignees in this Country of *West India* estates in the actual occupation of their owners. Such a course of dealing *is* not only absolutely necessary for the profitable cultivation of the estate, but for preventing the same from becoming deteriorated and going to waste. The effect of such dealing is to give the Consignee a lien over all other incumbrancers. It is to the disparagement of this admitted lien, that the judgment of the Chief Commissioner goes: and he proceeds on the presumption, that the consignment deed of the 15th of March, 1860, is a waiver or postponement of his general lien as a Consignee, in favour of the Respondents, the prior incumbrancers on the Estate. But the Appellant is himself a Mortgagee of a portion, as well as the Consignee of the estates, and the questions which arise are: First; to what extent does the general lien extend, against whom, and whether against a Mortgagee or prior incumbrancer? and, secondly, whether in this case, the Appellant being Consignee, and having a deed of consignment executed in his favour, which at the same time is a deed of Mortgage, has thereby consented to waive or postpone his rights as Consignee, and take only such interest in the estate as his Mortgage gives him? The effect of a covenant for consignment in a Mortgage is considered in *Bunbury* v. *Winter* (1). Now, as far as the decisions go, the lien of a Consignee has been universally held to extend to the exclusion of the Mortgagee's prior rights. In *Scott* v. *Nesbitt* (2), where the circumstances seem to have been similar to this case, the decision went to the effect, that where there is a Consignee in receipt of the whole of the proceeds of the estate, and supplying the necessary means for carrying on the estate, if the produce is insufficient to pay the Mortgagees on the estate, the Consignee has a lien on the future proceeds of the estate. [LORD WESTBURY:—Does Lord *Eldon*, in his judgment in *Scott* v.

(1) 1 J. & W. 255. (2) 14 Ves. 438.

Nesbitt, mean to go further than to decide that a Consignee has a general lien?] *West India* Estates are *sui generis*, one year's neglect to cultivate might render the estate wholly unproductive and valueless. That case was followed by *Sayers* v. *Whitfield* (1); *Simond* v. *Hibbert* (2); *Farquharson* v. *Balfour* (3); *Shaw* v. *Simpson* (4); *Morrison* v. *Morrison* (5), which was carried to the Court of Appeal, and was heard by the Lords Justices, but the judgment of Vice-Chancellor *Stuart* was sustained (6); then there are the observations of Lord *St. Leonards* in *Re Tharp* (7), where that learned Judge likens the principle upon which the title of Consignees has been supported to the practice acted upon in *Ireland* in regard to fines paid upon renewable leaseholds. In *Fraser* v. *Burgess* (8), all the authorities are collected, and the whole question of the general lien of a Consignee discussed and considered by this Court. The Privy Council had previously declared, in *Miles* v. *Atherton* (9), the lien of a Trustee under a Will, for supplies to a plantation, in preference to a Mortgagee's claim. All principles of Equity combine to uphold the lien we contend for; the Estate becomes valueless if the supplies cease, like a ship requiring necessary repairs, where the last Bottomry Bond has preference, and it has been held that the hypothecation of a ship cannot deprive the seaman of his right to wages: *The Sydney Cove* (10). So in the case of Mortgages on policies of Insurance where the premiums have been paid by the second Mortgagee. The decisions in the Court of the Commissioners of the *West India* Incumbered Estates have been uniformly in favour of the lien of the Consignee: *Greathead's Case* (11); *Harriott's Case* (12); *MacDowell's Case* (13). Then the question is, whether the rights of the Appellant as a Merchant and Consignee, either as regarded past or future advances, were limited or in any manner restricted by the consignment deed of the 15th of March, 1860. We contend

(1) 1 Knapp's P. C. Cases, 148.
(2) 1 Russ. & My. 719.
(3) 8 Sim. 210.
(4) 1 Y. & C. N. R. 732.
(5) 2 Sm. & Giff. 564.
(6) 7 De G. M. & G. 214.
(7) 2 Sm. & Giff. 578-9.
(8) 13 Moore's P. C. Cases, 314.
(9) 3 Burge's Comm. on Col. & For. Law, p. 350.
(10) 2 Dods. 13.
(11) Cust's West Ind. Incum. Estate Acts, p. 219 [2nd ed.]
(12) Ibid. 271.
(13) Cust's West Ind. Incum. Estate Acts, p. 300 [2nd ed.]

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that his rights as Consignee were paramount to his interest as Mortgagee, that they extended over all the estates in support of which he made consignments, though he is restricted as to his mortgage rights to the estate specifically named as his security. His rights under the consignment deed were, as regarded the Mortgagees, necessarily subject to their prior title and interest: and the expressions in the deed of what was implied if not expressed therein could have no effect on his lien as a Consignee: the prior Mortgagees must be held to have, at least tacitly, consented to the arrangement for consigning the produce of the estates in Mortgage, they might have interposed at any time to stop the supplies, but being no parties to the consignment deed were not affected by it, and were not entitled to take any benefit under it. Then again, the discretion given by the deed as to sending out supplies, was nothing more than the arrangement which is incident to the ordinary course of dealing between Consignee and Planter, and could not prejudice the Appellant's lien for such supplies as he might furnish, or for such drafts as he might accept.

Sir *R. Palmer*, Q.C., and Mr. *W. W. Mackeson*, appeared for the Respondents, but were not called upon.

Lord Westbury:—

Their Lordships are of opinion that in this case there are special circumstances in the relation existing between Mr. *Chambers*, the Appellant, and the proprietors of the *West India* plantations, upon which they propose to rest their judgment, and which relieve them from the necessity of considering the important propositions of law which have been adverted to in the able argument at the Bar.

The ordinary mercantile character and position of a Consignee of a *West Indian* plantation are well known. The custom of the Mercantile world is to select as Consignee, a Merchant residing in this Country, to whom the whole produce of the plantations is consigned, and who, in return for that produce, accepts Bills drawn upon him by the proprietor or manager in the *West Indies* for Island contingencies; and who, according to the orders of the manager or proprietor, purchases the supplies needed for the estate, and sends them over to the Island.

There is no necessity in a case of this kind that there should be any contract for the purpose of determining the right of the Consignee. The right of the Consignee, as it is supposed to be established by decisions, giving him a lien on the plantation in respect of the balance due to him, is an exception to the general rule which applies to Principal and Agent.

But lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limits their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum.* If a Consignee takes an express security, it excludes general lien.

In the present case, the question is, whether Mr. *Chambers* can be regarded as the Consignee of these plantations in the ordinary sense, or whether he is a Mortgagee with the appointment of Receiver as part of his security. He refers his appointment as Consignee to a particular Indenture, and we have to consider, therefore, whether that Indenture does not define the rights and interests that he shall have in respect of his dealings with this estate.

The deed is dated the 15th of March, 1860. It is made between Messrs. *Leith*, the proprietors of the plantations, or of the equity of redemption of those plantations, on the one hand, and Mr. *Chambers* on the other. The state of circumstances existing at that time between Mr. *Chambers* and the *Leiths*, which are set forth in the recitals of the deed, may be shortly stated. In the first place, Messrs. *Leith*, in the month of January, 1860, had mortgaged three plantations to Mr. *Chambers*,—plantations which are none of them included in the Mortgage of the present Respondents. This Mortgage was to secure the existing debt, and all future advances to be made by *Chambers*, not exceeding the sum of £2,500. It also appears that there was another Mortgage deed made by the *Leiths* to *Chambers*, dated on a later day of the same month of January, 1860, by which a certain other property, not included in the Mortgage of the Respondents, is mortgaged by the *Leiths* to *Chambers* for the purpose of securing a further debt and advance, not exceeding in the whole £800.

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The deed of the 15th of March, 1860, which is relied on as the appointment of Consignee, goes on to recite that the *Leiths* were entitled to other plantations subject to certain Mortgages or charges affecting the same. And then it recites that, in consideration of *Chambers* having forborne his debt then due to him from the *Leiths*, and having postponed for a long time the period of payment, the *Leiths* had agreed, so long only as possession should not be adversely taken by the parties holding the Mortgages or charges previously referred to, to consign to *Chambers* not less than two-thirds of the produce of these additional plantations.

The state of things, therefore, is shortly this: *Chambers*, the Mortgagee of certain estates, dissatisfied with the security, stipulates with the *Leiths* that he shall have a further security, in the shape of an engagement to consign a certain portion of the produce of other plantations; but inasmuch as those other plantations were themselves included in other Mortgages, this stipulation that *Chambers* should have the benefit of the consignment of a certain portion of their profits is made expressly subject to the rights and interests of those other Mortgagees.

The deed then proceeds to contain covenants on the part of the *Leiths*, by which they engage to consign to *Chambers* certain portions of the proceeds of these other plantations, in order that the amount of the proceeds so consigned may be applied by *Chambers* in aid of his already existing securities, and in part payment of the interest that, from time to time, should become due to him, and in part payment also of the interest of the existing debt.

With respect to the supplies, *Chambers* covenants in a remarkable manner. His engagement is, that he will make shipments, that he will send out all things necessary for the plantations, and pay the sums of money for which Bills might be drawn upon him, but so long only as the shipments of each year shall respectively exceed the amount of the expenses of the same year.

The course of dealing, therefore, is here clearly defined. The *Leiths* had no right to expect from the alleged Consignee any supplies or any payment of Bills for Island contingencies, unless they shipped to him every year a sufficient amount to cover that expenditure.

It has been urged strongly that it must be considered that the Mortgagees assented to what was going on between *Chambers* and the *Leiths*. Their assent, of course, would be of no avail unless they had information of the true state of the dealings. Suppose the Mortgagees, the present Respondents, to have been aware of this deed, the nature of which we have been stating, they would be warranted in treating it as a supplemental and additional security taken by *Chambers* in aid of his existing Mortgage. They would be warranted in assuming that *Chambers* intended to abide by the stipulations of the deed, and not to make advances unless he had in hand, or was about to have in hand, produce of the estate sufficient to cover those advances.

This, therefore, is an instrument that shews clearly the nature of the engagement between *Chambers* and the proprietor of the plantations. As we have already observed, he was dissatisfied with his security, and he bargained for the receivership of a considerable portion of other and additional produce, subject, however, to the rights of the persons entitled to Mortgages on that property;—he stipulates for this addition by way of aid to his existing security, and the rights that he has are the rights given to him by this contract. The claim that he now makes is a claim which, departing from the limited nature of this security, he desires to substitute for it—the lien of a general Consignee who has dealt with the entire proceeds of the estate according to mercantile usage, and has a balance due to him.

Our conclusion may be expressed in two results: one, that this is not a case of lien, but an express and definite contract, and that the limits and nature of that contract would be exceeded and put an end to, if we allowed this claim for a general lien.

The second is, that Mr. *Chambers* was not in the ordinary relation of Consignee. He was here dealing with the proprietors of the plantation in the character of Mortgagee, with the stipulations of a mortgage, and it was not the object or effect of the deed to create between him and the proprietors of the plantation the ordinary relation of Consignee and planter.

On these grounds, therefore, without adverting further to the argument upon the law applicable to Consignees, and without committing this Tribunal to any opinion whatever upon the general

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questions that have been argued, we decide that there was no relation that warrants the claim of lien by Mr. *Chambers* as Consignee. We decide that his claim is limited to his express security and contract, and that the claim he now advances is inconsistent with the nature of that security.

Their Lordships will, therefore, humbly report to Her Majesty, as their opinion, that the decision of the Commissioner of the *West India* Encumbered Estates Court ought to be affirmed, and this appeal dismissed with costs.

Solicitors for the Appellant: *Boys & Tweedies.*
Solicitors for the Respondents: *Kingsford & Dorman.*

J. C.* 1866 Nov. 27.

In re MALLET'S PATENT.

Letters Patent—Exclusive License—Prolongation of term upon condition of granting Licenses to the public similar to one already granted.

A Patentee, who was not a Manufacturer, granted a License to a manufacturing firm to manufacture the patented article, which, by agreement between them, was of an almost exclusive character. In granting a prolongation of the term of the Letters Patent, the new Letters Patent were directed to be made upon condition that Licenses should be granted by the Patentee to the Public upon terms similar to the one already granted.

THIS was an application for the extension of Letters Patent granted on the 28th of October, 1852, for "Improvements in Fire-proof and other Buildings and structures."

The invention, as described in the specification, related to the construction of fire-proof and other buildings and structures, or parts thereof, by the application, in manner therein described, of plates of iron or other suitable material, bent or otherwise figured into a peculiar convex and concave form, denominated "buckled plates." The petition set forth the nature and value of the invention, and the difficulties encountered by the Petitioner in bringing the same into public notice, and stated that one of the

* *Present*:—THE LORD JUSTICE TURNER, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

great difficulties by which he was met, and which prevented the progress of his invention, was, that he was not himself a Manufacturer, nor possessed of capital, nor in a position to start a manufactory of buckled plates himself; the dies and other plant and tools necessary for their manufacture being very expensive, that parties desirous of employing his buckled plates for small or moderate-sized structures found they could not procure the plates, often needed of particular sizes, unless they went to the expense themselves of making the necessary tools, and the cost of these on small quantities of plates was prohibitory. That consequently the demand was limited to cases only where a very large quantity was required for one work, as in the case of the new *Westminster Bridge*, where Messrs. *Cochrane & Co.* made all the necessary dies and tools at a very serious outlay, which were used to prepare the buckled plates, the total weight of which was about 300 tons. That to remedy this was found very difficult, as it was very difficult to induce any Ironmaster or Manufacturer to undertake to be at the expense of preparing dies and other tools to prepare a small order for plates to a special size, the cost of which could not be defrayed by that one order, on the chance that other and future orders might be obtained which would defray the outlay; and that it was not until late in the year 1861 that the Petitioner was able to close an agreement with Mr. *David Jones*, of *Herbert's Park Iron Works*, near *Bilston*, *Staffordshire*, who was largely engaged in rolling of iron sheets and plates, by which he undertook, upon certain terms, to make any required sizes of dies, and to execute all such orders for buckled plates as he might be enabled to obtain himself, or which should be transmitted to him by the Petitioner. That after this agreement was entered into, the Railway Bridge across the *Thames* at *Putney* was begun, and the Petitioner was induced to undertake to supply directly the Contractors for that Bridge with the large quantities which cover or floor it; that these plates were made by Mr. *David Jones* to the Petitioner's order, and delivered upon the works; but the contractors failed, and the Petitioner lost thereby not only his entire royalty, but the total value of the plates, for which he was not paid, and for which he had to pay his maker, Mr. *David Jones*. That the career of successful introduction and increasing employment of buckled plates, in fact, only

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dated from the period of the completion and opening to the public of the *Westminster New Bridge*, and the result to the Petitioner had been, on the whole, that until the last four years his patent had been almost wholly unproductive, and he found that just at the time when the patent was about to expire, the real and true value of his invention was getting well understood, and its use established and extending; and under these circumstances, and as the total profits which the Petitioner had as yet derived from an invention that had proved of great public and private value and importance were wholly inadequate to the merits of his invention, he prayed for a prolongation of the term of the Letters Patent for a further term of fourteen years.

The Petitioner and other scientific witnesses were examined, who deposed to the great value of the invention, and to the fact that it was becoming generally used in Government works and *public* Bridges. It also appeared that, by the agreement made by the Petitioner with *Jones*, he had granted him the almost exclusive license to manufacture the plates, the Petitioner only reserving particular contracts of his own.

It further appeared from the accounts of the patent that the Patentee had received from the working of the patent the sum of £5,519. 19*s.* 4*d.*, from which sum he debited himself with the loss, first, of a sum of £603. 14*s.* 10*d.*, for buckled plates supplied by him to Contractors named *Calvert & Co.*, who failed, and the amount was lost; and secondly, with the sum of £746. 15*s.*, the profits returned by the account furnished by *Jones*, the Licensee, for working the invention at 7*s.* per ton.

Mr. *Grove*, Q.C., and Mr. *Lawson*, for the Petitioner:—

Urged, that there had not been an adequate remuneration for a valuable public invention which was now coming into use, and that an extension of the term of the Letters Patent would enable him to reap the just reward of his invention.

The *Attorney-General* (Sir *John Rolt*, Q.C.), and Mr. *Hannen*, for the Crown:—

Submitted, first, whether the Petitioner had not been amply rewarded; and, secondly, with respect to the accounts, objected to

the items of £603 and £746, the amount of the account furnished by *Jones* of the profit from working the License, observing that the former item should be credited, and not debited, in the account, and that as the accounts were not satisfactory an extension ought not to be granted: *Trotman's Patent* (1).

THE LORD JUSTICE TURNER:—

Their Lordships have considered this case; they are fully satisfied with the value of this invention, and if, on the one side, the public would be likely to suffer from the enlargement of the term of the patent, on the other side, their Lordships are perfectly satisfied that the public have been great gainers by the saving which must necessarily have accrued from the adoption of the patent. Their Lordships, therefore, are of opinion, that it would be their duty to recommend to Her Majesty to grant some enlargement of the patent, provided the Patentee has not been sufficiently remunerated.

Now, without entering into the particular items which have been the subject of question, either the £603, or the £746, which are the only disputed items open to any real question; taking these items to be in favour of the public, and against the Patentee, their Lordships find that the Patentee has only received about £4,000 in respect of the patent. Spreading over the twelve years, there has been a profit of somewhat about £280 a year to the Patentee, and that without any charge being made against the public in respect of the attention and diligence which the Patentee has given to the introduction of this great improvement. Their Lordships, therefore, do not think they would do wrong in extending the patent for the term of four years. They will, therefore, recommend Her Majesty to grant an extension of four years. But their Lordships observe, from the evidence before them, there is an understanding apparently between Mr. *Jones* and the Patentee, that the License of Mr. *Jones*, though not made an exclusive License, should be so considered. Their Lordships think that the extension of the terms of the Letters Patent ought to be upon the condition of granting Licenses to all persons who may be desirous of having them upon the same terms as Mr. *David Jones's* License. Therefore, their Lordships will clothe the Order for the extension

(1) Law Rep. 1 P. C. 118.

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of the term of the Letters Patent, with the condition that the Patentee shall grant Licenses to all persons desirous of having the same, upon terms similar to the License already granted.

Solicitor for the Petitioner: *John Henry Johnson.*
Solicitors to the Treasury: for the Crown.

J. C.* 1866 *Nov.* 19, 20.

THE REV^D. EDWARD PARKER, CLERK . APPELLANT;
AND
FELIX LEACH . . . . . RESPONDENT.

ON APPEAL FROM THE CHANCERY COURT OF YORK.

Suit for perturbation of pew—Church repaired under a Faculty—Re-consecration not necessary—Plea to jurisdiction—Title to pew in chancel—Permissive occupation.

L., the tenant and occupier of the Manor-house in the parish of *W.*, instituted a suit in the Chancery Court of *York* against *P.*, the Incumbent and perpetual Curate, for perturbation of a pew, held by *L.* as appurtenant to the Manor House, and occupied by him therewith for nearly forty years. *P.*, the incumbent, admitted the destruction of the pew by his orders and direction, but pleaded—first, to the jurisdiction of the Court, on the ground that the Church was not in law a Church, never having been re-consecrated since its general repair in 1825; and, secondly, that the permissive occupation of the pew was not sufficient to entitle *L.* to sue:—*Held*, by the Judicial Committee,—

First, that, it appearing from the evidence, that the Church of *W.* having been repaired and rebuilt under a Faculty, upon its old foundation, the Tower and eastern wall and windows never having been removed, and some of the Offices of the Church performed during the repairs, it had never ceased to be a Parish Church so as to require re-consecration, but remained subject to the authority of the Diocesan; and that the judgment of the Court below overruling the protest to the jurisdiction was right: and,

Secondly, that as a pew being in the Chancel may legally belong to a party in respect of the ownership of a house, the title by occupation of such a pew was rightly pleaded, and, if proved, would entitle *L.* to maintain his suit.

Semble, If a Church be rebuilt on the old lines of foundation, including within it the same originally consecrated ground and no more, the Ecclesiastical law does not require that such Church should be re-consecrated.

THIS was a cause of perturbation of seat or pew depending in the Chancery Court of *York*, promoted by the Respondent, *Felix*

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

Leach, of *Brungerley*, in the Township of *Waddington*, in the County of *York*, against the Appellant, the Rev. *Edward Parker*, Clerk, the Incumbent of the perpetual curacy and parochial Chapelry of *Waddington*, and came before the Chancery Court of *York* by Letters of Request.

The seat in question was appurtenant to the Mansion-house of *Waddon Hall*, in the Township of *Waddington*, which belonged to the Honourable *Isabella Ramsden*, Widow, the Lady of the Manor of *Waddington*. The Respondent claimed the right to the use of the pew by permission of Mrs. *Ramsden*, as her tenant. He had occupied the pew in question under such permission from the restoration of the Church, in the year 1825, to the time when the pew was pulled down by the Appellant's directions, about the latter end of the year 1863, having been an inhabitant of the Township of *Waddington* during the whole of that period.

The Appellant, who for three years previous to the proceedings in the cause had been the Incumbent of the Church, in the month of December, 1863, without the authority of the Churchwardens, pulled down and entirely destroyed the pew which the Respondent had been in the habit of using. The Respondent then brought a suit for perturbation of pew in the Diocesan Court of *Ripon*, which was removed by Letters of Request to the Chancery Court of *York*.

The admission of the libel of the Respondent was opposed by the Appellant, on the ground that, in or about the year 1825, the Church of *Waddington* was pulled down, the foundations thereof removed, and the altar taken away, since which time there had been no consecration of the Church, and that by reason of such want of consecration the Court had no jurisdiction with respect to the Church; and, further, that it appeared from the libel of the Respondent that the pew in question belonged to the Honourable *Isabella Ramsden*, and that the Respondent had no right to it whatever.

The Respondent denied this, and alleged that the Church of *Waddington* was a consecrated building, dedicated to the service of Almighty God, in which the services of the Church were and still are duly performed, but that the date of such consecration

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was unknown to him. That at the time the Church was repaired, in 1825, the wall on the east end of the Church was not taken down except so far as was necessary to attach it to the side walls, which were then rebuilt under the authority of a Faculty granted on the 21st of April, 1825. That the Chancel of the Church at the time of the reparation was, and still is, formed by two inner or wing walls, which project at right angles from the east wall of the centre window, and on the north of such inner or wing walls there were, and still are, some family monuments of the Patrons of the living, and on the south of such inner wall there was, and there still is, a monument to the former owners of the *Waddow* estate. That neither of the inner or wing walls were removed, disturbed, or interfered with during the reparation of the Church, neither were the monuments removed or interfered with. That at the time of the reparation there were, and still are, three windows at the east end of the Church, one being a large centre window with stained glass figures, which formed the mid-chancel window, and the other two smaller windows, of which one was in the vestry and the other in the *Waddow* pew, which windows were in the same position prior to the reparation as they then were, and were not at such time altered or interfered with in any manner. That all the materials of the two old side walls, being on the north and south of the Church, were used in the re-erection of the side walls. That at the time of the reparation no alteration was made in the Chancels of the Church, beyond raising the walls a few feet in height. That the floors of the Chancels were not altered. That the space between the two wing walls was always covered over, even before the reparations, by a flat ceiling composed of lath and plaster, which remained until some time after a new roof had been put on. That the Altar or Communion table and rails surrounding it were not interfered with or removed at the time of the reparation, although after the Church had been repaired the Communion rails, which previously formed three sides of a square, were removed, and the same Communion rails were afterwards placed across the Chancel from one inner wall to the other inner wall, as they then remained. That the pews in the Chancel known as Mr. *Felix Leach's* pew (the Respondent's) the *Waddow* pews, Mr. *Taylor's* pew, the *Browsholme*

pew, and the other pews in the Chancel, were not taken down or interfered with during the reparations. That at such time the steeple of the Church was not disturbed, and that the foundations for the present north and south side walls were placed precisely on the site or situation of the old walls, and that the Church was no wider or narrower than it was previous to the reparation aforesaid; and the Respondent alleged, that it was not needful that the Church of *Waddington* should be re-consecrated in consequence of the reparations made therein as aforesaid; and he prayed that the Court would reject the Appellant's plea, and pronounce for its jurisdiction in the cause with respect to the Church, and condemn the Appellant in costs.

These allegations the Appellant denied, whereupon the Respondent prayed for a Monition against the Appellant and the Churchwardens of the Parish of *Waddington*, to bring in the specification and estimate for the works contracted for and agreed to by the Vestry at *Waddington* in the year 1824.

Affidavits were filed by the Appellant in support of the averments contained in his protest. The Respondent also filed Affidavits in answer to the Appellant's averments. The questions thus raised were argued by Counsel, when the Judge of the Chancery Court of *York* (*Granville Harcourt Vernon*, Esq.) overruled the protest against the jurisdiction, and decided that no re-consecration was necessary. Against this judgment the present appeal was interposed.

Mr. *A. J. Stephens*, Q.C., and Mr. *R. A. Bayford*, for the Appellant:—

This is primarily a question of jurisdiction. It is pleaded and proved that in the year 1824, the Parish Church of *Waddington* was pulled down, the foundations removed, and the altar taken away; since which there has been no consecration of the Church, and in consequence of such want of consecration, the Chancery Court of *York* had no jurisdiction with respect to the Church. If that objection be well founded, the other point raised relative to the title to the pew in question will not arise, namely, whether it be in Mrs. *Ramsden*, the owner of the Mansion in respect of which the pew is claimed, or in the Respondent, *Leach*, who is only her tenant, and has no

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title himself to the pew; and, therefore, the right to sustain a suit for perturbation will not arise.

First, then, as to this Church being a new building, and, therefore, requiring re-consecration. In making the repairs in 1825, it appears from the evidence that there was nothing left of the original fabric but the Tower, and a portion of the old walls, which have been so added to or raised as entirely to destroy the identity of the building, and to render, therefore, reconsecration necessary. In *Battiscombe* v. *Eve* (1), a re-consecration was required, the whole Church, except one arch, having been pulled down and rebuilt. So in *Warner* v. *Gater* (2), a Church-rate for defraying the expense of the consecration of a Church rebuilt under the Statute, 59 Geo. 3, c. 134, s. 40, was held valid, although no Faculty had been granted. It has been decided that if a Church is entirely taken down and rebuilt re-consecration is necessary; *Turner* v. *The Parishioners of Hanwell* (3). Though there is no authorized form for the consecration or the re-consecration of a Church in our Book of Common Prayer, there is such in the Irish Book (*Dublin* Ed., 1723), where the following services are to be found. First, there is "An Office to be used in the Restauration of a Church," the Rubric of which is thus: "Where the Fabrick of a Church is ruined." The form for consecration usually adopted is to be found in *Burns'* Ecclesiastical Law, vol. i., tit. "Church," p. 327 [9th Ed.]; but the special form, where the Church has been repaired, is only to be found in the Irish Prayer Book, already cited, and we produce copies of two Deeds of consecration, extracted from the Provincial Registry of *Armagh*; one dated the 29th of September, 1863, of the Parish Church of *Loughgilly*, in the Diocese of *Armagh*, and the other, dated the 1st of September, 1865, of the Church and Churchyard of *Tullaniskin*, in the same Diocese; the first of which recites that the Church of *Loughgilly* "has recently been altered, improved, and enlarged, including in the said enlargements a new Chancel;" and the second, of the Church of *Tullaniskin*, recites, that that Church "has recently been altered, improved, and enlarged." These precedents shew at once the practice, and the necessity for

(1) 7 L. T. (N. S.) 697. (2) 2 Curt. 315
(3) 1 Notes of Cases, 368.

re-consecration where alterations and improvements have been made, and a new Church is built on the same foundation. The Rubric for the "Restauration," proceeds: "The Bishop, attended by his Clergy, shall enter into the Church-yard, and go in procession round about the Church new built, and recite alternately Psalm 74;" after which, in the service, follows the Lord's Prayer, then the Collect "For Direction and Success in all Undertakings," from the post Communion service, then a prayer taken from the 9th chap. of *Ezra*, 6th verse, and then the 144th Psalm, "After which" (the Rubric directs) "the Bishop, attended with the Clergy, shall go to the Font, and use the same Office as is appointed for the Consecration or Dedication of Churches; and so to the end; omitting the words (place or places), because the place was consecrated before, and so was the Cemetery, in other things proceed without change." There is also in the same Book "A Short Office for Expiation and Illustration of a Church Desecrated or Profan'd," that is by "Murther and Bloodshed, by Uncleanness, or any other sort of Prophanation." The old Ecclesiastical law in such a case required, if not a re-consecration, a reconciliation; but where the fabric of the Church was destroyed, a re-consecration was necessary, as the new fabric of a Church is not the same Church. *Gibson's Codex*, p. 189, Tit. ix. c. 1, s. viii. *Van Espen, Jus. Ecclesiasticum Universum*, Vol. I., Part II., Tit. I.; Cap. iv., v., and vi.

Secondly, as to the title to the pew. The Respondent is but the tenant of the alleged owner, Mrs. *Ramsden*, he has clearly no right to the pew, his occupation being merely permissive and on sufferance; and the libel does not disclose a sufficient cause of action, and is not, therefore, admissible. To give a title to this pew, there must either have been a Faculty granted to Mrs. *Ramsden*, or her predecessors, or a permissive occupation by her; in either case, she alone is competent to institute such a suit as this. *Co. Litt.* Vol. I., B. 2, c. II., sec. 184, p. 122 a., 6; *Woollocombe* v. *Ouldridge* (1); *Byerley* v. *Windus* (2); *Clifford* v. *Wicks* (3); *Walter* v. *Gunner* (4); and the cases there referred to in the notes: *Pettman* v. *Bridger* (5). The Appellant, as incumbent of the Chapelry,

(1) 3 Add. 1, 6.
(2) 5 B. & C. 1, 18.
(3) 1 B. & Al. 498.
(4) 1 Hagg. Con. Rep. 314, 318.
(5) 1 Phil. 316, 325.

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had power to remove the pew: *Jones* v. *Ellis* (1); *Griffin* v. *Dighton* (2).

Dr. *Deane*, Q.C., and Dr. *Spinks*, for the Respondent:—

There is no pretence for saying this is a new Church, neither the Tower nor the eastern end of the Church were ever removed and the new side walls were erected on the old foundations. The repairs, moreover, were done under a Faculty. It is in evidence that the services of the Church were never entirely suspended. Marriages were celebrated, and it appears from the Churchwardens' accounts, that the Holy Communion was administered, for there is a charge for the bread and wine. How, then, can it be contended that this is a new Church? In *Co.* II. Inst., Stat. West. 2nd, c. 5, p. 363 [Ed. 1571], it is stated that "when the question was whether it were *Ecclesia aut Capella pertinens ad matricem Ecclesiam*, the issue was, whether it had *baptisterium et sepulturam*: for if it had the administration of the sacraments and sepulture it was in law judged a Church, and Lord *Coke* cites *Bic. de Smithes' Case*, Trin. 20, *Ed.* I., and other cases. What condition are the Parishioners of this Parish in, if the argument of the Appellant is well founded, and this Church has been no Church for the last forty years? Has the Reverend Incumbent reflected on the consequences if he were successful in his contention? There is no service either in the Book of Common Prayer, or elsewhere, for the re-consecration of a Church repaired or restored. Each Prelate frames, or may frame, his own form for consecration of a Church, and it is probable that, from general use, the one cited from the Irish Book of Common Prayer has become general in *Ireland*; but there is no authority for its forming a part of the Book of Common Prayer, or for its general use. In the case of *Warner* v. *Gater* (3), where the Church was rebuilt under the Statute, 59 Geo. 3, c. 134, Sir *Herbert Jenner* is represented as saying, that the Church could not be a Parish Church until it was consecrated. That is, however, but an *obiter dictum*, for the question of the necessity of consecration was not before the Court, and the Church, moreover, was altogether a new Church, which was not the case here. The case of *Turner* v. *The Parishioners of Hanwell* (4), must

(1) 2 Y. & J. 265.
(2) 33 L. J. (N.S.) Q. B. 29.
(3) 2 Curt. 315.
(4) 1 Notes of Cases, 368.

be wrongly reported, the learned Judge of the Arches never could have said, as he is there represented, that if the altar had been taken down there must be a re-consecration. That has been done over and over again, and very recently in *Westminster Abbey* itself, without any such re-consecration being required. The case of *Battiscombe* v. *Eve* (1), so much relied on by the Appellant, is not an authority binding on this Court, it was a decision of the Chancellor of *Rochester*, in the Consistory Court of that Diocese, and though entitled to great weight from the learning and ability of the learned Judge, Dr. *Robertson*, who delivered it, is, we insist, not warranted by the authorities relied on, and not supported by any legal precedent. There is, moreover, this essential difference, that in that case there was no Faculty for the repairs or rebuilding of the Church. There cannot be a partial consecration of a Church, every portion of the Church must be included; the Vestry as well as the body of the Church: *Wilson* v. *M'Math* (2). In the very same passage cited from *Van Espen, Jus. Ecc.*, the question is asked, What if the altar is removed, does that require a re-consecration of the Church? and the reply is—The altar is made for the Church, and not the Church for the altar; and, therefore, no fresh consecration is requisite. Even if the law were as reported in *Turner* v. *The Parishioners of Hanwell* (3), here the Church would not require re-consecration, for neither the Tower nor the altar have been disturbed.

The interference by the Incumbent with the pew, was wholly illegal, and unwarrantable; the Churchwardens are the only persons having a legal right to alter or remove the pews, and they must act under the authority of the Ordinary: *Pettman* v. *Bridger* (4). The suit was properly instituted by the Respondent, he had a possessory right in the pew: *Stocks* v. *Booth* (5); and if any objection was intended to be made to his title to sue, it should have been taken on the admission of the libel; it is too late now, even if tenable, which we submit it is not.

LORD WESTBURY:—

The Appellant in this case is the perpetual Curate and Incumbent

(1) 7 L. T. (N. S.) 697. (2) 3 Phil. 67. (3) 1 Notes of Cases, 368.
(4) 1 Phil. 316, 323. (5) 1 T. R. 428.

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of the Parish Church of *Waddington*, in the Diocese of *Ripon* and Province of *York*; the Respondent an aged gentleman resident within the same Parish.

There is in the Chancel of the Parish Church a pew, claimed as belonging to the Honourable Mrs. *Ramsden*, in respect of her being the owner of an ancient messuage within the Parish. Mrs. *Ramsden* has given license and permission to the Respondent to occupy that pew, of which she is the proprietor; the Respondent has had the use and enjoyment of it for nearly forty years.

In the month of *December*, 1863, the Appellant, without the authority of the Churchwardens, appears from the evidence to have gone to a Carpenter, an inhabitant of the Parish, to have brought him into the Chancel, and to have pulled down and entirely destroyed the pew which the Respondent had been in the habit of enjoying.

This was followed by a suit for perturbation of the pew commenced in the Diocesan Court, and removed by Letters of Request to the Chancery Court at *York*.

To the libel of the Respondent, the Appellant pleaded that there was no jurisdiction in the Archbishop of *York*, because the Church was not, in law, a Church at all, never having been re-consecrated since its general repair or rebuilding in the year 1826.

Now the Appellant has been himself for three years the Incumbent of the Church; Divine service has been celebrated there by him, and by his predecessors; Baptisms have been performed there; Marriages have been solemnized there; the Holy Communion has been administered in it for nearly forty years. It is a plea, therefore, pregnant with the most formidable consequences, if it be found to have any support in law.

The points which have been argued may be thus arranged. It is contended by the Appellant, as a general proposition, that if a Church be taken down and rebuilt, though it be rebuilt again upon the same foundations, the new edifice requires to be re-consecrated, and until it be re-consecrated, the Appellant contends, that it can have none of the character of a Church; that such an edifice, in point of law, is to be regarded no more than if it were any common building within the parish.

Such is the legal proposition which is first put forward on the part of the Appellant.

The second proposition is, that the Church in question, viz., this Parish Church of *Waddington*, had been rebuilt in such a manner as to bring it within the scope of the first proposition which he lays down, viz., that it was wholly rebuilt, and therefore required re-consecration.

The third ground that has been maintained by the Appellant is a technical one, relating to the form in which the title to the enjoyment of this pew was laid by the Respondent in his libel.

To prove the first proposition, viz., that a Church rebuilt upon the old foundations, if it be entirely or substantially rebuilt, requires re-consecration, very little authority has been produced. No decided case has been cited to their Lordships, with the exception, perhaps, of a case noted in *Burn's* Ecclesiastical Law (vol. i. p. 336), in which it is said that the Church of *Southmalling* having been polluted and pulled down, was new built, and then used for Divine offices without new consecration. Archbishop *Abbot* interdicted the Minister, Churchwardens, and Parishioners from the entrance of the Church until the Church and the Churchyard thereof should be again consecrated.

The particulars of the case are not given. It is a citation from *Gibson's Codex*, p. 190, and it can hardly be regarded as anything like a solemn legal decision on the point. Two things, however, appear to have occurred, viz., that the original Church was polluted in some manner not described, and probably on that ground was ordered to be pulled down, and then there was a new fabric which was considered by the Archbishop as requiring consecration.

The other cases cited to their Lordships contain mere *dicta* of different Judges, and do not involve the point now in question.

The case most relied on is one which occurred in the Diocese of *Rochester*, the case of *Battiscombe* v. *Eve* (1), in which the Chancellor, Dr. *Robertson*, cited a Treatise "*Pupilla Oculi*" (*John de Burgh*) pars. ix. cap. 1, "*De Consecratione Ecclesiæ, vel altaris, et de reconciliatione ejusdem*," fo. 146, F., of very early date, written anterior to the Reformation, in which the following expressions are used:—"*In tribus casibus debet Ecclesia dudum consecrata iterum con-*

(1) 7 L. T. (N. S.) 697.

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secrari." After stating two instances which do not bear on the case, he proceeds:—"*Tertius est, si Ecclesia funditus sit disrupta vel etiam ex toto reparata, sive ex eisdem lapidibus sive ex aliis.*" That is to say, where the Church has been destroyed from the foundation stone, "*funditus disrupta,*" or where the Church has been "*ex toto reparata*"—restored "*ex toto,*" completely from the top to the bottom in every part.

It is unnecessary in the present case that their Lordships should give any judicial opinion upon this general question, for reasons that will presently appear; but their Lordships are particularly desirous that it should be understood, that they do not mean by any observation to give authority to the position, that if a Church be rebuilt upon the old lines of foundation, including within it the same originally consecrated ground, and no more, such Church does need re-consecration. We give no judicial opinion upon that. We desire, however, to have it clearly understood that we do not by any means intend to recognize or to sanction such a doctrine, as being, in our opinion, a just view of the law. But that point will not be involved in our present judicial determination.

The judicial ground for the determination we arrive at rests upon the view we have taken of the second question; the second question being an inquiry whether in this particular case the Church was wholly rebuilt, so as to come within the meaning of a Church *ex toto reparata*, assuming for the moment that such a new building might require re-consecration.

Now, the history of the proceedings is this:—

A Faculty was applied for and granted for the repair of the Church. The Church consisted of a nave, two aisles, the Chancel, and Tower. It would seem that it had been ascertained that the walls of the body of the Church, including the nave and aisles, required to be completely taken down and renewed. The Tower did not stand in need of reparation, but all the walls, running from the Tower north and south to the east, required entire rebuilding. The eastern wall did not stand in need of being rebuilt. Accordingly the Faculty directed the repair of the Church to be made in conformity with that necessity. The Tower, therefore, remained untouched; the eastern wall, in which were three windows—a large window and two smaller windows, one on either side—also remained

untouched, except so far as it was necessary to pull down a part at either end of the eastern wall, for the purpose of tying on to it the new north and south walls that were erected.

The whole of the interior of the nave or body of the Church appears to have been altered; and, whereas, in former times there was an arched doorway communicating between the nave and the Tower, that doorway was stopped up; a new porch or entrance to the body of the Church was erected, the north and south walls were erected, and the interior of the nave of the Church was renewed.

With reference to the Chancel there is some conflicting evidence, but the witnesses agree that the Communion Table, within the Chancel, had on either side of it, north and south, two low walls, forming, as it were an interior Chancel. These low walls were not touched, so far as removal was concerned, but they appear to have been added to and carried to a greater height. The Communion Table being very old was replaced by a new one.

It is said that some of the pews then existing in the Chancel were taken down and new ones erected, but upon the whole of the evidence the conclusion is, that the pews in the Chancel were allowed to remain. There may have been in some instances new woodwork, but substantially the Chancel remained, save so far as we have mentioned, unaltered.

Now, it must be observed that this was done under a Faculty granted by the Diocesan; it was done, therefore, by virtue of Ecclesiastical authority. It is extremely difficult to understand how that which was done by virtue of Ecclesiastical authority could have the effect of rendering the thing itself, when done, exempt from that authority which was necessary for the doing of it. We put it, therefore, to the learned Counsel whether there was any instance of repairs or rebuilding done under a Faculty which had been held to require re-consecration? No such case has been produced to us. That case which occurred in the Diocese of *Rochester* appears to have proceeded wholly upon the ground that there the Church had been repaired or rebuilt without a Faculty; and having therefore been called into being not under Ecclesiastical authority, the learned Judge thought, rightly or wrongly, that it required re-consecration or re-dedication (the two words legally meaning the same thing), in order to give it the character of an eccle-

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siastical edifice, so as to be subject to the jurisdiction of the Diocesan. It is a decision which, so far as it goes, would seem to carry with it, by implication, the conclusion, that if the reparation, however extensive it might be, had been done under a Faculty, it would have precluded the allegation that it was a building which remained free from Ecclesiastical authority until it was re-consecrated.

So far, therefore, as that decision goes, it seems to present an expression of opinion that whatever was done under the Faculty, being done under Ecclesiastical authority, the building in respect of which it was so done must be considered as remaining subject to Ecclesiastical authority.

But that is not by any means the whole of the case, for the Respondent avers that when the portions of the Church which were rebuilt were pulled down, and while the edifice was therefore no longer fit to receive the Parishioners for the purposes of public worship, Marriages were still performed in the Church, and the Sacrament of Baptism continued to be administered. Marriages were celebrated in the Tower whilst the Church was in the act of being rebuilt; Marriages were also celebrated within its incipient walls. At no time, therefore, has there been any disuser of the edifice as a Church. It has been treated as the Parish Church, and used, even during the very act of rebuilding, for those ceremonies which could only be performed within the Parish Church. That which remained, therefore, the Tower and other portions of the building, still retained their Ecclesiastical character; and its user as a Parish Church has never been abandoned.

It is impossible to suppose that under such circumstances the building can have become desecrated, and so stripped of its original sacred character as to require that it should be again consecrated.

A question was put several times to the learned Counsel, by whom we have been much assisted, and who would have been able to answer the question if there are any Counsel able to answer it, whether pulling down the nave would involve a desecration of the Tower, so that it also must be re-consecrated. Whether the same doctrine would apply to the eastern wall and the Chancel? Whether those Marriages and Baptisms were all illegally performed which were performed when a certain part of the Church

was on the ground, and while the act of rebuilding was going on?

It was impossible that the answer to those questions could be either that these things were illegally done, or that the Tower and the other buildings had lost their original sacred character acquired by virtue of the prior consecration.

Another question was put to the learned Counsel: whether there was any form given, or whether any instance could be cited, of a partial consecration of a Church, *i.e.*, of a portion of the Church? Because the rule being that what has been once consecrated shall not be re-consecrated, the consecration in the present case must be limited entirely to the body of the Church, excluding the Chancel and the Tower. That would be an anomaly of which no example or precedent has been mentioned.

Reference was made to a case which occurred before Dr. *Lushington* in the Court of Arches—the case of *Turner* v. *The Parishioners of Hanwell* (1), and words were relied upon as seeming to intimate the opinion of the Judge that in that case the Church had lost entirely its sacred character, and would require to be re-consecrated.

The note of this case, which is a very short one, must be accurately looked at for the purpose of seeing what was the nature of the application, and the question which the Court was called upon to decide. The application was by a Parishioner for a Faculty to make a burial-place for himself and his family in the Parish Church, to the exclusion of others. At the time of the application, the note goes on to say, there was no Parish Church, the old Church having been almost entirely taken down, and a new one in the course of rebuilding.

Now, an application for a Faculty to make a burial-place is one, the propriety of which it would be impossible to determine until it was ascertained what was the area of the Church, and in what manner the interior of the Church would have to be arranged and disposed of.

Dr. *Lushington's* answer to the application was this: "I cannot grant such a Faculty. How can I grant a Faculty for a Church not built?" And the answer appears to us to have been a very conclusive one to that application.

(1) 1 Notes of Cases, 368.

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Then words are attributed to the learned Judge which could hardly have been used by him as they are here reported; but if they were so used, they were *obiter dicta*, not necessary for the case before him. He is reported to have said, "If the altar has been taken down, there must be a re-consecration, as my jurisdiction depends entirely *ratione loci*." If the learned Judge used those words, it is quite clear he must have borrowed them from the equivalent expressions which are found in *John de Burgh* and other writers at a period anterior to the Reformation, and intended to apply wholly to Roman Catholic Churches. In a Roman Catholic Church there is an altar, or place where the Priest offers sacrifice. In a Protestant Church there is no altar, in the same sense; but there is a Communion Table on which bread and wine are placed, that the Parishioners may come round it to partake of the Sacrament—the Supper of Our Lord.

It is impossible to derive from language applicable to a Roman Catholic altar a conclusion of law applicable to a Protestant Church, which conclusion cannot be drawn unless you hold the Communion Table to be in all respects equivalent to the altar of a Roman Catholic Church.

The note afterwards goes on to say that the motion was renewed subsequently; and "the Church having been rebuilt and consecrated, the Faculty was granted." It is impossible to tell (if it be correct that there was a re-consecration of the Church) what were the circumstances which induced the supposed necessity for that re-consecration. We cannot accept the language as amounting to a judicial determination that when, in the repair of a Church, a new Communion Table is put in the place of an old one, the Church must be re-consecrated.

But that brings us back to the inquiry (which is one of fact), has this Church been rebuilt in the sense in which the word rebuilding must be taken to be used, whenever reference is made to the re-consecration of a Church that has been rebuilt?

We repeat that this was not the rebuilding of an entire Church, but was the renewal of a portion only; that it was done under the authority of the Diocesan as matter of reparation, and not of rebuilding, and that there remained untouched an important portion of the original consecrated structure, in which the offices of a

Parish Church still continued, without interruption, to be performed.

Upon these grounds, therefore, their Lordships act; and confining their decision to the objection to jurisdiction, they found it upon the fact that there was no rebuilding of this Church, that it is not a new Church, but part of an old Church, with new buildings introduced into it by way of repair; and finding this was done by the authority of the Diocesan, under a legal Faculty for the purpose, they are of opinion that the Church never ceased to be a Parish Church so as to require re-consecration, but remained subject to the authority of the Diocesan. They decide, therefore, that the protest against the jurisdiction in the Court below was rightly and properly overruled.

The point remains upon the nature of the case, as stated by the Respondent in the libel.

Their Lordships have no doubt, from the manner in which the title of the Respondent is pleaded in the libel, that it will, when it is substantiated, give him in law a good right to the enjoyment of this pew. It is a pew in the Chancel, which legally may belong to a person in respect of the ownership of a house, or which may belong to a lay Rector; it is very different from a pew in the body of the Church, which can only be acquired by virtue of a Faculty, or by virtue of immemorial possession, *i.e.*, by prescription, which is founded on the notion of there having originally been a Faculty. Their Lordships think, therefore, there would be no weight in the objection made in point of law, even if it were at present capable of being raised by the Appellant, from the course which was taken in the Court below; but we find that no such point was raised in the Court below; no objection on that ground was urged upon the Judge in the Court below; the only question which was argued there was the question which is raised by the plea of the Appellant, viz., the plea alleging want of jurisdiction, which, we think was properly overruled.

We cannot imagine anything more dangerous or more deplorable than to come to the conclusion which the reverend Appellant, who has for three years been the Incumbent of this Church, seems not to be reluctant to arrive at, viz., that this fabric has been for the last forty years an unconsecrated place, in which the rites of the

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Church have not been duly performed,—in which, therefore, all that has been done would, in all probability, be legally good for nothing; notwithstanding that successive Diocesans, notwithstanding that all anterior Incumbents, notwithstanding that the whole of the Parishioners have been led to believe, and have believed, that the Church needed no re-consecration; that when it was repaired it could be reoccupied and restored to its original purposes without the necessity of that solemnity. We are happily able to arrive, without difficulty, at the conclusion that there was no need of such a ceremony. We regret that such a question should have been raised by the Appellant, and we shall advise Her Majesty to reject his appeal, and condemn him in costs.

Proctors for the Appellant: *John & J. H. Bayford.*
Proctors for the Respondent: *Deacon, Son, & Rogers.*

J. C.* 1866 *Nov.* 8, 9.

THOMAS WILLIAM DOYLE, AND OTHERS . APPELLANTS;

AND

GEORGE CHARLES FALCONER . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF COMMON PLEAS OF DOMINICA.

Dominica, Legislative Assembly of—Power of punishing contempt—Commitment, Form of warrant—Action against Speaker and Members for false imprisonment—Pleas—Justification.

The Legislative Assembly of *Dominica* does not possess the power of punishing a contempt, though committed in its presence and by one of its Members; such authority does not belong to a Colonial House of Assembly by analogy to the *lex et consuetudo Parliamenti*, which is inherent in the two Houses of Parliament in the *United Kingdom*, or to a Court of Justice, which is a Court of Record: a Colonial House of Assembly having no judicial functions.

Where, therefore, a Member of the Lower House of Assembly of *Dominica*, who had been taken into custody by the Serjeant-at-Arms, and committed to

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* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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the common gaol, by virtue of the Speaker's warrants, for a contempt committed in the face of the Assembly, brought an action for trespass and false imprisonment, and obtained damages: it was held by the Judicial Committee (affirming the judgment of the Court of Common Pleas of the Island) on demurrer to pleas of justification, that the House of Assembly had no such power to commit and punish as had been assumed, and that the Speaker and Members were liable.

The cases of *Kielley* v. *Carson* (1) and *Fenton* v. *Hampton* (2) decide conclusively, that Legislative Assemblies in the British Colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts when committed beyond their walls.

Semble, The Speaker's warrants having been issued by virtue of an alleged authority which, if it existed, was a limited one, ought to have shewn, on the face of them, that the contempt was committed in the presence of the House, and so fell within the limits of the authority assumed.

THIS was an appeal arising out of an action of trespass, for assault and imprisonment, brought by the Respondent, a Member of the House of Assembly of *Dominica* against the Appellant, the Speaker, and ten Members of the same House.

The declaration contained three counts. The first for assaulting the Plaintiff, on the 28th of May, 1863, and seizing and laying hold of him, and forcing and compelling him to go through divers public streets to the common gaol, and there imprisoning him, without any probable cause, for three days; the second was for an assault and false imprisonment, without reasonable cause, for three days; and the third, for a common assault.

To this action the Defendants pleaded:—First, the general issue to the whole declaration. Secondly, as to the first count, to the effect, that at the time mentioned in the declaration, the Defendant, *Doyle*, was Speaker, and the other Defendants, with the Plaintiff, were Members of the Lower House of Assembly of the Island. That on the day in question there was duly had and holden a meeting of the Lower House of Assembly, consisting of the Defendants, the Plaintiff, and a Mr. *Dupigny*. That at such meeting the Plaintiff, having already spoken by way of objection to a motion, and amendment thereon made by other Members, proceeded to further debate on his objection, contrary to the established rules and practice of the House, whereupon he was called to order by the Speaker. That, nevertheless, the

(1) 4 Moore's P. C. Cases, 63. (2) 11 Moore's P. C. Cases, 347.

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Plaintiff persisted in his speech, and addressed insulting words to the Speaker, which, pursuant to motion, were noted down as follows: "Who the devil are you to call me to order? you are a disgrace to the House." That thereupon it was resolved, (Mr. *Dupigny* objecting,) that the Plaintiff had been guilty of a high contempt of the House, and that he should be held in such contempt until he should have apologized. That thereupon the Defendant, *Doyle*, as Speaker, called upon the Plaintiff to apologize, who refused to do so, stating that he had said nothing requiring an apology, and continued to address the House. That the Speaker again called on the Plaintiff for an apology, when the Plaintiff replied, "You may tell me that I am in contempt one hundred times, if you like, but I shall speak. You may move it one hundred thousand times. I repeat what I have said. You are a disgrace to the House. You were expelled the House for robbery; the Minutes of 1845 can shew it." That the Lower House of Assembly thereupon resolved (*Dupigny* dissentient), that the Plaintiff, a Member of the House, having, whilst addressing the House, been called to order by the Speaker and House, and he having then addressed to the Speaker the words, "You are a disgrace to this House," and the House of Assembly having called upon him to apologize, and he having refused to do so, was held in contempt, and having, whilst so in contempt, interrupted and obstructed the business before the House, it was thereupon resolved, that the Plaintiff, for his disorderly conduct and contempt of the House, be taken into the custody of the Serjeant-at-Arms, and that the Speaker do issue his warrant, committing the Plaintiff to the common gaol during the pleasure of the House. Whereupon the Defendant, *Doyle*, in pursuance of the resolutions and order aforesaid, and according to the law, custom, and practice theretofore used and practised by the House, and which did always of right belong to the House for the punishment of contempts, and for interruptions and obstructions to the business of the House, by its Members, or others, in the presence and during the sittings of the House, and which authority had ever been enjoyed and exercised in like cases by Legislative Assemblies in other parts of the dominions of Her Majesty the Queen, did make and issue his warrant under his hand and name, as such

Speaker, directed to the Serjeant-at-Arms, or his Deputy, in and by which warrant reciting, that: "Forasmuch as the House of Assembly had that day adjudged that *George Charles Falconer*, Esquire (the Plaintiff), had been guilty of a contempt and breach of the privileges of the House, and thereupon ordered that *George Charles Falconer* should be for the offence committed to the common gaol of the said Island, during the pleasure of the House; it was required that the said Serjeant-at-Arms, or his Deputy, should take into his custody the body of *George Charles Falconer*, and then forthwith deliver him over to the custody of the keeper of the gaol." That the Defendant, *Doyle*, as such Speaker, delivered the warrant to one *Andrew Johnson*, the Serjeant-at-Arms, and to whom the same was directed to be executed.

So far the facts were pleaded by all the Defendants. The remainder of the allegations contained in the plea were pleaded by the Defendant, *Doyle*, only. After the averment of the delivery of the warrant to the Serjeant-at-Arms, the plea proceeded; and Defendant, *Doyle*, further says, that being such Speaker, after the making of the resolutions and order, and for the execution thereof, and according to the law, custom and practice of the House theretofore used, and which did always of right belong to the House (for the punishment of contempts committed, and for obstructions given to the business of the House by the Members or others in the presence and during the sittings of the House, and which authority had ever been exercised in like cases by Legislative Assemblies in other parts of the Queen's dominions), did, in pursuance of the resolutions and order, and for the further execution of the resolutions and order, make his certain other warrant under his hand and name, directed to the keeper of the gaol or his deputy, in and by which last mentioned warrant, reciting that the House of Assembly had that day resolved that *George Charles Falconer*, of the Island, Esquire, having been guilty of a contempt and breach of the privileges of that House, be committed to the common gaol of the Island during the pleasure of the House. Therefore, it was required that the keeper, or his deputy, should receive into his custody the body of *George Charles Falconer*, and him safely keep during the pleasure of that House. The plea then averred delivery of this last-mentioned warrant by the Defendant, *Doyle*,

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to the keeper of the gaol to be executed, and that by virtue of the first warrant, and in obedience to the resolutions and order of the House, *Johnson*, the Serjeant-at-Arms, arrested the Plaintiff, forced him to go into and along divers streets, &c., in the way to the gaol, and delivered him into the custody of the keeper; and that the keeper received the Plaintiff and detained and imprisoned him in the gaol, according to the warrant secondly mentioned. That *Johnson*, in arresting the Plaintiff and conveying him to prison, used as little force as he could.

The third plea pleaded to the second and third counts the same facts to those counts as pleaded by the second plea to the first count, concluding, that the Defendants were not guilty of the trespasses, or any of them, otherwise or in any manner than by the making, signing, issuing and delivering of the warrants by *Doyle*, as such Speaker, in pursuance of the resolutions and order aforesaid, in manner and form as in the plea alleged.

To these pleas the Plaintiff demurred. On the first plea an issue in fact was joined, to be tried. To the second and third pleas the Plaintiff demurred specially, assigning the causes to the effect:—First, that those pleas were no answer to the action, but were evasive and uncertain, and that no precise issue could be taken upon them. Secondly, that the pleas did not sufficiently aver and set forth the legal existence of the custom and practice alluded to by the pleas of punishing contempts, interruptions, and obstructions as of right belonging to the Lower House of Assembly, nor of the authority to commit for such contempts and obstructions mentioned in the said pleas as enjoyed in like cases by the Legislative Assemblies in other parts of the Queen's dominions. Thirdly, that the two warrants mentioned in the pleas were illegally and untechnically made and issued in (1st) that they did not set forth the precise nature of the alleged contempt; nor (2nd) when and where the same was committed; (3rd) nor that it was committed in the face and during the sitting of the Assembly; (4th) nor that the Plaintiff was a Member of the Lower House of Assembly; (5th) that they did not limit or fix the term of imprisonment, but left such term to the discretion of the House; and (6th) that the warrant was not under the hand and seal of the Defendant, *Doyle*. Fourthly,

that the second and third pleas did not set forth the words used by the Plaintiff on objecting to the original motion and amendment thereto alluded to by the pleas, nor the words used by one of the Defendants, *Charles Leathem*; and Fifthly, that the pleas were inartificially pleaded, and were in other respects uncertain and insufficient, &c.

Issue having been joined and Counsel heard in support of the demurrer and pleas, the Court reserved its judgment, which was afterwards delivered by the Chief Justice, *Sholto Thomas Pemberton*, Esq., in favour of the Plaintiff.

The cause was tried before the Chief Justice, by a special jury, on the 7th of July, 1864, and a verdict given for the Plaintiff, with £770 damages. Exceptions were taken to the admission of evidence and the ruling of the Judge, and a rule *nisi* obtained to set aside the verdict, and for a new trial, on the exceptions taken, and on the ground of excessive damages. The rule was argued, but ultimately abandoned, the Counsel for the Appellant intimating his intention to appeal from the judgment on the demurrer, as well as the refusal of a nonsuit, to Her Majesty in Council, whereupon judgment for the damages was entered up against the Defendant (the Appellant), and execution awarded. The appeal thus asserted came on for hearing, but the material one being that against the judgment of the Court on the demurrer, was alone argued.

Mr. *Mellish*, Q.C., and Mr. *Macnamara*, for the Appellant:—

Two questions are raised by the pleadings in this case, and were argued on the demurrer in the Court below. First, had the Lower House of Assembly in the Island power to commit one of its Members, by way of punishment for a contempt committed against it in its presence; and, secondly, assuming the existence of this power, are the pleas which set forth the several facts pleaded by way of justification, sustainable. Now, the pleas, though demurred to, were not traversed: the facts contained in them must, therefore, be admitted to be true; and, as we contend, shew a good and valid defence to the action, and the judgment on the demurrer ought to have been given for the Defendants. Assuming that it has been decided by the cases of *Kielley* v. *Carson* (1), and *Fenton* v. *Hampton* (2),

(1) 4 Moore's P. C. Cases, 63. (2) 11 Moore's P. C. Cases, 347.

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that the House of Assembly had no power to punish a contempt committed out of the House; the question is a very different one where, as in this case, the pleas allege the contempt and obstruction which the House had proceeded to punish, had been committed by one of its Members in the presence of the Assembly itself. In *Kielley* v. *Carson* (1), which is said to overrule the former decision of this Court in *Beaumont* v. *Barrett* (2), Mr. Baron *Parke*, in giving judgment, expressly says, that "The question, therefore, whether the House of Assembly could commit by way of punishment for a contempt, in the face of it, does not arise." That point is, therefore, undecided, and the learned Judge, in speaking of the powers conferred by the Common Law, and the principle which governs all legal incidents, "*Quando Lex aliquid concedit, concedere viditur et illud, sine quo res ipsa esse non potest,*" says: "In conformity to this principle, we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principles of the Common Law (3)."

Upon these principles, then, we contend, that the power here exercised is incident to the House of Assembly, as necessary to its independence and security as a Legislative body. It is not requisite for us to claim for the Assembly the privileges of Parliament: the *lex et consuetudo Parliamenti* is not involved in this case, further than is necessary for the due exercise of the Legislative authority and the character of the House of Assembly. In *Burdett* v. *Abbot* (4), Lord *Ellenborough* is represented to have said, that the power of committing for contempt is incident to every Legislative Assembly, and upon that *dictum* the decision in *Beaumont* v. *Barrett* (2) was founded, which has since been modified by *Kielley* v. *Carson*, yet for contempt such as this, committed in the face of the Assembly, we still maintain that the *dictum* of Lord *Ellenborough* is well founded. The case of *Fenton* v. *Hampton* (5), is an authority that the *lex et consuetudo Parliamenti* applies ex-

(1) 4 Moore's P. C. Cases, 63.
(2) 1 Moore's P. C. Cases, 59.
(3) 4 Moore's P. C. Cases, 88.
(4) 14 East, 137.
(5) 11 Moore's P. C. Cases, 347.

clusively to the Houses of Lords and Commons, and not to any Colonial House of Assembly; that we do not question. *Dill* v. *Murphy* (1), recognized the authority of *Kielley* v. *Carson*, but was decided on the construction and interpretation of the word "define," as applied to the privileges and powers of the Colonial Council and Assembly of *Victoria*, in the 35th section of the *Colonial Act*, 20 Vict. No. 1, under the powers conferred by the *Imperial Statute*, 18 & 19 Vict. c. 55.

Secondly, with regard to the warrants, it was contended in the Court below, and so held, that inasmuch as upon the face of the warrants they did not disclose that the offence was within the jurisdiction of the House of Assembly, they were bad, and the cases of *Christie* v. *Unwin* (2), *Harrison* v. *Wright* (3), and *Howard* v. *Gosset* (4), were relied on. But the pleas were a complete answer to the declaration; they contained, besides the warrants themselves, the full circumstances of the defence, and being demurred to, the Court was competent to determine whether or not the Lower House of Assembly had such a privilege as would support the pleas: *Stockdale* v. *Hansard* (5). The judgment of Mr. Justice *Williams* in *Howard* v. *Gosset* (6), which is the great authority on the form of such a warrant, is conclusively in our favour: *Daniell* v. *Phillipps* (7). We contend, therefore, that, upon the authorities, the warrants were sufficient.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Respondent:—

This is a question affecting the liberty of the subject, and must be decided by strict principles of law. The two principal questions raised in the Court below were important questions of constitutional law; first, whether the Lower House of Assembly in the Island of *Dominica* had the power, which it assumed to exercise, of punishing one of its own Members for an alleged contempt, committed in the face of the Assembly, and so adjudicating upon the fact and measure of punishment, and ordering and directing the execution of their own sentence of arrest and imprisonment; and, secondly, whether, assuming the possession of the power, the warrants of the Assembly, made out under the hand of their Speaker, were not

(1) 1 Moore's P. C. Cases (N. S.) 487. (2) 11 A. & E. 373, 379.
(3) 13 M. & W. 816. (4) 10 Q. B. 359, 377, 394. (5) 9 A. & E. 1.
(6) 10 Q. B. 398. (7) 1 C. M. & R. 662.

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invalid at law, as not shewing that the contempt was committed in face of the House, and not specifying the nature of the contempt, or for what term the party committed was to be imprisoned, or how he was to regain his liberty, but only ordering him to be committed to the common gaol of the Island during the pleasure of the House, and under which warrant he was arrested and imprisoned for three days, and only discharged under a writ of *Habeas corpus*.

Now, what is the constitution of the Lower House of Assembly which assumed this jurisdiction? It is not a Court of Record, nor had it any judicial functions whatever; it is simply a Legislative Assembly, constituted under the Royal Proclamation of the 21st of June, 1775, and empowered, by Commissions given at various times subsequently to the Governor, for the time being, to make, with the advice and consent of the Council, laws for the peace, welfare, and good government of the inhabitants of the Colony: *Clark's* Col. Law, p. 134. It may be that Colonial Assemblies are entitled to protect themselves from all impediments to the due course of their proceedings; *Chalmers'* Opinions, vol. I. pp. 263, 296, and, therefore, to remove obstructions offered to their deliberations; but that is a very different thing from assuming to punish by imprisonment, which can only be done by a Court of Record, or by the Imperial Parliament, by the *Lex Parliamenti*. *In re Brown* (1), the Court of Queen's Bench held, that the House of Keys in the *Isle of Man*, had not, merely from its being endowed with Legislative functions, the power to commit for contempt. *Kielley* v. *Carson*, *Fenton* v. *Hampton*, *Dill* v. *Murphy*, all shew that no such power is possessed by Colonial Legislatures. It has been contended, and is alleged in the pleas, that such power belongs to the Lower Assembly by virtue of the law, custom, and practice, heretofore used and practised by them, and which have always of right belonged to them, and not only to them, but to other British Colonial Assemblies; but no proof of such custom or usage was produced, nor do the pleas specifically plead any, and the demurrer, therefore, cannot be taken to admit such allegations. A demurrer admits only such facts as are well pleaded: *Duncan* v. *Thwaits* (2); *Howard* v. *Gosset* (3).

Then, secondly, as regards the warrants. The Assembly is no

(1) 33 L. J. (Q. B.) 193. (2) 3 B. & C. 584.
(3) 10 Q. B. 410.

Court of Record; it follows, therefore, that any warrant which it might issue for the arrest and imprisonment of a party for contempt towards it, must on its face disclose that the offence is within the scope of this limited jurisdiction: *Peacock* v. *Bell and Kendal* (1), *Paley* on Summary Convictions, p. 325 [5th Ed.]; *Reg.* v. *King* (2). Now, the warrants are bad, as not shewing that the alleged contempt was committed in the presence of the House, that the Respondent was a Member, what the nature of the contempt was, nor for what term he was to be imprisoned, or how he was to regain his liberty; and further, the warrants were not under seal. In *Howard* v. *Gosset* (3) the validity of the warrant was very largely discussed, and all the authorities bearing on the question are cited and commented on. Upon all these grounds we contend that the judgment of the Court below on the demurrer was right, and the appeal ought to be dismissed with costs.

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Dec. 15.

Judgment was reserved, and now delivered by

SIR JAMES W. COLVILE:—

The Respondent in this case, being a Member of the Lower House of Assembly of the Island of *Dominica*, brought an action of trespass for assault and false imprisonment against the Speaker and ten other Members of that body. The Defendants put in two special pleas justifying the trespasses complained of, to which the Respondent demurred. Judgment on the demurrer was given in his favour by the Court below, and the present appeal is against that judgment.

The following are the facts set forth in the pleas, so far as it is necessary to state them.

The Respondent having, whilst addressing the House, been called to order by the Speaker and House, and having then addressed to the Speaker, when in the due execution of his office, the words, "You are a disgrace to this House," and having been called upon by the House to apologize, and having refused to do so, was declared in contempt of the said Lower House of Assembly. While so in contempt, he further interrupted and obstructed the business before the House, whereupon it was resolved that for his

(1) 1 Wms. Saund. 74, b. (2) 1 D. & L. 721.
(3) 10 Q. B. pp. 359, 406, 408, 409, 456, 460.

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disorderly conduct and contempt of the House, he should be taken into the custody of the Serjeant-at-Arms, and that the Speaker should issue his warrant committing him to the common gaol of the Island during the pleasure of the House. In pursuance of this resolution, the Speaker issued two warrants: the one directed to the Serjeant-at-Arms, requiring him to take the Respondent, and to deliver him over to the keeper of the common gaol; the other directed to the gaoler, requiring him to receive into his custody the body of the Respondent, and to keep him safely during the pleasure of the House. But each warrant bore only on the face of it that the House of Assembly had adjudged the Respondent guilty of a contempt and breach of its privileges, and had ordered that he should be, for the said offence, committed to the common gaol of the Island during the pleasure of the House.

The questions upon which the sufficiency of the justification thus pleaded depend, are:—

First, does the House of Assembly possess the authority which the pleas allege did always of right belong to it, and to Legislative Assemblies in other parts of the dominions of Her Majesty, viz.: an authority to commit and punish for contempts committed, and for interruptions and obstructions given to the business of the said House of Assembly, by its Members or others, in its presence and during its sittings?

Secondly, assuming the existence of this alleged authority to be established, were the warrants issued by virtue of it sufficient in law?

The first question, affecting as it does the privileges of the Legislative Assemblies in many of the dependencies of the Crown, is one of importance. When it first arose before this Committee, in the case of *Beaumont* v. *Barrett* (1), the learned Judges then sitting decided broadly that the power of punishing contempts is inherent in every Assembly that possesses a supreme legislative authority, whether they are such as are a direct obstruction to its due course of proceeding, or such as have a tendency indirectly to produce such obstruction; and, therefore, that the Legislative Assembly of *Jamaica* had the power of imprisoning for a contempt by the publication of a libel.

(1) 1 Moore's P. C. Cases, 59.

Again, in *America*, the Supreme Court of the *United States*, a Tribunal whose judgments are entitled to the highest respect, held, in the case of *Anderson* v. *Dunn* (1), that the House of Representatives had, by necessary implication, a general power of punishing and committing for contempts, notwithstanding that the *lex scripta*, "the Constitution of the *United States*," had expressly conferred upon it a power limited to the punishment of contempts when committed by its own Members.

It is admitted, however, that the case of *Kielley* v. *Carson* (2), which overruled that of *Beaumont* v. *Barrett*, and has been followed by that of *Fenton* v. *Hampton* (3), must here be taken to have decided conclusively that the Legislative Assemblies in the British Colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts committed beyond their walls. The case is one which, having regard to the constitution of the Committee before which it was argued for the second time, their Lordships must accept as an authority of singular weight. And if the elaborate judgment which was then pronounced has in terms left open the question which is raised in the present case, it has stated principles which go far to afford the means of determining that question.

The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot, therefore, be inferred from the possession of certain powers by the House of Commons, by virtue of that ancient usage and prescription, that the like powers belong to Legislative Assemblies of comparatively recent creation in the dependencies of the Crown.

Again, there is no resemblance between a Colonial House of Assembly, being a body which has no judicial functions, and a Court of Justice, being a Court of Record. There is, therefore, no ground for saying that the power of punishing for contempt, because it is admitted to be inherent in the one, must be taken by analogy to be inherent in the other.

If, then, the power assumed by the House of Assembly cannot

(1) 6 Wheaton. Amer. Rep. 204. (2) 4 Moore's P. C. Cases, 63.
(3) 11 Moore's P. C. Cases, 347.

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be maintained by analogy to the privileges of the House of Commons, or the powers of a Court of Record, is there any other legal foundation upon which it may be rested? It has not, as both sides admit, been expressly granted. The learned Counsel for the Appellants invoked the principles of the Common Law, and as it must be conceded that the Common Law sanctions the exercise of the prerogative by which the Assembly has been created, the principle of the Common Law, which is embodied in the maxim, "*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest,*" applies to the body so created. The question, therefore, is reduced to this: Is the power to punish and commit for contempts committed in its presence one necessary to the existence of such a body as the Assembly of *Dominica*, and the proper exercise of the functions which it is intended to execute? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a Legislative body during its sitting, which last power is necessary for self-preservation. If a Member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their Lordships' judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. To the question, therefore, on which this case depends, their Lordships must answer in the negative. If the good sense and conduct of the members of Colonial Legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting, and to keep him excluded. The same rule would apply, *à fortiori*, to obstructions caused by any person not a member. And whenever the violation of order amounts to a breach of the peace, or other legal offence, recourse may be had to the ordinary tribunals.

It may be said that the dignity of an Assembly exercising

supreme legislative authority in a Colony, however small, and the importance of its functions, require more efficient protection than that which has just been indicated; that it is unseemly or inconvenient to subject the proceedings of such a body to examination by the local Tribunals; and that it is but reasonable to concede to it a power which belongs to every inferior Court of Record. On the other hand, it may be urged, with at least equal force, that the power contended for is of a high and peculiar character; that it is in derogation of the liberty of the subject, and carries with it the anomaly of making those who exercise it Judges in their own cause, and Judges from whom there is no appeal; and that if it may be safely intrusted to magistrates, who would all be personally responsible for any abuse of it to some higher authority, it might be very dangerous in the hands of a body which, from its very constitution, is practically irresponsible.

Their Lordships, however, are not at liberty to deal with considerations of this kind. There may or may not be good reasons for giving by express grant to such an Assembly as this, privileges beyond those which are legally and essentially incident to it. In the present instance, this possibly might have been done by the instrument creating the Assembly; since *Dominica* was a conquered or ceded Colony, and the introduction of the law of *England* seems to have been contemporaneous with the creation of the Assembly. It may also be possible to enlarge the existing privileges of the Assembly by an Act of the Local Legislature passed with the consent of the Crown, since such an Act seems to be within the 3rd section of the recent Statute, 28 & 29 Vict. c. 63. That extraordinary privileges of this kind, when regularly acquired, will be duly recognized here, is shown by the recent case of *Dill* v. *Murphy* (1). But their Lordships, sitting as a Court of Justice, have to consider not what privileges the House of Assembly of *Dominica* ought to have, but what by law it has. In order to establish that the particular power claimed is one of those privileges, the Appellants must shew that it is essential to the existence of the Assembly, an incident "*sine quo res ipsa esse non potest.*" Their Lordships are of opinion that it is not such an incident.

This being their Lordships' judgment, the foundation of the

(1) 1 Moore's P. C. Cases (N. S.) 487.

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justification pleaded fails; and it is unnecessary for them to consider at any length the subordinate question of the sufficiency of the warrants.

They have, however, no doubt that the warrants having been issued by virtue of an alleged authority which, if it existed, was confessedly a limited one, ought to have shewn on the face of them, that the alleged contempt was committed in the presence of the House, and so fell within the limits of that authority.

Their Lordships, therefore, conceiving that the judgment of the Court below was right upon both points, and that the costs of the appeal should, according to the ordinary rule, follow its result, will humbly recommend Her Majesty to dismiss this appeal, with costs.

Solicitor for the Appellants: *F. E. Mawe.*
Solicitor for the Respondents: *T. L. Wilson.*

J. C.* 1866 Nov. 13, 14.

RALPH NUNES . . . . . APPELLANT;

AND

ANDREW CARTER . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Jamaica Insolvent Act—Construction of—Insolvency—Transfer within six months of—Fraudulent preference—Evidence of.

The *Jamaica Insolvent Act*, 11 Vict. c. 28, s. 67, provides that, if any person in contemplation of insolvency shall transfer any of his estate to any Creditor for the benefit of such Creditor, such transfer shall be deemed fraudulent and void against the Official Assignee: provided always, that no such transfer shall be so deemed fraudulent and void unless made within six months before a declaration of insolvency:—*Held*, that a transfer of property made by a party in insolvent circumstances, within a period of six months before a declaration of insolvency, was absolutely void, although there was no evidence of any fraudulent preference.

THIS was an appeal from a judgment of the Supreme Court of *Jamaica*, by which a rule *nisi*, which had been obtained for a *venire de novo*, or for a new trial, was discharged by a majority of the Court.

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

The action was brought by the Respondent, as the Official Assignee of the estate and effects of one *Isaac Nunes Vaz*, an Insolvent debtor, against the Appellant, *Ralph Nunes*, and one *Benjamin Nunes*, who had died since the judgment appealed from was given. The form of the action was upon the case. The declaration contained six special counts, and three counts in trover, to all of which the Defendants pleaded "not guilty."

The action, in substance, was to recover damages from the Defendants for appropriating certain moneys, and securities for money, which were alleged to have been fraudulently transferred to them by *Vaz*, the Insolvent, within six months before his insolvency. The claim was founded upon the 67th sect. of the 11 Vict. c. 28 (the Insolvent Act in force for the Island of *Jamaica*), which section is as follows:—"That if any person, in contemplation of his becoming Insolvent, or being in insolvent circumstances, shall convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, Policy of assurance, Bond, Bill, note, money, property, goods or effects whatsoever, to any Creditor or Creditors, or to any person or persons in trust for, or to, or for the use, benefit, or advantage of, any Creditor or Creditors, or to any person who is, or may be liable as surety for such person, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed fraudulent and void as against the Official Assignee of such person: Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void unless made within six months before the commencement of such imprisonment, or before any declaration of insolvency according to the provisions of this Act, or with the view or intention by the party so transferring, charging, assigning, conveying, delivering, or making over, of applying for his discharge under this Act."

The action was tried before Mr. Justice *Cargill* and a special jury, in the month of June, 1863, when the following facts were given in evidence: The Plaintiffs, Messrs. *Nunes*, were Merchants at *Jamaica*, carrying on a large business there, under the style of *Nunes* Brothers; and the Insolvent, *Vaz*, was a trader in *Salvanna la Mar*, who had had dealings with Messrs. *Nunes* for some time previously to the transactions which were the subject of the action.

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In the early part of the year 1862, *Vaz* fell into ill health, and his affairs becoming somewhat deranged, in the month of March in that year he submitted them to *Benjamin Nunes*, the then senior partner of the firm, who, after the inspection of the books, undertook the management and conduct of *Vaz's* business. On assuming the management, *B. Nunes* discharged *Walcott*, one of *Vaz's* clerks, and put *Isaacs*, a Clerk of his own, in his place, and handed over to *Isaacs* the balances to open a new set of books. During the interval between March and June, 1862, when the insolvent condition of *Vaz* first became known to his creditors, *B. Nunes* succeeded in realizing out of *Vaz's* assets the greater portion of the debt due to his own firm. It further appeared that in the months of January and February, 1862, various sales of merchandise were made to *Vaz* by the Messrs. *Nunes*, and upon each sale, in accordance with the usual course of business, the Messrs. *Nunes* drew a Bill on *Vaz*, which he accepted at ninety days' sight, for the price of the goods: and these Bills were thereupon paid into the Bank of *Jamaica* by Messrs. *Nunes*, where they, as well as *Vaz*, kept a banking account. It did not appear at the trial whether these Bills were discounted by the Bank, or were merely deposited in their hands for the purpose of collection. They were, however, in the hands of the Bank at the time when they became respectively due; and it was proved that assets of *Vaz* were, with his concurrence, appropriated by the Bank during the months of February, March, April, and May, towards taking up those Bills. It was also proved that Messrs. *Nunes* had accepted a Bill for £143. 17*s.* 3*d.* for the accommodation of *Vaz*, which Bill was paid out of *Vaz's* assets in March, 1862, and that two other Bills for £289. 10*s.* and £150. 10*s.* respectively, were accepted by *Vaz*, and, with other Bills, taken up and paid by Messrs. *Nunes* in the months of April, May, and June following.

Vaz was declared Insolvent on the 2nd of October, 1862. The Respondent was chosen Official Assignee, and the action was brought by him against Messrs. *Nunes* to recover the amount of these acceptances.

Upon these facts the learned Judge, in summing up, directed the jury in the following terms: "The Plaintiff will be entitled to your verdict if the payment of the acceptances occurred within six

months immediately prior to the actual judicial declaration of insolvency, though they had been converted into money by discount at the Bank." The jury, upon this direction, found a general verdict for the Plaintiff for £1,226. 7*s.* 5*d.*

On the 8th of October, 1863, a rule *nisi* was obtained for a *venire de novo*, because the declaration contained counts bad in substance, and that the verdict and assessment of damages were general; or that the verdict obtained be set aside, and a new trial granted, on the following grounds: first, that the verdict was contrary to law; second, that the verdict was contrary to the evidence and the weight of evidence; and third, for misdirection of the learned Judge in charging the jury that the Plaintiffs would be entitled to their verdict if the payment of the acceptances occurred within six months immediately prior to the actual judicial declaration of insolvency, though they had been converted into money by discount at the Bank; and, lastly, that the damages were excessive.

Upon this rule coming on to be argued, before the Chief Justice, Sir *Bryan Edward*, and the Justices *Kemble* and *Ker*, it was discharged by a majority of the Court, the Chief Justice dissenting.

From this judgment the present appeal was brought.

Sir *R. Palmer*, Q.C., and Mr. *Garth*, Q.C., for the Appellant:—

We rely on the grounds stated in the rule *nisi* obtained in the Court below for a new trial: the verdict was contrary to, as well as against, the weight of evidence. The learned Judge misdirected the jury. The true question for the jury was, not whether the payment of the acceptances occurred within six months of the insolvency, but whether there was a fraudulent preference. An acceptor of a Bill, who had been provided with money by the drawer, has a right to retain the money against the drawer's assignee, if he became Bankrupt: *Yates* v. *Hoppe* (1). The action was brought under the 67th section of the *Jamaica Insolvent Act*, 11 Vict. c. 28, which provides, that in order to constitute a fraudulent preference the conveyance, assignment, or transfer, must be made by a party in contemplation of his becoming Insolvent or being already insolvent. Such contemplation of, or absolute insolvency, must mean a judicial declaration of insolvency, and a

(1) 19 L. J. Rep. (N. S.) C. P. 180.

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preference in favour of one Creditor over the others would, in such circumstances, be a fraudulent preference; that was decided in this Court in the case of *The Bank of Australasia* v. *Harris* (1), but in *Johnson* v. *Fesemeyer* (2), an assignment of an Equity of redemption, which left the trader in possession of the materials for carrying on his trade, was held not to be such a preference as would constitute an act of Bankruptcy, and, therefore, not a fraudulent preference. In *Becke* v. *Smith* (3), the Court of Exchequer held, that the 32nd section of provision in the *Insolvent Act*, 7 Geo. 4, c. 57, as to the validity of transfers within three months of the commencement of imprisonment, depends on the fact whether the assignment was made by the Insolvent with the view and intention of petitioning the Insolvent Court for his discharge. Here the jury were only directed to consider the question whether the transfer took place within six months of the insolvency.

Mr. *Coleridge*, Q.C., and Mr. *W. W. Mackeson*, for the Respondent:—

The ground of the decision of the Court below, and the consequent discharge of the rule *nisi*, was, that a delivery of part of the assets of the Insolvent, *Vaz*, in satisfaction of debts due by him to the *Nunes*, within six months of his declared insolvency, was fraudulent within the *Jamaica Act*, 11 Vict. c. 28, s. 67, as against the Respondent, the Official Assignee. We submit, that such an appropriation of the assets of *Vaz* was, irrespective of any fraud or fraudulent preference, in direct violation of that Act, and as such was impeachable by the Official Assignee. The *Jamaica Act* is not founded on the *English Insolvent Debtors' Act*, 7 Geo. 4, c. 57, which specifies three months as the prescribed time for making transfers. The case of *Becke* v. *Smith* (3), relied on by the Appellant, is in our favour. If the transfer be made within the prescribed period, no question arises as to fraudulent preference. The policy of the Act is manifest; it is the same policy which prevailed for many years in this Country, viz., that bargains with traders were liable to be set aside if made within a certain period of insolvency. The case of *The Bank of Australasia* v. *Harris* (4) differs materially from the present case, for the

(1) 15 Moore's P. C. Cases 97.
(2) 3 De G. & J. 13.
(3) 2 M. & W. 191.
(4) 15 Moore's P. C. Cases, 97.

provisions of the *Queensland Insolvent Act*, 5 Vict. No. 17, s. 8, are different from those of the *Jamaica Act*; for to constitute a fraudulent preference under that Act there must be either actual Insolvency, or a contemplation of the surrender by the Debtor of his estate, or knowledge on his part of proceedings for obtaining an order of sequestration of his estate as an Insolvent having been commenced against him.

LORD WESTBURY:—

Two points have been argued before us in support of this appeal, —one, a question of law turning on the proper construction of the *Insolvent Act* in *Jamaica*, and the other a proposition of fact.

The 67th section of the *Jamaica Insolvent Act*, 11 Vict. c. 28, is as follows (the learned Lord read the clause, *ante*, p. 343):—

The judicial declaration of Insolvency in this case took place on the 2nd of October, 1862.

The legal question which has been argued before us upon the construction of the Act is this. It is contended by the Appellant, that the mere fact of a transfer of property being made, within six months anterior to the declaration of Insolvency, will not avoid it, unless it be proved to be made under such circumstances as would have constituted a fraudulent preference of the Creditor to whom the property has been conveyed, under the Bankrupt law.

We are of opinion, that this is not the true construction of the Act.

In support of that construction, we were referred to a case decided by this Committee in the year 1861, *The Bank of Australasia* v. *Harris* (1), in which, on the construction of the *Queensland Insolvent Act*, 5 Vict. No. 17, s. 8, it was held, that a transfer of property made within a given time must be proved to be a fraudulent preference in order to its being avoided. In that Act relating to *Queensland*, the words had the effect of avoiding the transaction, if made within sixty days, provided it was not only made within that period of time, but also had the effect of preferring any then existing Creditor to another. The conditions of the avoidance of a transfer in that Act were, therefore, two: one, that it should be made within a certain period of time before the Insolvency; the

(1) 15 Moore's P. C. Cases, 97.

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other, conjointly, that it should have the effect of giving a preference to one Creditor over the others, and it was held, in the judicial interpretation of the Act, that the preference must be fraudulent.

A fraudulent preference is well known to the Bankrupt law. It arises where the Debtor, in contemplation of bankruptcy—that is, knowing his circumstances to be such as that bankruptcy must be, or will be, the probable result, though it may not be the inevitable result—does, *ex mero motu*, make a payment of money, or a delivery of property to a Creditor, not in the ordinary course of business, and without any pressure or demand on the part of the Creditor.

We have no doubt of the correctness of the decision on the *Queensland Act;* but the *Jamaica Act* is founded altogether upon that which was the policy of the Bankrupt law, and of the Insolvent law, from the earliest time, until they were altered by recent Legislative enactments.

In early times, by the Bankrupt law, as it was settled by the Statute of *James* I., a *bonâ fide* sale of property for value by a man who had committed an act of bankruptcy, although the Purchaser had no notice of it, might be avoided, if a Commission issued within five years after the transaction,—a very harsh and unreasonable law. It was altered, with much difficulty, by the Act Sir *Samuel Romilly* brought in in the year 1806. But that alteration extended only to this—that a *bonâ fide* sale to an innocent Purchaser, that is, a purchaser who had no notice of an act of Bankruptcy having been committed by the Trader, who was the vendor, *would* be avoided and set aside if a Commission of Bankruptcy issued against the Trader within two months after the date of the transaction. The avoidance was created simply by the relation of the subsequent Commission of Bankruptcy back to the prior act of bankruptcy. There was every moral reason for supporting *bonâ fide* transactions; but, according to the then notion of the law, it was expedient, and for the public interest, that transactions by Traders should be subject to be overreached and avoided, if they were found to have occurred within a certain period before bankruptcy; although the transaction, so far as the Purchaser or Creditor was concerned, was, on his part, a perfectly innocent proceeding.

By a subsequent alteration of the law, avoidance was not to take place, unless a Commission of Bankruptcy issued within twelve

months; and, finally, the law was altered as it now stands, viz., if there be a *bonâ fide* sale, or delivery of property, for value to a Purchaser, without notice of an act of Bankruptcy, that transaction is valid, although the Vendor or the Assignor subsequently become Bankrupt, and a prior act of bankruptcy is proved to have been committed.

The same policy existed also with reference to the Insolvent Acts, viz., transactions, however innocent, were avoided, if they were proved to have taken place by persons in insolvent circumstances within a certain period of time—three months before the judicial declaration of insolvency.

The *Jamaica Act* of the 11th *Victoria*, is clearly founded upon the same policy,—that is, the notion of the public interest to which we have referred. Similar rules may be found in the Insolvent law and Bankrupt law of almost every Country in *Europe*.

In a case to which we were referred in the Court of Exchequer, *Becke* v. *Smith* (1), Mr. Baron *Parke*, referring to a proviso in one of the Insolvent Acts in this Country then in force, uses these words,—"That proviso enacts that no such conveyance shall be void unless made within three months before the commencement of the imprisonment, or with a view of petitioning the Court for his (that is, the Insolvent's) discharge. If either of these circumstances occurs, the voluntary conveyance by an Insolvent is rendered null; if made within three months it is void; if made at any time, with the view of petitioning the Court, it is void."

We are, therefore, of opinion, that the true construction of this *Jamaica* Act is in conformity with the established principle upon which these enactments, whether in Bankruptcy or in Insolvency, were founded, viz., the principle that it is expedient to avoid transactions if made within a certain period of time before the adjudication of Bankruptcy or Insolvency. Transfers of property, made by a party in insolvent circumstances, if they occur within a period of six months before the declaration of Insolvency, are transactions which this law, proceeding upon that policy, pronounces to be fraudulent and void as against the Official Assignee. We cannot adopt the argument that you must, *ultrà* that, shew something amounting to a fraudulent preference. We

(1) 2 M. & W. 196.

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consider the transaction may be avoided if it be shewn to have occurred within six months previous to the Insolvency.

The next point that is raised for the support of avoiding the operation of this construction of the Act, is one of fact.

This appeal comes to us from an Order of the Supreme Court, refusing a new trial. A new trial was moved for on several grounds, one of which was misdirection by the learned Judge; another was that the verdict was against the evidence.

The case that went to the jury may be thus generally stated:— *Nunes*, the present Appellant, had certain acceptances of the Insolvent in his hands. It appears that those acceptances were paid in the month of April, within the six months; but then it is contended, on the part of the Appellant, that the money with which those acceptances were paid, was in reality the proceeds of certain property which had been *bonâ fide* transferred and handed over by *Vaz*, the Insolvent, to *Nunes* in the month of March, and, therefore, before the commencement of the period of six months.

This was a question of fact peculiarly fit for a jury to decide and if we are asked to set aside the verdict, which has negatived the existence of any such alleged case, on the ground that the verdict was contrary to the evidence, the evidence must be shewn to be clear, certain, and unambiguous on the particular point.

It was a transaction which, if true, admitted of being easily proved, for *Nunes* was himself examined, and it would have been only necessary for *Nunes* to have said "certain things, the property of *Vaz*, were actually delivered over or assigned to me by *Vaz* in the month of March, on a specific agreement that they should in my hands stand charged with the payment of these three particular acceptances; so that whenever the things so delivered were realized and converted into money, the money should be applicable, in pursuance of that agreement, to the payment of those acceptances." But nothing of the kind is to be found in the evidence of *Nunes*.

Nunes, it appears, was a Trader having certain relations of business with *Vaz*, the Insolvent. In the month of March he became aware of the embarrassed state of the affairs of *Vaz*, and he then took upon himself the management of the business of *Vaz*. The Clerk of *Vaz* was to become his Clerk, and act under his directions. He brought also from his own mercantile establishment another

Clerk, a man of the name of *Isaacs*, to act in the management of the affairs of *Vaz*. All the transactions from that time were in reality the transactions of *Nunes* under the general authority of *Vaz*, and not the specific acts of *Vaz* himself.

But, independent of this general consideration (which accounts for the loose expressions in the evidence of "means having been handed over," an observation which is applicable to all the assets of *Vaz*), independent of that general remark, when we come to examine the evidence it is impossible to collect from the witnesses (who might have plainly and simply deposed to the fact if it existed), anything like a specific statement, of the required clear and definite agreement, that the property so delivered over to *Nunes* should thenceforth be held by *Nunes* in the nature of a Mortgage to secure a particular debt. But, unless it was a perfectly legal transfer and assignment by the Insolvent, made anterior to the six months, it would not have been taken out of the operation of the Act. If the transaction was not in law complete, or if there were not in equity a binding and complete agreement, which would draw after it, as a mere consequence, the legal ownership, then there was in reality no change of property from *Vaz* to *Nunes* in the thing alleged to have been handed over, anterior to the commencement of the six months.

We have had this point argued with great care and accuracy; but after that argument, their Lordships are still of opinion, that the evidence is wholly insufficient to prove that the property in the things alleged to have been transferred and handed over anterior to April, was at all changed by any binding contract or agreement between *Vaz* and *Nunes*, and that, therefore, the property must be regarded as still remaining part of the assets of *Vaz*; and, consequently, these Bills must be considered as paid in April, 1862, within the six months, out of the money of *Vaz*.

On these grounds, therefore, we shall humbly advise Her Majesty to reject this appeal, and to dismiss it with costs.

Solicitor for the Appellant: *T. Purrier.*
Solicitors for the Respondent: *Tuke & Valpy.*

J. C.* 1866 Nov. 9.

ELIZABETH WEYMOUTH WILLIAMS . . APPELLANT;

AND

JOHN GREGORY STEVENS . . . . . RESPONDENT.

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Law of Jersey—Procureur générale et spécial, duties of, answerable to Cestui que trust for profit made as Procureur—Damnosa hereditas is no exception—Bankruptcy—Assignee.

It is no answer to the rule, that persons standing in the situation of Trustees or Agents must account to their *Cestui que trusts*, or Principals, for all benefit which they themselves obtain by virtue of that character, that in the course of acquiring the benefit which has been derived by the Trustee or Agent, he incurred a possibility of loss; it is sufficient, if the transaction has resulted in gain obtained by virtue of the Trusteeship or agency, to give the benefit to the *Cestui que trust*,

The Law of *Jersey*, which in case of Bankruptcy entitles the Creditors to succession, ranking from the latest Creditor, to take the whole of the Bankrupt's estate, with its liabilities, and become in fact the Assignee; when acted on, whether it be a profitable proceeding, or a *damnosa hereditas*, does not alter the right of the *Cestui que trust*, or, because of its risk, give a Trustee or Agent acting under it a legal title to property so acquired.

THIS was an appeal from a judgment of a full number of the Royal Court of the Island of *Jersey*, affirming a judgment of the inferior number, by which judgment a claim for £578 sterling, made by the Appellant against the Respondent, her *Procureur générale et spécial*, as being profit made by him from his position as her *Procureur*, and appropriated to his private use, was dismissed.

The circumstances of the case were these:—

By a contract, dated the 21st of September, 1844, *Edward Bond*, the late husband of the Appellant, purchased a house and premises in the Island of *Jersey* from one *Thomas Gray*. *Bond* died, having bequeathed the house to the Appellant, his widow, whereupon she became entitled to the benefit of the contract.

A short time after the death of her husband, the Appellant, by

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

power of Attorney, appointed the Respondent, *Stevens*, by a general and special procuration, to act for her and manage her property and affairs.

By the law of *Jersey* the effect of a *Procuration générale et spécial* is threefold. First, it deprives the person who has granted the procuration of the power of entering into any contract or transaction with respect to his or her property, real or personal, without the consent of the *Procureur*. Secondly, it gives the *Procureur* an unlimited control over the property, real or personal, of such person. And thirdly, it cannot, like an ordinary procuration, be recalled at will, but can only be revoked by an *Acte* of the Court.

On the 2nd of July, 1854, *Gray* was declared a Bankrupt, and made a cession of his real and personal property, which was placed "*en décret.*"

The Respondent, as *Procureur* of the Appellant, inserted in the *décret* in her name, as interested in the real estate of *Bond*, the contract between *Bond* and *Gray* of the 21st of September, 1844.

A *décret* is the process adopted in *Jersey* for disposing of the estate of a Bankrupt among his Creditors when he is possessed of real property. When a *décret* is ordered all persons who have claims registered, or unregistered, against the Bankrupt, or who have had transactions with him as to real property during the fifteen years which have immediately preceded his Bankruptcy, are required to deliver within a certain time to the *Greffier* of the Court, the statement of their claims against the Bankrupt, and the deeds, or contracts relative to real property, which they have passed with him, for the purpose of being inserted in the *décret*.

On the 16th of September, 1859, the Respondent, on behalf of his constituent, in right of the contract with *Bond* of the 21st of September, 1844, made himself tenant of the property of *Gray* in the *décret*, in the name of the Appellant.

When the Respondent so declared himself tenant, another Creditor in the *décret*, *John Godfray*, whose contract stood inserted therein next in order to the Appellant's, applied before the *Greffier* for the Appellant to give security for the payment of the arrears of *rentes* due on *Gray's* property, the expenses of the *décret*, and the other consequences incidental to the *teneure*, on the plea, that the Appellant was a person of insufficient means. At the

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same time *Godfray* offered, if the Appellant's *Procureur* would consent to give up the *teneure*, to become tenant in his stead, and to acknowledge as valid the contract of the 21st of September, 1844.

On the 24th of September, 1859, the Respondent having been summoned before the Royal Court for the confirmation of his tenancy as the Appellant's *Procureur*; *Godfray* renewed his application that the Appellant should give security, but on the Respondent's declaration that he had agreed to transfer and make over the *teneure* to one *Snell*, *Godfray* withdrew his application. Accordingly, on the 24th of September, 1859, by Act of Court, the record of the *teneure* of the Respondent was confirmed, and the Respondent, as *Procureur* of the Appellant, and for and in her name, substituted *Snell*, in the place of the Respondent, on condition that the contract of the 21st of September, 1844, should continue in force; and the whole property of *Gray* was adjudged to *Snell* as sole tenant.

On the day before the Act of Court, a private arrangement was entered into between the Respondent and *Snell*, in writing, dated the 23rd of September, 1859, which purported to be made by the Respondent with the consent and approbation of the Appellant and her Solicitor, but, as it appeared, without her sanction or knowledge; by which, after reciting the intended substitution by the Respondent, as *Procureur* of the Appellant, of *Snell* as sole tenant of *Gray*, it was agreed that the Respondent and *Snell* should share equally in the profit and loss from the tenancy, and they bound themselves to pass a contract to that effect within two months, under penalty, but without guarantee on the part of *Snell*. A proviso was added to this agreement, to the effect that the contract of the Appellant's husband, of 1844, with *Gray*, should remain good, or that some arrangement should be made touching this matter between the parties to that agreement and the Appellant, so that her interest in the transaction between her husband and *Gray* should be protected.

This agreement thus entered into was not registered in the Island, nor was any contract ever passed, as contemplated by the above arrangement.

On the 9th of November, 1859, another private agreement was made between the Respondent and *Snell*, by which the former

agreement of the 23rd of September, 1859, was cancelled, and another agreement substituted in its place, to the following effect: That *Snell* should remain sole owner of the property of the *teneure*; and instead of resigning the moiety to the Respondent, should grant (*transporter*) a sum of thirty-four quarters of wheat rent annually (being, at 15*s.* and a fraction, worth £26 3*s.* 1*d.*), and charge the same on the real property (*héritages*) of *Snell*, to and in favour of the Respondent and his heirs. That such grant should be in the form of *bail et vérité* (a contract of sale), but the payment of the money consideration, which would appear on the face of the grant, was not to be enforced by *Snell* from the Respondent. That the sum of wheat-rents was to represent the consideration for which the Respondent gave up his moiety of the *teneure*. That the first payment of the wheat-rent was to be made at Michaelmas, 1860, and afterwards for ever. That a contract should be passed by *Snell*, in conformity with this agreement. That all expenses incurred by the Respondent in relation to the *teneure*, should be repaid to him, including specificially a sum of £150 paid by him on the 28th of October, 1859, being a moiety of some arrears of *rentes* due under the *décret*. The penalty for the non-performance of this agreement was £500. This agreement was also entered into without the knowledge of the Appellant, and was never registered in the Island.

On the 19th of November, 1859, a contract was passed in Court before the *Bailiff* and *Jurats*, between *Snell* of the one part, and the Respondent of the other, by which *Snell* purported to sell to the Respondent in fee thirty-four quarters of annual wheat-rents, charged upon certain houses therein specified, and part of the property of *Gray's décret*, the ostensible price, or the consideration for the sale, which was therein stated to be paid, being £578 sterling.

This contract of sale was registered in the public registry of the Island, and on the same 19th day of November, 1859, an indorsement was made on the agreement of the 23rd of September, 1859, cancelling it. *Snell* repaid the £150 to the Respondent, in accordance with this contract. On the same 19th of November, *Snell* signed a document, by which, after reciting that the Appellant had, through the Respondent, her *Procureur*, declared herself *tenant* to the property of *Gray*, and also reciting the Act of

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Court, substituting *Snell* as tenant in consideration of such substitution, *Snell* bound himself to pay the Appellant £26 sterling a year for her life, payable quarterly.

The Appellant received two quarterly payments of this annuity, up to the 24th of June, 1860, and, as it appeared, reposing unlimited confidence in the Respondent, remained for some time unacquainted with the existence of the above agreements; but having discovered the advantage he had taken of his position as her *Procureur*, she became desirous of resuming the management of her affairs, and pressed the Respondent to renounce the *Procuration*, which he refused: whereupon, on the 21st of July, 1860, she instituted a suit in the Royal Court of Jersey to annul the *procuration*, and obtained, notwithstanding the opposition of the Respondent, on the 1st of September, 1830, an Act of the Royal Court annulling the *Procuration*.

Having thus obtained the power of administering her own affairs, she, on the 15th of November, 1860, commenced an action against the Respondent, by obtaining from the Royal Court a special writ, *Ordre de Justice*, in which she stated all the preceding transactions with which she had become acquainted, and alleged, *inter alia*, that the Respondent, as her *Procureur-Général*, had, with respect to the tenure of *Gray*, taken advantage of his position as such to procure for himself, and to her prejudice, advantages, and to acquire property to the amount of thirty-four quarters of wheat-rent, and she claimed from the Respondent the sum of £578 sterling as the value of the thirty-four quarters of wheat-rent so sold, as aforesaid, by *Snell* to the Respondent, with the further sum of £500 sterling as damages.

The Respondent pleaded to this action: he denied the imputations charged against him, and asserted that since he had been named *Procureur* of the Appellant, and had acted gratuitously, he had bettered her position, and procured for her an unexpected condition of comparative comfort; that he had declared himself *tenant* in her name, in order to try to preserve for her use the house which her husband had bequeathed to her, as she was unable even to pay the rents due; and he stated, at great length, all the dealings and agreements with *Godfray* and *Snell*, before mentioned, insisting that the Appellant, from the insufficiency of her means, would have been compelled to renounce the *teneure*, and that she had sanctioned his

acts by signing the receipts for the rent paid to her; that the thirty-four quarters of wheat-rent were not received by him in his character of *Procureur*, but as the price of his giving up his moiety of the *teneure*. He insisted that the property of the *décret* had only been vested in him for an instant, that the declaration of being *tenant* does not import property, and that in the case of substitution there is but a fiction of property; that the Court never would have confirmed the *teneure* of the Appellant, who was notoriously incapable of meeting the charges of the *décret;* and that the Appellant, having no property in the *décret*, there was nothing to prevent him, the Respondent, becoming a purchaser of a moiety thereof, especially as he secured for his constituent a considerable benefit from the transaction; and he maintained that the agreement of the 23rd of September, 1859, being a valid agreement, that of the 19th of November was a mere substitution for it, and that if he could acquire, as he insisted he could under the circumstances, he had full power to sell.

On the 16th of September, 1861, the inferior number of the Royal Court, consisting of the Bailiff and Jurats, gave the following judgment:—"Having taken into consideration all the facts of the case, amongst others, the charges of the *décret*, the insufficiency of the means of the Plaintiff, and the benefits which she has reaped from the substitution of the *teneure*, the Court decide that the Plaintiff's (the Appellant's) claim was not well founded, and discharged the Defendant (the Respondent) from the action."

On the 25th of January, 1865, the full Court, on appeal, adopting the reasons of the inferior number by a majority of six to one, by their judgment dismissed the appeal, with costs.

This was the judgment now appealed from.

Sir *R. Palmer*, Q.C., and Mr. *W. W. Mackeson*, for the Appellant:—

The reasons assigned by the Courts below for their judgment are wholly insufficient; none of them could justify a *Procureur* making profit out of his office, under any circumstances. A *Procureur*, by the law of *Jersey*, cannot derive any personal profit or advantage by virtue of his office: Rep. of Comms. on the Laws of *Jersey*, 1861, p. xxxii.; and neither can a party under a *Mandat*: *Godfray* v.

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Godfray (1). Any profit made belongs to his constituent. Even if it were otherwise, the circumstances disclosed by the pleadings in this suit afford no justification whatever for the conduct of the Respondent. He obtained the thirty-four quarters of wheat-rent for his own benefit, without taking upon himself any of the charges appertaining to the wheat-rent, which is an incorporeal hereditament, and without supplying the deficiency of the Appellant's means, which he claims as a ground for the legality of his proceedings. Nor did he take any precaution to secure the Appellant the limited advantages she has derived; for these she is indebted to *Snell*, and not to the Respondent, her *Procureur générale et spécial*. Such a power gives him unlimited control, and, unlike an ordinary procuration, cannot be recalled at will, and only by an *Acte* of Court. No principle is better known, both in Courts of equity and law, than that persons in a fiduciary capacity can derive no profit by reason of such relation. Trustees must account for any profits received by reason of their trusteeship to the party beneficially interested. In our Courts a *Cestui que trust's* Solicitor cannot bind the *Cestui que trust* by contract with the Trustee without special authority to do so: *Downes* v. *Grazebrook* (2). A purchase made by an Assignee of a Bankrupt was set aside, though purchased at the market value: *Ex parte Ridgway* (3). The same equity applies in all transactions affecting the interests of a party whose interests are in the keeping of an Agent or Trustee: *Story* on Agency, §§ 207, 208, pp. 168, 169; *Smith's* Mercantile Law, p. 49; *Paley* on Agency [Ed. by *Lloyd*], Part I., ch. 1, §§ 3, 4; *Chitty* on Comm. and Manuf., vol. iii. ch. 3, pp. 216—219, and 221.

Mr. *J. Pearson*, Q.C., and M. *D'Allain*, of the *Jersey* Bar, for the Respondent:—

The judgment of the Courts in *Jersey* was right, and ought to be upheld. It was consistent with the evidence in the case. We do not dispute the law as stated by the other side, but we contend that the Respondent did not, while acting as the *Procureur* of the Appellant, obtain any benefit or advantage to himself out of the property belonging to her. She was unable to give

(1) 3 Moore's P. C. Cases (N.S.) 316. (2) 3 Mer. 209.
(3) 11 Jur. (N.S.) 97, C.

the security required by *Godfray*, and must, on failing to provide it, have allowed *Godfray* to become tenant under the Bankruptcy of *Gray*, on terms less favourable to her than those which she obtained by the subrogation of *Snell*. By prevailing on *Snell* to be subrogated as tenant of the Bankrupt's estate, and to give the Appellant an annuity of £25, afterwards increased to £26, the Respondent secured an advantage for the Appellant, to which she was not entitled, and which she could not have obtained but for the Respondent's exercision in her behalf. *Snell* refused to be subrogated as tenant of the Bankrupt's estate, unless the Respondent would undertake one-half of the responsibilities which he incurred by such subrogation, and the Respondent having undertaken these liabilities, was fairly and justly entitled to any advantage which would ultimately accrue to him from undertaking them. No profit was made *virtute officii*. An Agent may share in the profit of his Principal if he thereby gets for his Principal better interest. If any loss had accrued to the Respondent by reason of the subrogation of *Snell* upon the terms of the agreement of the 23rd of September, 1859, the Respondent would have had to bear such loss, and could not have claimed to be indemnified by the Appellant.

LORD WESTBURY:—

In this case their Lordships are clearly of opinion that it would be subversive of the established doctrine of Courts of equity if the decree of the Court in *Jersey* were affirmed. Nothing can be better settled, or more in conformity with the dictates of justice, than the rule that persons standing in the situation of trustees or agents must account to their principals, or *Cestui que trusts*, for all the benefits which they themselves obtain by virtue of that character or relation.

And it is no answer to say that, in the course of acquiring the benefit which has been derived by the Trustee or Agent, he incurred a possibility of loss. That may well be; but if the transaction has resulted in gain, and is one in which the Trustee or Agent was in reality enabled to accomplish what he has done by virtue of his trusteeship or his agency, the consequence results that the whole benefit of the transaction belongs to the person whom he must be considered to have represented throughout.

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In this case *Stevens*, the Respondent, was the general Attorney of the Appellant. There was a proceeding in Bankruptcy against a person named *Gray*, of whom the husband and testator of the Appellant had purchased a house. By the law of Bankruptcy in *Jersey* the Creditors, or parties interested, stand in a certain order in a schedule which is made out, and that law entitles them successively, beginning from the most recent claimant at the bottom of the list, to take the whole of the estate of the Bankrupt, with all its liabilities, becoming in point of fact the Assignee.

Now, that may or may not be a profitable proceeding. It may in many cases be *damnosa hereditas;* in other cases it may happen that the estate of the Bankrupt yields a considerable surplus beyond the amount of the liabilities. Here the Appellant was legally in the list of *Gray's* Creditors; and when it came to her turn *Stevens*, as her Attorney, claimed to be tenant or Assignee of the whole of the estate. An objection was taken by another Creditor, on the ground of insolvency or insufficiency of means on the part of the Appellant, and that objection or demand for security was met by her Attorney in this way. Availing himself of the law of *Jersey*, he subrogated another person as tenant in her place. Accordingly, the tenancy of the estate was made out in the name of that other person, one *Snell*.

It is quite plain what was the real nature of the transaction, *Snell* had entered into an engagement that he would become the surrogate of *Stevens*, and stand in the shoes of that person in respect of the whole of *Gray's* estate, on the terms that the estate should be divided into moieties; one moiety to belong to himself, the other moiety to belong to *Stevens* the *Procureur*. All this is expressed in an agreement of the 23rd of September.

A provision was added to that agreement to the effect that the house which the Appellant's husband had purchased of *Gray* should be secured to her.

The agreement was worded in such a manner as to make it appear that this benefit to the Appellant was the whole of the consideration for the subrogation of the tenancy made by *Stevens* to *Snell*. Any one, on reading that agreement, would infer that the only benefit which was to be obtained, or could be obtained, as the consideration for the transfer of the Bankrupt's estate to *Snell*, was

the house secured to the Appellant. This agreement was produced to the Appellant by Mr. *Stevens*, her *Procureur*. At that time, the relation of principal and agent subsisted between the Appellant and Mr. *Stevens*. The truth, however, was, that this subrogation or transfer was worth a great deal more, because the moiety, which was so obtained by *Stevens*, he being then the agent of the Appellant, was a moiety which was immediately sold by *Stevens* back again to *Snell*, in consideration of a sum of £578. The whole thing was plainly one transaction; the whole of the instruments were in reality for one object.

There was an agreement or contract of sale between *Snell* and *Stevens*, which is to be found in the Record; and by that it was agreed that *Stevens* should resign to *Snell* the moiety of the *teneure* of *Gray*, as it is called,—that is, the moiety of the Bankrupt's estate which he was to receive; so that *Snell* should become the sole owner thereof, in consideration of an annuity which was to be granted to *Stevens*,—"a sum of thirty-four quarters of wheat-rent annually,"—which may be taken to represent the sum at which the moiety would be estimated in *Jersey*.

This was followed by another instrument of the 19th of November, 1859, which was in conformity with the agreement I have just referred to between *Snell* and *Stevens*, by which *Snell* purported to grant to *Stevens* an annuity charged upon a part of *Gray's* estate, the consideration for which was stated to be paid, being £578 sterling.

As we have already stated, the whole of this was plainly one and the same transaction between these parties. It is plain that at the time when the Bankrupt's estate was transferred to *Snell* there must have existed an agreement that he was to give a moiety of it to *Stevens*, and then, as soon as that agreement was made, an instrument was prepared by which the Appellant was made to believe (for that is the plain meaning of the document) that the whole consideration for this subrogation was nothing more than she then received; while her Attorney, or rather her Agent, was at that very moment putting into his pocket a sum of £578, which he had received from the person to whom he had subrogated the tenancy of the estate, which tenancy was, in fact, the property of the Appellant. It is the Appellant's right which has been acted upon throughout. It was in respect of the Appellant's

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right that the Respondent, being then her Agent, obtained a moiety of the tenancy of the estate, and he still retained that character when he sold that moiety for this sum of money to Mr. *Snell*. There is no liability in *Stevens* against which the Appellant is bound to provide. *Snell* has taken the whole estate or tenancy with all its liabilities. He has, in fact, paid *Stevens* the sum of £578 for one moiety, which must be taken as its clear value, notwithstanding any liability. This sum was in law received by the Respondent on account of the Appellant, and, as the Appellant does not claim the annuity that was bought with it, she must have this sum, with interest, paid to her by the Respondent.

We shall, therefore, advise Her Majesty to order that the judgment of the Court below be reversed, and that the sum of £578, with interest at 5 per cent. from the 19th of November, 1859, be paid to the Appellant by the Respondent, together with her costs in the Court below and of this appeal.

Solicitors for the Appellant: *Jones, Blaxland, & Jones.*
Solicitor for the Respondent: *George T. Woodrooffe.*

J. C.* 1866 *Nov.* 10, 12, 13.

THE REV. ANDREW MURRAY AND OTHERS . APPELLANTS;

AND

THE REV. THOMAS FRANCOIS BURGESS . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Cape of Good Hope—Dutch Reformed Church—Constitution of, under Ordinances of 1843 *and* 1847—*Proceedings against Minister on charges of false doctrines—Synod—Presbytery.*

The Dutch Reformed Church in the Colony of the *Cape of Good Hope* is a voluntary society, constituted and subsisting by mutual agreement. The regulation of its Ecclesiastical affairs depends upon contract; and the authority of its governing Bodies is derived wholly from the admission and agreement of the members, Ecclesiastical and lay, which constitute the Church or Society. This contract or agreement is embodied in certain laws and regula-

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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tions, which were settled by Ordinance, No. 7, in 1843; and subsequently altered, in 1847, by virtue of authority contained in the Ordinance of 1843. By Article 187, of the Ordinance of 1843, the Synod or General Assembly was organized, and made the sole and exclusive Tribunal for the trial of charges of false doctrine against Ministers. By one of the alterations made in 1847, the jurisdiction and authority thus given to the Synod as a Court of first instance was transferred to the Presbytery, with an appeal to the Synod; with liberty, where a case which concerns the welfare of the Church in general had been decided in the Superior Court, and, being capable of appeal, no appeal had been brought, for the Synod to take cognizance of it; though incapable of exercising or enforcing an original or primary jurisdiction. So *Held* by the Judicial Committee, on the construction of the Ordinances of 1843 and 1847, and the Laws and Regulations for the direction of the Dutch Reformed Church appended thereto, upon an appeal from a sentence of the Supreme Court of the *Cape of Good Hope*, in a case where a suit had been brought in that Court against the Members composing a Synodical Commission, to reverse and annul a sentence of suspension of a Minister of that Church pronounced by the Synod:—

Semble, that since the alteration made by the Ordinance of 1847, the Synod has no discretionary power of assuming primary jurisdiction in a charge of false doctrine against a Minister; such charge must be made and determined in the first instance by the Presbytery.

THE Dutch Reformed Church in *South Africa* is governed fundamentally, by the Ordinance, No. 7, 1843, of the Governor and Legislative Council of the *Cape of Good Hope*, which repealed the Church Regulations of the 25th of July, 1804, emanating from the Commissioner-General of the then Batavian Government: and in detail, by certain laws and regulations originally contained in the schedule to that Ordinance, and since, from time to time, amended under a power of legislation given by the same Ordinance to the General Assembly of the Church, and limited only by the principles laid down in the Ordinance itself.

The Respondent was Minister of the congregation of that Church at a place in the Colony called *Hanover*.

There are three grades of Courts in that Church; Consistories, Presbyteries, and the General Assembly, also called the Synod, or, in years when the Synod does not meet, the Synodical Commission. Charges against the doctrine of Ministers were brought immediately before the Synod, or Synodical Commission, till the year 1847, when, by an amendment of the regulations, they were transferred to the Presbyteries in the first instance.

A Synod of that Church met at *Cape Town* on the 14th of

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October, 1862, and previous to such meeting *Joubert*, an Elder of the congregation of *Colesberg*, sent to the *Scriba* of the Synod a written statement, to the effect that he, *Joubert*, had heard that the Respondent was infected with rationalism, and had held a certain conversation reported in such statement. At the first meeting of the Synod, *Joubert*, being a member thereof, called its attention to the aforesaid statement; and the Synod, on the 16th of October, 1862, referred the same to a Committee, nominated for the consideration of supplementary *agenda*, and commonly called the Judicial Committee.

The Judicial Committee, by means of the statement so made, formulated a charge against the Respondent of having denied various dogmas; and finding that the Respondent denied the charge, and that *Joubert* had not provided himself with any proofs, having been told by the *Scriba* of the Synod that before he could apply to it he must first comply with Art. 155 of the Laws and Regulations for the Dutch Reformed Church in *South Africa* made pursuant to the above Ordinance, No. 7, of 1843 (which regulate the procedure before the Presbyteries in the first instance), the Committee reported to the Synod accordingly, describing *Joubert* and the Respondent in its Report as Plaintiff and Defendant.

On hearing such Report the Synod, on the 11th of November, 1862, resolved that it could appoint a Special Commission of its own members to inquire on the spot into the charge, and report to the next Synodical Commission.

The Synod, however, after a long adjournment, owing to its constitution being questioned, and afterwards adjudged to be illegal, met again on the 15th of October, 1863; and on the 29th of that month, the Respondent, being a member thereof, moved that the resolution for the appointment of a Special Commission might be annulled, to the end that he might meet at once in Synod the reflections cast upon him by *Joubert*; but a counter-motion, to the effect that the resolution be adhered to, was proposed and carried, and against such counter-motion the Respondent entered his protest.

The Synod then, pursuant to the before mentioned resolution, appointed a Special Commission, which met at *Hanover*, in February, 1864, and examined several witnesses, not only as to the

alleged conversation, the rumours about which were reported to the Synod by *Joubert*, but also as to another conversation, not before mentioned or charged against the Respondent, but alleged to have taken place on the 25th of December, 1861. The Respondent, at such examination, appeared before the Commission under protest.

The Special Commission made its report to the Synodical Commission, to which *Joubert* and the Respondent also submitted certain written pleadings, that of the Respondent containing a renewal of his protest.

The Synodical Commission met on the 19th of April, 1864, and on that and several other days considered the Report of the Special commission and the pleadings; and on the 25th of April, 1864, it resolved to demand of the Respondent a clear and detailed statement of the import and sequence of both the alleged conversations, and what it was that occasioned the misunderstanding (if any) of his words, and further, what he believed with reference to the several dogmas he was accused of denying.

The Respondent declined to comply with such demand, and on the 16th of July, 1864, the Synodical Commission found him guilty of denying two of the dogmas which he was accused of denying, for which offence the Commission suspended the Respondent from his Ministry, and threatened to give further judgment in the case, if he should not acknowledge his guilt and retract on or before the 1st of March, 1865.

The sentence of the Synodical Commission was communicated by it to the Consistory and members of the Respondent's congregation, and by means thereof his right to occupy the pulpit of the congregation was put in jeopardy, and he was excluded by the Presbytery of *Graaf-Reinet*, of which he was a member, from its meetings.

In consequence, the Respondent commenced a suit by a summons issued out of the Supreme Court of the *Cape of Good Hope*, against the Appellant, the Rev. *Andrew Murray*, in his capacity of Moderator of the General Assembly or Synod of the Dutch Reformed Church of the Colony; and by his declaration, the Respondent claimed that the sentence of the Synodical Commission might be reversed, annulled, and declared void. The Appellant

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submitted, by way of plea or exception, that the suit ought to have been brought against the Synod and the members thereof.

The Supreme Court, on the 6th of December, 1864, overruled the exception, but held that the Synodical Commission ought to be Defendants, and gave the Respondent leave to amend his summons and declaration, and decreed the same to be served, when amended, severally and individually on the members who constituted the Synodical Commission of the 16th of July, 1864.

The Respondent amended his summons and declaration, and after some further litigation as to the necessary parties, which resulted in the then constitution of the suit being sustained by a judgment not now appealed from, the Appellants, on the 17th of May, 1865, excepted to the jurisdiction of the Supreme Court, on the grounds, first, of an inherent spiritual authority alleged by the Appellants to reside in the Dutch Reformed Church, and to be beyond the cognizance of the Supreme Court; and secondly, of the 9th section of the Ordinance, No. 7 of 1843, which protects the Church judicatories in pronouncing spiritual censures for scandals and offences.

The Supreme Court, consisting of the Chief Justice *Bell*, and Justices *Cloete* and *Watermeyer*, on the 27th of May, 1865, disallowed this plea; and on the 30th of May, 1865, that Court having ordered to be struck out, as not forming part of the record in the cause, a certain document annexed to the Appellants' plea, as being argumentative, irrelevant, and in breach of the 19th general rule of the Court, directed that the third ground, on which the Respondent prayed the judgment of the Court, namely, that according to the laws and regulations of the Dutch Reformed Church, as altered and amended in the year 1847, the Presbytery of *Graaf-Reinet* was the only Court competent to try the Respondent in the first instance, for or upon any charge against his doctrine, should be taken first in order, and on hearing the parties respectively on that ground alone, gave judgment for the Respondent in terms of the declaration, that the judgment, or sentence, of the Synodical Commission of the 16th of July, 1864, was null, void, and further adjudged that the Appellants pay costs of the suit.

The present appeal was brought from the judgments of the 27th of May, and the 30th of May, 1865.

Sir *R. Palmer*, Q.C., Mr. *N. C. Campbell*, of the Scotch Bar, and Mr. *Wickens*, for the Appellants:—

The principal appeal in this case is from the judgment of the Supreme Court of the *Cape of Good Hope*, overruling an exception taken to the jurisdiction of that Court, to the effect that the spiritual authority of the Dutch Reformed Church over its members was beyond the control, cognizance, or supervision of the Supreme Court. The Ordinance, No. 7 of 1843, declares the Dutch Reformed Church to be a Church exercising its discipline and government by Consistories, Presbyteries, and a General Assembly or Synod, and professing the doctrines contained in the Confession of the *Synod of Dort* and in the *Heidelberg Catechism*, and recognizes the General Assembly, or Synod, composed of all acting Ministers and Elders nominated by the Consistories, as the natural and proper Ecclesiastical authority by which rules and regulations for the government of the Church in its spiritual affairs may rightfully be made. To this Ordinance are appended certain laws and regulations made by the General Assembly, or Synod; but the Ordinance reserves to the General Assembly the power, from time to time, of altering those regulations, and making new ones, subject, however, to the condition, that no rule or regulation shall be of force if inconsistent with or repugnant to the Ordinance. By the 9th section of the Ordinance in question, after enacting that persons giving testimony before any duly constituted judicatory of the Church, shall not be subjected to actions in the Civil Courts, it is further enacted that:—"Nor shall any action, suit, or proceeding at law be instituted for the purpose of preventing any judicatory from pronouncing in the case of any scandal or offence which shall be brought before it, and proved to its satisfaction, such spiritual censures as may in that behalf be appointed by the said Church, or for the purpose of claiming any damages or relief in regard to such censures, if the same shall have been pronounced." The power of altering the Regulations of 1843 has, from time to time, been exercised by the Synod of the Dutch Reformed Church, but no alteration has been made in this 9th clause. Now, it was against a sentence or judgment pronounced by a Court so protected that the suit in the Supreme Court was brought. We contend here, as was contended below, that according to the true construction of the

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Ordinance of 1843 and the amended regulations made under it in 1847, the Synod of the Dutch Reformed Church of *South Africa* had jurisdiction to pronounce the sentence of the 16th of July, 1864, in the first instance, and without any previous hearing, before the Presbytery of *Graaf-Reinet*, or any other inferior Court. Again, the sentence complained of by the Appellant, being a spiritual sentence passed for a spiritual offence, against a member of the Dutch Reformed Church of *South Africa*, by the highest spiritual Court of that Church, is not liable to be altered, set aside, or impugned by a Civil Court, which the Supreme Court of the *Cape of Good Hope* is exclusively: *McMillan* v. *The Free Church of Scotland* (1), familiarly known as *The Cardross Case; Forbes* v. *Eden* (2); *Long* v. *The Bishop of Cape Town* (3); *Warren's Case*, in *Grindwood's* Compendium, and *Smith's* Hist. of Wesleyan Methodists.

We submit, also, that even if the objection to the Synod's jurisdiction had any foundation, such objection was waived by the Respondent; but we maintain, for the reasons already stated, that the judgment of the Supreme Court was contrary to law, and erroneous. That the Synod could have entertained the complaint made against the Respondent, and decided it by way of appeal, was not questioned by any of the Judges who delivered their opinions.

Mr. *Coleridge*, Q.C., Mr. *J. Fitzjames Stephen*, and Mr. *J. Westlake*, for the Respondent:—

The exceptions taken to the jurisdiction of the Supreme Court of the *Cape* were properly disallowed. The Dutch Reformed Church is not an Established Church, nor has it any exclusive power or jurisdiction in Ecclesiastical matters given to it by Statute, or otherwise, which can exclude the Civil Courts of the Colony from reviewing its proceedings. It is merely a voluntary association, and so designated and treated by the express terms of the Ordinance of 1843: *Long* v. *The Bishop of Cape Town* (4). But whatever may be its spiritual authority, it has no authority to violate its own laws. The 9th section of the Ordinance, No. 7 of

(1) Court of Session Cases, vol. xxii. (2nd Series), 290; S. C., vol. xxiii. p. 1314.

(2) Court of Session Cases, vol. iv. (3rd Series), p. 143.

(3) 1 Moore's P. C. Cases (N. S.) 411.

(4) 1 Moore's P. C. Cases (N. S.) 461.

1843, gives no higher immunity to the proceedings of the judicatory, duly constituted by the Church, than protection of the persons giving testimony before them, when in the exercise of their lawful functions, from actions for damages, or against the proceedings themselves when strictly Ecclesiastical, and confined to Ecclesiastical sentences, being interfered with by the Civil Courts. That is a very different question from the right to impose penalties as well as censures, and to interfere with the *status* and the legal rights of parties. Then as to the constitution of the Court which affected to try the Respondent. It was a Synodical Commission, a Tribunal erected without authority, *pro hac vice*, for the special purpose of trying the Respondent, over whom it had no authority or jurisdiction. The Presbytery of *Graaff-Reinet* was the only Tribunal capable of trying such a question. It may be that, previous to the alterations made in 1847, the Synod had jurisdiction in the first instance in a case of complaint against the doctrine or conduct of Ministers; but, by those alterations, jurisdiction over Ministers was expressly withdrawn from the Synod and given to the Presbytery. There may be an appeal to the Synod, but the only jurisdiction in the first instance is that of the Presbytery. It was justly said by one of the Judges in the Court below, that the question was not, as urged there, a matter of conscience. The Plaintiff complains to the Civil power, that his bread, his livelihood, his *status* in society, are about to be taken away. We submit, that any person, under such circumstances, is entitled to bring such an action as the present, and, adopting the judgment in the case of *Long* v. *The Bishop of Cape Town* (1), contend that suspension and deprivation are not matters of spiritual import, but matters subject to coercive judicial authority. We accept this reasoning, and insist that the judgment of the Court below must be upheld, and this appeal dismissed with costs.

Judgment was reserved, and now pronounced by

1867
Feb. 6.

LORD WESTBURY:—

The Respondent is a Clergyman of the Dutch Reformed Church at the *Cape of Good Hope*, and is the resident officiating Minister of the Church of *Hanover* in that Colony.

(1) 1 Moore's P. C. Cases (N. S.) 466.

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On the 16th of July, 1864, a decree of suspension was pronounced by a Synodical Commission, acting by order of the General Assembly or Synod of the Church, held at *Cape Town* in the year 1864, by which decree the Respondent, on the ground of errors in doctrine, was declared to be suspended from his sacred ministry until the next meeting of the Synodical Commission in the year 1865, when it was declared that the Synodical Commission would proceed to further judgment, unless certain things were in the meantime done by the Respondent.

This decree affected the Respondent's civil or temporal rights, inasmuch as it involved the loss of some of the emoluments of the Respondent's office; and on the 30th of September, 1864, he brought an action in the Supreme Court of the Colony against the Moderator and some other of the members of the Synod to set aside the decree as illegal and void.

The declaration in the action assigned several grounds or reasons for annulling the decree, the third of which was in these words:— "Because, according to the laws and regulations of the Dutch Reformed Church, as altered and amended in the year 1847, the Presbytery of *Graaf-Reinett* was the only Court competent to try the said Plaintiff in the first instance for or upon any charge against his doctrine; and because, therefore, the proceedings in his case, as hereinbefore set forth, were wholly irregular and illegal."

The Defendants took exception generally to the jurisdiction of the Supreme Court; and, secondly, that the action was barred by the 9th section of the Ordinance, No. 7 of 1843, the decree complained of being a spiritual censure.

The Supreme Court overruled these two exceptions, and gave leave to the Plaintiff to amend his summons and declaration by substituting as Defendants the members of the Synodical Commission who made the decree complained of.

From this Order there is no appeal.

The Supreme Court then directed that the third ground stated in the Plaintiff's declaration (and which we have already stated) should be first taken and argued, and, after full consideration, the Court granted judgment for the Plaintiff, and held the decree of the Synodical Commission to be null and void.

From this Order the present appeal is brought, and the sole

question is, whether the Synodical Commission had authority to try the Respondent in the first instance, and to make the decree of suspension from the Ministry.

The Dutch Reformed Church in the Colony of the *Cape of Good Hope* is a voluntary society, constituted and subsisting by mutual agreement. The regulation of its Ecclesiastical affairs depends upon contract, and the authority of its governing bodies is derived wholly from the submission and agreement of the members, Ecclesiastical and lay, which constitute the Church or Society.

This contract or agreement as now subsisting, is embodied in certain Laws and Regulations which, repealing former Regulations, were settled in 1843, and were afterwards, in 1847, altered in some material respects by virtue of an authority contained in the Regulations of 1843.

These rules of 1843, under the title of "Laws and Regulations for the direction of the Dutch Reformed Church in *South Africa*," were set forth in a schedule annexed to an Ordinance or Statute enacted, in 1843, by the Governor of the *Cape of Good Hope*, with the advice and consent of the Legislative Council thereof, and it may be useful to state the 6th and 8th enactments of this Ordinance:—

"VI. And be it enacted that the said Dutch Reformed Church shall be and remain a Church exercising its discipline and government by Consistories, Presbyteries, and a General Assembly or Synod, and acknowledging, receiving, and professing, in regard to the doctrine thereof, the doctrines contained in the Confession of the *Synod of Dort* and in the *Heidelberg Catechism*; and if any questions or divisions respecting church government, discipline, or doctrine, should hereafter arise between any members or reputed members of the said Church, or of any Congregation, Consistory, Presbytery, or General Assembly of the same, then those persons adhering to and professing, respectively, the said discipline and government, and the doctrines of the said Confession and Catechism, shall be deemed and taken, as against all persons who shall adhere to and profess any different discipline, government, or doctrines, to be the true Congregation, Consistory, Presbytery, or General Assembly, as the case may be, of the said Church, and, as such, of right entitled to the possession and enjoyment of any

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funds, endowments, or other property or rights by law belonging to the said Church, or to the Congregation, Consistory, Presbytery, or General Assembly, in which any such questions or divisions shall have arisen."

"VIII. And be it enacted, that no rule or regulations of the said Church, whether contained in the schedule to this Ordinance or to be afterwards framed, shall have or possess any direct or inherent power whatever to affect, in any way, the persons or properties of any persons whomsoever. But all such rules and regulations shall be regarded in law in like manner as the rules and regulations of a merely voluntary association, and shall be capable of affecting the persons or properties of such persons only as shall be found in the course of any action or suit before any competent Court to have subscribed, agreed to, adopted, or recognised, the said Rules and Regulations, or some of them, in such manner as to be bound thereby in virtue of the ordinary legal principles applicable to cases of express or implied contract."

The Laws and Regulations for the direction of the Dutch Reformed Church, in the schedule to this Ordinance of 1843, defined the jurisdiction or right of Ecclesiastical cognizance that was to be exercised by the governing bodies of the Church, namely, the Consistories, Presbyteries, and Synod, or General Assembly. Generally an appeal is given from the Consistory to the Presbytery, and from the Presbytery to the Synod: but certain subjects of complaint are appropriated to the jurisdiction or cognizance of the Synod or General Assembly in the first instance, and exclusively.

Thus, by Article 187, it is directed that "the General Assembly, or, if it does not meet that year, the Synodal Commission, shall have the immediate management of charges against the performance of duty, the doctrine or the conduct of Ministers or Candidates, whether brought before them by information of one of the members, or by special indictment." This Article was followed by various regulations, prescribing the mode of proceeding to trial of charges against Ministers before the Synod, and also giving power to the Synod to inflict various punishments, or "modes of reproof," of different degrees of severity. The Synod was thus duly organized and made the sole and exclusive Tribunal for the trial of charges of false doctrine against Ministers.

In 1847 it appears to have been thought that this primary jurisdiction so given to the General Assembly, or Synod, in matters of heresy, was inconsistent with the cardinal principle embodied in the Ordinance of 1840, that the Dutch Reformed Church should be and remain a Church, exercising its discipline and government by Consistories, Presbyteries, and a General Assembly, or Synod: and, further, that it was unjust, as it took away the ordinary right of appeal; and, accordingly, in the year 1847, certain alterations (in due exercise of the power for that purpose) were made in the Ordinances of 1843.

These alterations, so far as they are material to this case, consisted of an erasure or obliteration of so much of Article 187 as we have already cited, and of all the regulations relating to the procedure and the penalties or modes of reproof, in the case of trials before the Synod of charges against Ministers; and of an introduction into the Articles defining the jurisdiction of Presbyteries of the words "Ministers, Candidates," thereby making the Presbytery to which a Minister belongs, the Court, in the first instance, for the trial of its Ministers, on all charges relating to doctrine, discharge of duty, or conduct. All the Regulations appended to Article 187 in the Ordinances of 1843, relating to the mode of procedure and power of punishing by the Synod, were written into the Articles that regulate trials before the Presbyteries. Thus a complete transfer of the whole of the jurisdiction and authority, given to the Synod as a Court of First Instance to try charges against Ministers, was made to the Presbyteries, with an appeal to the Synod.

It is now contended, on the part of the Appellants, that there were certain provisions contained in the Ordinances of 1843, which were allowed to remain in 1847, and which now operate as an exception to the rule introduced by the alterations of 1847, and invest the Synod with a discretionary power of still assuming and exercising, in cases of charges against Ministers, an original primary jurisdiction. If this be so, the state of things would be extraordinary, and one likely to be attended with much inconvenience and injustice.

Their Lordships find that the transfer of the primary jurisdiction from the Synod to the Presbyteries is clear and positive; if in

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any cases it is to be defeated by force of an exception, the exception must be equally clear.

Further, it must be plainly seen that the clauses contained in the Ordinances of 1843, and which operated by way of exception to the arrangement thereby made, were also intended to operate by way of exception to the new arrangement of jurisdiction made by the alterations in 1847.

The clause relied on by the Appellants, both here and in the Court below, as constituting an exception to the rule that the Presbytery shall have the sole primary jurisdiction, is the latter part of the 7th Article in the General Regulations contained in the first section of the Ordinances of 1843. For greater clearness it may be useful to cite the 6th and 7th Articles *in extenso*:—

"6. In all cases decided by the sentence of a higher Church Court, the appeal must be made to the Court next following in rank; but after being decided for the second time, no new appeal is admissible.

"7. The notice of cases prosecuted according to the preceding Article in appeal must be taken in regular order, and no cases be brought before the higher Court which first ought to have been decided in the inferior ones, unless, in the meanwhile, no inferior Court had been held, and the nature of the case required a speedier settlement.

"All this, however, does not affect the right of the higher Courts to take notice of cases, even without appeal, which concern the welfare of the Church in general, and come under its jurisdiction."

Having regard to the 6th Article, the 7th Article would seem to apply only to appeals actually brought, or that might be brought, and not to refer to original cases.

With respect to the second part of the 7th Article, the meaning would seem to be this, that if a case which concerns the welfare of the Church in general, has been decided in an inferior Court, and no appeal is brought, the higher Court may take notice of it, provided it be a decision from which an appeal would lie to such higher Court, and so "come under its jurisdiction."

This construction attributes to the words "cases even without appeal," the meaning of cases decided in an inferior Court, but not

appealed from; and it gives to the following words of the first part of the 7th Article, viz., "and no cases be brought before the higher Courts which first ought to have been decided in the inferior ones," the effect of prohibiting appeals at once from the Consistory to the Synod, passing over the Presbytery, unless the case be urgent, and no Presbyterial Court be shortly held, which would happen every fifth year when the Synod meets, for during that year no Presbyteries can be held.

But the Appellants contend for a very different interpretation of the 7th Article. They insist that in the words cited above from the first part of it, viz., "no cases be brought before the higher Court," &c., the word "cases" means, or at least includes, original complaints that have not been brought before any Court; and they contend, therefore, first, that any original complaint which ought to be regularly brought, in the first instance, before a Presbytery, may, in the year in which the Presbytery does not sit, be brought in the first instance before the Synod, if it be a case which required a speedier settlement than could be obtained if the next sitting of the Presbytery were waited for; and of the fact whether it be such a case, the Appellants insist that the Synod is the sole and exclusive judge.

The Appellants contend, therefore, that as the Presbytery of *Graaf-Reinett* could not be held in the year 1864, by reason of its being the Synodical year, the complaint against the Respondent was properly brought, in the first instance, before the Synod.

If this verbal interpretation of the first part of the 7th Article were admitted to be correct, it would still be clear that Article 7, when originally composed and passed in 1843, could not have applied, and was not intended to apply, to cases like that of the Respondent; for all complaints against Ministers for false doctrine could not, until the new law of 1847, be instituted in the Presbyteries, but were reserved exclusively for the Synod, and their Lordships do not think that the just rules of construction would warrant them in giving to Article 7 a meaning and effect more extended and different than its original meaning and operation, so as to make the 7th Article an exception to the positive enactment introduced by the new enactment of 1847. The effect of doing so would be *pro tanto* to control and defeat the enactment that has,

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without exception, in cases against Ministers, transferred the primary jurisdiction from the Synod to the Presbytery.

There is no indication of any intention in the framers of the alterations of 1847 that Article 7 should apply to them, and for that purpose should have a wider signification than its original meaning.

On the contrary, it seems plain that, by the new amended Ordinance, which repealed all the powers of punishment which were originally given to the Synod, and re-enacted those powers in favour of the Presbyteries alone, the Synod was entirely deprived of the means of acting with effect as an original or primary Tribunal; for acting in the first instance, it could inflict no penalty, and its sentence would have no result.

Further, the rules of procedure before it as the primary and sole Court for trying charges of false doctrine, which were minutely prescribed in Article 187 of the Ordinances of 1843, are totally repealed by the enactment of 1847; and these circumstances appear to their Lordships to be evidence that it was the object and intent of the Ordinance of 1847 to strip the Synod absolutely of all original jurisdiction in cases of charges against the doctrine or conduct of Ministers, and to reduce it simply in such cases to a Court of appeal.

These observations would be sufficient, even if the language of the first part of the 7th Article admitted of the verbal interpretation given to it by the Appellant. But their Lordships are further of opinion that such is not the true interpretation of the words. The 7th Article gives the rule as to bringing and hearing Appeals, and when, after directing that cases prosecuted according to the 6th Article in Appeal, must be taken in regular order, it goes on to direct that no cases be brought before the Higher Court which first ought to have been decided in the inferior, it seems plain that the words "no cases" mean none of the cases mentioned in the preceding part of the sentence, that is, none of the cases prosecuted in appeal.

With respect to the latter part of the 7th Article, the Appellants contended that it became and was applicable to the new Ordinance of 1847, and that when so applied it had the effect of saving to the Synod the right of trying, as a Court of First instance, cases

which concerned the welfare of the Church in general; and that whether any particular case answered that description or not, the Synod alone had power to determine. With respect to the words "which come under its jurisdiction," the Appellants construe them as meaning, come under the jurisdiction of the Church. But the Church collectively, that is, apart from the Consistories, Presbyteries, and General Assembly, has no jurisdiction or means of jurisdiction under these Ordinances; and the meaning of these last words, although the expressions are inaccurate, seem to be necessarily this, viz., "which come under the jurisdiction of the Higher Court so taking notice of the case." But since the Articles of 1847, a complaint against a Minister for false doctrine is not a matter for the jurisdiction of the Synod, except by way of appeal from the Presbytery. Their Lordships are, moreover, of opinion that the better construction of the second part of Article 7 is, to hold that it is *in simili materiâ* with the first part, and that it relates not to original complaints, but to cases decided, and that have been, or might be, the subject of appeal.

It is not, indeed, necessary to fix and declare the true meaning of the 7th Article. It is sufficient to shew that the language is doubtful and obscure; and if this only were established, their Lordships would be of opinion that it could not be used for the purpose of controlling and restricting the clear and absolute enactment contained in the Ordinances of 1847.

That questions concerning doctrine shall be first tried by the Presbytery, and not by the Synod, is the positive rule enacted in 1847; and anything derogating from or taking a case out of this rule ought, in expression and intention, to be equally clear and certain as the rule itself.

On these grounds their Lordships are of opinion, and will humbly report to Her Majesty, that the judgment of the Court below ought to be affirmed, and this appeal dismissed with costs.

Solicitors for the Appellants: *Williams & James.*
Solicitors for the Respondents: *Venning, Naylor, & Robins.*

J. C.* 1866 Nov. 22, 23.

THE OWNERS OF THE VESSEL "SINGAPORE" . . . . . } APPELLANTS;

AND

THE OWNERS OF THE VESSEL "HEBE" . RESPONDENTS.

THE "SINGAPORE" AND THE "HEBE."

Collision—Judgment of High Court of Admiralty reversed—Re-hearing of appeal, petition for, dismissed.

Judgment of the High Court of Admiralty in a cause of collision, which imputed mutual blame, and condemned each party in a moiety of the damages and costs; reversed by the Judicial Committee upon a review of the evidence and the opinion of the Nautical Assessors.

A petition having been presented for a re-hearing of the appeal, before the report of the Judicial Committee had been confirmed by Her Majesty in Council, which stated that evidence had been received at the hearing of the appeal which was not called for or produced in the Court below, and which the Petitioner alleged contradicted the case made by the pleadings on both sides, was dismissed, the Judicial Committee, without deciding that they were not competent to grant a re-hearing, being of opinion, that the grounds relied on in the petition did not bring the case within any principle on which such an application could be supported.

THERE were two appeals in this case from the same sentence of the Judge of the High Court of Admiralty (the Right Honourable Dr. *Lushington*), delivered in cross actions of damage, respectively promoted by the owners of the *Singapore* against the owners of the *Hebe*, and by the *Hebe* against the *Singapore*, by which sentence that Judge pronounced the collision to be occasioned by fault of both parties, who were declared mutually to blame, and the damage arising therefrom directed to be borne equally by the owners of the *Singapore* and *Hebe*.

The collision happened on the night of the 21st of September, 1865, in the *Bay of Biscay*. The *Singapore* was a schooner, on her voyage with a cargo from *Singapore* for *Falmouth*, and the *Hebe* was a barque on her passage from *Liverpool* for *Alexandria*, with a cargo.

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

Both actions were heard together, the evidence being entirely oral; but the Master of the *Singapore*, who produced the Log-Book of his vessel, in consequence of notice from the owners of the *Hebe*, referred to entries therein, which were initials in the German language, and had the appearance of having been altered; translations, however, were admitted, and filed with the other evidence. It did not appear that any similar notice for the production of the Log-Book of the *Hebe* had been given on behalf of the *Singapore;* and the Log-Book of that vessel was not referred to or put in evidence.

The learned Judge of the Court below, who was assisted by two of the Trinity Masters, expressed his dissatisfaction with the evidence produced, and the difficulty he felt in deciding to which witnesses the most credit was due; and was of opinion that, under such circumstances, there was no other mode of solving the case than by looking to the probabilities of it; and ultimately declared that having, with the Trinity Masters, carefully considered the case, they had all come to the conclusion that both vessels were mutually to blame for the collision.

An appeal having been asserted on behalf of the *Singapore*, and adhered to by the *Hebe*, the two causes now came on, and were heard together.

The *Queen's Advocate* (Sir *R. Phillimore*, Q.C.), and Dr. *Twiss*, Q.C., for the owners of the *Singapore*:—

Repudiated the blame thrown upon the *Singapore* by the judgment of the Court below, and maintained that it was satisfactorily proved by the evidence that the collision was occasioned by the fault of the *Hebe*, and that it was impossible it could have been otherwise, the *Singapore* being close-hauled, and the *Hebe* running free, and the wind being proved, both by the witnesses and the Log-Book of the *Singapore*, to have been as pleaded in the preliminary Act, north-north-east, and not, as stated, but not proved, by the *Hebe*, north-west by west.

Dr. *Deane*, Q.C., and Mr. *Clarkson*, for the owners of the *Hebe*:—

Argued, that the collision was caused solely by the conduct of the *Singapore*; that the wind at the time was, as stated by the

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Hebe's preliminary Act; that the Log-Book of the *Singapore* had, upon the face of it, been tampered with, and could not be relied on for confirmation of the evidence regarding the direction of the wind; and in corroboration of their view, they produced, for the first time, the Log-Book of the *Hebe*. This was objected to by the Counsel for the *Singapore*, and though not formally received, was handed in to the Committee. It was stated that the entries therein corroborate the statement of the witnesses on behalf of the *Hebe* as to the direction of the wind being north-west.

The following judgment, which contains a full statement of the circumstances of the case, was delivered on behalf of their Lordships by

LORD WESTBURY:—

The case of the *Singapore* and the *Hebe* is one which has given their Lordships some anxiety. The case itself is difficult; and the embarrassment is still greater by the form in which it has been dealt with in the Court below.

In a case of this kind, where the circumstances are so extremely conflicting, the only reasonable and satisfactory mode of arriving at a conclusion is, by an analysis of the facts, to ascertain what is the principal fact or subject of inquiry upon which the case may be considered to hinge, and to endeavour to arrive at a satisfactory conclusion as to the testimony bearing upon that fact.

Now, the case upon the part of each vessel is, that she was close-hauled and that the other was running free. That depends, of course, upon the inquiry as to the direction of the wind. The evidence as to the quarter of the wind is very conflicting, and part of it is open to the legitimate conclusions resulting from the alteration that has been made in the log.

The case stands in this manner:—The allegation on the part of the *Hebe* is, that the wind was in the north-west; the allegation on the part of the *Singapore* is, that the wind was in the north-north-east. If the wind was in the north-west, the *Hebe*, whose course was south-west by west, was close-hauled and the *Singapore* was running free; if the wind was in the north-north-east, the *Singapore*, whose course was due east, with half a point, perhaps, to the northward, was close-hauled and the *Hebe* was running free.

Upon the examination of the witnesses on the subject of the direction of the wind, the Counsel for the *Hebe* called for the log of the *Singapore*. The requisition was made with a view of testing the accuracy of the evidence given on the part of the *Singapore*. Two or three witnesses had been examined on the part of the *Singapore* in addition to the Master. The Master kept the log. The Master in his examination in chief swore that the wind was north-north-east. His attention was called to the log, and, from an examination of the log, it appeared that the original entry in the log was that the wind was in the north. That entry had been obliterated by another entry in a different ink, in which the direction of the wind was indicated by the letters, N.N.O., which, being the initials of the German words, indicate that the wind was north-north-east.

The witnesses on the part of the *Singapore* were examined, as indeed were the other witnesses, many months after the transaction. It is unreasonable to suppose that they could speak to the direction of the wind purely from personal recollection. It is most reasonable to believe that they were shewn the log of the *Singapore*, with the direction of the wind entered as having been at the time of the collision north-north-east, and that it was used by them as a means of refreshing their memory, or rather of controlling their recollection, and inducing them to state that the wind was north-north-east.

Now, we do not in any manner intend to impute, either to the Master, or to these witnesses, an intention to deceive. It is, no doubt, of the highest importance that documents of this kind, having been originally drawn up in a given form, should have that form preserved, and that there should neither be erasure, obliteration, nor alteration, subsequently made. It is admitted by the Counsel for the *Singapore* that the entry must be taken as it was originally, so that it would have been impossible for them to contend that the wind was north-north-east, seeing that the original entry was that the wind was northerly.

Now, taking that fact, which is the plain result of the testimony of the log itself as against the *Singapore*, we have then to consider (as the *Singapore's* evidence must be considered as not evidence proving that the wind was north-north-east, but as her

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admission must be taken that the wind was north) we have to consider how the scale ought to turn, and whether the affirmative evidence that that wind was north-west must not be accepted.

It is desirable that it should be borne in mind that the log of the *Singapore, per se*, is not evidence of any fact for the *Singapore*. The log is a statement made by the Master of the *Singapore* at a time being contemporaneous with the event, and, therefore, more likely to be correct, and it is used for the purpose only of correcting a statement made at a subsequent time. It corrects the evidence of the Master, and it reasonably accounts for the testimony of the man on board the *Singapore*. The Master says that the wind was north-north-east. It is corrected by this entry: and, without for a moment supposing that the man did not intend to speak the truth, it reasonably accounts for the evidence of the man being in correspondence with the testimony given by the Master; but if the one is contradicted by the entry, the same thing must apply to the other.

It is not necessary to proceed upon an hypothesis that it was a fraudulent entry, or that the witnesses brought to support that entry on the part of the *Singapore* are witnesses who do not say what they believe to be the truth. On seeing the entry they might well have believed that the wind was in that quarter, and might be influenced by that entry, and so have given their testimony that that was the direction of the wind.

But the testimony on the part of the *Hebe* is not open to any such observation. So far as it goes, it is direct and positive that the wind was in the north-west. It is undoubtedly open to the observation urged by the Queen's Advocate, that the witnesses on the part of the *Hebe* are comparatively few in comparison with the number of witnesses that might have been called. If there were any reason to suppose that those witnesses had been designedly kept away, the observation would have had weight; but at a distance of time after the event it may well be supposed that there was a difficulty in calling additional testimony.

Still, bearing that remark in mind, and attributing the weight which is due to it, we are yet of opinion, that there is satisfactory affirmative evidence, positive evidence, on the part of the *Hebe*,

that the wind was in the north-west, and that that agrees with the other facts of the case, and accounts for the other facts in the case in a manner in which they cannot be accounted for by putting the wind in another quarter.

This being the result of our examination of the evidence upon that point, and finding, with the assistance that we have, that the wind being supposed to be in the north-west all the other facts of the case are made consistent and in a great measure reconciled, we have arrived at the conclusion that the wind must be taken to have been in the north-west at the time of the collision.

That being so, the rest of the case is reasonably free from contradictory testimony, except the point of the starboarding the helm of the *Hebe*, which is asserted on the one side and denied on the other.

Now, the wind being taken to have been in the north-west, the *Hebe* was running close-hauled, or nearly close-hauled,—sufficiently close-hauled as to bring her within the terms of the 12th rule, where that rule speaks of close-hauled vessels. The *Singapore*, on the other hand, was running free. The wind enabled her to have maintained her course, or altered her course, with perfect safety, and without losing her way.

The evidence shews that the *Hebe* ported a little when the ships were very near to one another, I think the evidence is "about two ships' length." The *Hebe* ported at that time, and it is the probable state of the case (in which we are confirmed by the opinion of the Nautical Assessors) that the *Hebe*, running close-hauled, and luffing as she did by porting her helm, threw herself up into the wind, so that her sails did not fill again within so short a distance, and so she may have drifted down and struck the *Singapore*. The nature of the blow, and the consequences of the blow, are hardly consistent with the hypothesis of the *Hebe*, when under full sail, running stem on into the bows of the *Singapore*. Had she done so, being so much larger a vessel and heavily laden, the blow would have been greatly more serious, and the consequences very much graver than they are found to have been.

Now, the *Singapore's* assertion that the *Hebe* starboarded her helm, could be nothing in the world more than a conjectural conclusion. She inferred that the *Hebe* starboarded, because the

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Hebe appeared to come in a direction which starboarding her helm, if she had way upon her, would have given to the *Hebe*. It is sworn, and there seems no reason to doubt the truth of the statement by the persons on board the *Hebe*, that she did not starboard her helm at all; but the act that she did of porting her helm being close-hauled at so short a distance from the *Singapore*, will account for all that follows, without the conclusion that the *Hebe* starboarded her helm and ran into the *Singapore*.

That being the state of the case, the next inquiry is, whether the *Singapore* was right in being in that position in which she is found when the *Hebe* in this manner came into collision with her?

What was it the duty of the *Singapore* to have done under the circumstances? She admits that she saw the lights of the *Hebe* for some time previously to the collision. We have found as a fact against her that she was running free. We have found that her head was in the direction, as she herself says, of either east or half a point to the northward of east. Her plain duty under those circumstances was, as she must have known, from the direction of the wind, and the lights, that the *Hebe* was close-hauled; her plain duty was to have ported her helm, altered her course, and so got out of the way. She says she did so. If she had done so it was utterly impossible that there could have been this collision. Whether she did or not this is plain, that it was her bounden duty to have gone out of the way, and that, the wind being in the quarter in which we find it proved to have been, and her course being such as she admits it was, it was plainly within her power, as it was within her obligation, to have got clearly out of the course that was being pursued by the *Hebe*.

Under those circumstances, therefore, their Lordships are of opinion that there is nothing in the facts, when thoroughly examined, to justify the conclusion that the *Hebe* was wrong as well as the *Singapore*. They are not desirous that a judgment should be passed which imputes blame to either party, where the grounds on which that conclusion is arrived at were not stated. There is no statement of the grounds on which the learned Judge in the Court below arrived at that conclusion. We have endeavoured to state the grounds on which (coming to the conclusion that we have done about the wind) we have no difficulty in deciding the

case. We think the *Hebe* was right, and the *Singapore* was to blame. J. C. 1866 THE "SINGAPORE" AND THE "HEBE."

Their Lordships are of opinion, therefore, and will, in conformity, humbly advise Her Majesty to reverse the judgment, to reject the petition of the *Singapore* with costs, and to award damages, to be settled and ascertained in the usual way by reference, to the *Hebe*, together with her costs of the suit, and her costs of this appeal.

THE Report of the Judicial Committee to Her Majesty, in accordance with the above judgment, not having been presented, and no Order in Council issued in conformity therewith by Her Majesty, the owners of the *Singapore* presented a special petition, addressed to the Judicial Committee, for a re-hearing of the appeal. This petition, after stating the circumstances of the appeals and judgment of their Lordships, whereby the owners of the *Singapore* were condemned in damages and costs, alleged "that during the hearing of the appeal the Counsel for the owners of the *Hebe* tendered to the Lords of the Judicial Committee present thereat a Book, described by him as the Log-Book of the *Hebe*, which Book the Lords were pleased thereupon to receive and examine, and subsequently commented upon, notwithstanding that the Book was not in evidence, neither in the appeals nor in the causes below, and also that the Counsel for the owners of the *Singapore* strongly opposed the reception of the same. That the Report of the Lords of the Judicial Committee to Her Most Gracious Majesty, in altering the decrees of the Court below in favour of the owners of the *Hebe*, proceeded upon grounds inconsistent with the case made by them in their pleadings, thereby involving a departure from the rule of the Judicial Committee, as laid down in its decisions in other cases." And after stating that the Report of the Judicial Committee had not been confirmed by Her Majesty; stated that the owners of the *Singapore* were resident in *Bremen*, in *Prussia*, and that the action was entered in the Court below against the *Singapore* and her freight, on behalf of the owners of the *Hebe*, the Petitioner prayed, that the Judicial Committee would be pleased to allow the appeals to be re-heard before them. J. C.* 1866 *Dec.* 8.

* *Present*:—SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, LORD JUSTICE CAIRNS, and SIR RICHARD TORIN KINDERSLEY.

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The *Queen's Advocate* (Sir *R. Phillimore*, Q.C.), and Dr. *Twiss*, Q.C., for the Petitioners:—

This Tribunal has the same power of rectifying mistakes which have been made by misprision, or otherwise, in embodying its judgment, as belongs by Common Law to Courts of Record. That has been decided after full argument and consideration in the case of *Rajundernarain Rae* v. *Bijai Govind Sing* (1). In that case all the authorities bearing on the subject were investigated, and besides the case of *Dumaresq* v. *Le Hardy* (2), which, with another case, was referred to by Lord *Brougham* in his judgment, as instances of rehearings before the Privy Council, there is also a full collection of cases extracted from the Journals of the House of Lords, where amendments, variations, and alterations, were allowed after the hearing of appeals by that House (3). Now, in all these cases the judgment or decree had been confirmed or enrolled, but in this case no such confirmation has taken place. The judgment which was pronounced by the members of this Committee is still in the form in which it was delivered—namely, the reasons which induce their Lordships to advise Her Majesty, and which the Act of Parliament (4 Will. 4, c. 41, s. 3) under which the Judicial Committee is constituted, requires to be given in open Court. Until the Order, which is framed in accordance with the judgment, has been signed and confirmed by Her Majesty in Council, there is really no final judgment; and if this Tribunal has the power of re-hearing, as the cases referred to shew it has, even when the judgment has been confirmed by the Order in Council, it must have authority to do so before such Order has been made or issued. Now, that is the state of circumstances in this case. There has been no Order in Council yet made or issued, confirming the judgment of this Tribunal In *Motz* v. *Moreau* (4), an application for the re-hearing of an appeal was, under circumstances somewhat similar to those we state in our petition, refused upon the ground only, that the documents objected to as improperly included in the transcript of the Record had not been objected to by the Appellants before the appeal, and had been referred to by them at the hearing of the appeal. The

(1) 1 Moore's P. C. Cases, 117.
(2) Ibid. 127.
(3) 1 Moore's P. C. Cases, 133 to p. 141.
(4) 13 Ibid. 398.

Judicial Committee, however, did not in that case question their own power to admit the re-hearing of an appeal, but only refused it in the circumstances of the case. Now, we say that this Court is bound by the pleadings, and must proceed *secundum allegata et probata: The North American* (1); *The Ann* (2). But the judgment pronounced by this Court in this case proceeds on grounds entirely different from those pleaded by either party. The allegation pleaded on the part of the *Singapore*, was, that the wind was north-north-east, and all the witnesses deposed to that being the true point of the wind. The Log-Book of the *Singapore* confirmed that statement. The allegation on the part of the *Hebe* was, that the wind was north-west. The *Hebe* produced no evidence in the Court below to rebut the allegation and proof given in by the *Singapore;* but at the hearing of the appeal the Log-Book of the *Hebe* was produced for the first time, and, though objected to by us, was examined by the Court, and it seems apparent, from the want of proof in the cause, that their Lordships must have drawn their conclusion from the entries in that Book, and not from the evidence in the cause. The judgment of their Lordships assumes that it was proved by the *Hebe* that the wind was north-west, and that she had so pleaded, whereas the fact is, she pleaded and proved, so far as her evidence can be relied on, that the wind was north-west by west. We apprehend, upon the authority of *Rajundernarain Rae* v. *Bijai Govind Sing* (3), as well as the undoubted power in this Committee to allow of a re-hearing before the final report and an Order in Council has been issued thereon, that, in the circumstances of this case, such re-hearing ought to be permitted.

SIR WILLIAM ERLE:—

In the case of the owners of the ship *Singapore* against the owners of the *Hebe*, this petition is for a re-hearing of the appeal.

An appeal was brought to this Court from the High Court of Admiralty, and when that appeal came before the Judicial Committee, Counsel were fully heard upon it, and after such full hearing the Judicial Committee pronounced a deliberate judgment,

(1) 12 Moore's P. C. Cases, 331. (2) 13 Moore's P. C. Cases, 198.
(3) 1 Moore's P. C. Cases, 117.

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stating the reasons for their decision, and the grounds upon which their report to Her Majesty would be founded.

We are now asked to order a re-hearing, their Lordship's report not having as yet received the approval of Her Majesty in Council; and the first question is, whether it is within the competency of this Court to make such an order?

We do not affirm that there is no competency in this Court to grant a re-hearing in any case. We find from the case of *Rajundernarain Rae* v. *Bijai Govind Sing*, reported in 1 Moore's P.C. Cases, 117, that there may be a re-hearing for the purpose of making an alteration in the form of an Order. It was done so there, after the Committee had actually decided on its report, and that report had been confirmed by the King in Council. In Lord *Brougham's* judgment in that case, a number of instances are collected, two in this Court, and others in the House of Lords, shewing that there may be a re-hearing either for the purpose above mentioned, or where the intention of the Court appears in the reasons given for their judgment, and that intention would be defeated unless an alteration were made (1).

There may be a mistake in the entry of the judgment, or the expressed intention of the Court may be defeated by defect of form in various ways, and where the Court sees clearly that, unless a re-hearing were granted, its intention declared in the report would be defeated, it is within the competency of the Court to grant it. This, however, is a Supreme Court of final appeal, and it is inconsistent with the purposes for which such a Tribunal was instituted, that in any case, at the option of the parties who are dissatisfied with the conclusion which the Court has arrived at, they should be at liberty to apply for a reconsideration of the judgment upon the point decided thereby. Although it is within the competency of the Court to grant a re-hearing, according to the authorities cited above, still it must be a very strong case indeed, and coming within the class of cases there collected, that would induce this Court so to interfere.

(1) See also *The Montreal Assurance Company* v. *M'Gillivray*, from *Canada*, in 13 Moore's P. C. Cases, p. 129, when an Order was made modifying a former Order, for the purpose of carrying into execution the intention of the Judicial Committee.

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With respect to the petition now before us, it appears to their Lordships that the grounds relied on for the Petitioner do not bring it within any principle on which such an application can be supported, and, therefore, the prayer of this petition is refused.

For the satisfaction of the parties we heard the grounds upon which the learned Counsel for the Petitioners desired to have the matter reconsidered: and although it is by no means essential to the decision we have come to, their Lordships give me authority to add, that they have considered the arguments so addressed to them, and having compared the statements in the plea of the owners of the *Hebe* with the reasons given in the judgment of the Judicial Committee, they see no reason whatever to be dissatisfied with the grounds of that judgment as stated in the report which has been already decided upon.

The petition is dismissed with costs.

Proctors for the owners of the *Singapore*: *Dyke & Stokes.*
Proctor for the owners of the *Hebe*: *C. Waddilove.*

JAMES GEORGE AND ANOTHER . . . . . APPELLANTS;
AND
THE QUEEN AND JOHN SHAW . . . . . RESPONDENTS.

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1866
Dec. 9, 10.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SIERRA LEONE.

Sierra Leone—Revenue laws, breach of—Proceedings in rem—Penalties—Security for costs—Appeal in formâ pauperis.

Decree of the Vice-Admiralty Court of *Sierra Leone* in a proceeding *in rem* for breach of the revenue laws of the Colony, condemning the goods seized, and the owners in penalties, reversed by the Judicial Committee, so far as the penalties were concerned, with costs, it appearing that though the claim of the owner of the goods was rightly rejected, because he failed to comply with the rule of the Vice-Admiralty Court requiring security for

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* *Present*:—SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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costs, yet that such rule did not apply as regarded the penalties, against which, he was entitled to be heard in the Court below without giving any such security.

Permission given to appeal *in formâ pauperis* in a case in which the Appellant was not heard in the Court below, and refused leave to appeal to Her Majesty in Council, the decision being in fact *ex parte*.

IN this case the appeal was brought from a decree of the Vice-Admiralty Court of *Sierra Leone*, pronounced in June, 1865, by which a canoe and barrel containing rum were condemned, and held forfeited to the Crown, on the ground that the barrel of rum had been illegally landed at *Borbor*, in the Colony of *Sierra Leone*, contrary to the provision of the Colonial Ordinance of the 19th of July, 1854, passed for the prevention of smuggling; and the canoe illegally employed in the removal of the rum, contrary to the same Ordinance; and the Appellant, *James George*, the owner of the rum, was condemned in a penalty of £300, being treble the value of the rum, pursuant to the provisions of the Order in Council of the 13th of February, 1849. It appeared that the barrel of rum had been cleared out of bond at *Freetown*, and entered for the *Cockborough* river, which is out of the jurisdiction of *Sierra Leone*, but having been landed, through stress of weather, as it was alleged, at *Borbor*, was there seized, with the canoe in which it was shipped, by order of the Collector of Customs.

The usual Monition was issued, but addressed only to *George*, although, as it was alleged, it was well known to the Officers of Customs that one *Shilling* was the owner of the canoe. Upon the return of the Monition, an affidavit of claim, in reply to the affidavit of seizure, was brought in, and a motion made on behalf of the Appellant, *George*, for leave to file a claim *in formâ pauperis* on the usual affidavit of poverty. By the § 27 of the Rules and Regulations of the Vice-Admiralty Courts Abroad, framed pursuant to the Statute, 2 & 3 Will. 4, c. 51, the claim and affidavit are to be prepared and given in as directed in derelict cases; but, in compliance with the Act, 6 Geo. 4, c. 114, s. 62, security must be given on behalf of the Claimant in the sum of £60 sterling, to answer costs, before any claim can be received. In pursuance of this rule the Judge of the Vice-Admiralty Court refused to receive the claim made on behalf of the Appellant, *George*, without

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security, and none such being tendered, proceeded, without hearing the parties, to condemn the canoe and barrel of rum for breach of the Customs' laws of the Colony, and further condemn the Appellant, *George*, in the penalties sued for, namely, £300. An application by *George* to be heard on the subject of the penalties was also refused. An appeal was asserted on behalf of both the Appellants, but on account of their poverty they were unable to give the security required for the purpose of appealing against the decree of the Vice-Admiralty Court.

On the 12th of February, 1866, an application was made to the Judicial Committee, on behalf of the Appellants, for leave to prosecute their appeal *in formâ pauperis*, notwithstanding that the usual security for costs had not been given by them in the Court below, when their Lordships, having heard Counsel on their behalf, gave them such leave, the Queen's Proctor being present, and not objecting thereto.

The appeal now came on for hearing.

Mr. *Edmund F. Moore*, Mr. *Rainy*, and Mr. *Pater*, for the Appellants:—

The seizure and prosecution were not justified in the circumstances of the case. The Appellants are both British subjects. *George* is a general trader, *Shilling*, the owner of the canoe, an old man living at *Sussex*, and had let and chartered his canoe at the time of the seizure to one *Kong Cresper*, who was navigating the same. It appears, from the affidavit of seizure, that the account the boat's crew of the canoe gave of themselves was, that they were bound for *Sussex*, on the way to the *Cockborough* river, that when off there the weather was dark and stormy, and the vessel, being unable to land, was driven on shore at *Borbor*, about a mile further down the coast, and there the cask of rum was removed out of her, to enable the necessary repairs to be made to her bottom. The cask of rum was stowed in a house adjoining. There was no concealment, and it was delivered up to the Officers immediately on their inquiring for it. Under such circumstances the seizure was uncalled for and illegal. The affidavit in reply to the affidavit of seizure, which the Court below refused to admit, because the usual claim had not been filed, or security for costs given, but

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which is returned with the papers in the cause; is a complete answer to the statement made in the affidavit of seizure. We apprehend that the leave given to appeal *in formâ pauperis* from the sentence of condemnation and penalties, entitles us to refer to that affidavit now, and that the Committee will give it its due weight. But there are other objections which render the judgment of the Vice-Admiralty Court untenable. In the first place, the seizure was made, as the Monition expressed, for breach of an Ordinance passed on the 16th of March, 1852, entitled "An Ordinance for Granting Duties on Customs," and of an Ordinance passed on the 19th of July, 1854, for "the prevention of smuggling;" and of an Order in Council of the 13th of February, 1849, for regulating the trade of the Colony of *Sierra Leone*, and of an Act of Parliament, the 18 & 19 Vict. c. 96, to consolidate certain Acts, and otherwise amend the laws of the Customs, whereas the decree proceeds solely on the Ordinance of the 19th of July, 1854.

Now, as regards the Order in Council of February, 1849, no penalty is imposed by that Order for anything prohibited by it to be done; and the Ordinance of the 19th of July, 1854, has been repealed by subsequent Orders in Council, and by the general provisions of the 16 & 17 Vict. c. 107, sec. 190, which declares all Colonial laws repugnant to Acts of Parliament to be absolutely void. But the chief ground of our complaint is, that we were condemned in penalties without being heard. The rule of the Vice-Admiralty Court requiring security for costs, before a Claimant can be heard, applies to proceedings *in rem*, when a seizure has been made; but there is no such rule *in personam;* the penalties are due, if at all, under the 18 & 19 Vict. c. 96, and are not prosecuted for under the Rules and Regulations of the Vice-Admiralty Court, but under the Statute. We contend, therefore, that we ought to have been heard against the penalties, and that to exclude us, as the Judge below did, because we could not give security for costs, was both irregular and illegal.

The *Queen's Advocate* (Sir *R. Phillimore*, Q.C.) and Mr. *Hannen*, for the Respondents:—

The affidavit of seizure discloses grounds amply sufficient to

justify the seizure and condemnation both of the rum and canoe. The forfeiture of the rum was rightly declared by the Court below to be under the Order in Council of the 13th of February, 1849. That Order, by the 6th section, provides: "that no goods shall be laden, or water-borne to be laden, on board any ship, or unladen from any ship in the said Colony, until due entry shall have been made of such goods, and warrant granted for the lading or unlading of the same; and the person entering any such goods shall deliver to the Collector of the Customs, or other proper Officer, a bill of the entry thereof, fairly written in words at length, containing the name of the exporter or importer, and of the ship, and of the Master, and of the place to or from which bound, and of the place within the port where the goods are to be laden or unladen, and the particulars of the quality and quantity of the goods, and the packages containing the same, and the marks and numbers on the packages, and setting forth whether such goods be the produce of the British possessions or not, and shall also deliver at the same time one or more duplicates of such bill, in which all sums and numbers may be expressed in figures, and the particulars to be contained in such bill of entry shall be written and arranged in such form and manner, and the number of such duplicates shall be such as the Collector or other principal officer shall require;" and, by the 21st section, it is ordered "that all vessels, boats, carriages, and cattle, made use of in the removal of any goods liable to forfeiture under that Order, or under any Act or Order relating to the customs, or to trade or navigation, shall be forfeited; and every person who shall assist or be otherwise concerned in the unshipping, landing, or removal, or in the harbouring of such goods, or to whose hands or possession the same shall knowingly come, shall forfeit the treble value thereof, or the penalty of £100, at the election of the Officers of the Customs; and the averment in any information or libel to be exhibited for the recovery of such penalty, that the Officer proceeding has elected to sue for the sum mentioned in the information or libel, shall be deemed sufficient proof of such election, without any other or further evidence of such fact."

Now, these are the provisions under which the proceedings were taken against the Appellants, the owners of the rum, and the canoe from which it was illegally landed. But there is another provision

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in this same Order in Council of the 13th of February, 1849, which declares all Laws repugnant to that Order to be void; it is the 46th section of the order which provides "That all laws, bye-laws, usages, or customs, at this time, or which hereafter shall be in practice, or endeavoured or intended to be in force or practice in the said Colony, which are in anywise repugnant to this Order, or to any Act of Parliament made, or hereafter to be made, in the *United Kingdom*, so far as such Act shall relate to the said Colony, are and shall be null and void to all intents and purposes whatsoever." Here then is an answer to the supposed repeal of this Order in Council by the Statute, 16 & 17 Vict. c. 107. Nor are there any grounds for arguing that such Order has been repealed by any subsequent Ordinance. The seizure, therefore, was a valid and rightful seizure, and if so, the penalties follow as of course; and the proceedings were properly taken, and were strictly in accordance with the practice of Her Majesty's Vice-Admiralty Courts, established and regulated by the rules framed under the Statute, 2 & 3 Will. 4, c. 51. The proceedings being under those rules, and the security required in making claims imperative by the Act, 6 Geo. 4, c. 114, sec. 62, the Court below had no power to relax the rule, or to admit the claim without security, and the consequent condemnation and adjudgment of penalties followed as of course; the Vice-Admiralty Court had no authority to admit a claim *in formâ pauperis*, nor will this Court establish so dangerous a precedent.

SIR WILLIAM ERLE:—

This is an appeal from a decree of the Vice-Admiralty Court of *Sierra Leone*, made in a proceeding *in rem*, in respect of the seizure of some property, viz., a canoe, and a barrel of rum, and also in a proceeding in respect of penalties alleged to have been incurred for breaches of the revenue laws. In the proceeding *in rem*, the judgment was that the property seized was forfeited, and in the same decree the Court adjudged that the penalties had been incurred, and condemned the Appellant, *George*, in the payment of those penalties. But, although both those matters are disposed of in one and the same decree, their Lordships are of opinion, that it has the effect of two separate and distinct decrees, as if pronounced in two separate and distinct suits; in one, the liability of the party

to penalties being the matter in dispute; in the other, the liability of the goods to be seized and condemned.

Now, in respect of the suit for the penalties, the Judge of the Court below, proceeding upon a rule relating to claims to goods supposed to be forfeited (as to which the party is not allowed to have his claim admitted, unless he has given security for costs), considered that that rule extended to a proceeding in which the question was the liability to penalties, and upon that ground condemned the Appellant, *George*. But inasmuch as it is contrary to the first principles of justice that a party should be liable to be condemned in penalties without having an opportunity of being heard (that being the effect of holding that it may be made a condition precedent that he shall not be heard until he has given security, which at times may be impossible); their Lordships at once recognise the validity of that as a ground of complaint against this decree.

If there had been an express enactment that, in circumstances like the present, a party should not be permitted to be heard until he had given security for costs, we should, of course, be bound to give effect to it; but no such clause in any Act of Parliament has been pointed out to us; their Lordships are, therefore, of opinion that, upon that ground, so much of the decree as imposes penalties on *George*, and condemns him in the sum of £300, should be reversed. He had a right to be heard—his right was refused; in that respect the proceeding was contrary to law, and he had a good ground of appeal.

The other portion of the decree is the judgment relating to the goods. It is a decree in a proceeding *in rem*, in respect of goods, which is in its nature different from a decree in a suit for penalties due under the revenue laws. The latter decree would be against a particular wrongdoer; but the proceeding *in rem* is a suit, in a manner, against all persons interested, and a judgment obtained in such a suit is, if valid in itself, a judgment against all the world.

Now, when goods are seized for a breach of the revenue law, the party interested in disputing the validity of the seizure has, according to the regulations made in that respect, a right to come in and have the validity of that seizure tried in the proper Court. But his right to come in and have the validity of that seizure

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tried is limited by the rules and regulations of the Vice-Admiralty Courts abroad, by one of which it is made law, that the claim and affidavit are to be prepared and given in as directed in derelict cases. But in compliance with the Act, 6 Geo. 4, c. 114, s. 62, security must be given on behalf of the Claimant, in a sum not exceeding £60 sterling, to answer the costs, before any claim can be received.

The Judge in the Court below held that the claim of the present Appellant, *George*, could not be received, because he could not give security for costs; and therefore, not having received his claim, the Court proceeded to give judgment of condemnation against the goods.

The case has been argued before us with considerable ability upon all the points.

It has been contended that this regulation had ceased to be operative, because, as was supposed, the Statute from which it emanated had been abolished. It is a regulation made by virtue of a Statute, and, being in conformity with the powers conferred by that Statute, it has the same authority as the Statute itself; and if the Statute had been repealed, the regulation would have ceased to have any operation.

But their Lordships are of opinion that the Appellant has failed to establish this proposition. The Statute under which this regulation was made appears to us to be in force and operation; the regulation, therefore, was one which still bound the learned Judge, and it was his duty to act upon it.

It appears that at the proper time the Claimant in the Court below (the Appellant, *George*, who desired to be a Claimant) came forward by his Proctor, and claimed to have a place as a suitor in Court, wherein he might dispute the validity of the seizure, and stop the proceedings for a condemnation; but, under the regulations above cited, it was objected that the claim could not be admitted unless security for costs was given. The question whether such security should be given was then gone into, and in the result the claim was not admitted, because security for costs could not be given.

Now, we are all of opinion, that at that stage of the proceedings the Judge in the Court below was warranted by the rule in coming to the conclusion he did. The claim, then, was not admitted;

and the claim not being admitted, the interference of *George*, as Claimant in the Court below, was from that time, so far as related to the proceeding *in rem*, at an end; and the decree passed which has been mentioned. The effect of the refusal to admit his claim was to exclude him from being a party to the suit so far as related to the proceeding *in rem*.

It is upon that ground our decision of this appeal is to proceed. The only party to the proceeding personally before the Court was, in point of law, not before the Court at all, because there was a condition precedent to his appearance being effective, viz., that he should give security for costs, which he had not complied with. Although he was present in Court in one sense, by his Proctor, yet, in point of law, he was not there at all; he was stopped from being there upon what we think was a good ground; and if that was a lawful stoppage, it was a ground for a decree against the party.

The Appellant having been so stopped from being heard in the Court below, might have appealed upon that ground; and, having obtained leave from this Committee to appeal *in formâ pauperis*, he has appeared before us, and contended that the ground upon which he was condemned, and refused leave to appeal, namely, because he neglected and was unable to give the requisite security for costs, was not a good ground; so far, however, as that is concerned, we are of opinion that the judgment of the Court below was right, and that this contention on the part of the Appellant has failed.

As to the subsequent proceedings in the Court below, there has been considerable argument before us. It is said that the proceedings after *George* had been so excluded were either irregular, defective, or otherwise void; and much of the argument has been upon the point as to the condemnation, the irregularity in the form of the Monition, and other defects in point of form.

As to those objections, we dispose of them upon the ground, that the suitor in the Court below could not be heard to argue or obtain judgment upon any of those grounds. We think the Appellant, *George*, having been properly excluded in the proceedings in the Court below, has no right in respect of this appeal to take up any matter which could not have been heard on his behalf against the judgment in the Court below.

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We, therefore, do not entertain any of those objections, and must not be understood to have given any opinion upon their validity or non-validity. The appeal is a matter between the parties, the Appellant, *George*, and the Respondents; and our judgment is limited to the rights vested in that Appellant, and the rights vested in him are limited in the manner already described.

Another point has been pressed upon us—the hardship of the case upon the Appellant, *George*; but it is obvious that that could have no influence upon our decision.

In the enactment of the revenue laws for the prevention of smuggling, the Legislature may very well have intended that in a proceeding *in rem*, in which every one who has any interest is summoned to come forward and make his claim, the right of every person so to come forward should be subject to some degree of restriction. It may be very reasonable that there should be security for costs, because it might be, that, unless there was a power to require such security, the revenue could not be collected. But whatever the reason may be, we must take the law as it stands, and we are clearly of opinion that the law as it stands authorized the Judge in the Court below to pronounce the judgment he did: that unless the Appellant, *George*, gave security for the costs, he ought to be excluded; and our judgment is that his claim, not being admitted in the Court below, the objections made to the subsequent proceedings cannot be maintained on this appeal.

The result is, that their Lordships will recommend to Her Majesty to dismiss the appeal, so far as regards the condemnation, that is, the judgment *in rem*, without prejudice, however, to any question in any other proceeding affecting the validity of such condemnation, as to which their Lordships, for the reasons already given, pronounce no opinion. And their Lordships will humbly advise Her Majesty to reverse that part of the decree which condemns the Appellant, *George*, in the penalty of £300, with the costs of this appeal, and further to remit the cause.

Solicitors for the Appellants: Messrs. *Hampton & Burgin.*

Proctor for the Respondent: *F. H. Dyke*, Her Majesty's Procurator-General.

In re HERBERT'S PATENT.

J. C.*
1867
Feb. 1, 2.

Letters Patent—Assignment of moiety—Petition by Patentee and Assignees for extension of term—Death of Patentee before hearing—Non-user a presumption against utility—Prolongation to Assignees in trust as to Patentee's moiety, for his Executrix and Residuary legatee.

Petition for prolongation of term of Letters Patent by Patentee, together with the Assignees of a moiety of the Patent. After the presentation of the petition, and before the hearing, the Patentee died, having by his Will appointed his Widow Executrix and Residuary legatee. Extension granted to the Assignees on condition that they held the moiety of the Patent in trust for the Widow of the Patentee.

If an invention has not been brought into practical use during the term of the Letters Patent, it raises a strong, though not conclusive, presumption against its utility; and unless there are circumstances to rebut such presumption, an extension of the term of Letters Patent will not be granted.

The fact of a Patent of a valuable nature, but having a limited market, not having been so generally used as to remunerate the Inventor, is sufficient to remove the presumption against the utility of the invention.

THE Petitioners in this case were the Patentee, *George Herbert*, and Messrs. *Newall & Co.*, Assignees of a moiety of the Patent rights.

The petition stated that *Herbert*, previously to the grant of the Letters Patent, had, after considerable personal application and cost, invented certain "Improvements in constructing and mooring light-vessels, buoys, and other similar floating bodies," for which he obtained Letters Patent, dated the 6th of April, 1853, which invention was of great utility and great public benefit. That the invention consisted principally in the constructing light-vessels, and also buoys and such like floating bodies, with bottoms of a concave or conical shape formed in such manner that mooring chains might be attached to them at or near the apex of the cone-shaped bottom, and at or as near as may be to their lines of floatation, and, where convenient, at or as near as may be to their centres of gravity. That the invention had introduced very great improvements in buoys which were previously in use, and the use of buoys, made according to the invention, had been attended with results of the utmost importance. The advantages which

* *Present*:—SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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buoys made according to the invention had over buoys which were previously in use, were that, from their peculiar construction, they preserved an upright position in all circumstances, and allowed of the mooring chains being so attached to them that they might be moored in exposed positions, where no other buoys which would afford equally conspicuous and visible sea marks could possibly be secured. That light-vessels, or floating light-houses, made according to the invention, had also great advantages over any other kind of light-vessels; they could be made much more steady, and exhibit lights of a higher order than any other, and could be securely moored in any required position, and even in the open ocean; which advantages were most important, and, when properly recognised by Official authorities, would revolutionise the existing system of Light-houses and vessels, and introduce a far safer and better system of lighting the approaches to our coasts, which would confer great advantages as well on this country as on the Maritime world at large. That the advantages arising from the manufacture and mooring of the Petitioner's buoys were being practically tested by Official authorities; the buoys being used by the *Trinity Board* where they required buoys to be moored in very exposed positions, and such buoys had been and were extensively used by the *Mersey Dock and Harbour Board*, by the Indian Government, and by the Governments of *France*, *Spain*, *Russia*, and *Holland*, by the *African Company* for the purpose of buoying the entrance to the *River Bonny*, and by others. That the Petitioner, *Herbert*, had sold one moiety of the Letters Patent to the other Petitioners, Messrs. *Newall & Co.*, for the sum of £1,000, and that the Petitioners had a reasonable expectation that if the term of the Letters Patent was prolonged, the Patentee would eventually receive remuneration for his outlay, and for the time and attention he had devoted to the introduction and working of the invention, and the other Petitioners, Messrs. *Newall & Co.*, would also be remunerated for the assistance and co-operation which they were prepared to give in bringing the invention into general use; that the payment of the sum of £1,000 to the Petitioner, *Herbert*, only partially covered the expenses which he had previously incurred, and that as the Petitioners had not as yet received any adequate remuneration, and the merits of the invention had only recently become recog-

nised by Official boards, the Petitioners prayed for a prolongation of the Letters Patent for an additional term of fourteen years.

After the petition was presented, the Patentee, *Herbert*, died, having by his Will appointed his Widow Executrix and Residuary legatee, whereby she became the sole person interested in the undisposed moiety of her late husband's Patent.

The fact of the death of the Patentee having been stated, and probate of the Will produced, their Lordships permitted the hearing to proceed without requiring a supplemental petition at that stage of the proceedings; but directed, in case a prolongation should be granted, that sufficient proofs should be afforded to enable the recital of the death and bequest to be inserted in the preamble of the Letters Patent.

Evidence of the meritorious nature of the invention was given, and of the efforts made to bring it into general use, and of its adoption by the *Trinity Board*. It appeared from the accounts, that, with the exception of the sum received for sale of the moiety, the Patentee had derived no benefit from the Patent in consequence of the limited demand for the invention.

Mr. *Grove*, Q.C., and Mr. *Aston*, for the Widow and Assignees:—

No similar case has occurred in which a Petitioner for a prolongation of the term of his Letters Patent has died pending the hearing. Here the Assignees of the moiety of the Patent are strictly the only Petitioners before the Court. The Widow of the original Patentee is, however, willing that, if an extension of the term be granted, it should be exclusively to the Assignees, as she has perfect confidence in them; or that there should be a declaration that they hold a moiety in trust for her.

With regard to the merits, it is evident that from the peculiar nature of the invention it must have a limited market, and great prejudice, and distrust, has existed against the Patent, which prevented it getting into general use, so that, practically, no profit has as yet been made by the Patentee. The accounts of the Licensees, as required by the rule laid down in *Trotman's Patent* (1), and *Mallet's Patent* (2), though shewing the sum of £400 as paid for royalties, is, in reality, a mere trade profit.

(1) Law Rep. 1 P. C. 118. (2) Law Rep. 1 P. C. 308.

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Mr. *Hannen*, for the Crown:—

Admitted the merit and utility of the invention, and, allowing the accounts to be correct, left it to their Lordships to determine whether there should be any, and what, prolongation.

SIR WILLIAM ERLE:—

In this case their Lordships will report to Her Majesty that there should be some extension of term granted to the proprietors of this Patent. When the case was first opened some of their Lordships were of opinion that it would fall within the principle of the case (1) which had been decided just previously, namely, that if a patent invention has been brought fully before the attention of those who are interested in its use and application, and that for fourteen years the Patentee has had the exclusive right to the Patent, at the end of that term (the privilege being somewhat in the nature of a contract with the public), they should have the power to use the Patent. An extension of the term, in fact, being the taking away from the public that which is in the nature of a contract between the Patentee and the public. But the full investigation which the present case has undergone has led their Lordships to the conclusion that there are material differences between this case and the one just decided, which prevent the application of the same principle.

This is an invention which has a very limited market; it is only wanted where man has to contend with the wind, and the waves and the tides, in a floating position. It has a very limited application with respect to one part of the invention which has been most brought to our attention by the evidence to-day. I mean its application to floating light-ships, where the use of this invention, as contemplated by the Patentee, namely, affording a safe guide to

(1) His Lordship alluded to *Clifford's Patent* for "Improvements in apparatus for lowering Boats evenly, and preventing them filling with water." There was no point in that case requiring a report. An extension of the term was refused, on the grounds stated by his Lordship. See also *Simister's Patent* (4 Moore's P. C. Cases, 164); *Wright's Patent* (1 Web. Pat. Cases, 576), where it was held, that the fact of an invention, when known, not getting into general use is, unless explained away, an objection to the extension of the term.

navigators in the night, by carrying lights at fixed places at sea, though of easy, must be of careful trial, depending on experiment and experience before it would be found capable of answering the purpose which the Patentee contemplated, and for which witnesses of great experience and knowledge on the subject have told us they considered it is applicable.

Their Lordships have instructed me to say, that they are of the same opinion which this Committee has expressed in former cases, namely, that an extension should be refused where an invention had never, during the space of the fourteen years for which it had been patented, been brought into practical use. Such want of user raises a strong presumption against the utility of the invention; not that such non-user creates a definite rule, but a presumption so strong that, unless there are circumstances to rebut it, if the invention has never been brought into practical use during the space of fourteen years, then we think no extension ought to be granted. Now, this invention has not been generally, or even much used, and there is room, therefore, for a like presumption; but, giving full attention to the evidence adduced, their Lordships are of opinion that that presumption is rebutted by the circumstances of the limited market and demand for such an invention; and by the difficulty of getting experiments made at night with floating lights. Several of the witnesses, however, who have been examined, Admirals of Her Majesty's Navy, and others accustomed to the sea, are confidently of opinion that the principle of the invention can be applied with safety. Therefore, however cautious we should be to form any opinion ourselves upon its practicability, we cannot but think that that which is calculated to resist successfully the power of the winds and waves during the daytime, when the experiments have hitherto been made, will be equally useful for the purpose when applied to light-ships by night, for which it is contemplated. Although the application of the Patent may not come within the province either of those who approve the original grant or recommend the extension, yet if the Patent is extended, as the Patentee will have a right to it for any purpose whatever, it is impossible not to see that this invention may be brought into very important and useful application in the way suggested, namely, as night guards to shipping in narrow entrances to our Channels, many of

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them thronged with commercial shipping; and no one who is at conversant with the litigation arising out of accidents from collisions in those Channels, can fail to appreciate the advantage which such an invention as this may prove to be, to the shipping interest.

Under these circumstances, their Lordships will recommend to Her Majesty that there should be an extension of the term of the Letters Patent, and, considering the difficulty there is in getting experiments made, and so bringing the test of experiment to bear upon the invention, they are of opinion that the extension should be granted for a period of five years.

It is, however, important that the legal advisers of Mrs. *Herbert* and the other parties concerned, should come to some arrangement upon the subject, so that her interest should be protected, and the form of our recommendation be adapted to the arrangement made between the parties. There should be legal security for the owners of the one moiety of this Patent, as against the owners of the other moiety.

Mr. *Grove*:—There is no objection on either side to your Lordships granting an extension of the Patent to the Assignees, making it a condition that the Assignees hold a moiety for the representative of the Patentee; that will be sufficient in equity.

Solicitors for the Petitioner: *Wilson, Bristows, & Carpmael.*
Solicitors for the Treasury for the Crown.

JAMES WILSON AND WIFE, AND WILLIAM COLE . . . . . } APPELLANTS;

AND

THE QUEEN AND JOHN SHAW . . . . . RESPONDENTS.

J. C.*
1866
Dec. 10, 11.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SIERRA LEONE.

Seizure of goods for breach of Customs Ordinances—Restoration without damages or costs—Probable cause for seizure certified by Judge—Practice—Costs—Appeal.

Appeal from a decree of the Vice-Admiralty Court of *Sierra Leone*, restoring property seized for breach of the Customs Laws, but without damages or costs, the Judge below being of opinion, that there was probable cause for the seizure; dismissed by the Judicial Committee with costs: their Lordships being of opinion: (1) that as regarded one of the Appellants, who proved not to be the owner of the goods, though so proceeded against, the appeal was for costs alone, and, therefore, could not be entertained; and (2) that it appearing from the evidence that there was probable cause for the seizure, the Judge of the Vice-Admiralty Court was justified in refusing to decree damages and costs to the other Appellants, the owners of the goods seized.

The case of *Xenos* v. *Aldersley* (1) referred to, and the criterion there applied in considering whether there was probable cause for seizure, recognised and approved.

THIS was an appeal from a decree of the Deputy Judge of the Vice-Admiralty Court at *Sierra Leone*, made on the 8th of August, 1865, whereby certain goods, consisting of two barrels of rum, which had been seized by the Respondent, *Shaw*, the acting Collector of Customs at *Sierra Leone*, for an alleged breach of the Customs Laws, were ordered to be restored, as not liable to forfeiture and condemnation, but there appearing to the Deputy Judge (Mr. *George W. Nicol*) probable cause for the seizure, he refused to condemn the Seizor in damages or costs.

The two barrels of rum were the property of the Appellants, the *Wilsons*, having been purchased by *Sarah Wilson*, who traded on her own account, from the Appellant, *Cole*, in whose name they

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, THE LORD JUSTICE CAIRNS, and SIR RICHARD TORIN KINDERSLEY.

(1) 12 Moore's P. C. Cases, 359.

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were bonded in the Customs' warehouse at *Freetown*, in the Colony.

The seizure was made on account of the temporary removal of the barrels from the public wharf (the Colonial Statute prohibiting such removal without the authority of the Customs), where they were left to be shipped in a canoe, then lying at anchor outside the harbour, and to which place they had been restored, the removal having, as it turned out, been made without the authority or knowledge of the owners or the Appellant, *Cole*.

The usual proceedings having been taken in the Vice-Admiralty Court, an affidavit of claim was brought in on behalf of the Appellants, the *Wilsons*, from which it appeared that the Appellant, *Cole*, had no interest in the goods seized, having sold them to *Sarah Wilson*, in whose custody or possession they in fact were at the time of the seizure. The Deputy Judge, however, thought that the evidence was conflicting, and declined deciding the case on the affidavit of claim, but, in accordance with the practice of the Vice-Admiralty Courts, ordered a Libel to be brought in by the Seizor. A Libel was accordingly brought in by the Seizor against *Cole* alone, the *Wilsons*, the real owners of the property, not being named. The cause was proceeded with by plea and proof, evidence being produced and witnesses examined, when the Deputy Judge, at the hearing, dismissed the Appellant, *Cole*, from the cause, and, by an interlocutory decree, pronounced that the two barrels containing rum were not liable to forfeiture and condemnation, as prayed; but there appearing to him to have been probable cause for the seizure thereof, he refused to condemn the Seizor, *Shaw*, in costs.

The Appellants, *Wilson* and wife, and *Cole*, asserted an appeal from this decree. They appealed from so much of the decree of the Court below as refused damages and costs to the Appellants, and prayed that that portion of the decree might be reversed, and that the damages and costs sustained by them in consequence of the vexatious and illegal seizure and detention of the property in question, and of the proceedings taken against them, might be pronounced for, and the Respondent, *Shaw*, the Seizor, condemned in all losses, damages, and costs arising from such seizure and prosecution.

Mr. *Edmund F. Moore*, Mr. *Rainy*, and Mr. *Pater*, for the Appellants.

The *Queen's Advocate* (Sir *R. Phillimore*, Q.C.) and Mr. *Hannen*, for the Respondents.

It was contended, on behalf of the Appellants, that the seizure of the two barrels of rum by the Respondent, *Shaw*, was vexatious, and without probable cause; and that the decree of the Vice-Admiralty Court was not only contrary to the evidence, but also erroneous, inasmuch as both the Seizor and the Deputy Judge had dealt with the Appellant, *Cole*, alone, upon the assumption that he was the owner of the property seized, and had ignored altogether the other Appellants, the *Wilsons*, who had appeared in the suit as Claimants of the two barrels of rum, and, in their affidavit of claim, had asked for damages and costs for the wrongful seizure thereof, the property being proved and admitted to be solely theirs. They insisted also that the expenses and losses had been very much increased by reason of the Deputy Judge having directed proceedings to be taken by Libel and Plea, there being abundant proof from the affidavits in reply to the affidavit of seizure, of the Appellants', the *Wilsons'*, right to the property seized. As to the allowance of an appeal for refusing to give damages and costs on restoration, they cited *The Ostsee* (1).

The Respondents, on the other hand, contended, first, that the evidence was sufficiently conflicting to justify the Judge in the Court below directing the cause to be proceeded with by Plea and proof; and, secondly, that there was probable cause for the seizure, and that the Judge was, therefore, justified in refusing damages or costs, under the 312th section of the Statute, 16 & 17 Vict. c. 107, which provides, that, in suits on Seizure, the Judge may certify that there was probable cause, and they insisted that there was no authority in the Vice-Admiralty Court to award damages to the Appellants. They, moreover, maintained that the appeal on the part of *Cole* was an appeal solely for costs, the admittance of which was contrary to the uniform practice of this Court, and, therefore, ought to be dismissed: *Attenborough* v. *Kemp* (2); *Richards* v. *Birley* (3).

(1) 9 Moore's P. C. Cases, 150. (2) 14 Moore's P. C. Cases, 351.
(3) 2 Moore's P. C. Cases (N.S.) 96.

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LORD JUSTICE CAIRNS:—

Their Lordships in this case have heard a number of questions argued at much greater length than either their importance or difficulty would have justified; but they have done so out of tenderness to the Appellants, lest any point deserving of notice should be left without argument.

With regard to one of the Appellants, *Cole*, it was attempted to maintain his right to appeal, on the ground that, although he had been absolved from penalties in the Court below, he had not been awarded the costs of the proceeding against him. Their Lordships are of opinion that, with regard to the Appellant, *Cole*, the appeal is strictly and simply one for costs, under circumstances in which their Lordships have at all times laid down as a rule, that an appeal for costs could not be entertained.

With regard to the *Wilsons*, the question which they have raised is this,—that although the property which they claim to belong to them was returned, no damages were awarded to them for the seizure and detention of their property.

That question, again, has given rise to a number of other questions, which we have to dispose of. In the first place, it was contended, on behalf of the Crown, that the *Wilsons* were limited in their argument by the nature of the appeal asserted on the face of the proceedings below; the proceedings below stating that the appeal asserted was merely an appeal on the ground of costs. It was argued also, on behalf of the Crown, that if that were not so, at all events, the citation which proceeded from this Tribunal was a citation which indicated an appeal on the subject of costs, and of costs alone.

Their Lordships, however, think that the appeal having been asserted in the Court below, and proper security having been given, it would not be right to limit the appeal to the precise matter of appeal which appears to have been stated on the minutes of the proceedings below; but that those who had asserted the appeal, and had given security, are entitled to be heard upon every question which could properly be alleged before their Lordships, by way of appeal. And with regard to the citation, their Lordships are of opinion that the citation does nothing more than recite the decree which had been made in the Colony, and that it

in no way limits any right of appeal which, otherwise, the Appellants would have been entitled to.

The objection next argued on behalf of the Respondents was, that the Judge of the Vice-Admiralty Court of *Sierra Leone* having made the statement on the Record, that there had been probable cause and sufficient ground for the seizure, the Statute, 16 & 107 Vict. c. 17, sec. 312, rendered that statement of the Judge a bar to any claim for damages, either in these or other proceedings. Their Lordships, however, are of opinion that, assuming that Statute to apply to the Colony of *Sierra Leone* (a point upon which their Lordships do not offer any opinion), the section contemplates an indorsement upon the Record in some proceeding in which the verdict of a jury has been rendered, for the purpose of being used in other proceedings, and not, as in this case, in the proceeding itself.

It was then contended, on behalf of the Crown, that there could not have been in the Vice-Admiralty Court any jurisdiction to award damages to the *Wilsons* in this case. Their Lordships, in the view they take of the remainder of the case, do not think it necessary to do more than to take notice that this question has been argued before them, and to say that the damages appear in other cases to have been awarded by a Court similarly situated to the Vice-Admiralty Court of *Sierra Leone*, and their Lordships, therefore, do not entertain any doubt that there would have been a want of jurisdiction to award damages if it had been proper to do so.

The remaining question in the case, and the one which has occupied the greatest length of time in discussion, is the question of fact whether there was or was not probable cause to warrant the Collector in seizing these goods.

Now, after looking at the minutes of the proceedings, their Lordships have considerable doubt whether the right to damages on the ground of the non-existence of probable cause was contended for on behalf of the *Wilsons* in the Court below; but here, again, they give the Appellants the benefit of the doubt, and assume that the point was made in their favour in that Court. But their Lordships propose to adhere to the rule which was laid down at this Board in the case of *Xenos* v. *Aldersley* (*The Evangelismos*) (1),

(1) 12 Moore's P. C. Cases, 359.

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with reference to the criterion to be applied in considering whether there has or has not been probable cause for seizure. It is true that was the case of the seizure of a ship upon an allegation of a damage sustained by a collision; but the principle which is there laid down is, in their Lordships' opinion, applicable to the case now before them. Their Lordships there said, we think:—"There is no reason for distinguishing this case, or giving damages. Undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia*, which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at Common Law damages may be obtained. In the Court of Admiralty the proceedings are, however, more convenient, because in the action in which the main question is disposed of, damages may be awarded: The real question in that case, following the principles laid down with regard to actions of this description, comes to this—is there, or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?"

Now, applying this rule, and simply dealing with the evidence which is given by two of the witnesses of the Appellants themselves, their Lordships are of opinion, that the evidence given by those witnesses discloses a state of facts which not only affords probable cause for the Collector seizing the goods in this case, but which would, in their Lordships' opinion, have made it a dereliction of duty on the part of the Collector if he had refrained from seizing the goods, until explanations were offered such as have been deemed satisfactory by the Court in this case. Their Lordships, therefore, upon this simple ground, will recommend to Her Majesty to dismiss the present appeal, and to dismiss it with costs.

Solicitors for the Appellants: *Hampton & Burgin.*

Proctor for the Respondents: *F. H. Dyke*, Her Majesty's Procurator-General.

BARTHOLOMEW CONRAD AUGUSTUS GUGY . . . . . } APPELLANT;

AND

WILLIAM BROWN . . . . . RESPONDENT.

J. C.*
1866
Dec. 14, 15.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Lower Canada—Old French Law—Judgment "avec dépens"—Costs—Taxation—Attorney acting in his own cause, right of, to Fees.

By the old French Law prevailing in *Lower Canada*, an Attorney acting as such in his own cause, and on his own behalf, is entitled under a judgment in his favour "*avec dépens*," upon taxation of costs, to the same fees as are allowed by the tariff to Attorneys in all ordinary cases. So *held* by the Judicial Committee on appeal, overruling the judgment of the Court of Queen's Bench (on the appeal side) in *Lower Canada*, and the authorities relied on by that Court for a contrary rule.

THIS was an appeal from a decree of the Court of Queen's Bench for *Lower Canada*, on the appeal side, dated the 19th of December, 1862; which reversed a judgment of the Superior Court of the District of *Quebec*, of the 2nd of November, 1861, pronounced by a single Judge on a motion made by the Appellant to review the Prothonotary's taxation of a Bill of costs under a prior judgment of that Court awarding him costs generally, "*avec dépens*."

The question raised and adjudicated upon in the Court below was, whether the Appellant, who was an Advocate and Attorney of the Courts, having been a party litigant, and having appeared personally in Court, and conducted his own case, was entitled, under the last-mentioned judgment, with reference to the practice and procedure of the Courts in *Lower Canada*, to have allowed, on the taxation of costs, against the opposite party (the Respondent) certain fees, charged by him in respect of services rendered to himself, as such litigant, in his professional character of Attorney. The Taxing Officer disallowed those fees; but the Judge of the Superior Court, to whom the matter was referred by way of

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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appeal, allowed them. The Court of Queen's Bench, on the appeal of the Respondent against that Order, reversed the same, adopting the view taken by the Taxing Officer, and affirmed his Order made on taxation. It was against that decree that the present appeal was instituted.

The facts were not in dispute; and those necessary for the consideration of the question were as follows:—

On the 5th of January, 1859, the Respondent, by a judgment of the Superior Court at *Quebec*, recovered against the Appellant, in an action of debt, the sum of £166 currency, with interest and costs. On the 24th of February, 1859, a writ of *Fieri facias* was issued out of that Court against the goods and chattels of the Appellant, addressed to the Sheriff of the district of *Quebec*, and authorizing him to levy a balance under the judgment, remaining unpaid.

The return of the Sheriff indorsed on the writ shewed that the goods and chattels were seized by him, under the writ, but that he had been prevented selling the same by reason of a proceeding taken by the Appellant, described as his "*opposition afin d'annuller.*" This opposition was dismissed with costs.

A writ of *venditioni exponas* was then issued to the Sheriff to sell the goods and chattels so seized. The Sheriff announced the sale, but afterwards made a return to the Court, stating that he was prevented from proceeding to a sale by reason of another "*opposition afin d'annuller,*" brought by the Appellant.

On the 4th of September, 1861, the hearing of the last mentioned opposition took place before the Judge of the Superior Court (Mr. Justice *Taschereau*), when he delivered judgment, wherein he stated as follows:—"*Considérant que le Demandeur en ne donnant pas crédit au dit Opposant du paiement de la dite somme de vingt-neuf louis quinze chelins a agi contrairement à ce qu'il devait faire, la Cour maintient la dite opposition afin d'annuller du dit Opposant, avec dépens contre le Demandeur, &c. &c.*"

Under this judgment, the Bill of costs in question was submitted to the Prothonotary and Taxing Officer by the Appellant, who, on the 2nd of October, 1861, recorded the following minute and order in taxation of the Bill:—"The Opposant, *Bartholomew C. A. Gugy*, Esq., having presented his Bill of costs upon the foregoing judgment for taxation, he being the Attorney exercising that office for him-

self only, wherein he claims to be allowed the sum of £10 as and for Attorney's fees in the said cause; and also another fee of £1. 10*s.* upon the defence *en droit* therein adverted to, to both of which the Plaintiff, by his Attorney, objecting, considering the ruling of Her Majesty's Court of appeals, bearing date the 7th of May, 1861. No. 873. *Gugy*, Appellant, and *Ferguson*, Respondent (1), as follows:—that is to say, 'With costs to the Appellant in this behalf as well in the Court below as in the Court here, in the taxing whereof no Attorney's or other fees upon any of the proceedings on hearings had in either Court shall be allowed to the Appellant by reason of his being a practising Attorney, and of his having personally conducted his own defence.' It is considered and ordered that the sums respectively of £1. 10*s.* and £10 be, and they are hereby severally disallowed, the said Opposant being a practising Attorney, and having personally conducted the proceedings in the said cause to which the said Bill of costs relates; therefore, the rest and residue of the said Bill of costs is hereby taxed and allowed at the sum of three pounds fifteen shillings and nine-pence currency (£3. 15*s.* 9*d.*), and no more." The two items thus disallowed were described in the Bill of costs as fees on *defense en droit*, £1. 10*s.*; Attorney's fee, £10.

The Appellant appealed from this Order to the Superior Court at *Quebec*, and prayed that the above taxation might be annulled, and the Prothonotary's decision reversed, and that the fees allowed by the tariff and rules of practice of the Court be allowed to the Appellant, upon the judgment in his favour.

On the 2nd of November, 1861, the Judge of the Superior Court at *Quebec* (Mr. Justice *Taschereau*) delivered judgment in the appeal, and therein stated as follows (2):—"*Considérant que la taxe faite par le Protonotaire du dit mémoire de frais est erronée et contraire au tariff de cette Cour, en ce que le dit Protonotaire a retranché du dit mémoire de frais les honoraires dûs au dit Opposant sur le principe que le dit Opposant, qui est un Avocat et Procureur pratiquant devant cette Cour, a lui-même signé son opposition et l'a lui-même conduite à jugement; considérant qu'en loi un Avocat a le droit de conduire lui-même sa défense devant aucun Tribunal et d'exiger les honoraires qui sont le juste salaire de ses troubles et vacations, et qu'en*

(1) 11 Low. Can. Reps. 420. (2) Ibid. 485.

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cela la position de son adversaire ne reçoit aucun préjudice, maintient la dite motion, et ordonne qu'il soit et il est par ces présents accordé au dit Opposant une somme de onze louis dix chelins pour ses honoraires sur la conduite de son opposition, en sus des autres items formant son mémoire de frais, mais sans frais sur la dite motion."

The Respondent appealed from this decision to the appeal side of the Court of Queen's Bench for *Lower Canada*.

The hearing of the appeal took place before the Justices *Aylwin*, *Meredith*, *Mondelet*, *Berthelot*, and *Badgley*, and on the 19th of December, 1862, the judgment of the majority (Mr. Justice *Mondelet* dissenting) was delivered, to the effect that, as by law and practice no fees could be allowed to Counsel and Attorneys in cases in which they act as Attorneys of Record in the cause, there was error in the judgment of the Superior Court at *Quebec* of the 2nd of November, 1861, by which the Appellant had been allowed costs in his favour, and it was ordered and decreed that the judgment be reversed, set aside, and annulled; and it was also adjudged that the Bill of costs, by which the sum of £11. 10*s.* currency was allowed, be rejected, and that the taxation of the Prothonotary be affirmed, with costs to be borne by the Appellant, and the Record was then directed to be remitted, in order that what law and justice might require under that decree might be done in the premises. The judgment concluded by stating that, on the motion of the Attorneys of the Respondent the Court granted them "*distraction de dépens* in this cause."

The Appellant applied for, and obtained leave to appeal to Her Majesty in Council from this judgment.

The Appellant, Mr. *Gugy*, appeared in person:—

First. The appeal in this case was improperly entertained by the Provincial Court of Appeal, the appellate side of the Court of Queen's Bench. That Court has no jurisdiction to hear an appeal from the Superior Court when the amount in controversy is less than £20. The Canadian Statute (Consolidated Statutes *Lower Canada*, ch. 77, sec. 23, p. 648-9) enacts: "That an appeal shall lie to the Court of Queen's Bench as a Court of Appeal and Error, from any judgment rendered by the Superior Court for *Lower Canada*, in any district, in all cases where the matter in dispute

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(1) 11 Low. Can. Reps. 409.

J. C. 1866 GUGY v. BROWN.

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one of taxation, and not against the judgment granting costs, and that the Appellant's claim to particular fees could not arise on such an appeal, a ground of objection which I submit ought to have been held fatal to the appeal below. Assuming, however, that the question regarding these items of costs is fit for decision here, the question is, first, what law is applicable to the case; and, secondly, how does such law apply. With regard to the first point, there can be no doubt that the old French law is the law which must govern the decision, for though there are many Acts among the Canadian Statutes relating to costs, and regulating the tariffs thereon, there is no Act which has prohibited an Attorney from receiving fees for conducting his own case. According to the old law of *France*, Attorneys could at all times conduct their own cases: *Pigeau, Procédure Civile du Châtelet; De l'Instruction*, liv. ii. part ii. [Ed. *Paris*, 1779]. This is a work of the highest authority on practice. *Le Parfait Procureur par Pierre Ne el Duval*, Tom. ii. par. ii. [Ed. *Lyons*, 1705]: another authority of equal value. In *France*, the Judges formerly assumed so much latitude in dealing with costs, and so much partiality in giving or withholding them, that many Edicts and *Ordonnances* were promulgated for the special guidance of the Courts on the question of costs: *Ordonnance of* 1667, *Tit.* 31, art. 1, "*Des dépens*," which but re-enacted a previous and very old rule: *La pratique judiciare. &c., de M. Imbrit, par M. Pierre Guenoir et M. Bernard Autonme.* Tit. "*De la Condamnation des dépens, taxe liquidation d'icenx*," p. 334 [Ed. *Paris*, 1623]. There are other Ordinances of earlier date to the same effect, which are collected and commented on in the same work, as those of *Charles* IV., 1324 and *Charles* VIII., 1493. Contrary to the rule that nothing could be granted which had not been claimed at the hands of the Court, it was held that the unsuccessful litigant should be condemned to pay costs, notwithstanding the omission of a conclusion to that effect. A judgment without a condemnation to pay costs was deemed so iniquitous, that the Judge who pronounced it was himself held liable for the amount: *Conférence de Bornier*, Tit. 31, "*Des dépens*" [Ed. 1729]; *Le Nouvreau practicien Français par Rémi Gastier*, Tit. "*De la taxe dépens*," p. 402 [Ed. *Paris*, 1665]; *La Jurisprudence du Code Justinian, conférée avec les Ordonnances Royaux, les Contumes de France,*

et les Décisions des Cours Souveraines, &c., par M. *Claude de Ferrier*, Liv. vii. tom. 2, p. 193 [Ed. *Paris*, 1684]; *Serpillon Commentaire sur l'Ordonnance de* 1667, tit. 31, "*Des Dépens*," p. 563 [Ed. 1776]. Such being the old law of *France*, the question is, has the Statute law of *Lower Canada* introduced or enacted any alteration. Now, I contend, that there are no statutory provisions in the law of *Lower Canada* which prohibit Attorneys from conducting their own causes, nor is there any tariff of fees which excludes fees payable and allowed to Attorneys, even in cases in which they act as Attorneys of Record in the cause on their own behalf: Consolidated Statutes, ch. 83, p. 752; authorizing Judges to make a Tariff of fees. This appears from the cases extracted from the Records of the Courts, and are unimpeachable; there are instances, ranging from the year 1839 to 1857, of Attorneys being allowed and receiving fees as such, in cases in which they personally conducted their own causes, and it was not until the year 1861, in a case in which I was interested, that for the first time it was made part of the Order for costs that my fees should not be allowed, by reason of my being a practising Attorney, and of my having personally conducted my own defence: *Brown* v. *Gugy* (1). Upon the authority of that Order the Taxing Officer refused to allow my fees. In the judgment in that case, Mr. Justice *Duval* relied chiefly on the authority of *Jousse*, citing the 2nd vol. of his *Justice Civile*, p. 460, No. 38. That passage, however, applies not to the Attorney, but to the *Avocat*, who, by the old law of *France*, could not recover his fees, though he might damages, by action. But the law is inapplicable, if an *Avocat* is a *Procureur*, as in *Lower Canada*, where every Attorney is also an Advocate. In the case of *Gugy* v. *Fergusson* (2), which was before the full Court on the appeal side of the Court of Queen's Bench, the law, as well as the reason of the case, is so ably stated by Mr. Justice *Meredith*, that I crave leave to use his judgment as my argument; he says (3), "As to the question raised in this case, and in several others, whether an Attorney conducting his own case can recover fees in the same way as if he were acting for another person, I must say that it has presented some difficulty to my mind. The tariff under our Statute, as has been remarked, is made for Officers of

(1) 11 Low. Can. Reps. 408. (2) Ibid. 409. (3) Ibid. 417.

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the Court; it may, therefore, be said, that if an individual, not an Attorney, were to conduct his own case, he could not be awarded the fees contained in the tariff for Attorneys; and it is further argued that a man cannot act as an Attorney for himself, because, in such a case, no contract of agency can intervene. Still, it is undeniable that the Defendant is an Attorney, and that he has performed certain services in this cause, for which, when performed by an Attorney, the tariff allows certain fees, and I really cannot see anything in law, or in reason, to prevent the Defendant, an Attorney, from receiving the fees usually incident to the services which he so performed. If the objection urged against the Appellant be well founded, it ought to have as much weight in *England* as it has here; and yet we know it would not be maintained there. The rule on this subject is, 'that where an Attorney is a party to an action, and obtains a judgment in his favour, he is entitled to the same costs as if he had conducted the action as Attorney for some other person, and not merely to the costs which another person suing or defending, in person, would be entitled to: *Archbold's* Prac. vol. i. p. 48; and in support of this opinion *Archbold* then cites several cases. The French authorities are divided on the point. *Serpillon*, p. 565, declares that even a private individual gaining his own cause is entitled to full costs; whereas *Jousse* is of a contrary opinion. The practice in this country may, I think, be said to be in favour of the Attorney. The Prothonotary of the Superior Court, an Officer of great experience, informs us that in the time of Chief Justice *Sewell* fees in such cases were not allowed, but in the time of Sir *James Stuart* the practice was to allow them; that the last-mentioned practice has continued ever since;' and he gives a note of four cases (1), in which Attorneys appearing in their own cases have been allowed their fees. Under these circumstances, I think it doubtful whether any change in the practice as to this matter ought to be made; and that if a change was determined on, it ought to be made so as not to affect pending cases. Indeed, it would seem to me hardly just, that an Attorney

(1) No. 1417 of 1857, *Pentland* and *Smith*; No. 1959, *Stuart* and *Miller*; No. 2145, *Pentland* and *Bell*, 1859; No. 2147, *Pentland* and *Bell*, 1859; to which may be added Circuit Court, No. 1025, 28 June, 1851, *Cannon* v. *Hemley*, also cited No. 2133 of 1856, *Allen* and *Gilbride*.

having conducted his own case to the close without any objection on the part of his antagonist, or of the Court, should be informed, at the last moment, that he could not legally do that which he actually had done, with success, in the presence of the Court. I, therefore, think the Appellant ought to have his costs." It is true that the majority of the Judges in that case were of a different opinion, and the result was there, as here, that the Attorney was refused his costs. But the reasoning of the learned Judge is so pertinent and forcible that I rely upon it as the strongest authority I could produce in my favour.

Mr. *Leith*, for the Respondent:—

The objections to the jurisdiction of the Court below—on the ground of value, and that the judgment for costs was not appealed from, but only the Order on taxation of the Officer of the Court, were disposed of conclusively by the Court of appeal, that when fees of office were in contest, the rule regarding the appealable value did not prevail in the Court of Queen's Bench in *Lower Canada*, had already been decided in the case of *Chabot* v. *Sewell* (1), and an appeal allowed to Her Majesty in Council in the former case of *Brown* v. *Gugy* (2), in which the order regarding costs was similar to that made here. The present Appellant was then Respondent, and had applied for and obtained from the Court below leave to appeal from that part of the Order refusing him his costs as Attorney in his own cause, but as he did not prosecute his cross appeal, no decision on the point was pronounced by this Court. Now, the learned Judges of the Court of Queen's Bench in *Lower Canada* have very ably and very fully stated the law in the reasons they have assigned for their judgment, one of whom was Mr. Justice *Meredith*, whose opinion in *Gugy* v. *Ferguson* (3) has been so much relied on. Mr. Justice *Mondelet*, though he took a different view of the law from the other Judges, did not deny the correctness of the statements regarding the practice of the Courts, both of *Quebec* and *Montreal*, being against the Appellant's claim.

The sole question, then, is, whether by the law and practice in *Lower Canada*, fees can be allowed to Attorneys in cases in which

(1) 1 Low. Can. Reps. 466. (2) 2 Moore's P. C. Cases (N. S.) 341.
(3) 11 Low. Can. Reps. 409.

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they are parties in the cause, and act as Attorneys. Now, I admit that this question is one for which there is not any express provision of law; but it is undoubted that there have been no less than four decisions of the Courts in *Lower Canada* directly bearing on the subject: *Chabot* v. *Sewell*, already referred to; the former case on appeal here of *Brown* v. *Gugy*, where the present Appellant brought a cross appeal on the very same grounds as he appeals here now, but did not prosecute it, and, therefore, must be held as assenting to the judgment; and the case of *Gugy* v. *Ferguson* (1) which was decided upon a decision of three to two of the Judges of the Queen's Bench (2). But I contend that the decision of this point of practice must depend entirely on the true construction of the Ordinance of *Louis* XIV. of April, 1667, Tit. 31, Art. 1; and the meaning of the "*dépens*" in that article, having reference to the *status* and character of an Attorney, and the application of the established tariff of fees to an Attorney acting in, and conducting his own cause. It appears that shortly after the conquest of *Canada* by *England*, Attorneys and Counsel were introduced into the Colony, and an Ordinance was passed by the then Governor and the Legislative Council, the 20 Geo. 3, c. 3, entitled, "For the Regulation and Establishment of Fees," and a tariff of fees was accordingly established, which has since been varied and extended under the *Lower Canada* Statutes, 41 Geo. 3, c. 7, and the 48 Geo. 3, c. 22. Under these Acts the tariff of costs as to Attorneys is laid down. No fee is allowed to any party not an Attorney, either as a Plaintiff or Defendant, acting in person. An Attorney must, *ex necessitate*, be a person employed by another: *Spelman, Gloss. Archæologicum, voce "Atturnatus,"* defines an Attorney, "*qui aliena negotia ad mandatum Domini administrat*"; and he refers to *Berault, Comment. de la Contume reformée de Normand. c.* 589. Mr. Justice *Badgley*, in the reasons given by him for his judgment, in this appeal, puts the case of the "*inscription en faux*," and the "*distraction de dépens*," both peculiar to the law of *Lower Canada*, as illustrating the impracticability of an Attorney being entitled to fees as such when acting in his own cause. In the former case he would require a procuration from himself, and in the latter, the costs being adjudged, according to the practice of the Court,

(1) 11 Low. Can. Reps. 409. (2) Ibid. 484.

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to the party in the cause, would be claimed by the Attorney, to whom they are never *eo nomine* given; and he cites *Pothier, Traité du Contrat de Mandats*, No. 135, vol. 4, tit. 10, and relies on the tariff of fees originally established by the Ordinance of 1667, and prevailing and in force in the *Lower Canada* Courts. So far as the decisions in the Courts of *Lower Canada* go, the result of them is decidedly against the Appellant, and even Mr. Justice *Meredith*, whose judgment he cites and relies on in *Gugy* v. *Ferguson*, was one of the Judges composing the majority in the case we are now arguing, and concurred with the law as laid down and commented on by the two other Judges who decided the case with him. Upon all these grounds, I submit, that the decree appealed against was just and proper, under the circumstances of the case, and with reference both to general principles of law, and the established practice and rules of procedure of the Courts of *Lower Canada*.

1867 *Feb.* 1.

Judgment was delivered by

SIR EDWARD VAUGHAN WILLIAMS:—

This case is an appeal from the decree of the Court of Queen's Bench for *Lower Canada*, dated the 19th of September, 1862. By this decree a judgment, dated the 2nd of November, 1861, of the Superior Court of the District of *Quebec* was reversed. That judgment was pronounced by a single Judge (*Taschereau*) on a motion made by the present Appellant to review the Prothonotary's taxation of a Bill of costs which had been submitted to him to be taxed by the Appellant, under a prior judgment of the last-mentioned Court upon a proceeding called "an opposition," awarding him costs as against the Respondent generally, by the words "*avec dépens.*" The question, and the only question, raised and decided in the two Courts was, whether the Appellant, who was an Advocate and Attorney duly admitted therein, and had appeared personally in Court and conducted his own case as Attorney on record, was entitled under the said judgment to charge in his Bill of costs, and to have allowed, on the taxation thereof against the Respondent, certain fees claimed and charged by him in respect of his character of Attorney. Judge *Taschereau* decided in the affirmative; the Court of Queen's Bench in the negative.

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The rule for deciding this question, as it was said by *La Fontaine*, C.J., in *Brown* v. *Gugy* (1), must be furnished by reference to the French and not to the English law, because the then existing French law was dominant in *Lower Canada* when it was conquered in 1759, and consequently that law continues to be dominant there, subject to any alterations which have been introduced by Legislative Acts, or other competent authority.

It is necessary, therefore, to inquire what the old French law was, with reference to this subject.

On behalf of the Appellant several authorities were cited, the principal of which are, "*Le Parfait Procureur*" (2), *Pigeau*, *Ferrière*, and *Serpillon*. These are for the most part stated in the Appellant's case, and referred to by Mr. Justice *Taschereau* in 11 Lower Canada Reports, 484-485. And their Lordships are of opinion, in accordance with the opinions of Mr. Justice *Meredith* and Mr. Justice *Taschereau*, that the passages cited from these Books constitute a preponderance of authorities in the French law for allowing fees to an Attorney who appears as such in his own case.

But it was argued for the Respondent, that the old French law has, at all events, been displaced by modern authorities. It is certainly true that although in the case which is the subject of appeal, when in the Superior Court of *Quebec*, Judge *Taschereau* adhered to the old French law, and decided the case accordingly in favour of the Attorney's claim (11 Lower Canada Reports, 480); yet on three earlier occasions the Court of Queen's Bench decided the contrary, in disregard of that law, and held that an Attorney conducting his own case is not entitled. Two of these cases were decided by a majority of three to two Judges in *Brown* v. *Gugy* (3), and *Gugy* v. *Ferguson* (4); and a third case of *Fournier* v. *Cannon* was cited by Mr. Justice *Meredith* in his judgment in the present case, in which he himself and all the other Judges of the Queen's Bench appear to have concurred.

In the judgment now under appeal, Mr. Justice *Meredith*, although he thought it right to agree with the majority of the Court, declared that his own contrary opinion (expressed in *Gugy* v. *Ferguson*) still remained unchanged; and Mr. Justice *Mondelet*

(1) 11 Low. Can. Reps. 407.
(2) Ed. 1705.
(3) 11 Low. Can. Reps. 401.
(4) Ibid. 409.

agreed in that unchanged opinion, and differed from the other Judges of the Court.

Mr. Justice *Aylwin* appears to rest his judgment mainly on the argument that the tariff gives fees to Attorneys only, and thus in effect denies them to parties who are not Attorneys, and that a person who appears in person cannot call himself an Attorney. In answer to this it may be observed, that an Attorney who conducts his own case, and describes himself on the face of the proceedings not as a party suing or defending in person, but as Attorney on Record, accepts by that very act all the duties and responsibilities which the practice of the Court imposes on Attorneys acting for ordinary clients. Mr. Justice *Meredith* founds his judgment merely on the propriety of a Judge's deferring to the authority of adjudged cases. Mr. Justice *Badgley*, in substance, takes the same view as Mr. Justice *Aylwin*, with the addition that he relies on the circumstance that in the case of an Attorney appearing for himself, inasmuch as in the proceeding by way of "*inscription en faux*," the law requires a special procuration from the party to his Attorney, as the foundation of the proceeding, there would be an absurdity in taking such a special power of Attorney from a man to himself; and further, that the proceeding by way of "*distraction et dépens*" would not be practicable, because the occasion for it could never arise. But their Lordships are constrained to observe that they cannot understand how these are good reasons for disallowing to the Attorney his fees for sevices performed in the cause as an Attorney.

It will be observed that in no one of these judgments is there any dealing with the authorities cited on behalf of the Appellant from the old French law Books in favour of the Attorney's right. The Judges do not at all deny that there are such authorities, or attempt to distinguish them. Mr. Justice *Duval* alone, in his judgment in the earlier case of *Brown* v. *Gugy*, says that the opinion of *Serpillon* on this point is of little weight, being founded on faulty reasoning only, and quotes a passage from *Jousse*, as to the rights of *Avocats*, as a conflicting authority. But Mr. Justice *Meredith* observed (1), "That authority (*Jousse*) is not applicable here in *Canada*, where Advocates are also Attorneys.

(1) 11 Low. Can. Reps. 412.

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It must be recollected that in *France* the right of action for fees was not only denied to Advocates, but such as claimed them were struck from the Rolls." And this appears to be the only authority which has been cited on behalf of the Respondent from the French law Books in denial of the Attorney's right to fees.

With respect to the argument founded on the Tariff of fees, the Court of Queen's Bench of *Lower Canada* is authorized by several Statutes to make and establish Tariffs of fees for the Counsel, Advocates, and Attorneys practising therein. But the object of such a Tariff appears to us to be, not to confer fees on any one, or to deprive any one of them, but simply to fix the amount of them for particular services done by such officers. If at the time of making the Tariff an Attorney acting for himself in a cause was, according to the authorities cited by the Appellant, entitled to such fees as would have been payable to another Attorney acting on his behalf, it surely was not meant by the Tariff to alter the law, and deprive him of such fees altogether, but merely to regulate the amount to be paid to him. On this point their Lordships concur with the view taken by Mr. Justice *Meredith* in *Gugy* v. *Ferguson* (1), where that learned Judge says, "It is undeniable that the Appellant is an Attorney, and that he has performed certain services in this cause for which, when performed by an Attorney, the Tariff allows certain fees; and I really cannot see anything in the law, or in reason, to prevent the Appellant, as Attorney, from receiving the fees usually incident to the services which he performed."

But it is intimated in the judgment of *La Fontaine*, C.J., in *Brown* v. *Gugy*, and asserted in the judgment of Mr. Justice *Aylwin* in the present case, that the practice has been to disallow fees to Attorneys conducting their own cases. And if this practice had been shewn to be uniform and long-established it would certainly have gone far to prove that the old authorities were not to be relied on.

But there appears to be some mistake on this subject; for it is said by Mr. Justice *Meredith*, in *Gugy* v. *Ferguson* (1), "The practice in this country may, I think, be said to be in favour of the Attorney. The Prothonotary of the Superior Court, an Officer of

(1) 11 Low. Can. Reps. 418.

great experience, informs us that in the time of Chief Justice *Sewell* fees in such cases were not allowed; but that in the time of Sir *James Stuart* the practice was to allow them; that the last-mentioned practice has continued ever since; and he has given us a note of four cases in which Attorneys appearing in their own cases have been allowed their fees. Under these circumstances I think it doubtful whether any change in the practice as to this matter ought to be made, and that if a change were determined on, it ought to be made so as not to affect pending causes."

Whether the Court of Queen's Bench might lawfully alter the law under the statutory power conferred by the Consolidated Statutes, c. 77, s. 15, to make and "establish such rules of practice as are requisite for regulating the due conduct of the causes, matters, and business before the said Court," it is unnecessary to decide; for the Court has in fact made no such rule, nor has the law been altered by any legislative Act, or other competent authority.

We, therefore, think it was the duty of the Judges of the Court to administer the old French law, and that they could not alter it, or decline to apply it, on grounds of supposed expediency, as they appear to have done in the judgment in the present case, and the preceding cases on which that judgment was founded.

For these reasons, their Lordships will advise Her Majesty that it should be reversed.

Their Lordships do not think it should be reversed with costs because the Appellant had a full opportunity of bringing the point before this Committee, and of obtaining their judgment, when the former case of *Brown* v. *Gugy* was before them (1). Had the present Appellant then prosecuted his cross appeal, the question which is the subject of the present appeal would have been then decided. His neglect to do so has been the occasion of the costs of this appeal having been incurred; and their Lordships, therefore, think he ought not to be allowed them (2).

Solicitor for the Appellant: *La Penotière.*

Solicitor for the Respondent: *Clarke, Son, & Rawlins.*

(1) 2 Moore's P. C. Cases (N.S.) 341.

(2) See the case of *The Jersey Bar* (13 Moore's P. C. Cases, 275), and the French *Ordonnances* there cited in note, as to the right of an *Avocat* to fix the amount of his fees, and to recover such fees by action.

J. C.* 1867 Feb. 18.

THE LONDON AND EDINBURGH SHIPPING COMPANY, THE OWNERS OF THE SCREW STEAMSHIP "IONA" . . . . . } APPELLANTS;

AND

THE OWNERS OF THE SAILING BARGE "EMILY FANNY" . . . . . } RESPONDENTS.

THE "IONA."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Compulsory pilotage—Merchant Shipping Act, 17 & 18 *Vict.* c. 104, *sec.* 388—*Collision—Damage—Joint negligence of Pilot and Master and crew—Liability of owners.*

In order to entitle the owner of a ship, having, by compulsion of law, a Pilot on board, to the benefit of the exemption contained in the *Merchant Shipping Act*, 17 & 18 Vict. c. 104, sec. 388, from liability for damage by default of the Pilot, it is not enough to prove that there was fault or negligence on the Pilot's part, but the owner must shew that there was no default on the part of the Master and crew, which might have in any degree been conducive to the damage.

Where, therefore, there was neglect on the part of the Master and crew to keep a good look-out, and such neglect conduced to a collision, the owners were held liable for the damage.

The duty of the Pilot is to attend to the navigation of the ship, and the Master and crew to keep a good look-out.

THE cause from which this appeal arose was one of damage arising out of a collision between the sailing Barge, *Emily Fanny*, and the screw Steamship, *Iona*, which happened on the 11th of March, 1866, in *Blackwall Reach* of the river *Thames*.

The *Iona*, a screw Steamship of 684 tons register, in charge of a licensed Trinity Pilot, whose employment was compulsory upon her owners, was proceeding down *Blackwall Reach*, under steam alone, and her course was being shaped to round *Blackwall Point*, when the *Emily Fanny* was seen rather on the starboard bow of the *Iona*, at a distance of about 300 yards, apparently

* *Present:*—THE MASTER OF THE ROLLS (LORD ROMILLY), SIR JAMES WILLIAM COLVILE, and SIR RICHARD TORIN KINDERSLEY.

proceeding to the northward; the helm of the *Iona*, which was then a-port for the purpose of rounding *Blackwall Point*, was, by order of the Pilot, put hard a-port, with a view of passing under the stern of the *Emily Fanny*, but the tide took the *Iona* and prevented her from answering her helm, and although her engines were, by order of the Pilot, eased, stopped, and reversed, she struck the *Emily Fanny*, and sank her.

The suit was brought by the owners of the Barge. The petition stated that the reach was clear; that the Steamer might have passed, either to the northward or southward of the Barge; that the collision was entirely attributable to the improper navigation of the *Iona*, and to the negligence and default of those on board her; and that there was no one looking out on board the Steamer. The answer alleged, first, that there was a good and vigilant look-out on board the Steamer; secondly, that the collision, and damages and losses consequent thereupon, were not caused by, or attributable to, any improper navigation of the *Iona*, or those on board her, but was the result of inevitable accident; and, lastly, that at the time of the collision the *Iona* had on board a licensed Pilot, by compulsion of law, who was in sole charge of the Steamer, and that his orders were promptly obeyed by the Master and crew; that if the collision was in any way occasioned by any one on board the *Iona*, it was solely occasioned by the Pilot, and, consequently, that the owners were not liable in respect of any damages caused by the collision.

The case was heard upon *vivâ voce* evidence before the Judge of the Admiralty Court (The Right Hon. Dr. *Lushington*), assisted by two Trinity Masters. The learned Judge, in summing up, addressed the Trinity Masters as follows:—"In this case there are two questions for your consideration; in the first place, it is perfectly clear that *primâ facie* the *Iona* was to blame for this collision, unless she can be exempted from the consequences of that blame by the evidence adduced on her behalf. The defence is, that she had a licensed Pilot on board, which Pilot, by law, she was bound to take; that she was at the time under the control, and navigated by, the Pilot; and that if any blame whatsoever attached, it was the blame of the Pilot. The case of inevitable accident is given up, and, therefore, the question that first

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arises is: was this accident occasioned by any erroneous management on the part of the Pilot, and in what way? The objection to the conduct of the Pilot, is, that there was no sufficient look-out on board the *Iona*, that if there had been a sufficient look-out the Barge would have been seen at an earlier period, and the collision might have been avoided. That is a matter for your consideration, but I think it is clear from the evidence that there was not a good look-out; the fact that a man was on the look-out is not sufficient evidence that a good look-out was kept; there was evidence that the Boatswain was on the look-out, but there was no evidence that the look-out was kept. If, therefore, you think the collision arose from the want of a sufficient look-out, then the exemption from blame, on account of the Pilot being on board, fails, because it was a defect in the navigation of the ship, for which the owners are responsible. The other question is this: It has been said that the *Iona* was intercepted, so to speak, by the tide, and though the power of the tide upon her was slight, yet that it was sufficient to prevent her getting round on the port tack as she intended; that she was a new vessel, and there was something wrong. I cannot form an opinion upon that at all, but I must leave it entirely to you. These are the two points for your consideration."

After consultation with the Trinity Masters, the learned Judge finally held, that there was no proof that there was a proper look-out kept on board the *Iona*; that she ought to have seen the Barge earlier, and prevented the collision, and, therefore, that her owners were liable. Hence the present appeal by the owners of the *Iona*.

Mr. *Brett*, Q.C., and Mr. *E. C. Clarkson*, for the Appellants:—

In the Court below the main grounds of the defence of the Appellants were:—first, that the collision arose from inevitable accident, but we do not now rely upon that point; and secondly, that if any blame was to be attributed to the *Iona*, it was solely to the Pilot. On this latter ground we rely, and submit that as the Appellants were compelled to take a Pilot on board, they are exempted from liability for damage arising by his neglect or default: The *Merchant Shipping Act*, 17 & 18 Vict. c. 104, sec. 388.

Now, it was proved by the Appellants' witnesses that the Barge was seen by the Pilot in ample time for him to have taken proper measures, and to have avoided the collision. It was his duty to keep a good look-out, which his position on the bridge of the Steamer allowed him to do. That fact was not properly taken into consideration by the learned Judge below. Had it been, then the question whether there was a proper look-out by the crew was wholly immaterial. As the Pilot saw the Barge in time and did not take proper measures, and, in addition, was guilty of palpable negligence, having regard to the state of the tide, in ordering the *Iona* to be put hard a-port, the blame rests on him. If, therefore, there be blame, it is to be attributable solely to the Pilot in charge of the Steamer, and that, under the above Statute, exempts the owners from liability for damage: *The Mæander* (1).

Dr. *Deane*, Q.C., and Mr. *V. Lushington*, for the Respondents:—

It was the duty of the Master and crew, as well as the Pilot, to keep a good look-out in order to avoid any collision, which was not done in this case. The *onus* is on the owners claiming the statutory exemption from liability for the damage, to prove strictly that there was no blame on the part of the Master and crew, which here they have failed to do: *The Schwalbe* (2). It has been held, under the former Statute, 6 Geo. 4, c. 125, sec. 55, that the owner is only exempted when the damage is solely caused by the negligence, default, or incompetency of the Pilot: *The Diana* (3); and the same construction has been put upon section 338 of the Statute, 17 & 18 Vict. c. 104, relied upon by the Appellants: *The Schwalbe* (4); *The Malvina* (5).

Their Lordships' judgment having been reserved, was now delivered by

SIR RICHARD T. KINDERSLEY:—

At about 8 o'clock in the morning of the 11th of March, 1866, and, therefore, in broad daylight, the Barge, *Emily Fanny*, laden

(1) 1 Moore's P. C. Cases (N.S.) 63.
(2) Lush. 239; S. C. 14 Moore's P. C. Cases, 241.
(3) 4 Moore's P. C. Cases, 11.
(4) 14 Moore's P. C. Cases, 241.
(5) 1 Moore's P. C. Cases (N.S.) 357.

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with sand, was coming up the river under sail, and with two men pulling at the oars, and heading nearly north; the Steamer, *Iona*, (a newly-built iron ship of 648 tons) was going down the river at the rate of six or seven miles an hour. The weather was nearly calm, what little wind there was being (as stated by the Appellants in the preliminary Act) from the southward and eastward. The state of the tide was "last quarter flood," that is, nearly high water, running up the river at the rate of about a knot an hour. The Steamer was in charge of *William George Allen*, a licensed Trinity House Pilot, who was standing on the high bridge, his proper place, whence he gave his directions to the man at the wheel by waving his hand in the usual manner. The Master of the Steamer, *Thomas Raison*, was standing on the roof of the midships house, which forms a sort of lower bridge. The Boatswain was stationed on the forecastle to keep a look-out ahead. As the Steamer was rounding *Blackwall Point*, she came, stem on, against the port side of the Barge, which immediately filled and sank. About these facts there is no controversy.

The Respondents instituted proceedings in the High Court of Admiralty against the Appellants in a cause of damage; and by their petition, after stating the facts, alleged that the collision was entirely attributable to the improper navigation of the Steamer, and to the negligence and default of those on board her.

The Appellants, by their answer, alleged that whilst the course of the Steamer was being shaped to round *Blackwall Point*, the Barge was seen ahead, and rather on the starboard bow of the Steamer, and at the distance of between 200 and 300 yards, apparently proceeding to the northward; that thereupon the helm of the Steamer, which was then a-port for the purpose of rounding *Blackwall Point*, was, by order of the Pilot, put hard a-port, with a view to pass under the stern of the Barge, but the tide took the Steamer and prevented her from answering her helm; and although the engines were, by order of the Pilot, eased, stopped, and reversed, a collision could not be prevented, and the Steamer, with her stem and port bow struck the Barge on her port side, and notwithstanding that a fender was put over the side of the Steamer, the Barge sank. The answer also asserted that the collision, and the damages and losses consequent thereon, were not caused by or

attributable to any improper navigation of the Steamer, or to any negligence or default of those, or any of those, on board her, but was the result of inevitable accident. The answer further asserted, that if the collision was in any way occasioned by any one on board the Steamer, it was solely occasioned by the Pilot, and they (the Appellants) were not liable for any damage caused thereby.

The cause came on to be heard on the 24th of July last, before the learned Judge of the High Court of Admiralty, assisted by two elder brethren of the Trinity House. Four witnesses were called by the Appellants,—*Allen*, the Pilot; *Raison*, the Master of the Steamer; *Edgar*, the second Engineer; and *Williamson*, the second Officer, who was at the wheel, with two other men, when the collision occurred. They were examined *vivâ voce* in Court. The Respondents called no witnesses. The learned Judge, having pointed out to his two Assessors the questions upon which their opinions were required, and after consultation with them, declared his opinion to be, that there was no proof that a proper look-out was kept on board the Steamer; that she ought to have seen the Barge earlier, and prevented the collision; and, therefore, he pronounced against the Steamer, and condemned the owners thereof in damages and costs. From that decision the present appeal is brought by the owners of the Steamer.

In arguing this appeal, the Appellants, by their Counsel, no longer contend that the collision was not occasioned by the negligence or default of any one on board the Steamer, but was the result of inevitable accident. That point they abandon; and the only ground upon which they insist that the decision ought to be reversed is, that the collision was, as they allege, occasioned entirely by the default of the Pilot, and that, therefore, the owners of the Steamer are exempt from liability. This is the only point which their Lordships have now to consider.

By the *Merchant Shipping Act*, 17 & 18 Vict. c. 104, sec. 388, it is enacted, that no owner or Master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified Pilot acting in charge of such ship, within any district where the employment of such Pilot is compulsory by law.

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An enactment substantially to the same effect, though expressed in different language, was contained in the *Pilotage Act*, 6 Geo. 4, c. 125, sec. 55.

Now, in construing those Acts, it has been established as a principle, that, in order to entitle the owners to the benefit of the exemption from liability thereby provided, they must prove that the damage, for which it is sought to make them liable, was occasioned exclusively by the default of the Pilot. It is not enough for them to prove that there was fault or negligence in the Pilot—they must prove, to the satisfaction of the Court, which has to try the question, that there was no default whatever on the part of the Officers and crew of their vessel, or any of them, which might have been, in any degree, conducive to the damage. This principle was very clearly laid down by Dr. *Lushington*, in the case of *The Diana* (1), which was a case under the earlier of the two Statutes. That learned Judge there says:—"To obtain the exemption from responsibility conferred by the Act, I think that the owners of *The Diana* should prove that the accident arose entirely from the fault of the Pilot; that the exception under the Act ought to be construed strictly, and that if the accident was occasioned by the joint misconduct of the Pilot and crew, I am bound to hold that the liability still attaches to the owners." The same principle was upheld and acted upon by this Court in the case of *The Christiana* (2), which was also under the Statute of 6 Geo. 4, c. 125; and in the case of *The Schwalbe* (3), under the Act, 17 & 18 Vict. c. 104, sec. 388, and it has been treated as the established law in several other cases, both in this and in other Courts.

The question, therefore, which their Lordships have to determine, is simply this:—Is it proved to their satisfaction that there was no default in any of the crew of the Steamer, which may have conduced to the collision? And upon this question, their Lordships having fully considered the evidence, entirely concur in the opinion of the learned Judge of the Court below, that it is not so proved; for it is not proved that a good look-out was kept on board the Steamer.

(1) 1 W. Rob. 135. (2) 7 Moore's P. C. Cases, 160.
(3) 14 Moore's P. C. Cases, 250.

The importance of alleging and proving that a good look-out was kept, was, of course, felt by the Appellants; and, accordingly, in the second article of their answer to the petition in the Court below, they expressly allege that a good and vigilant look-out was being kept from on board her. Now, what evidence do they adduce in support of that allegation? They prove that the Boatswain was stationed on the forecastle to keep a look-out; but they prove no more. Now, what was the duty of the man thus stationed on the look-out? Surely his duty was to keep a vigilant look-out, and, when he saw any craft ahead, to report to the Pilot. There was nothing to prevent the Barge being seen from the Steamer some time before they were within 300 yards of each other, when the Pilot first saw her. Although the Appellants, in the preliminary Act, allege that the weather was hazy (contrary to the allegation of the Respondents, that it was clear), there is no evidence of the presence of any haze. Nor is it suggested that there were any other vessels in the way, or any other obstruction to a wide and distant view. Indeed, it is plain from a comparison of the evidence of the Pilot and of the Master, that the Barge was actually seen by at least one individual on board the Steamer (namely, the Master) before the Pilot saw her; for the Pilot says that, for the purpose of rounding the point, and before he saw the Barge, he had given an order to "slow" the engines, and had waved to port the helm, and that he afterwards saw the Barge, distant about 300 yards, and then waved to put the helm hard a-port; and the Master says, that at the time when the Pilot gave the order first to "slow," and the first order to port, he (the Master) had already seen the Barge, and that in fact he saw her as the Steamer was passing the Factory before she came to *Blackwall Point*, thus clearly shewing that the Master saw the Barge before the Pilot did. And if the Master could see her, the Boatswain on the forecastle might have seen her, and ought to have seen her, and would have seen her if he had been keeping a vigilant look-out. Whether the man saw the Barge or not, or whether he was or was not keeping any look-out at all, does not appear; but it is not suggested that he made any report whatever. The learned Counsel for the Appellants was, therefore, driven to the necessity of arguing that it was the Pilot's duty to keep a look-out, which

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his elevated position on the high bridge well enabled him to do: and that it was unnecessary for the man stationed on the look-out to make any report, or indeed to keep a look-out at all. The argument cannot be admitted. Its admission would produce very mischievous consequences, and very much increase the risk of navigation. No doubt the Pilot may, and probably in most cases does, see a craft ahead as soon as any one else on board; but his attention is necessarily directed, from time to time, to other matters relating to the navigation of the vessel under his charge, besides keeping a look-out; and on that account it may happen that he does not see an object ahead so soon as he ought to have been aware of it, in order to enable him to take measures to avoid it. Hence arises the necessity for having a man stationed on the forecastle, with the special and sole duty of keeping a vigilant look-out, a necessity fully recognised on the part of those on board the Steamer, by their stationing the Boatswain on the forecastle for that special purpose. And it is impossible to hold that the man so stationed was justified in neglecting to keep a look-out, on the ground that it is the duty of the Pilot to keep a look-out.

The only remaining question is, whether the failure of the look-out man to perform his duty did not conduce, or may not have conduced (for that is sufficient for the present purpose) to bring about the collision. *Allen*, the Pilot, in his examination, says that when he first saw the Barge she was distant about 300 yards. At the rate at which the Steamer was going, six or seven miles an hour (say six and a half miles an hour), it would take only about a minute and a half to go over that space. He says, that as soon as he saw the Barge he ordered the helm (which was already a-port to round the point), to be put hard a-port, which was immediately done; that the Steamer at first answered to the helm, and payed off to starboard; but that when she came to the tide (which, it is obvious, from the very sharp and sudden bend of the river at that place, would be running somewhat across the channel of the river from the southern towards the northern shore), the tide took her on the starboard bow, and she ceased to obey the helm, and, in consequence thereof, she ran into the Barge. The Master's evidence corroborates this representation of the Pilot. No doubt the

Pilot ought (as it was argued for the Appellants) to have known that, in the then state of the tide, and at that part of the river, such would be the effect of the tide on the starboard bow. But there seems no reason for supposing that he did not know it; indeed, it does not require the knowledge or experience of a Pilot to know, from the remarkable bend of the river round *Blackwall Point*, that such must be the effect of the tide in its then state. Now, if the Pilot had been earlier made aware of the position of the Barge, he might have sooner put the helm hard a-port so as to avoid a collision, and we are bound to assume that he would have done so. As it was, he was not made aware of the position of the Barge till he saw her only about 300 yards distant, when it was too late to prevent the collision. Thus the neglect of duty on the part of the look-out man, not only might have been conducive to the disaster, but was in all probability the ultimate cause of it.

Upon the whole case, their Lordships are of opinion that there was neglect of duty on the part of the look-out man; that this neglect of duty conduced to the collision; and that it was such default on the part of the crew of the Steamer as to disentitle the owners to the benefit of that exemption from responsibility which the Statute provides. They will, therefore, humbly advise Her Majesty to affirm the decision of the Court below, and to dismiss this appeal with costs.

Proctors for the Appellants: *Clarkson, Son, & Cooper.*
Proctors for the Respondents: *Lauri & Keen.*

J. C.* 1867 *Feb.* 2, 4.

DANIEL HERRICK . . . . . APPELLANT;

AND

GARRET SIXBY . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Lower Canada, law of—Action en bornage—Boundaries—Quantities described in deeds—Ambiguity—Rules of construction—Prescription.

Action *en bornage* to ascertain the boundary line between the contiguous properties of the Plaintiff and Defendant, which property was formerly one Lot, and described as containing between 140 or 150 acres. This was afterwards sold in two Lots. The Plaintiff's, the eastern portion, was described in the deeds as containing "90 acres, more or less." The Defendant's, the western portion, "about fifty acres;" but the descriptions in the deeds did not agree as to the way the line of boundary was to run. The effect of a Surveyor's report, which the Court in *Canada* homologated, was to make a boundary line, by which the Defendant got sixty-one acres, and reduced the Plaintiff's to eighty-two acres. Upon appeal, *held* (reversing the decrees of the Superior Court and the Court of Queen's Bench), that those Courts were wrong in their construction of the deeds and evidence as to the boundaries, the rule being that, if in a deed conveying land the description of the land intended to be conveyed is couched in such ambiguous terms that it is very doubtful what was intended to be the boundaries of the land, and the language of the description equally admits of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making the quantity altogether different, the former construction must prevail.

Held, further, that the case differed from a conveyance of a certain ascertained piece of land accurately described by its boundaries on all sides, with a statement that it contained so many acres, "or thereabouts," when, if the quantity was inaccurately stated, it did not affect the transaction.

By the law of *Lower Canada* the term of prescription is thirty years.

To sustain a plea of prescription, the evidence must shew peaceable uninterrupted possession and ownership for upwards of thirty years.

THIS was an action *en bornage*, brought by the Appellant against the Respondent in the Superior Court for the District of *Montreal*, to ascertain the boundary line between contiguous pieces of land of the Appellant and the Respondent, which land originally belonged to the same owner, and formed together a certain parcel of ground, described in the deeds of both the Appellant and Respondent as

* *Present*:—SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

Lot No. 3, which Lot was said to contain between 140 and 150 acres, and described as bounded on the south by the boundary line, along the 45th parallel of latitude, between *Canada* and *Vermont*, on the north by a line parallel to the last-mentioned line, and on the east and west by lines perpendicular thereto. The whole Lot formed a rectangular block, and there was no difference between the parties as to its original boundaries or area, the question being the boundaries after the division.

The western portion of Lot No. 3 was sold in the year 1813 to the Respondent's predecessor in title, as "about fifty acres of land." The eastern portion of Lot No. 3 was sold in 1845 to the Appellant's predecessor in title, and was described as containing "ninety acres more or less." It was agreed between the parties that a hemlock stump, referred to in the deeds of the Respondent, and still existing in the line of the southern boundary of Lot No. 3, was the point from which the boundary line between the properties of the Appellant and Respondent was to start. The question was in what direction it was to run. The Appellant contended that it should run parallel with the eastern and western, and perpendicular to the northern and southern boundaries of Lot No. 5, so as to give each party a rectangular block of land. This would have given the Respondent about fifty-one acres, the quantity conveyed by the deed being "about fifty acres," and the Appellant little over ninety acres, the quantity mentioned in his deed. The Respondent, on the other hand, contended that the boundary line ought to run in a zig-zag line towards the north-east; which would give him eighty-two acres instead of "about fifty acres," as conveyed by his deeds, and the Appellant sixty-two, instead of "ninety acres," as conveyed by his deeds. From a plan referred to in the Court below, there appeared to be a ledge of rocks running north-east from the hemlock stump, a short distance to the east of a brook flowing into the *Rock River*. The Respondent claimed that his boundary should run at the base of this ledge of rocks.

The facts were these:—

Early in the present century, *John Ruiter* owned an estate in the *Seigniory* of *St. Armand*, in *Lower Canada*. Such estate was, at his death, divided among his heirs, in which the portion of one

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Captain *John Ruiter* was distinguished as Lot No. 3, and described as containing 140 acres.

By a deed, dated the 3rd of March, 1813, Captain *Ruiter* sold and conveyed a part of that Lot to *George* and *David Krans*, brothers, by the following description:—"About fifty acres of land, part and parcel of that tract of land situate, lying, and being in the aforesaid *Seigniory* of *St. Armand*, known and distinguished by Lot No. 3; the said fifty acres or thereabouts to extend from the westerly boundary line of said Lot and on the whole width thereof, and easterly to the foot of a ledge of rocks which runs across the Lot at a certain distance easterly of a certain brook, which also runs across said Lot, the southerly boundary of which said part of said Lot is a hemlock tree, which stands on the southerly boundary line thereof, and is marked *G. & D. K.*, 1813." The property so sold ultimately came into the possession of the Respondent.

By a deed, dated the 15th of August, 1845, the Sheriff of the district of *Montreal*, under a writ of execution sued out by *Abel Houghton* against the lands and tenements of *George Chapman*, sold and conveyed to *Abel Houghton* a lot of land thus described:—"A lot of land, situate in the *Seigniory* of *St. Armand*, in the district of *Montreal*, being part of Lot No. 3 on a plan of division of the land of the late *John Ruiter* among the heirs of his estate, containing ninety acres in superficies, more or less; bounded to the south by the Province line, to the west by the remaining part of the said Lot No. 3, owned by *Miles Krans*, to the north by *Miles Krans* and *James Allen*, and to the east by Lot No. 4 on the plan."

Houghton sold and conveyed to the Appellant the land comprised in the last-mentioned deed, by the same description.

The Appellant brought the present action against the Respondent in the Superior Court for the District of *Montreal*, and by the declaration alleged, that the Respondent occupied his land, or, as the Appellant called it, encroached, praying that the respective lands of the parties might be measured and bounded at their common expense, by a Surveyor to be agreed on by them, or in default of such agreement to be named by the Court, that a *proces verbal* of such measuring and bounding might be homologated by the Court, if

found just, and that the Respondent might be condemned to restore to the Appellant the profits which he had derived, or might have derived, from his alleged encroachment, to the extent of £150 currency, with costs of suit.

The Respondent, by his plea, claimed to hold to the ledge of rocks, both by his deeds and by a prescription exceeding thirty years, and averred that *Ruiter*, the vendor in 1813, did not dispose of the Appellant's portion of the Lot No. 3 for a long time after he had sold the Respondent's portion thereof, and that any title which he might have granted for the Appellant's portion was subject to the fulfilment and warranty of the title which he had granted of the Respondent's portion, and prayed that the respective lands of the parties might be measured and bounded at their common expense, according to their titles and to the possession and rights of the Respondent, and according to the marks, limits, indications, and boundaries defined and marked out by the Respondent's titles.

Witnesses were examined, whose testimony as to the boundary and uninterrupted user relied on by the Respondent was contradictory and conflicting.

The Judge (The Hon. Mr. *Smith*) having heard the case on the merits, ordered, *avant faire droit*, that the contiguous properties in question should be measured and bounded by a sworn Surveyor, according to the respective titles of the several parties, and that the Surveyor should particularly establish and run a line of division between them, adjoining and adjacent to the ledge of rocks, and along the base of the ledge, and should fix and determine the line by proper metes and bounds, and should report to the Court accordingly.

The Surveyor made his report, which, with a plan thereto annexed, was filed, and by a final judgment pronounced on the 31st of October, 1862, by the Hon. Mr. Assistant Justice *Monk*, the Superior Court homologated the report, and determined the boundary between the contiguous properties in question, in accordance with the Respondent's contention.

The Appellant appealed to the Court of Queen's Bench, which Court, on the 1st of March, 1864, by a majority of the Judges, affirmed the judgment of the 31st of October, 1862.

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The present appeal was from this judgment of confirmation, and was argued by

Mr. *Manisty*, Q.C., and Mr. *Wills*, for the Appellant; and by

Mr. *J. Westlake*, and Mr. *A. Aitken*, for the Respondent.

The Appellant's contention was, that the case ought to have been decided upon the deeds alone, or upon the deeds and parol evidence of uninterrupted user; and insisted that the judgment was erroneous, in giving him little more than sixty acres, when he had purchased ninety acres.

For the Respondent, it was submitted—first, that *Ruiter's* sale to the *Kranses*, in 1813, was a *corps certain*, defined by metes and bounds, and not liable to be affected by an erroneous indication of quantity, and that the Court had properly determined the boundary; secondly, that the Respondent and his predecessors in title had held the quantity of acres the Court awarded, uninterruptedly, for more than thirty years, in accordance with such boundary, and were thus entitled by prescription.

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SIR RICHARD T. KINDERSLEY:—

This is an appeal from a judgment of the Court of Queen's Bench, of *Lower Canada*, dated the 1st of March, 1864, affirming a judgment of the Superior Court of that Province, dated the 31st of October, 1862.

The action in which these judgments were given was an action *en bornage* by the Appellant, to have the boundaries between two contiguous properties of the Appellant and the Respondent ascertained and determined.

The following are the circumstances out of which the action arose:—

One *John Ruiter*, who died in or before the year 1809, was the owner of a landed estate in the *Seigniory* of *St. Armand*, in *Lower Canada*. After his death, his estate was, in 1809, divided among his heirs, according to a plan of partition shewn on a map, made and prepared by one *Amos Lay*, a Surveyor. One of the heirs was Captain *John Ruiter*, and by the partition there was allotted to him (besides another piece of land containing about sixty acres, called Lot 4 on the map, not in question in this suit) a piece of

land distinguished on that map as Lot 3, and described as containing 140 acres.

This piece of land, which it will be convenient always to call Lot 3 (that being its designation not only on the partition map, but also in the subsequent deeds of both the Appellant and the Respondent) is in form (speaking with mathematical accuracy) a trapezium, but it is so nearly a rectangular parallelogram, that, for all practical purposes, it may be so considered, and, indeed, it is so represented in some of the maps given in evidence. It is bounded on the south by the boundary line between *Canada* and *Vermont*, which is a straight line running along the 45th parallel of latitude, and, therefore, of course, running due east and west; its western boundary is a straight line drawn perpendicularly to the southern boundary; its eastern boundary is a straight line drawn very nearly, though not quite, perpendicularly to the southern boundary line; and its northern boundary is a straight line drawn from the northern end of the western boundary line, and running towards the east, parallel, or very nearly parallel, with the southern boundary. Its length from west to east is greater than its width from south to north. It consisted, at the period referred to, of wild forest and woodland; but it appears that in comparatively recent times some patches of it have been cleared for pasture. It is necessary to observe that, at a point on the southern boundary line of this Lot 3, at a distance from the south-western corner of one-third of the whole length of the southern boundary line, a brook crosses the southern boundary, flowing into and diagonally across Lot 3, the direction of its course being about N.N.E.; and, a little to the eastward of this brook, a ledge of rocks runs also diagonally across the whole Lot 3, from the southern to the northern boundary, in a direction nearly the same as that of the brook. It is further to be observed, that, by recent survey and measurement, made under an order of the Court below, this Lot 3 is found to contain 144 acres and 2 roods.

In 1813, Captain *John Ruiter*, being the owner of this Lot 3, sold a part of it, at the western end thereof, to two brothers, *George* and *David Krans;* and by a deed, dated the 3rd of March, 1813, he conveyed to them by the following description:—"About fifty acres of land, part and parcel of that tract of land situate, lying,

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and being in the aforesaid *Seigniory* of *St. Armand*, known and distinguished by Lot No. 3; the said fifty acres, or thereabout, to extend from the westerly boundary line of the said lot, and on the whole width thereof, and easterly to the foot of a ledge of rocks which runs across the said lot, at a certain distance easterly of a certain brook which also runs across said Lot, the south-easterly boundary of which said part of said Lot is a hemlock tree, which stands on the southerly boundary line thereof, and is marked *G* and *D. K.*, 1813."

It is upon the construction which ought to be put upon that description that the controversy between the parties mainly turns.

The portion of Lot 3 thus conveyed to *George* and *David Krans*, afterwards became the property of *Miles Krans*. By a deed, dated the 23rd of February, 1846, *Miles Krans* conveyed it to *James Slade Allan*; and by a deed, dated the 17th of January, 1848, *Allan* conveyed it to the Respondent. In both these deeds, the property conveyed is described in the same terms as those before mentioned to have been contained in the deed of the 3rd of March, 1813.

The remaining portion of Lot 3, which was not comprised in the conveyance to the *Kranses*, afterwards passed from Captain *John Ruiter*, through successive holders, until it became vested in one *George Chipman*; and by a deed, dated the 15th of August, 1845, the Sheriff of the District of *Montreal*, under a writ of execution sued out by one *Abel Houghton*, against the lands and tenements of *George Chipman*, sold and conveyed to *Abel Houghton* by the following description:—"A lot of land, situate in the *Seigniory* of *St. Armand* in the district of *Montreal*, being part of Lot No. 3, on a plan of division of the land of the late *John Ruiter*, among the heirs of his estate,—the said plan made by *Amos Lay*, Surveyor, and dated the 6th day of December, 1809, —containing ninety acres in superficies, more or less; bounded to the south by the Province line; to the west, by the remaining part of the said Lot No. 3, owned by *Miles Krans*; to the north by *Miles Krans* and *James Allan*; and to the east by Lot No. 4 on the said plan."

It appears that, in that transaction, *Abel Houghton*, who was the cashier of the *St. Alban's* Bank, was acting on behalf of, and as Trustee for, that Bank; and by a deed, dated the 23rd of October,

1855, *Abel Houghton*, on his own behalf, and on behalf of the *St. Alban's* Bank, and by virtue of a power of attorney from the Bank, sold and conveyed to the Appellant the land comprised in the Sheriff's deed, by the same description.

The Appellant's case is, that the property comprised in those two last-mentioned deeds was the residue of Lot 3, not comprised in the conveyance of the 3rd of March, 1813, to the two *Kranses*. He has not, however, proved the conveyances or other instruments by which that residue passed from Captain *John Ruiter*, and became vested in *George Chipman*; and upon that ground an objection has been raised by the learned Counsel for the Respondent, that it is not shewn that *George Chipman* ever was the owner of the eastern portion of Lot 3, and, therefore, that the Appellant, not having proved his title to that portion, could not maintain his action. That objection, however, their Lordships have no hesitation in disallowing. It is not suggested that any person has, or claims to have, any right or title to any portion of Lot 3, other than the Appellant and the Respondent. Moreover, the Respondent, with the view of proving that the owner, for the time being, of the western portion of Lot 3 had exercised acts of ownership on the portion of land which is in controversy, with the knowledge of, and without objection by the owner, for the time being, of the eastern portion of the said Lot 3, called as witnesses in the Court below, *Miles Krans* and *James Slade Allan*, who had been successively the owners of the western portion; and their evidence shews that *Chipman* was, at one time, the owner of the eastern portion of Lot 3. *Miles Krans*, after stating that he cut wood on the Lot, says:—"During the time I so cut wood on the said lot of land, to the east of it" ("to the east of it" means the eastern part of it), "now owned by the Plaintiff" (the Appellant), "was possessed successively by *John Ruiter, John Rhodes, Anthony Rhodes;* after which, I think, it went into the hands of *George Chipman.*" *Allan* says:—"Old Mr. *Rhodes*, and Mr. *Chipman*, and the Bank of *St. Alban's* were, one after another, in possession of the east part of the said Lot, to the east of the foot of the ledge of rocks. Old Mr. *Rhodes* was in possession of it when witness first went there in 1836; afterwards, *Chipman*, and, subsequently, the Bank of *St. Alban's* and Mr. *Chipman*, as I understood." Another witness called by the

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Respondent, namely, *Augustin Lavoie*, deposes that the Respondent's cows were impounded by *Chipman*, for having trespassed on his part of the said Lot ("*pour avoir traversé sur sa part dudit Lot*").

It cannot be doubted that *Chipman* was the owner of the eastern portion of Lot 3; and it is to be observed that the description in the conveyance made by the Sheriff to *Abel Houghton*, under the writ of execution against *Chipman*, is an apt and appropriate description of so much of Lot 3 as was not comprised in the conveyance of the 3rd of March, 1813, by Captain *John Ruiter* to *George* and *David Krans*. And it may be added that the Respondent, by his plea, so far from disputing the Appellant's title to the eastern portion of Lot 3, by strong implication, and almost in terms, admits it; and the plea ends with a prayer that it may be adjudged and ordered that the measure and boundaries of the said lands and properties of the Appellant and Respondent may be had and made by a sworn Land Surveyor, to be agreed upon by the parties, or appointed by the Court.

Assuming, then, that the Appellant is the owner of the eastern, and the Respondent of the western portion of this Lot 3,—the question is, what is the right boundary between those two portions? That question is, in truth, the same as this,—what, according to the true construction of the words of description in the conveyance of the 3rd of March, 1813, from Captain *John Ruiter* to *George* and *David Krans*, having regard to the local features therein referred to, was the eastern boundary of the property thereby conveyed? All depends upon the construction of that deed, and nothing which has since occurred can affect that construction. The question must now be tried between the Appellant and Respondent, in precisely the same manner as it would have been tried if the dispute had arisen between Captain *John Ruiter* and *George* and *David Krans* immediately after the execution of the deed of the 3rd of March, 1813.

The Appellant insists that, according to the true construction of that deed, the parties thereto intended that the eastern boundary of the portion thereby conveyed should be a straight line drawn from the hemlock tree, situate on the southern boundary line, *due* north, *i.e.* parallel to the western boundary line, till it meets the northern boundary line. The Respondent, on the other hand,

insists that the parties intended that the eastern boundary of the portion conveyed should be the foot of the ledge of rocks along its whole course.

Now, whichever of these two views is the right one, it appears from the evidence, that if the Appellant's view be adopted, then the effect will be that the portion conveyed by that deed would contain a little more than fifty acres,—agreeing, therefore, with the quantity mentioned in the deed, which is "about fifty acres." Whereas if the Respondent's view be adopted, and the ledge of rocks is held to be the eastern boundary of the portion conveyed by the deed, then the effect will be that that portion would contain eighty-two acres, instead of "about fifty." This consequence of the success of the Respondent's contention is, it must be confessed, somewhat startling.

Let us now see how the case was dealt with by the learned Judges of the Superior Court, and afterwards by those of the Court of Queen's Bench, on appeal.

In the Superior Court the case was heard before Mr. Justice *Smith*, who decided in favour of the Respondent (the then Defendant); and made an Order, dated the 27th of May, 1862, directing that a line should be run, by a sworn Surveyor, to be agreed upon by the parties, or (if they could not agree) to be appointed by the Court, along the base of the ledge of rocks as the boundary between the Appellant and Respondent respectively. We have not the advantage of knowing the reasons for which Mr. Justice *Smith* came to this conclusion. The parties not agreeing on a Surveyor, one *Amos Vaughan*, a sworn Surveyor, was appointed by the Court; and in obedience to the Order of Mr. Justice *Smith*, he drew a boundary line along the base of the ledge of rocks, from the southern to the northern boundary of the Lot; and he duly made his report, stating in detail what he had done, which report was filed on the 17th of October, 1862. On the 31st of October, 1862, the case came again before the Superior Court, on the report of the Surveyor, and of two motions by the Appellant, that the Order of Mr. Justice *Smith* might be revised, and that the Surveyor's report might be rejected, and on a motion by the Respondent that the Surveyor's report might be approved and homologated; whereupon Mr. Assistant Justice *Monk*, before whom

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the matter came, made an Order rejecting the Appellant's motions, and granting that of the Respondent, homologating the Surveyor's report, and establishing the boundary as set out in that report.

In the Appellant's case on the appeal to the Court of Queen's Bench, some remarks of Mr. Assistant Justice *Monk* on that occasion are set out, from which it would appear that he considered the Order of Mr. Justice *Smith* as final, and not as interlocutory, for which reason it was not in his power to revise it, but that he used expressions which might lead to the inference that he was not satisfied with the decision of Mr. Justice *Smith*. However this may be, it seems certain that he (Mr. Assistant Justice *Monk*) expressed no opinion in favour of the Respondent's case.

The Appellant having appealed to the Court of Queen's Bench, the case came on for hearing before that Court, on the 1st of March, 1864, in the presence of Mr. Assistant Justice *Badgley*, Mr. Justice *Meredith*, and Mr. Justice *Mondelet*, and the decision of the Superior Court was affirmed. We have the reasons or judgments of the three learned Judges.

Mr. Justice *Badgley*, in his judgment, seems to assume that the description in the deed of the 3rd of March, 1813, specified all the boundaries of the portion of Lot 3 which was thereby conveyed, and in particular, that it specified the ledge of rocks as the eastern boundary; and then he cites several authorities to shew that if, in a deed of conveyance, the description of the piece of land conveyed states its boundaries on all sides, and states also its contents, but states them incorrectly, then that part of the description which specifies the boundaries must prevail, and the specification of the quantity must be disregarded. If the assumption of the learned Judge be correct, there would seem to be no reason to challenge the conclusion. But the assumption that the deed of the 3rd of March, 1813, specifies the boundaries of the land conveyed on all its sides, is simply begging the whole question. The very question between the parties is whether, upon a true construction of the language of the deed of the 3rd of March, 1813, it did make the ledge of rocks the eastern boundary of the piece of land thereby conveyed. And to that question the judgment of Mr. Justice *Badgley* is not addressed. Indeed, it may be doubted whether the learned Judge had not before him by some mistake, instead of a

true copy of the description in the deed, some paper which (though purporting to be a copy) was altogether incorrect. For towards the earlier part of his judgment, after a statement of the facts, and observations on the circumstance that the Appellant produced no title deed earlier than the Sheriff's conveyance to *Abel Houghton* in 1845, we find this passage:—"The piece of land, the *Krans's* purchase and the Respondent's property, is described as inclosed within fixed boundaries, plainly described on the four sides, with a south-east point of departure for (misprinted from) the eastern boundary, as follows:"—(Now, what follows is in inverted commas, as if it was a quotation from the deed.) "'Running north-west' (clearly a misprint for north-east) 'at the foot or along the foot of a ledge of rocks, which run across the Lot at a distance east of a certain brook, which runs across the said Lot.'" (After that quotation he proceeds:—) "The ledge of rocks and brook being natural boundaries, can admit of no dispute, and are shewn on the map or plan of division mentioned in the Sheriff's deed." If the learned Judge was accidentally led to suppose that the passage which he puts in inverted commas was a true copy of the words of the deed, it is no wonder that he made the assumption that in the deed the piece of land was (as he says) "described as inclosed within fixed boundaries plainly described on the four sides."

The judgment of Mr. Justice *Meredith* is not open to the same remark. He discusses the question of the construction of the description in the deed, and arrives at the conclusion that it was intended that the ledge of rocks should be the eastern boundary. The substance of his able reasoning on the point is contained in the following passage in his judgment:—"That description certainly is not clearly worded; but still it seems to me impossible to suppose that if, as the Appellant alleges, the parties intended the line in question should run parallel with the ends of the Lot, and at right angles with the north and south lines, the description could have been worded as it is. Not only is there not one word tending, however remotely, to indicate such an intention; but there are words clearly indicating, I think, a contrary intention. To what purpose did the description refer to 'the ledge of rocks which runs across the said Lot,' and specify the situation of that ledge as being 'at a certain distance easterly of a certain brook

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which runs across the said Lot,' if the division was to be a straight line uninfluenced by the course of the ledge of rocks so carefully described? The ledge of rocks which runs across the said Lot cannot, I think, have been referred to for the purpose of determining the south-easterly boundary of the Lot sold, for that was placed beyond the possibility of doubt by the hemlock tree marked 'G. and D. K.' (the names of the purchasers) '1813;' and if the ledge of rocks were not referred to for that purpose, it must, I think, have been referred to as indicating the course of the line.'

These observations of the learned Judge seem to present the arguments in favour of the Respondent's view as clearly and as strongly as it is possible to put them. Those arguments will be noticed presently.

Mr. Justice *Mondelet* differed from his two colleagues, and thought the decision of the Superior Court ought to be reversed. The reason he assigns is, that the effect of that decision was to give the purchaser eighty-two acres instead of the fifty, or thereabouts, intended for him by the deed.

There being thus two members of the Court for affirmance, and only one for reversal, the decision of the Superior Court was of course affirmed. And from that decision the present appeal is brought.

The question, what construction ought to be put upon the language of the description in the deed of the 3rd of March, 1813, in order to determine the eastern boundary of the piece of land thereby conveyed, is certainly one of considerable difficulty, and it is not surprising that there should have been a difference of opinion among the Judges of the Courts below. But, after full consideration, their Lordships are unable to concur in the conclusion arrived at by the majority of those learned Judges.

The language of the deed is extremely indefinite and ambiguous. It is impossible to say that it is quite incapable of the construction contended for by the Respondent; but, on the other hand, we are of opinion, that it is at least equally capable of the construction contended for by the Appellant; and, upon the whole, we think that the latter construction is the one which best satisfies all the language of the deed. By the terms of the deed the fifty acres of land, or thereabouts, intended to be conveyed, are to extend from

the westerly boundary of Lot 3 (which, it is to be recollected, is a straight line at right angles, or as nearly as possible at right angles, to both the southern and the northern boundary of the Lot) and on the whole width thereof (that is, on the whole width of the Lot), and easterly to the foot of a ledge of rocks, &c.; that is, the portion of land intended to be conveyed is to extend from the western boundary line towards the east,—it is to extend on the whole width of the Lot, which seems to imply that its width is to be the width of the whole Lot,—and it is to extend eastward till you come to the foot of the ledge of rocks, and there you are to stop. Now, it is obvious that, if after first reaching the foot of the ledge of rocks as you proceed towards the east, the portion to be conveyed is carried on still further to the east, so as to make the ledge of rocks its eastern boundary, all that additional part which would be thus included would not be of the width of the whole Lot; for inasmuch as the ledge of rocks does not run direct from south to north, but diagonally towards the north-east,—the width of that latter part of the portion, instead of continuing to be of the width of the whole Lot, would be gradually diminishing in width until it terminated in a point at the north-east. It would be too much to say that the language of the deed must necessarily receive this construction, and that it is incapable of any other; but it is not too much to say that it is at least as capable of this construction as of the construction contended for by the Respondent.

With respect to the argument, that if the parties had intended the eastern boundary to be that which is insisted upon by the Appellant, the deed would not have been worded as it is, but that intention would have been expressed in clear and unambiguous terms,—that argument seems to bear not less strongly against the Respondent's view; for it may be asked, with equal force, if the parties intended the ledge of rocks to be the eastern boundary, why did they not express that intention in clear and unambiguous terms. And with respect to the argument, that the careful description of the ledge of rocks as running across the Lot could only have been introduced for the purpose of indicating the whole course of the ledge of rocks as the line of the eastern boundary,—the answer is, that there was this sufficient reason for describing

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the land intended to be conveyed is couched in such ambiguous terms that it is very doubtful what were intended to be the boundaries of the land, and the language of the description equally admits of two different constructions, the one of which would make the quantity of the land conveyed agree with the quantity mentioned in the deed, and the other would make the quantity altogether different, the former construction must prevail. Applying that principle to the present case, the deed states the intention to be to convey "about fifty acres:"—The language of the deed with respect to boundaries is (for the present purpose) to be considered as equally susceptible of each of the two constructions contended for:—The effect of the one construction is to make the portion conveyed fifty-one acres, that is, "about fifty acres," the quantity mentioned in the deed; whereas the effect of the other construction is to make it no less than eighty-two acres instead of "about fifty acres." According to the principle before referred to the former construction must prevail.

Indeed it is impossible to read this deed, bearing in mind the nature, and character, and condition of Lot 3 at that time, without feeling satisfied that the dominant idea and intention of the parties was, that out of this rectangular block of wild uncultivated woodland which was known to contain about 140 acres, Captain *John Ruiter* should sell and convey to the two *Kranses* about fifty acres at the western end thereof, in consideration of 225 dollars. The question of boundaries was, to their minds, altogether subordinate to that of the quantity. It is not like the case of a conveyance of a certain ascertained piece of land, described precisely and accurately by its boundaries on all sides, adding a statement that it contains so many acres or thereabouts,—in which case, if it turns out that the quantity is incorrectly stated, it shall not affect the transaction. It is the case of a conveyance of a certain number of acres, or thereabouts, to be taken out of a larger block of land, and never yet measured off or ascertained, followed by directions, expressed in ambiguous language, as to the mode in which it is to be measured off. And, therefore, none of the authorities, or of the reasons which apply to the cases of clearly described boundaries, accompanied by an erroneous statement of the quantity, apply to the present case.

Their Lordships are of opinion that the construction contended for by the Appellant is the true construction, and ought to be adopted.

The Respondent went into a good deal of evidence in the Court below, with the view of proving that the possession and enjoyment had always been in accordance with the construction of the deed which he insists upon; but, upon examination, this evidence, so far from establishing an uniform, continuous, uninterrupted possession and enjoyment from the date of the deed, merely goes to shew that during the later portion of the period which has elapsed since that date, some scattered isolated acts, few and far between, and not of any important character, nor satisfactorily proved to have been known to the owners of the eastern portion,—have been occasionally done by some of the owners of the western portion of the Lot, upon that part which lies between the two boundaries asserted respectively by the Appellant and the Respondent, such as cutting some wood, or tapping maple trees for sugar,—acts which, in the opinion of their Lordships, can have no effect in determining the rights of the parties under the deed of the 3rd of March, 1813.

The same evidence is relied upon by the Respondent, to support an objection which he raises to the action, that the Appellant is barred by the rule of prescription. By the law of *Lower Canada* the time of prescription is thirty years. Now, so far from proving (to use the language of his plea) "public, open, peaceable, uninterrupted possession and ownership for a period exceeding thirty years" of the part of Lot 3 which is in controversy, no one of the occasional acts of ownership deposed to by the witnesses is proved to have taken place at a time nearly so far back as thirty years before the commencement of the action. The plea of prescription entirely fails.

Upon the whole, their Lordships are of opinion that the proper boundary between the two portions of Lot 3, belonging to the Appellant and the Respondent respectively, is a straight line to be drawn from the hemlock tree before-mentioned, on the southern boundary line of Lot 3, across the Lot, parallel to the western boundary line, up to the northern boundary line. They will, therefore, humbly advise Her Majesty to reverse the decision of the Court of Queen's Bench, and to remit the cause to the Superior

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Court of *Lower Canada*, with instructions to that Court to make such orders, and take such steps, as shall be necessary and proper to make and establish the boundary between the two portions of Lot 3, belonging to the Appellant and Respondent respectively, by a line drawn from the hemlock tree in the manner before-mentioned.

The Respondent must pay the costs of the appeal to the Court of Queen's Bench, and also the costs of this appeal.

Solicitors for the Appellant: *Ashurst, Morris, & Co.*
Solicitor for the Respondent: *La Penotière.*

J. C.* 1867 *Feb.* 27.

JOHN HADDOW CARMICHAEL AND OTHERS, OWNERS OF THE SHIP "MARTABAN". . . } APPELLANTS;

AND

JOHN BRODIE AND OTHERS, OWNERS OF THE SHIP "SIR RALPH ABERCROMBIE" AND HER CARGO; STEPHEN H. DALY, SECOND MATE, AND OTHERS, PART OF THE CREW OF THE "MARTABAN;" AND THE MASTER, REST OF THE OFFICERS, AND CREW OF THE "MARTABAN" . . . . . } RESPONDENTS.

THE "SIR RALPH ABERCROMBIE."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SAINT HELENA.

Salvage—Compensation to owners of salving vessel deviating from her course—Risk of salving vessel.

In estimating salvage reward to the owners of the salving vessel, the circumstances that the salving vessel deviating from her course might have vitiated the insurance, the possibility of being answerable to the owners of the cargo for such deviation, and the exposure to danger of the salving ship in rendering salvage services, are elements to be taken into consideration.

IN this case the appeal was brought from certain decrees of the Vice-Admiralty Court of *St. Helena*, in a salvage suit, instituted

* *Present:*—DR. LUSHINGTON, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

in that Court by part of the crew of the ship *Martaban* against the ship, *Sir Ralph Abercrombie*, and her cargo, brought into *St. Helena*, and there seized as a derelict.

The ship, *Martaban*, belonging to the Appellants, whilst on a voyage from *London* to *Bombay*, on the 21st of May, 1865, met with the *Sir Ralph Abercrombie*, with signals of distress flying. The *Martaban* bore down to her, and when she got near, the Captain and some of the crew of the *Sir Ralph Abercrombie* came on board her, stating that their vessel had lost her rudder, and was in distress. All hands abandoned her the next day, and the Captain of the *Martaban*, finding it impossible to induce the crew of the *Sir Ralph Abercrombie* to return, sent his second Mate, the Carpenter, and eight seamen, to take charge of her, and to navigate her to *England*, where she was bound with a very valuable cargo.

The *Martaban* then proceeded on her voyage, but being ten hands short out of twenty-one, she was obliged to put into the *Mauritius*, where the Master and crew of the *Sir Ralph Abercrombie* were landed, and the Captain of the *Martaban* hired hands to supply the place of those put on board the *Sir Ralph Abercrombie*. Those on board the *Sir Ralph Abercrombie* navigated her successfully as far as *St. Helena*, where they arrived about the 22nd of June, 1865; but, some temporary repairs requiring to be done to her before proceeding to *England*, they put into *St. Helena*, where, on their arrival, the ship and cargo were seized as a derelict by the Vice-Admiralty Court.

Upon these facts coming to the knowledge of the owners of the *Martaban*, they communicated with the managing owner of the *Sir Ralph Abercrombie*, and it was agreed between them that it would be to the interest of all parties concerned to have the ship and cargo released from the arrest as a derelict, and sent home to *England*, in order that she might earn her freight, and that, on her arrival, proceedings should be taken in the High Court of Admiralty of *England* to have compensation awarded for the salvage service. Steps were taken for that purpose, but before it was acted upon, the Appellant, *Carmichael*, received information that *Daly*, *Young*, and the eight seamen, had claimed salvage in the Vice-Admiralty Court at *St. Helena*, and that a sum of £12,000 had been awarded, not in respect of the second Mate, Carpenter, and

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eight seamen only, but as the total salvage compensation for the Owners, Master, and all the crew of the *Martaban;* and he was also given to understand that no appearance had been entered on behalf of the Owners of the *Martaban* at the time this award was made, but that after it had been made, and at the time the Court was requested to apportion it, a Proctor had appeared for the owners of the *Martaban,* and prayed to share in the distribution; but it appeared afterwards that such was not the fact, but that the Proctor had appeared for the Owners as Salvors, and filed a petition on their behalf before the salvage had been decreed.

The Judge of the Court (the Hon. *W. B. Phelps*), by his decree dated the 4th of September, 1865, apportioned the £12,000 thus:—

To be set apart to meet the claims of the Owners of the *Martaban* (without indicating what sum would be awarded to them)	£3,000.	0.	0
And the remaining £9,000 thus:—			
To *Daly*, the second Mate	1,600.	0.	0
To *Young*, the Carpenter	1,400.	0.	0
To the eight common seamen, in equal portions	6,000.	0.	0
	£12,000.	0.	0.

No appeal was asserted on behalf of the Owners of the *Martaban,* and the same mail which brought information of the above award informed the Owners of the *Martaban* that the whole of the £9,000 had been paid away to the several persons above mentioned.

As the Owners of the *Martaban* considered that an appeal from this decision would be fruitless, as it would be impossible to get the money after it had been paid away; they instructed their Proctor to claim a due proportion of the £3,000 set apart to meet the claims of the Owners of the *Martaban,* and to assert an appeal, if necessary.

The Judge of the Vice-Admiralty Court distributed the £3,000 in the following manner:—

To *Daly*	£2,000.	0.	0
To the Owners of the *Martaban*.	600.	0.	0
To the chief Mate of the *Martaban* . . .	50.	0.	0
And to the eight common seamen	350.	0.	0
	£3,000.	0.	0.

An appeal was asserted on behalf of the owners of the *Martaban*, and the Proctor who had appeared in their behalf opposed the payment of any portion of the £3,000 (which was then in the Registry), until the result of the appeal had been ascertained, but the protest was overruled by the Judge, and, after taking security Bonds, the £2,000 was paid out of the Registry to *Daly's* Proctor, and the £350 to the Proctor for the eight common seamen, leaving the £650, awarded to the chief Mate and owners, in the Registry.

The owners of the *Martaban* presented a petition of appeal to Her Majesty in Council, and moved the Judicial Committee to order the usual Inhibition, and also a Monition to transmit the £3,000 to the Registry of the High Court of Admiralty and appeals, which was granted.

The Inhibition, with Monition to transmit the £3,000, was duly served.

On the 11th of February, 1867, the Appellants moved their Lordships to pronounce the Judge of the Vice-Admiralty Court of *St. Helena*, the Registrar, and others, contumacious, in not having obeyed the Monition, and to decree an attachment to issue against them for contempt, or a sequestration; their Lordships, however, declined to make an order, but gave leave to move, upon the final hearing of the appeal, for an Order on the sureties to pay whatever might be found due from them.

The appeal now came on for hearing, and it was prayed that in the event of any alteration in the decree appealed from, that an Order might be made on the sureties to pay what sum might be awarded.

The *Queen's Advocate* (Sir *R. Phillimore*, Q.C.), and Dr. *Deane*, Q.C., for the Appellants:—

The mode in which the Court has awarded the salvage compensation is most unjust, and in principle wholly unprecedented. The Court below ought to have taken into consideration the claim for the risk and expense incurred by the owners of the *Martaban* in consequence of the assistance rendered to the *Sir Ralph Abercrombie*, and the deviation from her voyage rendered necessary thereby. Such deviation might have vitiated the insurance: *Lawrence* v. *Sydebotham* (1); *The Henry Ewbank and*

(1) 6 East, 52.

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cargo (1); *The Orbona* (2), *The Scindia* (3); and this on a ship and cargo of the value of nearly £100,000. There was the possibility also of her being liable to the owners of the cargo for such deviation. Moreover, the *Martaban* parted with ten of her hands in rendering salvage service, which weakened her crew and exposed her to danger. The sum awarded to her owners, considering the risk and services rendered, is totally inadequate as a salvage remuneration.

Mr. *Clarkson*, for the Respondent, *Daly*:—

The services rendered by the crew of the *Martaban* who were on board the salved ship, especially this Respondent, the Mate, were most meritorious. It was only by extraordinary exertions, in great danger, that the ship was saved. In the exercise of the Court's discretion, the sum awarded him and others on board was a fair reward.

DR. LUSHINGTON:—

The question in this case is, how their Lordships will recommend Her Majesty to dispose of the sum of £3,000, which has been reserved out of a sum of £12,000, the amount originally allotted by the Court below as a compensation for the services which had been rendered to a disabled vessel, the *Sir Ralph Abercrombie*. The simple question is, how this £3,000 should be disposed of, having of course regard to the mode in which the remaining £9,000 has been distributed by the Judge of the Court below. It is not for their Lordships, even if we were desirous of undertaking the task, to say how the whole sum of £12,000 should have been allotted and distributed if it had been within our reach: but we must bear in mind what has been done, and, with reference thereto, consider the claims which are now made upon this £3,000.

There has been some discussion at the Bar as to the relative claims of the Owners of ships, and of the Masters and crew, who are the actual Salvors. But it cannot be necessary at this day to discuss those principles in any detail, because they have been so

(1) 1 Sumner, Amr. Rep. 424. (2) 1 Spinks' Ecc. & Adm. Rep. 161.
(3) Law Rep. 1 P. C. 241.

constantly acted upon, and are of such every-day occurrence, that no one entertains any doubt as to the principles themselves; and the only difficulty that ever arises, is to ascertain the facts so as to apply the principles to the individual case.

In the present instance the vessel to which the services were rendered was a ship of large dimensions, laden with a very valuable cargo, and she was in a certain degree of distress, viz., she had, when she applied for assistance, lost her rudder, and I think she had three feet of water in her. It is not requisite or necessary that we should deliver any precise opinion as to the degree of distress in which she was. At the same time, it is but right to say that such a state of distress is not very uncommon, and in the Admiralty Court we should not consider that she was in very imminent peril, because, even without very skilled persons, a temporary rudder can be rigged up, so that she might, if there was tolerably fine weather, be got into a place of refuge if within any reasonable distance. However that may be, the Master of this vessel must have been actuated by the conviction that there was imminent danger, for it is clear that of his own accord he, in the first instance, abandoned the vessel. I state this because the evidence is uncontradicted that he went in his boat on board the vessel which ultimately rendered the salvage service—he went with his wife, and with his chronometers—all proving, or at least being *primâ facie* evidence, that he did not intend to attempt to navigate his own vessel any further. The Master of the *Martaban* seems, in the first instance, to have been desirous of rendering such assistance as was in his power; but it happened that a very short time afterwards the rest of the crew of this vessel, the *Sir Ralph Abercrombie*, quitted her and came on board the *Martaban*, so that in fact she became, in one sense of the word, a derelict vessel; and then it appears the idea occurred that the Master of the *Sir Ralph Abercrombie* and his crew should all remain on board the *Martaban*, and that a less number of persons, with the assistance of the Carpenter belonging to the *Martaban*, should take charge of the vessel, and, I believe, in the first instance, with the view of taking her to the *Mauritius*. We need not, perhaps, endeavour to investigate with any very great nicety what was the original intention and how it came to be changed;

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but, upon my mind, individually, there is an impression that the original intention was to have taken her to the *Mauritius* in the first instance, which was at no very great distance off, and that afterwards the second Mate and the persons with him on board, finding that the vessel was capable of being navigated successfully, thought it more expedient to take her to her original place of destination,—in all probability, in the expectation that they would get a much larger reward. It is not necessary minutely to consider whether or not the Master of the *Martaban* intended to recall these persons or not. Considerable doubt and difficulty might arise in coming to a very decided opinion whether the Master of the *Martaban*, in recalling the second Mate, which according to the evidence he intended to do, intended finally to abandon this vessel or not. We think there would be some difficulty in coming to a positive determination thereon, so far as to say that he comes within that category, which has been pointed out, of a person who has utterly abandoned the salvage of a vessel after having commenced to render service. However, be that as it may, the vessel is brought, under the guidance of *Daly*, the second Mate of the *Martaban*, to its destination. This conduct, no doubt, is very praiseworthy, and he was very much assisted by the Carpenter who was on board, who constructed the temporary rudder, and who also undoubtedly afforded very great assistance.

Of the sum of £12,000 awarded by the Vice-Admiralty Court of *St. Helena*, the allotment which has been made is to the following effect:—£1,600 is awarded to *Daly*, £1,400 to *Young*, the Carpenter, and £6,000 amongst the eight seamen belonging to the *Martaban* who assisted in bringing the vessel, the *Sir Ralph Abercrombie*, safe to *St. Helena*.

Now, the first consideration is, whether or not this allotment of £9,000 out of the £12,000 salvage to the second Mate and others who took the vessel to *St. Helena*, is an adequate reward to them for their services, or whether Her Majesty ought, in justice, and according to the usual rule of allotment for salvage service, to increase it out of the remaining £3,000.

Their Lordships are of opinion that the sum of £1,600 is an ample reward for the services *Daly* rendered, even estimating them as high as you may. He does not appear to have incurred

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any great risk or any great danger. At one time, no doubt, there was tempestuous weather, and then there might be a certain degree of difficulty; but £1,600 is a very large reward to give a person in his situation for the services which he performed.

We next come to consider what, out of this £3,000, ought to be given to the Owners of the *Martaban*. We think it is quite right that the claims of the Owners should be considered, not only on account of the doubt whether the insurance might not be vitiated, and whether the Owners of the ship might not become responsible to the Owners of the cargo for the acts of their servants in deviating from their course to render the assistance, and weakening the crew, but also for the risk to which their property has been exposed in rendering the service, and which in justice ought to be made good to them. Now, to say nothing of the deviation, it is quite clear that nine or ten of the most useful servants on board the *Martaban* were taken away and placed on board the *Sir Ralph Abercrombie*. It is said that an equal number, indeed a larger number, of men went on board afterwards; but it is a very different thing to take away a large part of the crew accustomed to perform their duty under the guidance of the Master of the *Martaban* and to put in their place a set of persons of whom he knows nothing, and who, according to the appearance they make in this case, undoubtedly were not the people to render very valuable assistance.

We, therefore, think that the Owners are entitled to due consideration at the hands of this Committee, and, therefore, their Lordships intend to recommend Her Majesty to allot to them a sum of £2,000 out of the £3,000.

With regard to the remaining £1,000, we award to the Master of the *Martaban* £300; and I think it right to observe that in all probability we should have given a larger sum than £300, if it had not been, so far as we can make out from the evidence, that there was a certain degree of vacillation on his part, which deprives him of the highest merit; but we give the £300 upon this principle,—that it is a very great responsibility for the Master of any Merchant vessel, especially one which contains a very valuable cargo, to weaken his crew to the extent which this Master weakened his crew in order to assist another vessel; in fact, it is ex-

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posing the interests of the Owners committed to his charge, to considerable risk, and that is a great responsibility. We think this case, looking at all the facts, that £300 will be sufficient.

Then we award to the chief Mate, whose duties beyond doubt, must have been increased, and whose labours must have been the greater, the sum of £150; and £550 to the rest of the crew of the *Martaban*, according to their respective ratings, which exhausts the sum of £3,000.

Their Lordships will humbly recommend Her Majesty to order that the decree or Order of the Judge of the Vice-Admiralty Court of *St. Helena* of the 23rd of November, 1865, be reversed, the cause retained, and the said sum of £3,000 apportioned in the manner stated in this judgment, each party paying his own costs of this appeal.

A Monition will issue against the sureties, and in case the whole £3,000 is not recovered, all parties must take *pro ratâ*.

Proctors for the Appellants: *Deacon, Son, & Rogers.*
Proctors for the Respondents: *Clarkson, Son, & Cooper.*

THOMAS BURNE SIMPSON . . . . . APPELLANT;

AND

THOMAS FLAMANK . . . . . RESPONDENT.

J. C.* 1867 June 18.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Church Discipline Act (3 & 4 *Vict. c.* 86, *s.* 20), *construction of—Commissioners' authority—Form of citation or decree under s.* 13.

In a Commission issued under the *Church Discipline Act*, 3 & 4 Vict. c. 86, it is not necessary that the offences complained of should be stated to have been committed within the two years limited by sec. 20 of that Act, if they are charged and admitted as continuing offences.

No appeal is given by the Act, 3 & 4 Vict. c. 86, either to the Arches Court, or thence to Her Majesty in Council, from the decision of the Commissioners, on the regularity or irregularity of the proceedings before them.

A citation or decree issued by the Court under Letters of Request being in the form prescribed by the rules made pursuant to sec. 13 of the Act, it is no valid objection that it does not state the offences complained of to have been committed within two years, the time prescribed. It is sufficient if the Letters of Request, which are the foundation of the suit, allege that fact.

THE APPELLANT in this case was the Incumbent of the perpetual Curacy and Parish Church of *East Teignmouth* in the County of *Devon*, in the Diocese of *Exeter*.

The Respondent was a Parishioner, and one of the Churchwardens of that Parish.

The suit in which the Interlocutory Order appealed against was made, arose from a complaint brought by the Respondent before the Lord Bishop of *Exeter*, pursuant to the *Church Discipline Act* (3 & 4 Vict. c. 86), touching certain ceremonies used by the Appellant during public service in the Parish Church.

The complaint, which was dated the 21st of May, 1866, set forth the practices objected to in the following form:—"First, that the Appellant has lights on the Communion Table when they are not required for the purpose of giving light; second, that in the administration of the Holy Communion, immediately before the prayer of consecration, the Appellant mixes water

* *Present*:—THE LORD PRESIDENT (THE DUKE OF MARLBOROUGH), THE ARCHBISHOP OF YORK, LORD CAIRNS (LORD JUSTICE), LORD JUSTICE TURNER, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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with the wine; third, that after saying the prayer of consecration, the Appellant raises the Paten with both hands over his head, and the Cup in like manner; fourth, that when the alms collected at the Offertory are brought to be placed on the Communion Table, the Appellant places the same on a stool by the side of the Table, instead of on the Communion Table; and, fifth, that in saying the last prayer of the Morning and Evening Service the Appellant omits 'all' in the concluding sentence."

The Bishop, having given due notice to the Appellant, issued, on the 20th of June, 1866, a Commission to certain Commissioners therein named, empowering them to make inquiry as to the grounds of the charges so made by the Respondent against the Appellant. On the 7th of July, 1866, previous to the meeting of the Commissioners, notice was given on behalf of the Appellant that at the sitting of the Commission he would admit the facts alleged in the complaint of the Respondent.

The Commissioners met on the 10th of July, when a preliminary objection was taken on behalf of the Appellant; that the offences were not charged to have been committed within two years according to the provisions of the Act, 3 & 4 Vict. c. 86, s. 21. The Commissioners overruled the objection, when the Appellant formally admitted the facts above stated in the complaint of the Respondent; and, after taking the depositions of witnesses in confirmation thereof, the Commissioners declared their opinion to be, that there was sufficient *primâ facie* ground for instituting further proceedings.

By Letters of Request the Bishop of *Exeter* sent the case to the Court of appeal of the Province of *Canterbury*, to issue a citation, and a decree or citation accordingly issued, calling on the Appellant to answer the charges of the Respondent. The Letters of Request alleged the offences charged to have been committed within two years then last past. Articles were exhibited and filed on behalf of the Respondent. On the 3rd of November, 1866, no appearance under protest or other form of objection to the decree or citation having been made, a preliminary objection to the admission of the Articles in form—but, in substance, to the decree or citation—was taken by the Appellant, to the same effect as had been previously urged before the Commissioners—namely, that neither the Com-

mission which authorized the Commissioners to proceed, nor the citation or decree under which the Letters of Request were issued, expressly stated, that the offences charged had been committed within two years then last past. The objection so limited was argued, and, on the 26th of November, the learned Judge of the Arches Court (The Right Hon. Dr. *Lushington*) delivered judgment overruling the objection. The learned Judge was of opinion, regarding the decision of the Commissioners, that he had no authority to inquire into that decision, there being no appeal given by the Act from their report; he, moreover, held that, under the authority of *Ditcher* v. *Denison* (1) and *The Bishop of Hereford* v. *T.* (2), it was clear that not only his jurisdiction, but that the suit or proceedings to which the Act affixes the limit of two years from the commission of the offence, commenced from the issuing of the citation or decree; he was also of opinion that the charges referring to a continuing practice, and being made in the present tense, necessarily implied that they were offences continuing up to the time of issuing the decree; and that the Letters of Request contained a sufficient allegation that the charges referred to offences committed within two years then past. He, therefore, refused to sustain the preliminary objection raised to the admission of the Articles charged. On application for leave to appeal to the Queen in Council, the Court gave permission.

The *Queen's Advocate* (Sir *R. Phillimore*, Q.C.), Dr. *Deane*, Q.C., and Mr. *Hannen*, for the Appellant:—

We limit our objection to the admissibility of the Articles to the points of form taken in the Court below. These proceedings cannot be sustained. First, because the Commission issued by the Bishop to inquire into the charges made, and authorizing the Commissioners to proceed, did not state that the offences into which they were to inquire had been committed within two years. Secondly, the same error pervaded the decree or citation issued from the Court of Arches in pursuance of the Letters of Request from the Bishop. The period of two years is made essential by the 20th section of the *Church Discipline Act*, the 3 & 4 Vict. c. 86, under which the proceedings in this case were taken; that section

(1) 11 Moore's P. C. Cases, 324. (2) 2 Rob. Ecc. Rep. 604.

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enacts "that every suit or proceeding against any Clerk in Holy Orders for any offence against the Laws Ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards;" and the 23rd section provides, "that no criminal suit or proceeding against a Clerk in Holy Orders for any offence against the Laws Ecclesiastical, shall be instituted in any Ecclesiastical Court otherwise than hereinbefore enacted or provided." This being a criminal proceeding leading, if the charges made are proved, to suspension or deprivation, the utmost strictness is requisite, and the Appellant is entitled to every provision made for his protection: *Paley* on Convictions p. 63. Neither the Commission issued in the first instance by the Bishop, nor the decree by Letters of Request issued from the Registry of the Arches Court, alleged, as they ought to have done, that the offences charged had been committed within two years then last past. If there was no appeal from the Commissioners to the learned Judge, on the validity of the objection to the form of the Commission, the Court below undoubtedly had authority to decide the point as regarded the decree issued by that Court, and we are clearly entitled to the full benefit of the objection taken there. The case of *Ditcher* v. *Denison* (1), which was relied on by the learned Judge in the Court below, decided that the citation was the commencement of the suit, and, if so, surely that instrument ought to allege the commission of the offence within the two years, as required by the 20th section of the Act. The case of the *Bishop of Hereford* v. *T.* (2), also relied on by the Court below, determined that the issuing the decree or citation was the commencement of the suit. It is no answer to the omission in the Commission or decree, that the offences, are alleged in the Articles to have been committed within the requisite time; in a criminal suit it is not competent to the Promoter to set forth in the Articles an offence not contained in the citation: *Breeks* v. *Woolfrey* (3).

By the 13th section of the Act, the Bishop of the Diocese in which the Clerk offending holds preferment may send the cause in the first instance to the Court of appeal of the Province, without

(1) 11 Moore's P. C. Cases, 324. (2) 2 Rob. Ecc. Rep. pp. 595, 604.
(3) 1 Curt. Ecc. Rep. 880.

issuing any commission of inquiry into the alleged offences; and the Judge of such Court is empowered to make orders for expediting such suits, or otherwise improving the practice of the Court. Had the case, therefore, been so sent to the Arches Court it must have been heard there according to the law and practice of that Court. Now, the first of the Rules and Regulations directed to be observed in all causes, suits, or proceedings instituted in the Arches Court of *Canterbury*, which have been made pursuant to this authority, and are now in force, provides "that all decrees, citations, monitions, inhibitions, compulsories, and other instruments under seal, shall be prepared in and issued from the Registry of this Court in forms to be approved of by the Judge, on written application (from the Proctor of the party or parties requiring the same, and signed by him), and no act of Court shall be necessary to lead such decrees or other instruments, and the same shall bear date on the day on which they are respectively issued," and a form of a decree is annexed to this Rule. It is said that this Rule and form of decree contain no direction regarding the period within which the offence complained of must be laid to have been committed. The form, however, is, like the Rule, general, and intended to be made applicable to all cases indiscriminately; it cannot be held to exclude the absolute requirements of the Statute as to time, which are imperative, and must appear on the very face of the proceedings.

Mr. *A. J. Stephens*, Q.C., Dr. *Swabey*, and Mr. *H. R. Droop*, for the Respondent, were not called on.

Their Lordships reserved their judgment, which was now delivered by

THE LORD ARCHBISHOP OF YORK:—

Their Lordships having heard the case of the Appellant elaborately argued, have not thought it necessary to call upon the Counsel for the Respondent, and are now prepared to state the reasons for the advice which they propose humbly to tender to Her Majesty in reference to this appeal.

It was, in the first place, contended that the Commission issued on the 20th June, 1866, by the Lord Bishop of *Exeter*, did not

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state on the face of it that the offences mentioned in it had been committed within the two years defined by section 20 of the Act, 3 & 4 Vict. c. 86, and that, therefore, the report of the Commissioners, and all the subsequent proceedings, were invalid.

Their Lordships are unable to see any foundation for this argument. The Statute, although it prescribes a limit of time within which the proceedings by Commission must be commenced, is silent as to any specific form of, or statements in, the Commission; and the notice of the Commission, which the Statute requires to be given to the person accused, is to state the nature of the offence, with the names, addition, and residence of the party on whose application or motion the Commission is about to issue, and nothing more.

The Commission and the notice in the present case allege with substantial, if not with technical, distinctness, that the offences which are charged are continuing offences; and the Appellant when he appeared before the Commissioners, objected by his Counsel, not that the offences were not in fact committed within two years, but merely that they were not alleged to have been so committed; and this objection having been overruled, the Appellant admitted the facts mentioned in each of the charges. The Appellant, therefore, has in no way been misled or prejudiced in the course of his defence before the Commission; and this part of the appeal against the form of the proceedings is, in their Lordships' opinion, wholly without justification.

Their Lordships, however, although they have entered into the merits of this objection of the Appellant, desire to express no dissent whatever from the view of the Dean of Arches, that the proceedings before the Commissioners would not be open to appeal before the Arches Court on the score of irregularity; and this part of the appeal to Her Majesty would, on this ground also, fail.

It was argued, in the next place, that the decree or citation from the Arches Court ought to have stated, and did not state, that the offences alleged had been committed within two years previous to the citation. The case, it was said, if sent by the Bishop, under section 13 of the Act, to be heard before the Court of appeal of the Province, must be there "heard and determined according to the law and practice of such Court," and the practice of the Court

of Arches, it was contended, required that the decree should shew on the face of it jurisdiction in this respect.

The Appellant did not raise this objection in the Court of Arches by appearing under protest. On the contrary, he appeared absolutely to the citation, and prayed Articles; and afterwards opposed, on this ground, the admission of the Articles. Their Lordships will, in favour of the Appellant, assume, although they would hesitate to decide, that it was open to him, after appearing and praying Articles, to object to the citation in point of form: and they will also assume in his favour, although they think it open to doubt, that the statement in the citation of offences as continuing offences did not sufficiently shew a jurisdiction under the Statute.

The Statute, however, by section 13, provided that the Judge of the Arches Court should have power to make orders for expediting suits under the Act, or otherwise improving the practice of the Court. It appears that by the Rules or Orders of the Arches Court, made under this Statute, and in force at the time of this citation, a form of citation or decree was given, approved of by the Judge; and in this form, obviously intended to shorten what had been previously in use, no provision is made for the specification of the offence, or for a statement of the time when or within which it was committed; but the Letters of Request are referred to as remaining in the Registry of the Court, and as being the foundation of, and, therefore, shewing the jurisdiction to issue, the decree. The form of decree citing the Appellant appears to their Lordships to have been in accordance with the form given by these orders; and the Letters of Request which the decree refers to contain an express statement that the offences alleged were committed within two years. The decree appears, therefore, to their Lordships to be in accordance with the practice of the Court; and they are unable, as to this, as well as in the case of the other objection, to look upon it otherwise than as groundless, and made only for the purpose of delay.

Their Lordships will humbly advise Her Majesty to dismiss the appeal with costs.

Proctors for the Appellant: *Brooks & Co.*
Proctors for the Respondent: *Tebbs & Sons.*

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EDWARD MAUGER . . . . . APPELLANT;

AND

GEORGE SCOTT LE GALLAIS AND OTHERS RESPONDENTS.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Jersey—Law of—Acte of States, 24th June, 1851, Arts. 8 and 10—Holograph Will—Real Estate—Attestation clause.

Article 8 of the *Acte* of the States of *Jersey*, of the 24th of June, 1851, confirmed by the Order of Her Majesty in Council of the 7th of August, 1851, containing the law relating to Wills, provides as follows:—"*Pour que les legs d'immeubles contenus dans un Testament soient valables, il faut que le Testateur, en présence des deux témoins, ait apposé sa signature à la fin, ou ait reconnu sa signature ainsi apposée, et que les deux témoins présents en méme tems aient alors apposé leurs signatures au Testament, en présence du Testateur. Si le Testament n'est pas olographe, la lecture en sera faite en présence du Testateur et des deux témoins. Pour qu'un Testament olographe soit valable, l'attestation des témoins devra être datée.*"

Article 10 declares: "*Les legs d'immeubles, faits dans les quarante jours qui ont précédé la mort du Testateur, seront nuls, à moins que la mort n'arrive par cas fortuit.*"

To a holograph Will, disposing of both real and personal estate, dated and signed by the Testator in the presence of two witnesses, an attestation clause was appended, in the following terms: "*Le présent Testament olographe a été signé par le Testateur en notre présence, et nous y avons apposé notre signature, comme témoins, en présence du dit Testateur, et en présence l'un de l'autre, le dit jour:*"—

Held, affirming the judgments of the Inferior, as well as the Superior Number of the Royal Court of *Jersey*, that the words "*le dit jour*," in the attestation clause, referred sufficiently to the date contained in the Will, to comply with the requisition of the 8th Article; and that the Will being holograph was, notwithstanding the provisions of Article 10 of the *Acte* 1851, a valid and efficient instrument.

THIS was an action brought to set aside the Will of the Rev. *Samuel Wright*, late of the parish of *St. John's*, in the Island of *Jersey*, and to have the same declared by the Royal Court null and void, so far as the same purported to dispose of the Testator's real estate in the Island.

By his Will the Testator (*inter alia*) gave all the real estate

* *Present:*—LORD JUSTICE TURNER, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

which he then possessed, or which he might possess, in the Island of *Jersey* at the time of his decease, and which was of the nature of "*Conquêts et Acquêts*" unto his wife, *Marie Le Gallais*, absolutely, subject to the payment of the charges which might be due thereon, and he appointed her Executrix.

The Will was dated the 10th of March, 1863, signed by the Testator in the presence of two witnesses, who attested the same, and the attestation clause to the Will was in the words following, —"*Le présent Testament olographe a été signé par le Testateur en notre présence, et nous y avons apposé notre signature, comme témoins, en présence du dit Testateur, et en présence l'un de l'autre, le dit jour.* Jas. Le Brun, *un des Ecrivains de la Cour Royale;* Jean Bailhache, *Témoins.*"

The Will, as well as the attestation clause, was wholly in the handwriting of the Testator, and was propounded by *Marie Le Gallais* as a holograph Will.

The Testator died on the 16th of June, 1863, without having revoked or altered the Will, which was proved by *Marie Le Gallais* in the Ecclesiastical Court of the Island of *Jersey* on the 30th of June, 1863, and was registered in the Royal Court of the Island on the 8th of July, 1863.

The eighth Article of the *Acte* of the States, of the 24th of June, 1851, approved and ratified by Her Majesty's Order in Council of the 7th of August, 1851, which is the existing law of *Jersey* relating to Wills, is in the words following:

"*Pour que les legs d'immeubles contenus dans un Testament soient valables, il faut que le Testateur, en présence des deux témoins, ait apposé sa signature à la fin, ou ait reconnu sa signature ainsi apposée, et que les deux témoins présens en même tems aient alors apposé leurs signatures au Testament, en présence du Testateur.*.

"*Si le Testament n'est pas olographe, la lecture en sera faite en présence du Testateur et des deux témoins.*

"*Pour qu'un Testament olographe soit valable, l'attestation des témoins devra être datée.*

"*Un des témoins devra être un des Membres des États, un des Officiers de la Reine près la Cour Royale, un des Avocats du Barreau, ou un des Ecrivains de la Cour Royale.*

"*Les formalités ci-dessus seront observées sous peine de nullité.*"

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By the tenth Article it is further enacted: "*Les legs d'immeubles faits dans les quarante jours qui ont précédé la mort du Testateur seront nuls, à moins que la mort n'arrive par cas fortuit.*"

The Appellant was the eldest son of *Edward Mauger* and *Mary Elizabeth Wright*, his wife, deceased, and principal heir of his Mother, who was the only sister of the Testator, and as such principal heir of his Mother the Appellant was the principal collateral heir of the Testator, who died without issue, and as such entitled to the possession of the whole of the real estate of the Testator undisposed of by his Will, until partition thereof between the Appellant and his co-heirs.

The Appellant's case was that the words "*le dit jour*" in the attestation clause to the Will of the Testator did not constitute a date to such attestation clause within the meaning of the eighth Article of the law relating to Wills of real estate, and that consequently the Will, so far as related to the disposition of the real property of the Testator in the Island of *Jersey*, was invalid, and, therefore, that he, as principal heir of the Testator, was entitled to the whole of the real property of the Testator.

The Appellant, as such principal heir of the Testator, actioned *Marie Le Gallais* before the Royal Court of the Island of *Jersey* for the purpose of having the Will, so far as related to the disposition of real estate, declared null and void, on the ground that the attestation of the persons who signed the Will as witnesses was not dated in obedience to and within the meaning of the disposition in the law as to Wills of real property, which declares that in order to make a holograph Will valid the attestation of the Witnesses shall be dated.

The cause was heard before the Inferior Number of the Royal Court of the Island of *Jersey*, who, on the 2nd of December, 1863, gave their judgment that the reasons of the Appellant for declaring the Will to be null and void were not well founded, and dismissed *Marie Le Gallais* from the action, giving the Appellant leave to appeal from such decision to the Superior Number of the Court.

Marie Le Gallais died on the 18th of October, 1864, before the appeal of the Appellant could be heard, by the Superior Number of the Royal Court, having made her Will, bearing date the

5th of August, 1864, whereby (*inter alia*) she gave and devised one moiety of her real estate unto her nephew, the Respondent, *George Scott Le Gallais*, absolutely, and also gave and devised the other moiety of her said real estate unto her brother, *William George Le Gallais*, for life, and from and after the decease of *William George Le Gallais*, she gave and devised the last mentioned moiety of her real estate unto the Respondents, *John Edward Le Gallais, George William Le Gallais, Philip Bertaut Le Gallais, Edward John Le Gallais, Agnes Caroline Bereton Acom Le Gallais*, and *Mary Ann Le Gallais*, the children of *William George Le Gallais*, absolutely.

In consequence of the death of *Marie Le Gallais*, pending the appeal, and of her having bequeathed her real estate in manner above mentioned, it became necessary to make the above-named legatees parties to the appeal, as representing *Marie Le Gallais* deceased.

John Godfray was duly appointed by *John Edward Le Gallais* as his *Procureur* in the Island, and the Respondent, *Francis Amiraux Godfray*, was also duly appointed by the Royal Court of the Island *Administrateur* of the property of *George William Le Gallais, Philip Bertaut Le Gallais*, and *Edward John Le Gallais*, who were absent from the Island, all of whom, together with the parties' *Procureur* and *Administrateur*, as such, were made parties to the appeal from the judgment of the Inferior Number.

On the 22nd of November, 1865, the majority of the Superior Number of the Royal Court confirmed the judgment of the Inferior Number, and condemned the Appellant to the costs, giving leave to the Appellant to appeal to Her Majesty in Council.

William George Le Gallais departed this life on the 29th day of December, 1865, without having made any Will, leaving *John Edward Le Gallais*, his eldest son and principal heir him surviving.

William George Le Gallais had only a life interest in a moiety of the real property devised by the Will of *Marie Le Gallais* as aforesaid. *John Godfray*, the *Procureur* of *John Edward Le Gallais*, renounced the procuration; and the Respondent, *Francis Noel Giraudot*, was, on the 24th of November, 1865, appointed by

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the Royal Court of *Jersey Administrateur* of the property of *John Edward Le Gallais*, who was absent from the Island.

By an Order in Council, bearing date the 27th of June, 1867, it was ordered that the appeal be revived, as against *Francis Noel Giraudot* as "*Administrateur*" of *John Edward Le Gallais* in the place of *John Godfray*, and as against *John Edward Le Gallais* as principal heir of his father, *William George Le Gallais*, deceased.

Her Majesty's Procurator General for Jersey (*M. Marett*), and Mr. *W. Streeten*, for the Appellant:—

The attestation of the witnesses to the Will of the Testator is not dated as required by the law relating to Wills of real estate in the Island of *Jersey*. The words in the attestation, "*le dit jour*" are not in themselves a certain date. They are capable of being construed as a date, only by referring to the date in the body of the Will. The Will is a holograph Will, and, as such, it is not requisite by the law of *Jersey* that it should be read to the witnesses, or in their presence. Its contents, and, therefore, its date, are in contemplation of law unknown to them. A reference to the contents in order to establish the date of their attestation, is not a compliance with the injunction of the law, which requires the witnesses in the attestation clause to give the contents of the Will a date, which must mean a certain date. Again, if the words "*le dit jour*" at the end of the attestation clause, are to be deemed a sufficient date within the meaning of the eighth Article of the law of 1851: such a construction would totally set aside the intention of the Legislature in providing that the attestation clause of a holograph Will shall be dated. The object of such intention is, that as a holograph Will is not required to be read over to the Testator in the presence of the attesting witnesses, there must be some evidence on the face of the Will, and yet apart from the Will, shewing what was the real day on which such holograph Will was executed. This is of the utmost importance, because by Art. 10 of the law of Wills no disposition of real property is valid which is made within forty days preceding the death of the Testator: *Lois et Réglemens des Etats de Jersey qui ont reçu la sanction Royale, depuis* 1771; *Acte de Testamens*, 24th June, 1851, and Order in Council

confirming same of the 7th of August, 1851, Article 8 and 10. It is clear, therefore, that any relaxation of the rules relating to the form of Wills of real property which require that the attestation to a holograph Will shall be dated, will open a door to fraud, by giving a Testator, desirous of disposing of his real property, an opportunity of ante-dating his Will, so that the same may appear to have been executed more than forty days before his death. This, it is evident, it was the intention of the *Acte* regarding the law of Wills to prevent, by requiring that the attestation clause to a holograph Will shall be dated. The decision of the Courts below renders nugatory such precaution.

Mr. *Glasse*, Q.C., and Mr. *D. Gardiner*, for the Respondents were not called upon.

SIR RICHARD T. KINDERSLEY :—

Their Lordships do not think it necessary to call on Counsel for the Respondents.

This is an appeal from the decision of the Royal Court of *Jersey*, by which it has been determined that the Will of Mr. *Wright*, dated the 10th of March, 1863, was duly executed and attested in the manner required by the law of *Jersey* to pass real estate.

The law of *Jersey*, as applicable to this case, is contained in an Order in Council dated the 7th of August, 1851, and the *Acte* passed by the States of *Jersey* on the 24th of June of that year. The object of this *Acte* and Order in Council was, as stated by the learned *Procureur-Général of Jersey*, to introduce for the first time the testamentary power so far as relates to real estate; and it introduced it to a limited extent, and required certain specific forms and ceremonies to be observed; and if those forms and ceremonies are not duly observed the Will, so far as relates to real estate, is invalid.

The Article of the Order in Council especially applicable to this case is Article 8. The first portion of that Article relates to the manner in which the Will must be executed by the Testator and attested by the witnesses. It is in these terms:—"*Pour que les legs d'immeubles contenus dans un Testament soient valables, il faut*

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que le Testateur, en présence des deux témoins, ait apposé sa signature à la fin, ou ait reconnu sa signature ainsi apposée, et que les deux témoins présens en même tems aient alors apposé leurs signatures au Testament, en présence du Testateur."

Now, stopping there for a moment, this is one of the requisitions the non-observance of which renders the Will of realty invalid. It is clear that it requires nothing to be stated upon the attestation with respect to the observance of this formality. It only requires that the fact should be so, leaving the proof of it to extrinsic evidence. It may be usual, as it is with us, to express in the attestation that the formalities were observed; but there is no necessity, according to this clause of the Order in Council, any more than there is a necessity according to our law under the *Wills Act*, that this should be stated on the face of the attestation, so that if it were questioned whether these formalities were duly observed, the fact would have to be proved by evidence in the ordinary course.

The next clause is:—"*Si le Testament n'est pas olographe, la lecture en sera faite en présence du Testateur et des deux témoins.*" It must have been read over. It may be usual, and no doubt expedient, to express on the face of the attestation that that was observed; but it is no more necessary in that case to express upon the face of the attestation that this formality was observed than in the other case.

Then we come to that clause which is more especially applicable to the present case:—"*Pour qu'un Testament olographe soit valable, l'attestation des témoins devra être datée;*" and the question is, what construction is to be put upon this clause.

It is clear that the attestation must be "dated," in the sense in which that term is to be read, or else it will be void. It may be a question what was the particular reason for making that requisition? The learned *Procureur-Général* has stated reasons more or less satisfactory, which may be the true reasons. Assuming that the reason was, as it has been suggested, that you might know on the face of the attestation when the Will was actually executed and attested, with reference to the question of whether it was executed and attested prior to the commencement of the forty days preceding the death of the Testator, it is difficult to see

why a similar requisition was not made with respect to a non-holograph Will; and it seems hardly satisfactory to say that, in the case of a non-holograph Will, its being read over makes it unnecessary that the attestation should be dated, because the reading over of the non-holograph Will would not in any way shew upon the face of the attestation, nor would it shew upon the face of the Will necessarily, when the Will was executed and attested. A Will might contain no date, and it is not contended that a Will without a date would be invalid on that ground. A Will might have a date, but the date might have been put to it at a time antecedent to the time at which the execution and attestation took place. It might even have been previously not only dated, but signed by the Testator, because all that is required is, that he should acknowledge his signature in the presence of the witnesses. Therefore if the reason for requiring the dating of the attestation to a holograph Will be in order that upon the face of the attestation you may see what that date was with reference to the question of the forty days, it is difficult to see why a similar requisition was not made in the case of the non-holograph Will. It is, however, unnecessary to determine what the particular reason was for introducing this clause requiring the dating of the attestation. It is sufficient to say that it was intended that upon reading the attestation you should know what the date was; and the only question is, may you not know that just as well by the date being given by reference to the date of the Will, which is on the same paper with the attestation, as if that date were repeated in words and figures in the attestation itself?

It is contended that under the true construction of this clause requiring the dating of the attestation, it is absolutely necessary that there should be no reference to anything whatever extrinsic to the attestation; that you must not refer to anything but the attestation; and if, shutting your eyes to everything else, you do not find the date upon that attestation, it is bad. Now, their Lordships are of opinion that that is an assumption which is not well founded. If the reason for the requisition be, as clearly it must be, whatever ulterior reason there may have been, that it might be known from the attestation itself what the date of the execution and attestation actually was, it appears to their Lordships

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that that object is just as well attained, and the attestation is as effectually dated, by the reference to the date of the Will on the same paper as by repeating it in full, provided always that the Will itself contains only one single date. If indeed the Will contained not only the date of the Will, but also some other date with reference to another matter, then it would be ambiguous and doubtful what was meant by "*le dit jour.*" "*Le dit jour*" must refer only to one single date. But if, as in the present case, there is no date or time mentioned in the Will throughout, except that one time which is the date of the Will, it appears to their Lordships that upon the reason of the thing, and for the purpose of accomplishing the object of this clause, the attestation is as well dated by the form of reference to the date of the Will as it would be if the date were repeated in words and figures at length in the attestation itself.

Their Lordships, therefore, are of opinion that this appeal cannot be maintained, and they will humbly recommend Her Majesty that it should be dismissed with costs.

Solicitors for the Appellant: *Hancock, Saunders, & Hawksford.*
Solicitors for the Respondents: *Dangerfield & Fraser.*

THE BANK OF UPPER CANADA . . . . APPELLANTS; J. C.*
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AND
JAMES LEWIS BRADSHAW AND OTHERS . RESPONDENTS. June 24, 25, 26.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Principal and Agent—Scope of authority of Manager of Bank—Action by Banking Company against the late Manager and Cashier for negligence and misconduct in application of funds.

In an action brought by a Banking Company against their late Manager and Cashier to recover moneys belonging to the Bank, alleged to have been improperly applied in discounting Bills, &c., for his own advantage, for the benefit of parties and Companies with whom he was connected, and in which he was interested, it appeared that such transactions were all in the ordinary course of the business of the Bank; that he had not exceeded the power and authority with which he was intrusted; and that no case of bad faith could be proved against him; the Judicial Committee, affirming the judgments of the Superior Court and Court of Queen's Bench of *Lower Canada*, *held*, under such circumstances, that no such action could be sustained, and dismissed the appeal with costs.

THIS was an appeal from a judgment of the Court of Queen's Bench for *Lower Canada*, confirming, in respect of the matters appealed from, the decision of the Superior Court at *Quebec*.

The Appellants were a Banking Corporation, carrying on business in *Canada*, having their principal place of business at *Toronto*, and at the time to which the proceedings in this appeal related, they had a Branch Bank at *Quebec*, at which *James Foster Bradshaw*, the Defendant in the action hereinafter mentioned, and since deceased, was their Manager and Cashier. The Respondents were the heirs of *Bradshaw*, and as such had resumed the defence on his decease.

The action was commenced by the Appellants on the 12th of February, 1859, by the issue of writs of *arrêt simple* and *saisie-arrêt*, under which the property of the Defendant, *Bradshaw*, was seized as security, and retained. The action was brought to recover the sum of £40,000, by way of damages against the Defendant, for-

* *Present*:—LORD CAIRNS (LORD JUSTICE), LORD JUSTICE TURNER, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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alleged misconduct in his duty of Cashier, and in particular to recover money of the Plaintiffs, alleged to have been lent by him, by discounting Bills and otherwise, for his personal advantage, to persons with whom he was interested in business. The declaration, which consisted of three counts, stated to this effect, and particularized five instances in which the Defendant was alleged to have advanced sums of money for his own advantage to parties to whom he was interested, which still remained unpaid to the Bank; these were specified, and are hereafter set forth.

The Defendant pleaded a plea of perpetual peremptory exemption, and also a plea of *defence au fonds en fait*, the substance of which amounted to a general denial of all the allegations in the declaration; he also set up affirmative defences to the effect,—that he was acting under the immediate superintendence of the Appellants, and with their approbation, and further that any claims due from him had been satisfied and settled.

Issues having been raised on these points, the parties proceeded to adduce evidence, and a most voluminous mass of evidence, both oral and documentary, was taken.

From the evidence it appeared that the Plaintiffs were a Banking Corporation, whose head office was at *Toronto*, and that in 1851 they resolved to open a branch of their Bank at *Quebec*, in which city there were at that time several Banks of long standing. That the late Mr. *Bradshaw* was chosen as Manager and Cashier, and continued in that capacity until his resignation on the 2nd of December, 1858. The business of the *Quebec* Branch was controlled by the head of the establishment at *Toronto*, and it was proved that no capital, in the way of specie or otherwise, had ever been assigned to the *Quebec* Branch. It appeared, however, that *Bradshaw*, by his industry, energy, and skill, had created a large connection, and that during the seven years in which he was Manager the profits had amounted to more than £50,000. The general charges of misconduct made against *Bradshaw* were abandoned, and the Plaintiffs, on the trial, were limited to the four specific charges made in the third count of the declaration, in which it was alleged that the Defendant had advanced certain sums of money to persons with whom he was connected for his own personal advantage, and under cir-

cumstances which rendered such advances inconsistent with his duty to the Bank. The particulars of these sums were as follows: First, moneys advanced to or drawn out of the Bank by the *Quebec and Lake Superior Mining Company* between October, 1853, and December, 1856, amounting to 2,276 dols. 73c. Second, moneys drawn out by *Cecil Mortimer*, Treasurer of the *Canada Grand Trunk Telegraph Company*, from January, 1854, to December, 1857, amounting to 1,506 dols. Third, balance due on notes discounted for a Mr. *McKay*, in the year 1858, amounting to 1,615 dols. And, fourth, moneys drawn by one *Wilson*, in connection with steamboat speculations in which the Defendant was alleged to have been interested, from 1853 to 1858, amounting to 25,574 dols. 47c.

With regard to the first of these items of charge, it was proved by the evidence that the *Quebec and Lake Superior Mining Company* was a Company incorporated by an Act of the local Legislature, which banked at the Plaintiffs' branch Bank at *Quebec*, and that calls made on the shareholders were payable there. It appeared that the Company, from time to time, overdrew their account, and sometimes had a considerable balance in their favour. *Bradshaw* was one of the largest shareholders and a Director in this Company, he paid all the calls upon his shares down to September, 1854, after which he gradually became in arrear in respect of calls made upon stock held in his name, the arrears amounting, in 1856, to £608. 8*s*. In September, 1855, at a meeting of the Directors of the Company, at which *Bradshaw* was present, it was resolved to make a further call upon the shareholders to the amount of about £1,700, and *Bradshaw* agreed, upon the faith of that call, to give the Company credit, at the *Hamilton* Branch of the Plaintiffs' Bank, to the extent of £500. A draft at three months for that amount was accordingly discounted at *Hamilton*, on the 20th of September, 1855, and sent to *Quebec* for collection. During the three months that the Bill was running, money due on the call made as above mentioned was paid into the Bank at *Quebec*, to the amount of nearly £1,100; but this was all drawn out by the Company before the Bill became due. When the Bill became due, it was protested for non-payment, and after being held over till the 7th of March, 1856, was placed to the debit of

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the Company as a cheque, together with the costs of protest and interest, and the Company's account thus became overdrawn to the extent of £552. 9*s.* 9*d.* It was proved that the shareholders of the Company were solvent, and that out of 40*s.* per share, which was payable under the terms of the Charter, only 24*s.* 9*d.* per share had been called up. No effort was made, either by the Plaintiffs or their Agents, to obtain payment of the amount from the Company before commencing the action against *Bradshaw*. It was sought to be shewn on the part of the Plaintiffs that *Bradshaw* had been led originally to grant this discount, and subsequently to avoid enforcing payment of it, for fear that the Company should press him for the payment of the calls due from him, but such proof failed.

With respect to the second item, it was proved that the *Grand Trunk Telegraph Company* was also an incorporated Company; that the late Mr. *Bradshaw* was a shareholder, but to the extent only of £100; that he was also a Director, but took no active part in the management of the Company. The Company banked with the Plaintiffs' Branch at *Quebec*, and the instalments on the shares taken by persons in the neighbourhood of *Quebec* were paid into the Bank. Three out of the four instalments due upon the stock were called in, and the sums payable in respect of them to the Bank amounted to £1,980, only £1,210 was however, in fact, paid up, against which the Company, from time to time, drew. The account was overdrawn in March, 1854, but was covered by instalments subsequently paid. In July, 1854, a note in favour of *P. Low*, which had been discounted at the Bank under the authority of *Bradshaw*, became due, and not being paid, was protested for non-payment, and after being held over for a few days, was placed to the debit of the Company, whose account thus became overdrawn to the extent of £451, subsequently reduced by instalments which were paid in to £376. 11*s.* 8*d.* The instalments remaining due were sufficient, if duly paid, to discharge this and leave a sum of £417. 10*s.* to the credit of the Company.

The Company failed to carry their telegraph to *Quebec*, according to their agreement, and the stockholders at *Quebec* refused to pay the rest of the instalments. Of the instalments so remaining unpaid, £50 was in respect of shares held by *Bradshaw*.

Several applications for payment were made, both by *Bradshaw* and the Plaintiff's Cashier at *Toronto*, to the Chairman and Secretary of the Company, but the amount remained unpaid.

The facts relating to the third claim were as follows:—*McKay* was a House painter, in large business, and was in the habit of getting Bills and Notes discounted at the Plaintiffs' *Quebec* Branch from its commencement. All the Bills which fell due while *Bradshaw* was Manager were duly paid, but at the time of his resignation three Bills were running, which were not met when due. It was proved that this was owing to the destruction of *McKay's* premises by fire, which caused him a loss of £3,000, and obliged him to compound with his creditors, and that at the time when the Bills were discounted his credit was good. The Plaintiffs accepted from *McKay* a composition in payment of these Notes, and upon that composition released him from all his liabilities.

Of the above three notes, one made by *McKay* and indorsed by *Plunkett*, and two made by *Plunkett* and indorsed by *McKay*, formed the third item of the Plaintiffs' claim, on the ground of the following allegations:—

In the year 1858, *McKay* was employed by *Bradshaw* to paint two houses, one belonging to himself, and one to a Mr. *Baby*; *Bradshaw* paid what was due for his own house, but refused to pay for the work done to *Baby's*, denying his liability to do so. An action was subsequently brought against him, which he resisted, but he was ultimately held liable, on the ground that the order was given by him. It was stated by *McKay*, in his evidence for the Plaintiffs, that when he was pressing *Bradshaw* for payment of the sum due for *Baby's* house, as he was in want of money, *Bradshaw* told him he would discount a Note for him, and that he thereupon got a Note discounted, which was drawn by a Mr. *Power*, and which was renewed or taken up when due. The three Notes in question were not shewn to be in any way connected with the above transaction, nor were they, or either of them, produced in evidence, nor was there any sufficient reason given for their not being so produced.

The fourth item of the Plaintiffs' claim was the largest and most important, involving the personal character of the late Mr. *Brad-*

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shaw, and was the origin of the whole charge. On this there was a direct conflict of evidence, and the right of the Plaintiffs to recover depended upon the degree of credit to be attached to the evidence of *Wilson*. His evidence was, in substance, that in 1853 he purchased a steamer, named the *Admiral*, which had been greatly injured by fire, and that *Bradshaw* mentioned to him the name of Mr. *Baby*, who would be likely to purchase it; that *Bradshaw* subsequently offered, if he would give him a half interest in the ship, to afford him facilities for obtaining money to repair it, and that he agreed to this arrangement. That, in 1854, *Bradshaw* told him that *Baby* would be likely to require another steamer, and that if he would purchase one called the *Princess Royal*, for the purpose of re-sale, and would give him a half interest in her, he would afford him the necessary facilities to enable him to do so. That part of the purchase-money paid for the *Princess Royal* consisted of the proceeds of two drafts on *W. Lindsay*, being the two drafts which formed the first two items of the present claim. That the *Princess Royal* was not sold, but was run down by another steamer, and that *Bradshaw* then told him that if he would give him a release from all liability in respect of the *Princess Royal*, he would give him a certain amount of facilities on *McDonald* and *Logan's* paper, and would, if the losses were heavy, relieve him from the two drafts on *W. Lindsay* above mentioned. That, in accordance with this arrangement, *Bradshaw* discounted for him *McDonald* and *Logan's* two Notes, which formed the next two items of the Plaintiffs' claim. The witness gave no evidence with regard to the other items of the Plaintiffs' claim, except as to the overdrawing of his account; they were, however, shewn to be in respect of Bills and Notes which had been discounted for him at various times, and which remained overdue and unpaid at the time of *Bradshaw's* resignation; with respect to his overdrawn account, he alleged that, in 1857, needing some money, to fit up some boats at *Three Rivers*, he applied to *Bradshaw*, who agreed to pay certain accounts for him to the extent of £500, and to take a Note for that amount on condition of his giving him a more formal release from all liabilities in respect of the *Princess Royal*, and that that arrangement was carried out, and caused the overdrawing of the account.

The above allegations were wholly denied on behalf of *Bradshaw*, and were not proved to the satisfaction of the Court below.

By the law of *Lower Canada*, the parties to a cause cannot give evidence in their own behalf, but they are allowed to be examined by the opposite party. *Bradshaw* tendered himself for examination by the Plaintiffs, but they declined to examine him, and he had, therefore, no opportunity of contradicting the matters on oath.

The Judge of the Superior Court (the Hon. Mr. Justice *Taschereau*), considered *Wilson* as wholly unworthy of credit, and the majority of Judges of the Court of Queen's Bench concurred in that opinion.

On the 5th of September, 1864, Mr. Justice *Taschereau* gave judgment, maintaining the exception of the Defendant, and dismissing the action with costs.

The Appellants appealed against this judgment to the Court of Queen's Bench (consisting of the Chief Justice *Duval*, and the Justices *Aylwin*, *Meredith*, *Mondelet*, and *Badgley*), and, on the 20th of March, 1865, judgment was given by that Court, affirming the judgment of the Superior Court, except as to the claim in respect of £569. 3*s.* 7*d.* advanced by the Defendant, *Bradshaw*, to the *Lake Superior Mining Company*, of which he was a shareholder; and, as to this sum, the Court of Queen's Bench of *Lower Canada* reversed the judgment of the Superior Court, and condemned the Respondents in that amount, with costs. The Court also declared the seizing under the writs of *saisie-arrêt*, and *saisie-arrêt* simple, good and valid to the extent of the above amount and costs; and they directed each party to pay their own costs of that Court. Mr. Justice *Aylwin* dissented in part from this judgment.

The Defendant, *Bradshaw*, having never denied his liability to pay to the *Quebec and Lake Superior Mining Company*, and through them to the Plaintiffs, the sum claimed in the action in respect of the transactions with that Company; and having resisted that portion of the Plaintiffs' claim only on account of the charge of fraud which was connected with it in the Plaintiffs' declaration, but which did not form the ground of the judgment of the Court of Queen's Bench, the Respondents did not appeal from that part of the judgment.

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The present appeal was brought by the Appellants to reverse the judgment of the Court of Queen's Bench.

The appeal was argued at great length by

Mr. *C. G. Holt*, Q.C., of the *Lower Canada* Bar, and Mr. *Wallis Williams*, on behalf of the Appellants, and

Sir *R. Palmer*, Q.C., and Mr. *Henry M. Bompas*, for the Respondents.

The case depended for the most part, and was ultimately decided upon the effect of the evidence taken in the cause. This, as before stated, was extensive and voluminous; the points important to the decision of the case are, however, so fully stated by their Lordships in their judgment, that it has not been thought requisite to set them out more in detail than has already been done.

The contention of the Appellants was, that the sum awarded as advanced by *Bradshaw* to the *Lake Superior Mining Company* was in the nature of damages, and ought to have included interest, in addition to the sum awarded; that the judgment both of the Superior Court and the Court of Queen's Bench was erroneous in law. That there was a clear breach of duty made out against *Bradshaw* in respect of each and every one of the charges made against him; and that the inferences drawn by the Courts below were manifestly contrary to the weight of evidence. They cited and relied on *The Aberdeen Railway Company* v. *Blakie* (1); *Ex parte Lacey* (2); *Ex parte Bennett* (3); *Ex parte James* (4); *Story's* Comms. on Equity, p. 304—311; *Story* on Agency, Ch. vii. p. 240: *Civil Code of Lower Canada*, Tit. "*Mandat*," Ch. ii. Arts. 1709-1714; *Domenget, du Mandat de la Commission, et la Question d'Affaires*, vol. i. pp. 197, 248, 268—278.

The Respondent's Counsel, on the other hand, relying on the effect of the evidence and the judgment of both Courts below, insisted that it was amply proved that the moneys alleged to have been misappropriated by *Bradshaw*, were clearly advanced by him in the ordinary course of business, and within the scope of his authority as Manager of the Appellants' Bank; that the Appellants

(1) 1 Macq. Sc. Ap. 461.
(2) 6 Ves. 626-28.
(3) 10 Ves. 394.
(4) 8 Ves. 344.

ratified the acts of which they were complaining, and that they failed to shew that they had sustained any damage. They examined and commented on the authorities cited by the Appellants, which they contended did not establish the position contended for.

LORD CAIRNS:—

Their Lordships having heard the able and elaborate argument addressed to them at the Bar in this appeal, and having had the opportunity of examining the careful judgments which have been delivered by the Superior Court and the Court of Queen's Bench of *Lower Canada*, are prepared to state the reasons upon which they will humbly report their opinion to Her Majesty.

On the first question raised on behalf of the Appellants, their Lordships have not heard the Respondents' Counsel. This question relates to the claim arising out of the moneys of the Bank advanced by *Bradshaw* to the *Quebec and Lake Superior Mining Company*. The Court of Queen's Bench of *Canada* have awarded to the Appellants a specific sum in respect of that claim, namely, a sum equal to the balance due to the Bank from the *Mining Company* on the banking account of the latter, but the Appellants contend that in addition to the sum awarded to them, a sum in respect of interest from the time when the account of the *Lake Superior Mining Company* was closed up to the time of the action brought, should also be awarded. Now this specific claim for interest was not made distinctly in the Court below, nor is it made at all upon the case of the Appellants before their Lordships. Their Lordships, notwithstanding, have considered the argument in support of the claim, and they are of opinion that the claim is founded upon a fallacy. It may well be that in an action founded upon contract in respect of the dealings between the Bank and its customer, the *Lake Superior Mining Company*, there would have been a claim by virtue of contract upon one side or the other for interest. But the present claim is not founded on contract: it is a claim by the Bank against its own Agent for damages in respect of a loss said to have accrued through his conduct. Their Lordships might have entertained some doubt, if the question had been brought before them, whether the Bank was entitled to the sum which actually was awarded, the balance, namely, of the account

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of the *Lake Superior Mining Company*, and whether the proper measure of damages might not rather have been the sum of £500 advanced by the Manager to the *Lake Superior Mining Company*, in which he was a shareholder and a Director, *minus* any repayment on account of that sum to the Bank. That question, however, is not before their Lordships, and upon the question which is before them, their Lordships are not prepared to depart from or to increase the amount of damages awarded by the Court below. It would in any case require clear proof that the Court below had proceeded upon a principle entirely erroneous, to induce their Lordships, upon a question of damages, to alter the amount awarded. Their Lordships are not prepared to say that the Court below ought to have gone beyond the sum which they have awarded here in respect to the damages which are claimed.

The next point argued was the claim arising upon the account of the *Canada Grand Trunk Telegraph Company*. The nature of that claim is this:—It appears that *Bradshaw*, the Manager of the Appellants' Bank, was a shareholder to the amount of £100 in an incorporated Company called the *Grand Trunk Telegraph Company*. He was also one of the Directors of that Company. It is stated in the evidence that he was not a managing Director, and took little or no part in the management of the Company. The head office of the *Telegraph Company* was at *Toronto*. Several of the shareholders lived in and about *Quebec*. Calls were payable upon the shares of the Company, and the branch of the Bank of the Appellants at *Quebec* was made the agent for the purpose of collecting those calls. Schedules of the calls were sent down, and printed receipts, already signed, to be handed to the shareholders as they paid their calls. Payments were made running over a great number of months, in respect of the first, and second, and third calls, and from time to time drafts or cheques were drawn by the *Telegraph Company* upon the Bank at *Quebec* in respect of the moneys received by the Bank. While the calls were thus coming in, and while the habit of business was as described, a draft or cheque was drawn by the *Telegraph Company* for £500, and that draft was paid, and the payment of that draft caused the account to be, for the time being, overdrawn. If the calls had continued to be paid as they had been, in course of payment the

amount by which the account was overdrawn would have been liquidated; but owing to some suspension in the works of the *Telegraph Company*, the shareholders declined to continue to pay their calls, and the account remained overdrawn. It is stated that the shareholders, or most of them, are solvent, and that their calls might still be recovered. Now, it is alleged, that by reason of the interest of *Bradshaw* as a shareholder and Director of the Company, it was beyond his power and authority to have allowed the account to become overdrawn by payment of this note for £500. It is said, either that he should have given no accommodation to the Company, or, at all events, that before doing so he should have told the Bank that he was interested in the Company, a fact which it is alleged the Bank did not know. And it is contended that he should be made liable for the deficiency upon this account. Their Lordships are desirous in no way to qualify or to abridge the doctrine of law prevailing in almost all systems of jurisprudence, that any one standing in the position of an Agent cannot be allowed to put his duty in conflict with his interests, and they are certainly not prepared to rest the application of the doctrine on the amount of the interest, adverse to that of his employer, which the Agent may be supposed to have. But it is to be observed that in the present case the dealings between the Bank and their customer were dealings in which the customer was not *Bradshaw*, but an incorporated Company, *Bradshaw* being a shareholder in that Company, distinct in point of law from the Company itself. It is also to be observed that *Bradshaw* had been appointed to manage the business of the Bank in the midst of a community consisting of individuals and of incorporated trading companies similar to the *Telegraph Company*, in which companies *Bradshaw* might or might not hold shares. Now their Lordships entertain no doubt, that if any case of bad faith or fraud were shewn to occur in dealings between the Manager and corporations in which he was a shareholder, dealings of that kind could not be supported. But their Lordships think that the just conclusion to be drawn from the facts, and from the course of business in the present case, is, that it was within the power of *Bradshaw*, as Manager of this Bank, to deal in the ordinary and proper course of banking business, not merely with

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the individuals, but also with the trading corporations of the place in which he was placed as Manager, and to deal in that way with the trading corporations, even although he himself might hold shares in any one of them. And if that be the true view of the position and authority of *Bradshaw*, it cannot, their Lordships think, be denied that the advance made to the *Telegraph Company* upon the account that I have described, was entirely a legitimate act in the course of the ordinary business of the Bank. Their Lordships, therefore, preserving entirely intact the general rule as to the conduct and duty of Agents, are not prepared to hold that *Bradshaw* exceeded his power or authority in dealing with the *Telegraph Company* in the way that has been described.

The next and the largest question in the case is with reference to the dealings in the account of Mr. *Wilson*. The first of those dealings in respect of which the judgment of the Court below has been impugned, is as to the drafts which have been called in course of the argument the *Lindsay* drafts. Those drafts were two in number: they were drafts drawn by *Wilson* upon his Agent, *Lindsay*; *Wilson* trading at *Quebec*,—his Agent, *Lindsay*, at *Montreal*; and were drafts in respect of real transactions, for *Lindsay* was receiving, from time to time, moneys of *Wilson* which it was the object of *Wilson* to have the benefit of at *Quebec*; they were discounted by *Bradshaw*, as the Manager of the Bank, and discounted for *Wilson*. At the time of the discount of these drafts the evidence shews that *Wilson* enjoyed unblemished and undiminished credit in the mercantile community of *Quebec*, and that he was a person who had been, and who continued to be, in a very extensive business. Now it was stated on behalf of the Appellants, very fairly, in their argument, that so far as vicissitudes of trade were concerned, and so far even as any error of judgment might be imputed to *Bradshaw*, they did not desire upon those grounds to challenge his acts and conduct. But it was said that these drafts upon *Lindsay* were drafts which in some way had been used or had been intended to facilitate the purchase of a ship called the *Princess Royal*; that in that ship *Wilson* and *Bradshaw*, the Respondent, were jointly interested; and that, therefore, in discounting these drafts *Bradshaw*, the Respondent, was virtually providing, by means of the funds of his

employers, facilities for his own speculation in conjunction with *Wilson*. This must depend upon the evidence in the case, and their Lordships can find no evidence whatever in any way connecting these drafts with the *Princess Royal*, her purchase, or her employment, except the statement occurring in the evidence of *Wilson* himself, where he says, with regard to these two drafts on *Lindsay*, that they have been drawn to facilitate the payment of the *Princess Royal*, and of another boat to which he refers. There is not in the facts, which are otherwise proved, as to the payments for the *Princess Royal*, anything which supports, and there is much which is at variance with, this statement of *Wilson;* and their Lordships, with regard to the testimony of *Wilson*, are obliged to assent to the view taken by both branches of the Court in the Colony, that upon any question in this case depending upon the unsupported testimony of *Wilson*, that testimony cannot be relied upon. Their Lordships also are obliged to observe that it having been in the power of the Appellants to examine *Bradshaw* while he was yet alive, and *Bradshaw* having been, as was stated to us, called upon a *subpœna*, but not examined, their Lordships would be slow upon any charge against the conduct of *Bradshaw's* depending upon the unsupported testimony of one witness, to hold that charge proved in a case where no opportunity had been given to *Bradshaw*, the Respondent, to explain or to deny the charge. Their Lordships, therefore,—the evidence failing entirely to connect the drafts of *Lindsay* with any dealings in which *Bradshaw* was personally interested,—are of opinion that the discount of those drafts was merely an ordinary banking transaction in the course of the business of which *Bradshaw* was Manager, and that no claim can be made against him in respect of that discount.

The next point urged on behalf of the Appellants was a claim in respect of a draft for £1,100, the draft which has been termed in argument the *Wenham* draft, the proceeds of which upon discount were carried to the account of *Wilson*, and were applied by *Wilson* in part payment of the price of the *Princess Royal*, in which, as has been already stated, *Wilson* and *Bradshaw* had some joint interest. Now, if it were shewn that *Bradshaw* was aware of the purpose for which this draft was drawn and discounted, and if, further, any loss

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had accrued to the Bank in respect of the discount of this draft their Lordships can see that a claim might have been made against *Bradshaw* in respect of that loss. But their Lordships find that the one hand no evidence has been given that *Bradshaw* was aware of the purpose for which this draft was to be applied, and on the other hand (and this alone would be sufficient for the opinion which their Lordships have formed) the sum credited to *Wilson* on account in respect of this draft was almost immediately, or very shortly afterwards, paid and satisfied by the ordinary appropriation of the payments in upon the other side of the account of *Wilson* and the Bank. No loss, therefore, can be said to have accrued to the Bank in respect of this sum.

The next item referred to by the Appellants is the *McDonald* and *Logan* notes and cheque of the 23rd of July, the 1st of August, and the 9th of June, 1855, respectively. Here again, so far as these notes and cheque were discounted and cashed upon the faith of the names upon them, their Lordships are of opinion that the transaction was one of an ordinary and proper character, *Wilson* being, as has been already stated, in large business and in credit; *McDonald* and *Logan* being also in credit and business at that time. And the observations which have been made with reference to the *Lindsay* drafts apply also to the paper of *McDonald* and *Logan*. If it were shewn that there was any connection between the discount of this paper and any transaction in which *Bradshaw* was personally interested, and loss had accrued, a claim might have been made against *Bradshaw;* but no evidence has been adduced which satisfies their Lordships, or raises in their Lordships' minds any suspicion, that the discount of this paper was connected with any such transaction. The argument, in point of fact as to these items at last resolved itself into this, that there must be a presumption that *Bradshaw*, the Manager of the Bank, was in some manner in the power of *Wilson*, from the circumstance that a notarial letter addressed to him by *Wilson*, subsequent to the date of these drafts, insisting that *Bradshaw* was under liability to him in respect to joint transactions, must be accepted as proof of the statements in that letter. Their Lordships are of opinion that to draw such a presumption from such a letter would be much too violent; and the more so, because no evidence

has been adduced to shew that, in point of fact, the statements in that letter were not repudiated, or were not objected to, on the part of *Bradshaw*.

The last and remaining item is in respect of the sum appearing to the debit of *Wilson* upon the statement of his account with the Bank at the close of the management of *Bradshaw*. That account was overdrawn. It had become overdrawn by reason of an advance of £500 by *Bradshaw* to *Wilson*. The circumstances under which that advance took place are fully detailed in the evidence of Mr. *Ross*, the legal adviser at that time of the Bank. Mr. *Ross* states that certain security was, under his advice, taken at that time from *Wilson* to the Bank; that one of the terms of the arrangement with reference to the security was that the Respondent should, on the part of the Bank, advance the sum of £500. Mr. *Ross* states that he was of opinion that that was a wise and judicious arrangement; that it was made under his sanction; and that he approved of it at the time the arrangement was made. There is no suggestion that at that time *Bradshaw* had any personal interest in any dealings with which *Wilson* was concerned. Their Lordships see no reason to think that this was otherwise than a prudent and legitimate advance made by *Bradshaw* for the benefit of *Wilson*.

Upon the whole, their Lordships think that the case of the Appellants has entirely failed, and they will humbly recommend Her Majesty to dismiss the appeal with costs.

Solicitors for the Appellants: *Roberts & Simpson.*
Solicitors for the Respondents: *Bischoff, Coxe, & Bompas.*

J. C.* 1867 July 4.

THE OWNERS OF THE STEAMSHIP "VELASQUEZ" APPELLANTS;

AND

GEORGE ROWLAND BRIGGS AND OTHERS, OWNERS OF THE "STAR OF CEYLON" } RESPONDENTS.

THE "VELASQUEZ."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Shipping—Sailing Rules—Collision between Steamer and Sailing Vessel—Compulsory Pilotage—Joint negligence of Pilot and Master and crew—Look-out—Damages—Liability of owners.

A Steamer was sighted by a sailing vessel at a sufficient distance to have avoided a collision. The Steamer took no steps until the vessels were very near each other, when she starboarded her helm, and the sailing vessel ported her helm to avoid a collision, which, notwithstanding, took place :—

Held, that the Steamer was alone to blame, as it was the duty of a Steamer to keep out of the way of the sailing vessel, provided she could do it, either by starboarding or porting her helm, and that, on the other hand, it was the duty of the sailing vessel to keep her course, and that she could only be excused from deviating from it by shewing that it was necessary to do so in order to avoid immediate danger.

To entitle the owners of a ship under the compulsory charge of a licensed Pilot to the benefit of the provisions of a Statute which exempts them from liability, when a collision has occurred by the fault of the Pilot, it lies on them to prove that it was occasioned solely by the Pilot.

If the Master and crew have contributed to the accident, by not keeping a sufficient look-out, so as to give the Pilot the earliest possible information of an approaching vessel, although the Pilot is also to blame, the owners are not exempted from liability for the damage.

A CAUSE of collision.

The facts and evidence are so fully stated in the judgment of their Lordships as to render any statement here unnecessary. The Judge of the Court below (The Right Hon. Dr. *Lushington*) held the *Velasquez* alone to blame. Hence the appeal.

The case was argued by

Mr. *Brett*, Q.C., and Mr. *Clarkson*, for the Appellants, and

Dr. *Deane*, Q.C., and Mr. *J. P. Murphy*, for the Respondents.

* *Present* :—SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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It was argued by the Appellants, first, that the Court below miscarried in estimating the evidence; that the sailing vessel, the *Star of Ceylon*, was not justified in departing from her course, which she ought to have kept, and that the collision occurred by her porting; secondly, that there was a good look-out kept on board the Steamer; and thirdly, that if there was any one on board the *Velasquez* to blame, the Pilot was the only person, and that as the Pilot was in charge by compulsion of law, the owners were not liable for the damages, citing on this point *The Iona* (1), and the cases there referred to.

For the Respondents it was contended, first, that no good look-out was kept on board the *Velasquez*, and that the Pilot had contributed to the accident; and secondly, that being a Steamer, she neglected to alter her course, as she might have done, and thereby avoided the collision.

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Judgment having been reserved, was now delivered by

SIR JAMES W. COLVILE:—

This is an appeal on the part of the owners of the Spanish Steamer, the *Velasquez*, against the sentence or decree of the High Court of Admiralty, which has pronounced that that vessel was in fault in running down the late Barque, called the *Star of Ceylon*, and has condemned the Appellants and their bail in the damages proceeded for, and costs of suit.

The conflict of evidence is far less than generally occurs in cases of collision. The undisputed facts of the case are: that about half-past seven on the evening of the 11th of October last the Steamer, being in charge of a licensed Pilot, was proceeding up channel, steering north-east by north; whilst the Barque was going down channel, heading south-west by south, and, therefore, on a course parallel to that of the Steamer. The wind was east by south; each vessel was making about six knots an hour through the water; and the tide, which was against the Steamer, was of course in favour of the Barque. It is further admitted that at some time before the collision the Steamer starboarded her helm, or at least executed a manœuvre which had the effect which star-

(1) Law Rep. 1 P. C. 426.

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boarding a helm of the ordinary construction produces; and that the Barque ported her helm. The result was a collision in which the Barque, being struck on the port-bow by the stem of the Steamer, was sunk, her crew happily escaping on board of the Steamer.

The case of the Barque is thus stated: "The mast-head light of the Steamer was first seen, at the distance of between three and four miles nearly ahead, but a little on the port bow of the Barque; her red or port light was subsequently made out in the same direction. She continued to approach the Barque on her port bow, and in such a direction as to involve danger of a collision unless one of the vessels ported; and as no alteration was made in her course when the two vessels were so near that it was dangerous for the Barque to keep on her course, the helm of the latter was ported. Very shortly after this had been done, and the vessels would otherwise have passed clear of each other, the Steamship was noticed to be making towards the Barque, and as the only means of avoiding a collision, or lessening the effect thereof, the helm of the Barque was put hard a-port; but almost immediately afterwards the Steamer, having shut in her red and opened her green light, ran stem on into the Barque," &c. And the contention of the Plaintiffs, the owners of the Barque, was, that the collision was attributable solely to the carelessness, negligence, and want of skill of those on board and in charge of the Steamship, more especially in their having omitted, either from want of a good look-out or otherwise, to take within sufficient time the proper measures to keep clear of the Barque.

The defence on the part of the Steamer raised the following case. "The Barque was first seen at the distance of about three-quarters of a mile from, and being from two to three points on the starboard bow of, the Steamer, and with no light then visible on board the latter. The Steamer starboarded by order of the Pilot, and her head went off to port, and she kept out of the way of the Barque; but the latter improperly deviated from her course, under a port helm, and exhibited a red light to those on board the Steamer, and caused danger of collision; whereupon, by order of the Pilot, the Steamer hard a-starboarded and stopped her engines, but the Barque nevertheless ran into, and with her port bow before

the fore rigging struck the Steamer on her stem and starboard bow." And the contention of the Defendants was that the collision was caused by the negligent and improper navigation of the Barque. Another and distinct ground of defence was, that if the collision was in any way occasioned by anybody on board the Steamer, it was occasioned solely by the licensed Pilot, whose orders in respect of her navigation were promptly and implicitly obeyed by her Master and crew.

In the circumstance stated, it was the duty of the Steamer to keep out of the way of the sailing vessel; and provided she did so effectually, she was at liberty to do it either by starboarding or by porting her helm. On the other hand, it was the duty of the Barque to keep her course, and she could be excused for deviating from it only by shewing that it was necessary to do so in order to avoid immediate danger.

The learned Judge of the High Court of Admiralty, after considering the evidence, with the aid of the Trinity Masters, came to the conclusion that no blame attached to the Barque; that the whole blame attached to the Steamer; that blame attached to the Pilot; but that blame also attached to the crew, by reason of the want of a good look-out.

At the close of the argument for the Appellants their Lordships intimated their opinion that no ground had been made for disturbing this judgment in so far as it found that as between the colliding vessels the Steamer was solely in fault. The conclusions which they drew from the evidence were, that the vessels were meeting port side to port side; that the Steamer took no steps to avoid the Barque until the vessels were very near each other; and that in these circumstances the Barque was justified in porting her helm when she did port it; whilst, on the other hand, the starboarding of the helm of the Steamer when it took place was a dangerous and improper manœuvre, and the immediate cause of the collision.

Upon the question whether the Court below was justified in holding that blame attached to the crew as well as to the Pilot, their Lordships having heard both sides, reserved their judgment; and it is that question alone which we have now to determine.

It has been established by a long course of decisions, both in the

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High Court of Admiralty and at this Board, that to entitle the owners of a ship which is under the charge of a licensed Pilot to the benefit of the provision in the Act which exempts them from liability where the collision has been occasioned by the fault of the Pilot, it lies upon them to prove that it was caused *solely* by his fault. To shew to what extent this general burden lies upon the owners, it is sufficient to cite the case of *The Schwalbe* (1). There the cause of collision was an improper starboarding of the helm; an act of navigation presumably attributable to an order from the Pilot. Yet the owners were held liable because they had failed to prove expressly that the order to starboard was given by the Pilot. Lord *Chelmsford*, in delivering the judgment of this Committee, said, "The owners, therefore, fail entirely in the evidence necessary to transfer the responsibility from themselves: and without considering whether there was any negligent act or omission on the part of the crew of the *Schwalbe*, their Lordships think it sufficient to say, that the owners have not succeeded in establishing that the collision is to be attributed solely (if at all) to the fault of the Pilot."

Again, the cases have clearly established that if, for any act or omission which contributed to the accident, the Master or crew is to blame,—then, although the Pilot is also to blame, the owners are not exempted from liability. One of the strongest cases of this kind is that of *The Christiana* (2), for there every act of omission (and there were several of them) which contributed to the accident was an act for which the Pilot was to blame; yet inasmuch as for one of them, viz., the omission to strike and haul down certain yards and masts, the Master was held to be also in fault, the owners were not exonerated from liability.

On the other hand, such cases as *The George* (3) and *The Atlas* (4) seem to shew, that if it be proved on the part of the owners that the Pilot was in fault, and there is no sufficient proof that the Master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them.

(1) 14 Moore's P. C. Cases, 241.
(2) 7 Moore's P. C. Cases, 160.
(3) 4 Notes of Cases, 161.
(4) 5 Ibid. 50.

If, however, the evidence shews that there were acts of negligence on the part of the Master and crew which may have contributed to the accident, as well as fault on the part of the Pilot, the duty of shewing that the former did not contribute in part to the accident seems to be involved in the obligation of the owners to prove that the *causa causans* of the collision was exclusively the fault of the Pilot. *The Iona* (1), one of the most recent cases decided by this Committee, seems to go the full length of this proposition.

We have now to apply these principles to the present case. What are the facts deposed to by the Pilot and crew of the *Velasquez*, who alone can speak to what passed on board that vessel?

The Pilot says that he was on the forepart of the bridge; that he first saw a sail on his starboard bow when the Barque was about three-quarters of a mile off; that he saw no light; that he ordered the helm to be starboarded; that the *Velasquez* obeyed her helm; and that shortly after he had given this order he saw the red light of the Barque open.

The look-out man (a Spaniard) says that he first saw the Barque on the starboard bow, and distant about a mile more or less; that he too saw no light; and that he reported the sail to the Mate (also a Spaniard). And the Mate, who was on the bridge with the Pilot, says, that when the look-out man sang out in Spanish, "a vessel on starboard," he looked towards the Pilot, who was then looking to starboard with his glasses; that he (the witness) looking in the same direction, saw the Barque about three-quarters of a mile off; that thereupon the Pilot gave the signal for going to port; and after that was done he (the witness) saw the red light of the Barque, having previously seen no light.

Upon this evidence it is no doubt proved that the helm was starboarded by the order of the Pilot, given on his own observation of the Barque, and not upon any communication to him of its position.

On the other hand, it is to be observed that this evidence, if strictly true and correct, would raise some inference of a negligent look-out. For nothing is seen of the Barque until she is within a

(1) Law Rep. 1 P. C. 426.

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mile of the Steamer, and nothing even then is seen of her lights, although there is evidence in the cause, believed by the Court below, that her lights were burning well; and the Pilot admits that on that particular night a good light might have been seen three miles off.

The evidence, however, cannot be taken to be wholly true or correct. For all these witnesses concur in representing the Barque as on the starboard bow of the Steamer; whereas their Lordships have found, upon the other evidence in the cause, that the vessels were approaching each other port side to port side.

If the crew and the Pilot have combined consciously to put forward a false case, all that can be said is that the owners have failed to shew, by trustworthy evidence, that the fault was exclusively the fault of the Pilot. But if it be assumed, as their Lordships would willingly assume, that the witnesses honestly mistook the position of the Barque, the natural inference from that is, that if there had been a proper look-out, not only would the Barque have been descried at a greater distance, but her true position would have been known.

That it is the duty of the crew, by means of a sufficient look-out, to give to the Pilot the earliest possible information of an approaching vessel, and accurately to describe her position, was the principle enforced in the case of *The Iona*; and in the present case it may reasonably be inferred that if the Pilot had received earlier information of the Barque, or had been told that she was on the port side of his own vessel, he would not have given the order to starboard at all, or would have given it at a time when on a starboard helm he could have gone clear of the Barque.

Their Lordships are, therefore, unable to say that there is error in the finding of the very learned Judge of the Court of Admiralty, that blame attached to the crew as well as to the Pilot of the *Velasquez*; and they will humbly recommend to Her Majesty that this appeal be dismissed with costs.

Proctors for the Appellants: *Clarkson, Son, & Cooper.*

Proctors for the Respondents: *Deacon, Son, & Rogers.*

THE OWNERS OF THE "AGRA" . . . . . APPELLANTS; J. C.*
AND 1867
THE OWNERS OF THE "ELIZABETH JENKINS" RESPONDENTS. July 6, 8.

THE "AGRA" AND "ELIZABETH JENKINS."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Shipping—Collision—Sailing rules, 18 & 19 *of* 1863—*Vessel departing from her course—Burthen of proof of necessity—Both vessels to blame—Reversal—Damages divided—Costs.*

If a ship bound to keep her course, under the 18th sailing rule of 1863, justifies her departure from that rule under the 19th rule, she takes upon herself the obligation of shewing not only that her departure was at the time it took place necessary, in order to avoid immediate danger; but also that the course adopted by her was reasonably calculated to avoid that danger.

In reversing the decree of the Admiralty Court on the ground that both vessels were to blame, the damages were directed to be equally divided; each party to bear his own costs, both on appeal and in the Court below.

IN this case the appeal was brought from a decree of the Court of Admiralty, made in a consolidated cause of damage instituted by the owners of the Barque, *Elizabeth Jenkins* and crew, and a cross suit by the owners of the ship, the *Agra*.

The suits were tried upon oral evidence before the learned Judge of the Admiralty Court (The Right Hon. Dr. *Lushington*), assisted by two elder brethren of the *Trinity House*, and the Court found that the collision was caused solely by the *Agra*, and condemned her owners in damages and costs. Against this decree the owners of the *Agra* brought the present appeal.

The facts were these:—

The collision between the Barque, *Elizabeth Jenkins*, and the ship, the *Agra*, took place about 8 o'clock, P.M., on the 10th of November, 1866, off the *Ower's* Light-ship, in the English Channel. The night was cloudy, but not thick. The *Elizabeth Jenkins* was heading

* *Present*:—LORD CAIRNS (LORD JUSTICE), SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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south-east, under plain sail, close hauled on the starboard tack, making six knots an hour. The *Agra* was steering west, close hauled on the port tack, making about six and a-half knots an hour. The wind was south-south-west.

Under the 12th and 18th of the Regulations of 1863 (1), it was, in these circumstances, the duty of the *Agra*, having the wind on the port side, to keep out of the way of the *Elizabeth Jenkins*; the *Elizabeth Jenkins*, on the other hand, ought to have kept her course, unless a departure from her course was warranted under the 19th rule, by the necessity of avoiding immediate danger.

As the ships were nearing, and about to cross, the *Agra* gave way, porting her helm, squaring her after-yards, and letting go her spanker. The *Elizabeth Jenkins* did not keep her course, but starboarded her helm and hauled in her spanker; and the result was a collision, the starboard bow of the *Agra*, near the stem, striking, or being struck, by the stem of the *Elizabeth Jenkins*; the *Elizabeth Jenkins* foundering, and the Master and several seamen being drowned.

It was contended for the owners of the *Elizabeth Jenkins* that the *Agra* so long delayed porting her helm and giving way that those on board the *Elizabeth Jenkins* were led to think she was trying, and intended, to cross the bows of the *Elizabeth Jenkins*, and that a collision must, if the *Elizabeth Jenkins* kept her course, take place; and that the change in the course of the *Elizabeth Jenkins* was thus necessary in order to avoid immediate danger.

For the *Agra*, on the other hand, it was alleged, that she ported and gave way as soon as she saw the red light (the only light that she admitted she did see) of the *Elizabeth Jenkins*. That she observed the loom of the *Elizabeth Jenkins* when about a mile or three-quarters of a mile distant. That at that time the *Elizabeth Jenkins* had no lights visible; for the Master and Pilot of the *Agra*, seeing the loom of the *Elizabeth Jenkins* before them, endeavoured to make out her lights, first with the naked eye, and then with glasses, and could not do so; and, therefore, concluded she was on the same tack, with her stern towards the *Agra*. That they continued watching, and after some little time saw the red light of the *Elizabeth Jenkins*, and immediately ported their helm; and that it

(1) See Regulations, Lush. App. lxxvi.

was thus the want of proper lights on board the *Elizabeth Jenkins* which made the *Agra* delay porting so long, and that the *Agra* was free of all blame. It was further alleged for the *Agra*, that when the *Elizabeth Jenkins* did depart from her course, she ought to have put down her helm and luffed up to the wind, in order to deaden her way, in place of starboarding, thereby accelerating her speed, and increasing the violence of a collision.

The *Solicitor-General* (Sir *J. Karslake*, Q.C.), and Mr. *Aspinall*, Q.C., and Mr. *Butt*, for the Appellants:—

It sufficiently appears from the evidence that when the *Elizabeth Jenkins* was first sighted by the *Agra* she exhibited no light; it was concluded, therefore, by those on board the *Agra*, that she was on the same tack as the *Agra*, and so the *Agra* continued her course for a short time, but a red light becoming suddenly visible from on board the *Elizabeth Jenkins*, the helm of the *Agra* was put hard a-port, and her after-yards squared, and her spanker let go, by which means she would have gone clear of the vessel port side to port side, had not the *Elizabeth Jenkins* improperly put her helm hard a-starboard, and thereby threw herself right under the bows of the *Agra*, the stem of which struck her on the starboard bow. Now, the fact that the *Elizabeth Jenkins*, the starboard tacked ship, bore away before the ships came together, proves that had she kept her course, as by the Admiralty sailing rules, No. 12 and 18 of 1863, she was bound to have done, no collision could have happened, and she can only recover, by the true construction of No. 19 of those rules, by justifying, which she has failed to do, a departure from those rules. The collision could have been avoided if, instead of starboarding her helm, she had ported: *The Lady Ann* (1). To sanction such a manœuvre as that adopted by the *Elizabeth Jenkins* would be to counteract the efforts made by the Legislature to enforce the rule of the road.

Mr. *Brett*, Q.C., and Mr. *Clarkson*, for the Respondents:—

As held by the Court below, we insist that the *Agra* was solely to blame. The *Elizabeth Jenkins* exhibited her lights; keeping her course as required by the 12th rule, and only altered her

(1) 7 Notes of Cases, 369.

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course, under circumstances which were justified by rule 19, to avoid a collision.

Their Lordships' judgment having been reserved was delivered (July 20) by

SIR JAMES W. COLVILE:—

After stating the facts, his Lordship proceeded:—.

Their Lordships do not see any reason to disbelieve the very precise and consistent evidence of the Master of the *Agra*, and of *Albert*, the Pilot, corroborated as it is by that of *Jones*, the Mate, and rendered probable by the statement of *Tracey*, the Trinity Pilot, as to the dimness of the lights of the *Elizabeth Jenkins*, on the 2nd of November previous; and they are disposed to think that when the loom of the *Elizabeth Jenkins* was first seen by the Master of the *Agra*, and examined through the night glasses, her lights could not, for some reason or other, be made out. They think, however, that, between that time and the moment when the red light of the *Elizabeth Jenkins* was actually seen, an interval longer than these witnesses represent must have elapsed, and that during this interval a more careful and continuous look-out on board the *Agra* would have enabled them to discover the red light sooner, and would have shewn, even irrespective of the light, that the *Elizabeth Jenkins* was nearing them, and the course she was pursuing. Their Lordships, therefore, cannot acquit the *Agra* of blame. They think she might and ought to have ported sooner.

Was, then, the *Elizabeth Jenkins* free from blame, or is blame to be attributed to her as well as to the *Agra?* That she departed from the 18th rule is clear, for she did not keep her course; and that this departure had not the effect of avoiding danger is also clear, for a collision of a most disastrous character occurred. Now, their Lordships are clearly of opinion that if a ship, bound to keep her course under the 18th rule, justifies her departure from that rule under the words of the 19th rule, she takes upon herself the obligation of shewing both that her departure was at the time it took place necessary, in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger. Their Lordships find that this

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has been the construction put upon the 19th rule in the cases of *The George Dean* v. *The Constitution* (1); *Holt*, Rule of Road, p. 101; *The Planet* v. *The Aura* (2); and, inferentially, in the case of *The Great Eastern* (3), before this Board. This obligation the owners of the *Elizabeth Jenkins* have not, as their Lordships think, discharged. It is remarkable that no one of the witnesses for the *Elizabeth Jenkins* ventures to say that had she continued her course, the *Agra* porting when she did, the collision would not have been avoided. *Robins*, the Mate of the *Elizabeth Jenkins*, in his examination in chief, states that he thinks the collision would have taken place had his ship continued her course; but he evidently speaks on the hypothesis of the *Agra* having continued her course also; and it is clear that when the order to starboard was given by the Master of the *Elizabeth Jenkins* to *Robins*, the latter thought it an erroneous order, and remonstrated against it. Looking to all the evidence in the case, their Lordships think—and it is also the opinion of the Nautical gentlemen by whom they are assisted—that the *Agra* would have passed free of the *Elizabeth Jenkins* had the latter maintained her course; and that even if the *Elizabeth Jenkins* had, from apprehension of danger, altered or interrupted her course, she should have done so by luffing up to the wind, thereby stopping her way, and mitigating, as far as possible, the effect of a collision, if a collision should take place.

Their Lordships, therefore, have come to the conclusion that both vessels were to blame, and that the collision is attributable to both—the *Agra* for not sooner observing and getting out of the way of the *Elizabeth Jenkins*; and the *Elizabeth Jenkins* for departing from her course without sufficient necessity, and for departing from it in a manner calculated to increase, and not to diminish or avoid, danger.

Their Lordships have referred to the testimony of *Robins*, the Mate of the *Elizabeth Jenkins*, and to the opinion which he appears to have expressed at the time to the Master as to the course the latter was taking. They see no reason for looking at this evidence as otherwise than trustworthy; and they cannot but con-

(1) Admiralty Court, 1 Feb. 1865.
(2) Admiralty Court, 7 Dec. 1865.
(3) 3 Moore's P. C. Cases, (N.S.) 31.

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sider it, if trustworthy, as having an important bearing on the facts of the case. They agree with the very learned and experienced Judge from whose decision this appeal is brought, and who has so long, and with such advantage to the public, presided over the Admiralty Court, as to the jealousy with which any attempt to warp the evidence of a witness by communications between him and either of the litigating parties should be watched and repudiated; but they cannot think that the evidence should, merely on the ground of such communications, be entirely thrown aside. The evidence of *Robins* appears to them to have been given fairly, and with no desire or design to bear against the *Elizabeth Jenkins*, and they cannot but think that less weight than that to which it was fairly entitled was attributed to it in the observations of the learned Judge, and that in this way an element in the case materially bearing on the questions proposed to the Nautical Assessors, was to a great extent withdrawn from their consideration.

Their Lordships have, for this reason, and also because the effect of the 19th rule was not presented to the Nautical Assessors with the distinct explanation that was desirable, and which it appears to have received from the same learned Judge himself in the case of *The Planet* and *The Aura*, the less difficulty in departing, to the extent already stated, from the decision of the Court below.

Their Lordships will humbly advise Her Majesty that the judgment of the Court below be altered by finding that both ships were to blame. The consequence will be, that the damages must be equally divided, and each party will bear his own costs, both here and in the Court below.

Proctors for the Appellants: *Dyke & Stokes.*
Proctors for the Respondents: *Clarkson, Son, & Cooper.*

In re ALLAN'S PATENT.

J. C.*
1867
July 15.

Letters Patent—Non-user—Presumption against utility—Prolongation of term refused.

Where the utility of a Patent has not been tested by actual employment, for a period of fourteen years, although efforts have been made by the Patentee to bring it into use, it raises a very strong presumption against its practical utility, which presumption can only be rebutted by the strongest evidence.

Application for a prolongation of the term, in the circumstances of non-user, refused by the Judicial Committee.

LETTERS PATENT, dated the 12th of August, 1853, were granted to the Petitioner, the Patentee, for his invention of "improvements in Electric conductors, and in the means of insulating Electric conductors." The Patent had never been brought into practical use.

Allan, the Patentee, by his petition, prayed for an extension of the term of the Patent. The petition alleged, that the invention consisted of improvements in the method of constructing and insulating Electric conductors, and particularly in the method of constructing submarine conductors, by surrounding them with an insulating substance known as "Telegraphic cables," by which improvements great lightness and strength were obtained, so that the laying down of Telegraphic cables, in great depths of water, was rendered much easier than it was before the date of the invention, and the risk of breaking the cable, during the process of laying down, much diminished; that prior to the date of the Patent, the method of constructing Telegraphic cables had been to surround an electric conductor with an insulating substance, and to surround this insulating substance again with an outside sheathing of wire-rope, or with some other protective sheathing; that the weight of Telegraphic cables thus constructed was considerable, and the difficulties of laying down such cables very great; that, by the method of constructing Telegraphic cables invented by the Petitioner, the outside sheathing was rendered unnecessary, and, by

* *Present:*—LORD ROMILLY (MASTER OF THE ROLLS), SIR EDWARD VAUGHAN WILLIAMS, SIR JAMES WILLIAM COLVILE, and SIR RICHARD TORIN KINDERSLEY.

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this and other improvements which were introduced, greater strength and far greater lightness in the cable were obtained than could be obtained by any method of constructing Telegraphic cables known before the date of the Petitioner's invention; that the method of constructing Telegraphic cables invented by the Petitioner was less costly than any method known at the date of his invention; that this method of construction was principally suitable for cables constructed for great distances, and to be laid down in great depths of water; that the outlay necessary for constructing a long Telegraphic cable, and for laying it down in great depths of water, was so heavy that such an operation could not possibly be carried out by any private individuals, and that only a Company with a large capital could carry on such an undertaking; that the Petitioner being, therefore, unable himself to bring his invention into public use, endeavoured to get it adopted, and pointed out that a Telegraphic cable constructed on the principle invented by him might be laid down between *Great Britain* and *America*; that in the year 1855 great efforts were made by him to form a Company which would bring his invention into general use, by laying down a Telegraphic cable between *Ireland* and *America*, but that he did not receive the assistance he required, and that consequently no Company was formed; that in the year 1858, in consequence of the efforts of the Petitioner, a Company was formed called the "*Great Indian Submarine Telegraph Company*," for the purpose of establishing telegraphic communication with the *East Indies*; that sufficient capital not being subscribed, such Company failed; that the Petitioner continued to make every effort to get his invention known and adopted, and, in the year 1865, a Company was formed for the purpose of establishing telegraphic communication between *England* and *America*, by means of his invention; that for the purposes of such Company a large amount of capital was subscribed; but, in consequence of the disturbed state of financial affairs, the full amount of capital requisite could not be raised, and the undertaking was abandoned; that another Company had lately been formed, with a capital of £600,000, for the purpose of laying down, between *England* and Her Majesty's *North American* possessions, a Telegraphic cable, constructed according to the Petitioner's

invention; that the construction of a Telegraphic cable for that purpose would occupy a considerable time, and that probably the cable so to be constructed would not be laid down until after the determination of the term granted by the Letters Patent; and the Petitioner further alleged, that he had made every effort in his power to bring his invention into general use, but had hitherto failed, in consequence of the very large amount of capital required for the construction and laying down of Telegraphic cables, and also in consequence of the opposition which his invention had received from persons interested in the manufacture of Telegraphic cables; that the Petitioner had hitherto gained no profit whatever from his invention, but had sustained losses; but that he had a reasonable expectation that the difficulties that had been encountered in bringing this invention into public use had been removed, and if the term was renewed he would reap some reward for his outlay and exertion, and that the public would be benefited by the use of his invention, and he prayed for an extension of the term for seven years.

No caveats were entered against the application.

Mr. *Grove*, Q.C., and Mr. *C. Grove*, for the Petitioner, and

Mr. *Hannen*, appeared for the Crown.

Evidence was given of the ingenious character of the Patent, and of the unsuccessful efforts made by the Patentee to induce Telegraph Companies to adopt the invention, and also of his ineffectual endeavours to form Companies to carry the invention into practice. There had been no user of the Patent, or profits derived from it.

LORD ROMILLY :—

Has there been any case in which the term of a Patent has been prolonged by the Judicial Committee, where the Patent has not been brought into use during the term of fourteen years?

Mr. *Grove* :—

In *Berrington's Patent* (1) for improved Knapsacks, there was

(1) P. C. 5 July, 1852. See case referred to, *Coryton's* Law of Patents, 225.

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no user during the term, yet a prolongation was granted. In the case of *Woodcroft's Patent* (1), Lord *Brougham* observed that, it is not enough to object that the Patent has been long in coming into operation, for the steam engine itself and many other discoveries are open to the same observation. It is true, with respect to user, it has been held at Common Law, that an Inventor, after successful experiments in the presence of others, must not delay in applying for Letters Patent, or he will have given his Patent to the world: *Newall* v. *Elliott* (2). [LORD ROMILLY:—In *Bakewell's Patent* (3) this Court refused to prolong the term of a very ingenious Patent on the sole ground of non-user.] The present case differs from that case. There the Patentee took no steps to bring the invention into use. Here it required a large capital to work the Patent, and every effort was made by the Patentee to get Companies to work the invention though without success.

LORD ROMILLY:—

Their Lordships are of opinion, that a sufficient case has not been made out for an extension of this Patent. Early in the opening of the case their Lordships were doubtful whether, unless under the very peculiar circumstances of the case, the Judicial Committee of the Privy Council had ever recommended the extension of a Patent of which there had been no user for a period of fourteen years, namely, during the whole of the duration of the Patent. Mr. *Grove*, upon application being made to him to ascertain whether such a case could be found, referred to *Berrington's Patent*, which we now have before us, which was a Patent for Knapsacks. The judgment there given by Dr. *Lushington* was in these words: "Their Lordships feel some surprise, considering the very high testimonials which have been produced to the usefulness of this invention, to find that after the lapse of so great a period of time it does not seem to have been adopted in the service of any one of Her Majesty's regiments. It would, perhaps, almost lead their Lordships to doubt whether, or not, the invention was so

(1) 2 Webs. Pat. Cases, 32. (2) 4 Jur. (N. S.) 562; 27 L. J. (C. P.) 337.
(3) 15 Moore's P. C. Cases, 385.

meritorious as has been described by the witnesses; but as there is no evidence to shew that this article has ever been tried and failed in attaining the objects which it is calculated to attain, their Lordships are of opinion, that they ought to give the Patentee the benefit of any doubt of that kind. Their Lordships are, therefore, disposed to advise Her Majesty that this Patent should be extended for a period of five years, under the hope that its utility will be displayed, and that, if that utility is clearly ascertained, then there will be no delay in introducing it into the Army, which it is said to be so well calculated to benefit."

Their Lordships observe upon that case, that the introduction of the improved Knapsacks being in the year 1852, when there was no Volunteer corps in existence, they could only have been employed by Her Majesty's Government, and, therefore, their Lordships seem to have thought that an extension of this Patent (which could affect nobody, and could only be beneficial in case Her Majesty's Government thought fit to use it, and if they did not, would be a dead letter) was in the proper exercise of their discretion.

The same question came fully before their Lordships in the year 1862, in *Bakewell's Patent*, in which Lord *Chelmsford*, in delivering their Lordship's judgment, said (1): "In the course of the opening of the learned Counsel for the Petitioner, an inquiry was made by their Lordships whether he could refer to any case in which there had been a recommendation of an extension of the term of a Patent for an invention which, during the whole course of fourteen years, had not been in use, and it appears that no such case can be found. On the other hand, if it were necessary, it might be shewn that their Lordships have on more than one occasion intimated that the fact of a Patent not having been used would be one ground, at least, for refusing to recommend an extension of the term. Now, non-user of a Patent can hardly be said to be a ground why an extension of the term should be absolutely refused, but it must always amount to a very strong presumption as to the invention not being useful. Of course that presumption may be rebutted, as all other presumptions may be, by evidence of the utility of the Patent, and if upon this occasion the Patentee has

(1) 15 Moore's P. C. Cases, 386.

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been able to give satisfactory reasons why his Patent, which was perfectly well known, had not been introduced into use, that, of course, would have answered the presumption, which is *prima facie* against him, on account of the non-user of the Patent." His Lordship goes on to state, that although the presumption might be rebutted, it must be by the very strongest, the most distinct and clear evidence, and in that case, although their Lordships thought it a very remarkable and ingenious invention, they did not think proper to recommend a prolongation of the term of the Patent.

In the present case their Lordships think, that there is nothing to rebut the fact that there has been no user of this Patent for the period of fourteen years. It cannot be said that there was no knowledge of the invention, for it has been very fully advertised and made known on various occasions, and their Lordships have also to observe that there is much more difficulty in dealing with the case of a Patent where it has not been used for fourteen years, than in dealing with one where a user has taken place, because, assuming that there is no utility in the invention, there is nobody whose interest it is to oppose it; but where it has been used for a considerable number of years, there are persons who always desire to get rid of the invention, and from them their Lordships hear all the arguments which can properly be brought against the validity of the Patent. That is not so where the Attorney-General alone appears to oppose the Petition, because he opposes it lightly, he merely calls their Lordships' attention to the circumstances of the case, and submits to them, whether the utility of the invention is proved; and the question whether it be the subject matter of a Patent, the profits derived, and various other matters which would be very fully discussed if there were the ordinary opposition, which there is where a Patent has been used, fail in a case of this description.

Now, their Lordships' difficulty arises from this circumstance: they are of opinion that there has been abundant opportunities of trying this Patent. In the first place, there have been three Companies attempted to be set on foot for the purpose of carrying it into execution, which have failed It is difficult to understand how, in the years 1855, 1858, and 1862, there should have been

the failure of carrying the matter into execution, in case the Company had been well founded, and backed by competent persons, and the invention approved of, it would probably have been carried into full and satisfactory operation. But the opportunities of trying the utility of the Patent do not cease there. There have been two large Companies formed for laying an electric telegraph between *Ireland* and the *United States*, upon both occasions Mr. *Allan's* Patent has been carefully brought before them. It is difficult to understand (and certainly no evidence of a satisfactory character has been laid before their Lordships to satisfy them) why it should be that a small body of proprietors, as we believe was the fact in the case of the first *Atlantic Telegraph*, should voluntarily accept a tender of £600,000, to do that which might be more effectually and beneficially accomplished by a tender by the Patentee of £400,000. It is not suggested that they acted from any corrupt motives, they had their own interest to consider, and yet they carefully adopted the other cable, and not Mr. *Allan's* Patent. The same course seems to have been pursued with the second *Atlantic Telegraph*, and the only suggestion why they did not adopt Mr. *Allan's* Patent is, that they thought it best to adhere to the old plans, and not to indulge in any new experiments, and that for that reason they did not attempt to use Mr. *Allan's* Patent. So, in the case of the *Mediterranean Cable*, Mr. *Allan's* Patent has not been adopted. Having all these circumstances present to their minds, their Lordships think that the rule to be laid down by the Judicial Committee in this case is, that where the utility of a Patent has not been tested by actual employment for a period of fourteen years, it raises a very strong presumption against its utility, which can only be rebutted by the very strongest evidence; and that, upon the present occasion, the evidence, so far from rebutting the presumption, rather leads to a presumption that this was considered not to be a practical Patent, however theoretical it might be found to be. In that state of circumstances, their Lordships think that they cannot with propriety recommend an extension of the present Patent.

Solicitors for the Petitioner: *Lloyd & Chevallier*.
Solicitors for the Treasury, for the Crown.

J. C.*

1867

July 15, 16, 19.

In re POOLE'S PATENT.

Letters Patent taken out in England before Patent granted in a Foreign Country for the same Invention—Construction—Act, 15 & 16 *Vict. c.* 83, *s.* 25—*Power to grant Prolongation of Term—Accounts—Profits.*

The Act for the amending the law for granting Patents, 15 & 16 Vict. c. 83, sec. 25, does not deprive the Judicial Committee of the Privy Council of the power to entertain an application for an extension of the term of Letters Patent taken out first in *England*, though a Patent has been obtained for the same invention in a Foreign State; and the Foreign Patent would expire before the expiration of the prolonged term.

Secus, if the Patent was first obtained abroad by a Foreign subject, and afterwards taken out in *England*.

A Patentee residing in *America*, for the purpose of getting the patented article into general use in *England*, arranged with an Agent in *England*, and in consideration gave him a moiety of the royalties:—*Held*, that in estimating the profits of the Patentee derived from the Patent, such moiety was to be deducted.

THIS was an application by an Assignee of a Patent, for a prolongation of the term of Letters Patent taken out in *England* in November, 1853, by *Moses Poole*, for an invention communicated to him from abroad, being "Improvements in surface condensers, and in evaporators and heaters for steam engines."

It appeared from the petition, that *Poole*, by deed, dated the 4th of May, 1854, assigned the unexpired term of the Patent, and of any extension of the term, to one *Sewell*, a British subject resident in *New York*, in *America*, who was the first discoverer, and had communicated the invention to *Poole*. *Sewell*, in November, 1854, took out a Patent in *America* for the same invention. By the law which then prevailed in *America* the Patent would expire there in 1867 (1). *Sewell* died in 1865, and his personal representatives by deed assigned, subject to half the royalties being paid to them, the residue of the term to the Petitioner, *Thomas Davison*.

* *Present*:—LORD ROMILLY (MASTER OF THE ROLLS), SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

(1) See The Comms. of Patents Journ., 14 Feb. 1860, pp. 215 and 216 of the Acts of 1836 and 1839 relating to previous Foreign Patents; and Ib., July 26, 1861, pp. 932 and 933, *as to* the present rules and regulations in the *United States* as to extensions and *to* previous Foreign Patents.

The evidence established that the invention was a most meritorious and useful one; and, as respected the remuneration received by *Sewell*, that for the first seven years no profits were made, and it was only when he entered into an arrangement with an Agent to work the Patent in *England*, in consideration of the assignment of a moiety of the royalties, that any profits were made. The accounts shewed a profit of about £7,000, of which the Agent in *England* had received half for royalties. There was no account put in evidence of the profits derived from the American Patent.

A question arose whether, as the Patent in *America* would expire in the course of a year, it was in the power of the Judicial Committee to grant an extension of the English Patent.

By the Act for amending the law for granting Patents for inventions, 15 & 16 Vict. c. 83, sec. 25, it is enacted, that "Where, upon any application made after the passing of this Act, Letters Patent are granted in the *United Kingdom* for or in respect of any invention first invented in any Foreign country, or by the subject of any Foreign Power or State, and a Patent or like privilege for the monopoly or exclusive use or exercise of such invention in any Foreign country is there obtained before the grant of such Letters Patent in the *United Kingdom*, all rights and privileges under such Letters Patent shall (notwithstanding any term in such Letters Patent limited) cease and be void immediately upon the expiration or other determination of the term during which the Patent or like privilege obtained in such Foreign country shall continue in force, or, where more than one such Patent or like privilege is obtained abroad, immediately upon the expiration or determination of the term which shall first expire or be determined of such several Patents or like privileges: Provided always, that no Letters Patent for or in respect of any invention for which any such Patent or like privilege as aforesaid shall have been obtained in any Foreign country, and which shall be granted in the said *United Kingdom* after the expiration of the term for which such Patent or privilege was granted or was in force, shall be of any validity."

Mr. *Aston*, for the Petitioner:—

This section has no application to the present case, which differs essentially from the case contemplated by the Legislature, which

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was obviously intended to apply only to cases where Letters Patent had been obtained abroad in the first instance. That was the construction put upon this section by Lord *Wensleydale* in *Aubé's Patent* (1), where a Foreign Patent had expired before the application for extension of the English Patent; and the same principle was recognised in *Newton's Patent* (2); but the very question now raised was determined in *Betts's Patent* (3). In that case there were three Patents granted for the same invention, in *France*, *Belgium*, and *England*, and the Belgian Patent had expired before the application for a prolongation here; yet, as the English Patent was obtained first, this Tribunal held that the section did not apply, so as to deprive the Committee of the power to entertain the application. By the Patent Law now in force in the *United States*, the American Patent, having been previously obtained abroad, extends only for seventeen years (4).

Mr. *Hannen*, on behalf of the Crown:—

Submitted, first, that accounts were not satisfactory, or the requirements enumerated in *Trotman's Patent* (5) complied with; secondly, that the remuneration, £7,000, received by *Sewell*, in *England*, although the Patent was a meritorious one, was ample, and, further, that it was not shewn what profits were derived by *Sewell* from the American Patent.

Mr. *Aston*:—

It is admitted that this is a most useful Patent, yet it is proved that all *Sewell* has received for the English Patent has been £3,500, a remuneration totally inadequate for such an invention. In taking the accounts, one half of the royalties paid to the Agent is to be deducted (*Perkins' Patent* (6)) from the profits derived.

1867 *July* 20.

LORD ROMILLY:—

In this case their Lordships, having considered the evidence laid before them, are of opinion that a case has been made out for

(1) 9 Moore's P. C. Cases, 43.
(2) 15 Moore's P. C. Cases, 176.
(3) 1 Moore's P. C. Cases (N. S.) 49.
(4) See The Comms. of Pat. Journ. pp. 932 and 933, July 26, 1861, where the Act relating to Extension of Foreign Patents is set out.
(5) Law Rep. 1 P. C. 118.
(6) 2 Webs. Pat. Cases, 16.

a prolongation of the Patent, provided no legal impediment stands in the way. It appears that *Sewell* took out a Patent in this country, in November, 1853, for the ordinary term of fourteen years, and that in the following November, in 1854, he obtained a Patent in the *United States*, which, according to the law then existing there, would expire one year after the time when the English Patent would expire. Their Lordships are informed, though I am not sure that the evidence of this is distinctly before them, that *Sewell* was an English-born subject, residing in *America* when the Patent was taken out. Their Lordships do not consider that circumstance of very material importance with respect to the question which arises upon the point of law to be mentioned presently.

It appears that for the first six years *Sewell* made no profit at all in this country. There is no account of what profits he made in the *United States*, nor do their Lordships think it material for this purpose, because the question before them is, what profits were made and what benefits were sustained by the introduction of the invention into this country. It appears that he made no profits at all for nearly seven years; but for the remaining seven years he seems to have made a little more than £7,000 in the whole. It was accomplished in this manner:—He employed a gentleman to come to this country to manage the Patent for him, upon an agreement that they should divide the profits between them. Upon the documentary evidence given to their Lordships, which is confirmed by the evidence taken orally before them, it appears that they have had about £3,500 each.

Their Lordships consider that the Patent is one of great utility. They think that it has been proved to them that it is a Patent of great advantage for the construction of steam engines. That the mode of fixing the tubes so as to enable a perfect flow of cold water to take place externally, thus producing the required effects of condensation of the steam without the injurious consequences hitherto observed, is of the greatest value. The testimony is unanimous on that subject. Mr. *Hannen* very properly stated that he could not dispute that there was very great utility in the invention. That being so, their Lordships think that £7,000 is an inadequate remuneration for the time, and trouble, and risk occasioned by this

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invention, and, therefore, that it is desirable that the Patent should be extended.

The question then arises, whether their Lordships are fettered by any legal impediment from granting any extension. The objection is taken that, by the 25th section of the Act, 15 & 16 Vict., Letters Patent in the *United Kingdom* cannot continue in force after the expiration of a Foreign Patent; and if that is the true construction of the Statute, the result will be, that upon the expiration of the American Patent, no Patent can be granted in this country. But their Lordships think that this is not the true construction of this clause. The clause is this:—[His Lordship read the section, *ante*, p. 515, and proceeded.] Now, their Lordships think, upon the due construction of that clause, that it applies to the case where a Patent has been obtained in a Foreign country before the Patent was obtained in this country, combined with this further circumstance, that the invention in respect of which the Patent here was granted was first invented either in a a Foreign country or by the subject of a Foreign State. Their Lordships are of opinion, therefore, that this clause of the Statute must apply to a case where a Patent has been previously obtained in a Foreign country. And it is obvious, from various considerations, that that must be the meaning of the clause, for, if not, an English-born subject who took out a Patent in this country for an invention invented here could not venture to take out a Patent in a Foreign country if the Patent in the Foreign country was of shorter duration than in this country, as, for instance, in *Belgium*, where the term appears to be ten years, as it would absolutely preclude his ever applying for a continuation of the Patent here, inasmuch as the Patent for the same invention would previously have expired in the Foreign country. Therefore, their Lordships think that the section is not meant to apply to such cases, nor to prevent persons, if they are natural-born English subjects, who have taken out a Patent here, from obtaining a continuation of the Patent, though they have subsequently taken out a Patent in another country for the same invention.

Their Lordships' view of this case is confirmed by the case of *Bett's Patent* (1). There it appears, that the Letters Patent for

(1) 1 Moore's P. C. Cases (N. S.) 49.

an invention made in *England* were granted, in 1849, to Mr. *Betts*, who was a British subject. In the following year a Patent was granted in *France* for the same invention for fifteen years, and in the same year another Patent was granted in *Belgium* for ten years. The *Belgian* Patent of course expired before the *English* Patent, and before any application was made for a prolongation of the Patent. In that case the Judicial Committee held that the section which I have read did not apply so as to deprive their Lordships of the power of entertaining an application for a prolongation of the Patent; and their Lordships in that case decided that this section applied only to cases where the original Patent had been granted in a Foreign country, and not to those where the Patent had been first granted in the *United Kingdom;* and in this decision no reference is made to the question by whom the Patent was taken out, whether by a foreigner or natural-born English subject. Their Lordships think that decision applies to this case. The Patent here was taken out in November, 1853, and the Patent in the *United States* was taken out in November, 1854. The consequence of this is, that their Lordships, taking into consideration the whole of the matter, the remuneration received, the value of the invention, and the arrangement which has been entered into between the gentleman who applies here and the family of the inventor, who is deceased, think it fit that an extension should be granted for five years; and their Lordships will, therefore, humbly report to Her Majesty as their opinion, that this Patent should be so extended.

Solicitor for the Petitioner: *Bristow Hunt.*
Solicitors to the Treasury, for the Crown.

J. C.* 1867 June 27, 28.

THE ATTORNEY-GENERAL OF OUR LADY THE QUEEN FOR THE COLONY OF NEW SOUTH WALES . . . . . } APPELLANT;

AND

HENRY LOUIS BERTRAND . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Prerogative of the Crown—Appeal to Privy Council from the Colonies in Criminal cases—Felony—New Trial—Evidence—Judge's notes.

It is the inherent prerogative right, and, on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction in all cases criminal as well as civil, arising in the Colonies, from which an appeal lies, and where, either by the terms of a Charter or Statute, the power of the Crown has not been parted with, with a view not only to ensure, as far as may be, the due administration of justice in an individual case, but also to preserve generally the due course of procedure.

The exercise of this branch of the prerogative in criminal cases is to be cautiously admitted, and is regulated by consideration of circumstances and consequences. Leave to appeal will only be granted in special circumstances, such as where a case raises questions of great and general importance in the administration of justice, when it will be proper for the Judicial Committee to advise the allowance of such an appeal.

A Prisoner was tried by the Court in *New South Wales* for Felony, the jury not agreeing, were discharged, and a fresh trial had. On the second trial, at the same sittings, before another jury, some of the witnesses having been re-sworn, the evidence given by them at the first trial was read over to them from the Judge's notes, liberty being given both to the prosecution and to the Prisoner to examine and cross-examine:—

Held, on appeal from a judgment of the Supreme Court at *New South Wales* granting, in such circumstances, a new trial:—

First, that the course adopted by the Judge at the fresh trial was irregular, and could not be cured even by the consent of the Prisoner: and

Secondly, that according to the English law prevailing in *New South Wales*, the Supreme Court had no power to grant a new trial in a case of Felony.

The case of *The Queen* v. *Scaife* (1), in which a new trial was granted after conviction for Felony, by the Court of Queen's Bench, examined and not followed.

THIS was an appeal from the judgment of the Supreme Court of *New South Wales* granting a new trial in the case of the Queen on

* *Present*:—SIR JOHN TAYLOR COLERIDGE, SIR WILLIAM ERLE, SIR EDWARD VAUGHAN WILLIAMS, SIR FITZROY KELLY (THE LORD CHIEF BARON), and SIR RICHARD TORIN KINDERSLEY.

(1) 17 Q. B. Rep. 238.

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the prosecution of the Attorney-General for the Colony, against the Respondent, *Bertrand*, under the following circumstances:—

On the 18th of December, 1865, an information (1) was filed in the Supreme Court of *New South Wales*, at the sittings held at *Darlinghurst*, in *Sydney*, in that Colony, as a Court of Oyer and Terminer and Goal delivery, by Her Majesty's Attorney-General for the Colony, charging that the Respondent, on the 6th of October, 1865, at *Saint Leonard's*, in the Colony aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder one *Henry Kinder*.

To this information the Prisoner pleaded not guilty, and issue was joined thereon. The Prisoner was tried on the 14th, 15th, and 16th days of February, 1866, before the Chief Justice, Sir *Alfred Stephen*, and a jury. The evidence for the Crown having been taken, the Counsel for the Prisoner addressed the jury on his behalf, and no witnesses being called for the defence, the jury was charged by the Chief Justice and retired to consider their verdict, and after having been locked up for twenty-one hours and upwards, returned into Court, and stated that they had not agreed upon their verdict, and were not at any time likely to agree thereon; whereupon, having been then kept, without at any time separating, for the space of three days and three nights and upwards, and stating that they were exhausted, and that some of them were ill, the Chief Justice discharged them from giving any verdict, and remanded the Prisoner to his former custody.

On the 22nd of the same month of February, and at the same sittings of the Court, the Prisoner was again brought for trial before the Court, and was then and there tried before the Chief Justice and another jury, when that jury found a verdict of guilty, and the Court sentenced the Prisoner to death.

At the second trial the Chief Justice allowed the evidence of several of the witnesses who had been called as witnesses for the Crown at the first trial, to be taken in the following manner: each of such witnesses was placed in the witness box, and was then sworn in the usual manner; the Chief Justice then

(1) By the law prevailing in *New South Wales*, an information at the instance of the Attorney-General of that Colony stands in the place of an indictment found by a Grand jury in *England*.

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informed the witness that he intended to read over the notes which he (the Chief Justice) had taken of the evidence given by the witnesses at the former trial, and that if the witness wished to add anything to the evidence he had then given, or to alter or correct it in any way, he could do so. The Chief Justice also then informed the Counsel for the Prisoner and the Counsel for the Crown, that if either of them wished to ask the witness any questions he could do so. No specific or definite consent was given by the Prisoner or his Counsel as to the proposed course being adopted, or as to any specific witness being thus examined; but no objection was then made by the Prisoner or his Counsel, and they were considered by the Court to have assented to the course proposed.

On the first trial, at the close of the defence, the Counsel prosecuting for the Crown claimed to reply, but upon objection being taken, the claim, at the suggestion of the Chief Justice, was withdrawn. But at the second trial, at the close of the defence, the Counsel prosecuting for the Crown (and acting for the Attorney-General), claimed and was allowed by the Chief Justice to reply, the Prisoner's Counsel having, as was alleged, been induced by the withdrawal on the former occasion of the claim to reply, to suppose that if he did not call witnesses no reply would be allowed, abstained from calling witnesses.

On the 12th of March, 1866, the Supreme Court of *New South Wales* sitting in Banco, upon the motion of the Counsel for the Prisoner, granted a rule *nisi* calling upon the Attorney-General to shew cause why the verdict of guilty should not be set aside, and why a new trial of the issue should not be had, or why the judgment should not be arrested on the ground (*inter alia*) that the evidence of some of the witnesses, called on behalf of the Crown upon the trial, had been read to the jury from the notes taken by the Chief Justice at the former trial, and that a reply had been permitted, contrary to the practice of the Court, by which the Prisoner had been prejudiced in his defence.

The rule *nisi* came on for argument before the Court in Banco, on the 17th of March, 1866, when, upon hearing Counsel on the part of the Attorney-General, and also upon the part of the Respondent, the Judges of the Court sitting in Banco gave

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judgment. Mr. Justice *Hargrave* and Mr. Justice *Cheeke* gave judgment to the effect, that at the second trial there had been a substantial miscarriage of justice, and that there ought to be a new trial. They were of opinion, that the jurisdiction of the Supreme Court of *New South Wales* being declared by the 9 Geo. 4, c. 83, s. 3, to be co-extensive in all civil and criminal matters with the jurisdiction of the Court of Queen's Bench at *Westminster*, and that Court having, in the recent case of *The Queen* v. *Scaife* (1), upon grounds analogous to the present case, granted a new trial, it was competent for the Supreme Court to do the like: as the mode adopted by the Chief Justice in submitting the evidence to the jury on the second trial was irregular, and amounted to such a miscarriage of justice as entitled the prisoner to a new trial.

The Chief Justice was of opinion that, admitting the authority of the decision in *The Queen* v. *Scaife*, and the analogy of the Supreme Court to the Court of Queen's Bench at *Westminster*, yet that there had been no such miscarriage of justice as would entitle the Prisoner to a new trial, inasmuch as the evidence alleged to have been irregular had been so taken at the instance of the Prisoner personally, and upon the application of his Counsel, and as there was no ground whatever for supposing that the Prisoner had been injuriously affected thereby, therefore, that the rule asked for ought to be refused. Mr. Justice *Faucett* gave judgment in accordance with the opinion of the Chief Justice; but subsequently withdrew his judgment in order that there might be an appeal to Her Majesty in Council, and the verdict so found by the jury, upon the trial of the Prisoner upon the 22nd of February, 1866, was thereupon set aside and a new trial granted.

1866 *June* 27.*

A petition for special leave to appeal against this judgment was presented by the Attorney-General of the Colony to Her Majesty in Council. The petition was heard *ex parte*.

The *Attorney-General* (Sir *R. Palmer*, Q.C.) and Sir *Hugh Cairns*, Q.C., for the Petitioner:—

By the imperial Statute, 9 Geo. 4, c. 83, ss. 3, 4, the constitu-

* *Present:*—LORD WENSLEYDALE, SIR JOHN TAYLOR COLERIDGE, and SIR EDWARD VAUGHAN WILLIAMS.

(1) 17 Q. B. Rep. 238.

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tion of the Supreme Court in *New South Wales* is defined and declared to be a Court of Record, and to possess the same jurisdiction and powers as the Courts of King's Bench, Common Pleas, and Exchequer, in *England*. The English law of procedure, therefore, is the rule to govern the case. By that law no new trial lies in a case of Felony. It is true that in *The Queen* v. *Scaife* (1), a new trial where there had been a conviction for Felony, was granted by the Court of Queen's Bench, but we submit that that case, when examined, cannot be upheld, and is contrary to law. [SIR EDWARD VAUGHAN WILLIAMS:—There the record was brought up and became a Court of Queen's Bench record. Here it is an information at the instance of the Attorney-General of the Colony, and the question is, whether there is the same means of making it a Crown Office record and removing it.] The course adopted by the the Chief Justice at the second trial, in reading the evidence of the witnesses taken at the first trial, instead of examining them afresh, as in a case of a new trial, where the former jury has been discharged on the ground of illness of one of the jurors, or otherwise, without giving a verdict, as in *Rex* v. *Edwards* (2), *Kinlock's Case* (3), even if it constituted such an irregularity as to have occasioned a miscarriage of justice, yet the remedy in a Criminal suit is not by a new trial; that is not the practice here, and cannot be in the Colony of *New South Wales*.

The Crown, by virtue of its prerogative, can admit an appeal from a Colonial Court, even in a criminal matter, unless it has parted with that right by Act of Parliament, or, as in the case of the Supreme Courts in the *East Indies*, by the Charter of Justice creating the Courts: *The Queen* v. *Eduljee Byramjee* (4); *The Queen* v. *Alloo Paroo* (5); *The Queen* v. *Joykissen Mookerjee* (6); *The Falkland Islands Company* v. *The Queen* (7). In the latter case it is laid down by Lord *Kingsdown*, that "it may be assumed that the Queen has authority by virtue of the prerogative to review the decisions of all Colonial Courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with

(1) 17 Q. B. Rep. 238.
(2) 3 Camp. 208; S. C. 4 Taunt. 309.
(3) Foster, 16.
(4) 5 Moore's P. C. Cases, 276.
(5) Ibid. 296.
(6) 1 Moore's P. C. Cases (N.S.) 272.
(7) 1 Moore's P. C. Cases (N.S.) 299.

such authority." The royal prerogative to entertain such appeals is not expressly taken away by the Statute, 9 Geo. 4, c. 83, creating the Supreme Court at *New South Wales*, and, therefore, subsists.

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LORD WENSLEYDALE:—

Their Lordships are of opinion, that sufficient grounds appear upon the face of these proceedings for them to recommend that the leave sought to appeal should be granted. The allowance of the appeal must, however, be on terms; the Prisoner must remain in prison until he is delivered in due course of law.

By an Order in Council made on the petition, leave to appeal was granted, and it was ordered that all further proceedings in the matter should be stayed until the decision of Her Majesty in Council upon the appeal should be known in the Colony.

The appeal having been admitted now came on for hearing.

1867 June 27, 28.

Sir *R. Palmer*, Q.C., and Mr. *Hannen*, for the Appellant:—

It was not competent for the Supreme Court of *New South Wales* to grant a new trial in a case of Felony, whether capital or otherwise. That Court was established by the Charter of Justice of the 13th of October, 1823, made pursuant to, and under the authority of, the previous Act of the 4 Geo. 4, c. 96, and confirmed and continued by the Statute, 9 Geo. 4, c. 83. By the 3rd section of the latter Act, the constitution of the Supreme Court is made identical with that of the Supreme Courts in *Westminster*. Both the Charter of Justice and the Statute, 9 Geo. 4, c. 83, give an appeal to Her Majesty in Council from judgments, orders, and decrees of the Supreme Court: but there is no mention of, or provision for, appeals in criminal proceedings. No such provision is to be found in the 7 & 8 Vict. c. 38, which enlarged and improved the jurisdiction of Her Majesty in Council, or in the provisions contained in the Privy Council Act, 3 & 4 Will. 4, c. 41. Nor is there any appeal given in criminal matters by the Act, 11 & 12 Vict. c. 78, for the amendment of the administration of the Criminal Law, which has been introduced and made law in *New South Wales* by Act, 15 Vict., No. 8 of 1849. These Acts, it is true, provide for the reservation of points of law in criminal trials, but such points are to be reserved by the

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Judge, to be argued and determined before a *quorum* of the Judges of the Supreme Court, and though such provision may be, in some respects, equivalent to an appeal in a criminal suit, there is no authority either in our Courts, or the Supreme Court of *New South Wales*, to grant a new trial in a criminal suit. It is not necessary for us to contend that the Queen has not the power of granting an appeal in a criminal suit. This is a case of the Court below assuming authority to grant a new trial, a power it was not competent to exercise, any more than the Courts at *Westminster Hall*. The only case to be found for such a proceeding is *The Queen* v. *Scaife* (1), which, however, when examined, is no authority; the question of the power of the Court of Queen's Bench was, in fact, never argued. Granting new trials is a practice of comparatively modern date. The history of its introduction is to be found in *The King* v. *Mawbey* (2), which was a case of misdemeanor only. In a note to the case of *The King* v. *The Inhabitants of the County of Oxford* (3), it is stated, that there is no instance of a new trial being granted in a capital case. All the authorities upon the point are collected there.

With regard to the merits, even if the Supreme Court possessed the power of granting a new trial in a criminal proceeding, which we deny, the power was wrongly exercised in this case, as the reading of the evidence of the witnesses taken at the former trial was regular and with the consent of the Prisoner. The same course was adopted by Mr. Justice *Patteson* in *Rex* v. *Foster* (4). Even if there was an irregularity it was trivial, and in no way calculated to injure the Prisoner, and there was no miscarriage of justice occasioned by such a course. The cases of *The King* v. *Edwards* (5); *The King* v. *Streck* (6); *Stokes's Case* (7) *Foster's Case* (4), relied on by the Chief Justice of the Court below, are all cases before a single Judge, and have no binding authority as decisions on this Tribunal. Neither the withdrawal of his judgment by Mr. Justice *Faucett*, or the allowance of the reply to the Crown, formed any valid ground of objection; they are both consistent with the

(1) 17 Q. B. Rep. 238; S. C. 2 Den. C. C. 281, 286.
(2) 6 Term Rep. 619.
(3) 13 East, 410, 415.
(4) 7 C. & P. 496.
(5) 3 Camp. 207.
(6) 2 C. & P. 413.
(7) 6 C. & P. 151.

practice of our Courts in criminal prosecutions, and upon difference of opinion among the Judges. The conviction of the Respondent was, therefore, right and legal, and such conviction ought to stand.

Mr. *H. S. Giffard*, Q.C., Mr. *F. H. Lewis*, and Mr. *E. Clarke*, for the Respondent:—

By the Statutes and Charter of Justice of the Supreme Court at *New South Wales*, that Court is invested with all the jurisdiction and power that belong to the Court of Queen's Bench at *Westminster*. It has, therefore, a general power to order a new trial in favour of a Prisoner who has been convicted, where the trial has taken place before the Court itself. *The Queen* v. *Scaife* (1) is a direct authority on this point, that it is competent for the Court of Queen's Bench to grant a new trial in a case of Felony. The contention of the Appellant that the question of jurisdiction was overlooked cannot be sustained. Although the Prisoner in that case on the new trial received a heavier sentence, yet no attempt was made to quash the second conviction. Granting a new trial, in recent times, has been extended from civil cases to indictments for misdemeanors and Felony. *The Queen* v. *Scaife* was in accordance with the previous cases of *The Queen* v. *Mawbey* (2), and *The Queen* v. *Gompertz* (3); *Bright* v. *Eynon* (4); *The King* v. *Davis* (5); *The King* v. *Reynell* (6). We do not contend that a right of appeal exists in a case where the Supreme Court, sitting as a Criminal Court, has exercised, under the jurisdiction given by Statute, the powers of the Court of Queen's Bench at *Westminster*; that Court having no such jurisdiction. But the ordering a new trial is quite another thing, and is consistent with the course of practice of the Court of Queen's Bench.

It is a discretionary act with which this Tribunal will not interfere, though we do not question the right of the Queen, by Her prerogative, to grant an appeal in criminal as well as civil suits, except where such right has been relinquished, or is restricted by Act of Parliament: *The Queen* v. *Eduljee Byramjee* (7);

(1) 17 Q. B. Rep. 238.
(2) 6 Term Rep. 619.
(3) 9 Q. B. Rep. 831.
(4) 1 Bur. 393.
(5) 12 Mod. 9.
(6) 6 East, 315.
(7) 5 Moore's P. C. Cases, 276.

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Nga Hoong v. *The Queen* (1); *The Queen* v. *Alloo Paroo* (2); *Aga Kurboolie Mahomed* v. *The Queen* (3); *Pooneakhoty Moodelia* v. *The King* (4): yet in *Re Ames* (5), from *Jersey*, and *The Queen* v. *Joykissen Mookerjee* (6), from the *Sudder Nizamut Adawlut* at *Bengal*, such right was shewn not to exist. From all these authorities it is clear that this is a case in which such right if it exists ought not to be exercised. The ordering a new trial by the Supreme Court was an exercise of its discretionary power, with which neither this nor any other Court of appeal will interfere. It was, as we maintain, rightly exercised, for the proceedings in taking the evidence on the second trial were wholly irregular and contrary to law. The depositions of the witnesses taken at the former trial were inadmissible as evidence: *Taylor* on Evidence, § 442 [3rd Ed.]. By the old law it was only in the case of death or absence that they were admissible: 1 *Hale*, P. C. 305; so now by Act 11 & 12 Vict. c. 42, sec. 17. The allowance also of a reply on the part of the Crown was a surprise on the Counsel for the Prisoner, and produced a miscarriage of justice. The irregularity at the trial was prejudicial to the Respondent, and his presumed consent cannot cure it. As no Writ of Error would lie, nothing was open to him but to apply for a new trial. Again, the Judges being evenly divided in opinion the decision was in favour of the Respondent, and he ought to have had the benefit of it, instead of being prejudiced by the course adopted by Mr. Justice *Faucett* of withdrawing his judgment.

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The consideration of the judgment having been reserved, was now pronounced by

SIR JOHN T. COLERIDGE:—

This is an appeal by the Attorney-General of *New South Wales* on behalf of Her Majesty, against an Order of the Supreme Court of that Colony, making absolute a rule *nisi* for a new trial, which had been obtained on behalf of the Respondent, against whom a verdict of guilty had passed on an information charging him with wilful murder. By the law of the Colony an information

(1) 7 Moore's Ind. App. Cases. 72.
(2) 5 Moore's P. C. Cases, 296.
(3) 4 Moore's P. C. Cases, 239.
(4) 3 Knapp's Rep. 348.
(5) 3 Moore's P. C. Cases, 409.
(6) 1 Moore's P.C. Cases (N.S.) 272.

by the Attorney-General stands in the place of an indictment found by a Grand jury. The Appellant had been tried at the same sittings, and the jury not agreeing, had been discharged; upon the second trial a new jury, taken from the same panel, had found him guilty—sentence of death had been pronounced, and the rule above mentioned had been subsequently obtained. The record, after mentioning that fact, stated, "That it had been made to appear to the said Court, that at the trial of the said *Henry Louis Bertrand*, certain of the witnesses for our Lady the Queen, after being duly sworn at the said last-mentioned trial, were allowed by the said Chief Justice, at the request of the said *Henry Louis Bertrand*, and of his Counsel, to be examined by reference to notes of the evidence given, or supposed to have been given, by those witnesses at the aforesaid first trial; and that such notes, the same having been taken at that trial by the said Chief Justice, were then at such request, and by consent of the Counsel prosecuting for Her Majesty, read in open Court to such witnesses respectively, each of them thereupon being asked, and declaring on his oath, whether the matter so read to him was true; and that thereupon as well the Counsel for the said *Henry Louis Bertrand* as the Counsel for Her Majesty, then and there examined, or were permitted to examine, each such witnesses orally in the ordinary manner." The record then concluded thus:—"And because it appears to the said Court now here sitting in Banc as aforesaid, that the said last-mentioned trial, and the proceedings thereat in respect of the matters so suggested and appearing, were and are irregular, and contrary to law; therefore on motion this day made to the Court on behalf of the said *Henry Louis Bertrand*, it is ordered by the said Court that, for the cause aforesaid, the verdict so given against him as aforesaid be set aside, and the judgment thereon vacated, and that the sheriff do cause a jury anew to come for the trial of the issue so joined upon the information aforesaid between Her Majesty's Attorney-General and the said *Henry Louis Bertrand;* and the prisoner is remanded to the custody of such sheriff in order to take his trial accordingly on that information."

Upon this statement it was contended, first, on behalf of the Respondent that their Lordships ought not to entertain the appeal; but they do not accede to this. Upon principle, and

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reference to the decisions of this Committee, it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a Charter or Statute, the authority has not been parted with, it is the inherent prorogative right, and, on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally. The interest of the Crown, duly considered, is at least as great in these respects in criminal as in civil cases; but the exercise of this prerogative is to be regulated by a consideration of circumstances and consequences; and interference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an appeal by its Officers on behalf of itself or by individuals. The instances of such appeals being entertained are therefore very rare.

The opinions stated by this Committee in the case of *Ames and others* (1); *The Queen* v. *Joykissen Mookerjee* (2); and *The Falkland Islands Company* v. *The Queen* (3), establish these positions.

The result is, that any application to be allowed to appeal in a criminal case comes to this Committee labouring under a great preliminary difficulty—a difficulty not always overcome by the mere suggestion of hardship in the circumstances of the case; yet the difficulty is not invincible. It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose; but it may safely be said, that when the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted, or diverted into a new course, which might create a precedent for the future; and also where there is no other means of preventing these consequences, then it will be proper for this Committee to entertain an appeal, if referred to it for its decision.

The present case appears to fall within this category, on the allegations of both parties; on the one hand, it is clear that the

(1) 3 Moore's P. C. Cases, 409. (2) 1 Moore's P. C. Cases (N.S.) 272.
(3) 1 Moore's P. C. Cases (N.S.) 299.

Court below has directed a new trial in a case of Felony; it is alleged that no such trial can be had according to the uniform practice in our Criminal Law; if this allegation be correct, it is obvious that an innovation has been made without authority, one of great importance, and establishing a precedent which may be expected to be frequently acted on. On the other hand, it is alleged that a serious departure has been made from the ordinary course of conducting a criminal trial before a jury; and if this be true, it is obviously of the last importance to prevent this for the future; and it has not been seriously contended on either side that any mode of redressing these alleged miscarriages exists but that which has been resorted to. Their Lordships therefore will not decline to entertain the present appeal; and they proceed accordingly to consider the first ground on which it is rested—the grant of a new trial in a case of Felony.

It is alleged, and, so far as their Lordships are aware, truly, that according to the universal impression among Lawyers, no such power exists as that which the Court below has exercised in this instance; and further, that but a single case is reported in which an application for a new trial in felony has been made, and but one—the same case, of course—in which it has succeeded. That case occurred in 1851, and although, as is well known, the public attention has been very much drawn to the subject during the interval which has since occurred, and it cannot be doubted that verdicts have since been pronounced which might have seemed questionable, no attempt has been made in this country to press the authority of that case in support of a similar application. On a matter of so much importance, it is right to consider that case attentively, and it is fortunate as to the freedom with which their Lordships may deal with it, that two of them who have taken part in the hearing of this appeal, also took part in the decision then arrived at. *The Queen* v. *Scaife, Smith, and Rooke* (1), was a case of an indictment for felony, found at the *Hull* Borough Sessions, and removed by *certiorari*. The trial was at the *York* Assizes, before the late Mr. Justice *Cresswell*, and in the course of it a deposition of a living witness not produced, was tendered on the part of the prosecution; there were grounds which applied only to

(1) 17 Q. B. Rep. 238.

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Smith, on which it was admissible as against him; the counsel for that prisoner objected to its reception, but the learned Judge overruled the objection, and rightly,—he admitted it, as is said, "subject to the objection;" the meaning of which probably was, that he might, upon consideration, have referred his ruling to the Court of Criminal Appeal. But in summing up he left the evidence generally to the jury, omitting to tell them that the deposition could affect *Smith* only. Singularly enough, the jury convicted *Scaife* and *Rooke*, and acquitted *Smith*. In the following Term a rule *nisi* was obtained for a new trial, on the grounds of improper reception of evidence and misdirection. The case was argued at some length, and neither in the course of the argument, nor in the judgments which followed, was a syllable uttered on the point now in question; the attention both of the Counsel and the Judges seems to have been exclusively confined to the questions of evidence and misdirection; but after the judgments pronounced making the rule absolute this occurred: the counsel for the rule suggested that there was a difficulty in ascertaining what rule should be drawn up, "no precedent having been found for a new trial in Felony." Upon which Lord *Campbell* is reported to have said "That might have been an argument against our hearing the motion." Still, however, the rule was made absolute, and a new trial, in fact, took place.

It appears, then, from this examination of the case, that a most important innovation in the practice of our Criminal Law was here made without a word of argument at the Bar upon it, or the attention of the Court having been for a moment addressed to it, until after the opinions of all the Judges had been expressed on the point really debated. And, as has been already stated, the decision has taken no root in our law, and borne no fruit in our practice. Are their Lordships to be bound by it in the advice they are now to tender to Her Majesty? It is somewhat embarrassing, even apparently, to disregard any judgment of the Court of Queen's Bench; but, in truth, when examined this can scarcely be said to be a judgment upon the point now to be decided; substantially the Court decided, and decided rightly, the only question directly for consideration, namely, that of the reception of evidence and misdirection, and for that alone the decision is properly an autho-

rity. That they adhered to it in spite of the consequence involved, after it was pointed out to them, is true; and their Lordships now venture to say, to be regretted; for, at all events, it would seem, that if such an innovation were to be made it should not have been made without argument, or indirectly.

Their Lordships, therefore, will feel at liberty to consider the present case apart from this authority. The course of the general argument for the Respondent was of this sort:—It seemed not to be very seriously denied that, except for the precedent of *The Queen* v. *Scaife*, the Court below, in making absolute the rule for a new trial, had introduced a new practice; but it was said that this was in analogy with the whole proceeding of our Courts of Justice in regard to new trials; that as to these, as in many other instances, a wholesome improvement in our law had been made and established; that this improvement had been made in the exercise of a wise discretion, and perhaps inherent powers, for the advancement of justice; that new trials had commenced in civil matters, and advanced in them gradually, and, upon consideration, from one class of cases to another; that thence they had passed to criminal proceedings, first where the substance was civil, though the form was criminal, and thence to misdemeanors, such as perjury, bribery, and the like, where both form and substance were criminal. Hitherto it was admitted that they had, except in the instance of *The Queen* v. *Scaife*, stopped short of Felonies, but that the principle in all was the same; and that, where there was the same reason, the same course ought to be permitted. There may be much of truth in this historical account; and if their Lordships were to pursue it into details, it might not be difficult to shew how irregular the course has been, and what anomalies, and even imperfections perhaps, still remain. But they need not do this; it is enough to say they cannot accept the conclusion: what long usage has gradually established, however first introduced, becomes law; and no Court, nor any more this Committee, has jurisdiction to alter it; but, on the same principle, neither the one nor the other can, in the first instance, make that to be law which neither the Legislature nor usage has made to be so, however reasonable, or expedient, or just, or in analogy with the existing law it may seem to be. In saying this, their Lordships desire to be under-

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stood as expressing no opinion that the introduction of new trials in Felony would or would not be expedient, or conduce to a more just or more careful administration of the law.

The conclusion to which their Lordships have thus come on the power to grant the new trial makes it unnecessary for them to express any judicial opinion on the remaining point, whether, assuming the power to exist, it was exercised by the Court below on such insufficient grounds that, if the question were open, the rule could not be sustained. Nor do they intend to do so; but, as they will have humbly to advise Her Majesty that the Respondent ought not to have the benefit of a new trial, and the verdict of guilty and sentence thereupon will consequently remain in force against him, it may be not improper to add a very few remarks on the course taken at the trial. They are bound to adopt, and willingly adopt, the account which the record gives, and it appears that what was done was done at the request of the Respondent and his Counsel, and with the consent of the Counsel for Her Majesty; the witnesses were before the jury, were asked, all in turn, whether what was read was true, and were submitted, at the pleasure of the Counsel on either side, to fresh oral examination and cross-examination; and their Lordships have no doubt that the whole proceeding was conducted by the able and learned Judge who presided with due care for the interests of justice on both sides. In nothing that their Lordships shall say do they intend to make the slightest reflection on him, nor are they in a condition to say that any injustice to the Prisoner resulted from it. Yet it is one of the inconveniences of such a course, that no one in their Lordships' position, and called to review the proceeding, could be sure of the contrary. It is a mistake, moreover, to consider the question only with reference to the Prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a Prisoner's consent, even when he is advised by Counsel, and substantially, not, of course, literally, affirms the wisdom of the common understanding in the profession, that a Prisoner can consent to nothing. For thus it will be seen that a most important consideration is for-

gotten,—that of the Jury charged with deciding on the effect of the evidence. It is essential that no unnecessary difficulty should be thrown in the way of their understanding and rightly appreciating it. The evidence in this case, taken in the usual way on the former trial, had occupied nearly three days. Those of their Lordships who have been used, on motions for new trials, to hear the Judge's notes of the evidence read, probably know well by experience how difficult it is to sustain the attention, or collect the value of particular parts, when that evidence is long; and one cannot but feel how much more this difficulty must press upon twelve men of the ordinary rank, intelligence, and experience of common Jurymen. But this is far from all. The most careful note must often fail to convey the evidence fully in some of its most important elements,—those for which the open oral examination of the witness in presence of Prisoner, Judge, and jury, is so justly prized. It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the Prisoner, when that has been important, upon the statement of anything of particular moment; nor could the Judge properly take on him to supply any of these defects; who, indeed, will not necessarily be the same on both trials; it is, in short, or it may be, the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it.

Their Lordships neither affirm nor deny that any of these inconveniences in fact happened on the trial of the Respondent. It is one of the evils incident to the cause that it makes such affirmation and denial equally impossible. They do not pronounce that anything amounting in law to a mistrial can be fairly charged on the course pursued. Neither, of course, do they intend to press their remarks in cases where a necessity exists (which is not alleged here), nor to the literal and entire exclusion of the reading any part of the evidence with the guards used on this occasion. The part may be so unequivocally formal, or so short, as to make their remarks inapplicable. But their Lordships do not hesitate to express their anxious wish to discourage generally the mode of laying the evidence before the jury which was adopted on this

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trial. They have no doubt that, upon an application on behalf of the Respondent, which they recommend to be made to the proper authorities, such weight will be given to these remarks as they may be found to deserve.

Their Lordships will advise Her Majesty that this appeal should be sustained without costs, and that the Order for a new trial should be reversed.

Solicitors for the Appellant; Messrs. *Oliverson, Peachey, Denis, & Peachey.*

Solicitors for the Respondent: Messrs. *Lewis & Lewis.*

J. C.* 1867 *July* 8.

SIDNEY LEVIEN . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM JAMAICA.

Privy Council — Jurisdiction — Prerogative of the Crown — Appeal against conviction by Colonial Court for Misdemeanor—Practice—Pardon granted before hearing of appeal.

Special leave to appeal from a conviction of a Colonial Court for a misdemeanor having been given, subject to the question of the jurisdiction of Her Majesty to admit such an appeal; and it appearing, at the opening of the appeal, that since such qualified leave had been granted the Prisoner had obtained a free pardon and been discharged from prison, the Judicial Committee declined to enter upon the merits of the case, or to pronounce an opinion upon the legal objections to the conviction, the prisoner having obtained the substantial benefit of a free pardon, and dismissed the appeal.

IN this case leave to appeal had been granted by Her Majesty in Council, upon the recommendation of the Judicial Committee (1), to the Appellant, from a judgment of a Court of Oyer and Terminer, held by virtue of a Special Commission issued by the Governor of the Island of *Jamaica*, at the City of *Kingston*, for

* *Present*:—LORD CAIRNS (LORD JUSTICE), SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

(1) The Petition was heard on the 27th of June, 1866, before Lord Wensleydale, Sir John Taylor Coleridge, and Sir Edward Vaughan Williams.

the County of *Surrey*, in the Island of *Jamaica*, in the months of January and February, 1866, whereby the Appellant was sentenced to imprisonment for a misdemeanor in publishing a seditious libel; such leave was granted, however, without prejudice to any objection that might be taken thereafter to Her Majesty's jurisdiction to grant leave to appeal in a criminal case. The leave to appeal so given was upon allegations contained in the petition, which, in substance, were objections to the constitution and jurisdiction of the Court of Special Commission under the *Jamaica Act*, 29 Vict. c. 6, which it was alleged was absolutely void *ab initio*; or, if not so, had been avoided and expired through the superseding of the Governor of the Island, and for errors in law and fact in striking the jury, as appeared upon the record.

The Attorney-General put in a case on behalf of the Crown, raising the question, first, as to the jurisdiction of Her Majesty in Council to entertain the appeal; and especially having regard to the fact that since the leave to appeal had been granted the Appellant, on his own memorial, had received a free pardon, and was no longer in prison under the sentence complained of. Other grounds were also stated, shewing the regularity of the proceedings and the validity of the conviction; but, upon the appeal being opened, and the fact of the free pardon having been granted admitted, their Lordships stopped the case.

Mr. *McMahon* (with whom was Mr. *H. Payne*), appeared for the Appellant.

The *Attorney-General* (Sir *J. B. Karslake*, Q.C.), and Mr. *Hannen*, for the Crown.

LORD CAIRNS:—

In this case an application was made to Her Majesty, in the course of last year, for leave to appeal, and, upon the recommendation of their Lordships, Her Majesty was pleased, on the 6th of July, 1866, to make an Order, on the petition of the present Appellant, that he should have leave to appeal, without prejudice, however, to any objection that might be taken thereafter, on behalf of the Crown, to the jurisdiction of Her Majesty in Council in the matter.

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At the time the petition of the Appellant was presented and this Order in Council made, the Appellant was in prison under the sentence of which he complained. Since that time he has been released from prison,—released, as we understand, upon his own memorial,—and he has, by the remittal of his sentence, obtained all the substantial, even if not all the technical, benefits which would be conferred in this particular case by a free pardon.

Now, having regard to the principles upon which they have always acted when leave to appeal in criminal cases has been prayed for,—principles which were fully recognised in the case of *The Falkland Islands Company* v. *The Queen* (1) their Lordships have no hesitation in saying that if, at the time when the petition of the Appellant for leave to appeal was heard, the facts which now appear could have been made known to their Lordships, the leave to appeal which was given would not have been granted.

Their Lordships, therefore, having regard to the Order which was then made, and to the facts which now appear to be in existence, are clearly of opinion that no good purpose could be answered by entertaining the present appeal and hearing it further; they are of opinion, therefore, that, on this ground, and this ground alone, the appeal must be dismissed; but their Lordships will advise Her Majesty to make no order as to costs.

The report made on the appeal set forth, that having taken the appeal into consideration, and it appearing that the Appellant had been released from prison, and his punishment remitted since the leave to appeal had been granted, their Lordships were of opinion, that the appeal should be dismissed the Board, each party paying their own costs, and, by an Order in Council, dated the 3rd of August, 1867, it was ordered as therein recommended.

Solicitors for the Appellant: *Shaen & Roscoe.*
The Solicitors to the Treasury, for the Crown.

(1) 1 Moore's P. C. Cases (N.S.) 299.

JAMES MACDONALD . . . . . APPELLANT;

AND

JAMES LAMBE . . . . . RESPONDENT;

AND

MARY NICKLE *et al.* . . . . . RESPONDENTS.

J. C.*
1867
June 18, 19, 20, 21.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH OF LOWER CANADA.

Lower Canada, law of—Fief—Action to recover land, part of a Seigneurie—Grant—Title—Adverse possession—Prescription.

Action by *Seigneur* to recover possession of a piece of ungranted land forming part of his *Seigneurie*, against a party claiming under an informal deed from one who had no title deed, but who, with the Defendant, had been in undisturbed possession for thirty years:—

Held (affirming the judgment of the Court of Queen's Bench for *Lower Canada*), that a plea of prescription of thirty years' possession was a bar to the action, as:—first, that it made no difference that during the time of such adverse possession the *Seigneur* had, under the Statute, 6 Geo. 4. c. 59, for the extinction of Feudal and Seignioral rights in the Province of *Lower Canada*, surrendered the *Seigneurie* to the Crown for the purpose of commuting the tenure into free and common socage, the issuing of the Letters Patent regranting the same being *uno flatu* with the surrender to the Crown, and that, both by the ancient French law in force in *Lower Canada* as by the *English* law, prescription ran in favour of a party in actual possession for thirty years; and, secondly, that such adverse possession enured in favour of a party deriving title to the land through his predecessor in possession:—

Held, further, that such junction of possession did not require a title, in itself *translatif de propriété*, from one possessor to the other; but that any kind of informal writing, *sous seing privé*, supported by verbal evidence, was sufficient to establish the transfer.

THE appeals in these cases were from the decisions of the Court of Queen's Bench in *Lower Canada*, in two petitory actions brought by the Appellant against the Respondent to recover possession of certain lots of land, described as severally containing 213 acres, and 193 acres, and known as Lot 16 in the 5th range of *Russeltown*, in the District of *Montreal*, and for mesne profits and damages. Both actions were brought in the District Court of *Montreal*. The facts and pleadings were the same in both cases.

* *Present*:—LORD CAIRNS (LORD JUSTICE), LORD JUSTICE TURNER, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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The declaration in the first action alleged, that on the 20th of October, 1832, the Hon. *Edward Ellice* was, and for more than twenty years had been, in possession of the ungranted lands of the *Seigneurie* of *Beauharnois*, including the land claimed in the action, that on that date he surrendered them to the Crown, and that the Crown, by Letters Patent, regranted them to him in free and common socage. The declaration then alleged a title in the Plaintiff to the land in question, derived from *Ellice*, and averred that the Defendant, about the year 1850, had taken possession of the land, and ever since kept it from the Plaintiff; received the rents and profits; cut down trees; and prayed that the Plaintiff be declared owner, and the Defendant adjudged to deliver up the land, and repay the rent and profits he had received, with £100 as damages.

The Defendant pleaded in substance, first, a plea of *chose jugée* alleging a previous action by one *Mary Ball* against the Defendant to recover the same land, wherein judgment was given for the Defendant, and that the Plaintiff was the representative of *Ball*. Second, that neither the Plaintiff, nor any of those through whom he traced his title, had ever had possession of the land, or any delivery or tradition of seisin of it, but that the Defendant and his predecessor had always had possession of the land adversely to them. Third, that the Plaintiff's predecessor in estate, *Silas Ball*, had not received any *délivrance de legs* from the legal representatives of *Mary Ball*. Fourth, that the Letters Patent only granted lands which *Ellice* had been previously possessed of, and was entitled to surrender; that the Plaintiff had shewn no title in *Ellice* previous to the Letters Patent, and that the Defendant had been in possession of the land for more than twenty years previous to 1832, and that *Ellice*, therefore, was not entitled to surrender them. Fifth, a plea setting out the original grant, by *Louis* XIV. of *France*, of the *Seigneurie* of *Beauharnois*, and alleging that the land in question did not come within the limits of the original grant, and concluding for a rule or judgment of Experts to determine whether the land in question did or did not come within such limits. Sixth, a plea traversing the title deeds alleged in the declaration and setting up a right by prescription of thirty years. Seventh, a denial that the Plaintiff had ever had possession of the land, or any tradition of it,

"*réele ou feinte.*" Eighth, a plea setting up "*impenses et améliorations,*" made by himself and his *auteurs*, and concluding that the Plaintiff should be ordered to repay them before being put in possession of the land, and lastly, the general issue.

The Plaintiff filed general answers to the first seven pleas, and to the eighth a special answer, alleging that all the "*impenses et améliorations*" had been made in bad faith, and praying that the rents and profits received by the Defendant might, if necessary, be set off against them, concluding for a rule or judgment of *Expertise*, and replied generally to the ninth plea.

From the evidence it appeared, that the *Seigneurie* or *Fief* of *Villechauve* or *Beauharnois* was originally granted by *Louis* XIV. of *France* to the Marquises *De Beauharnois* and *De Beaumont*, in the year 1709. Contradictory evidence was adduced by the Plaintiff and Defendant respectively on the question whether *Russeltown*, of which the land claimed in the declaration formed part, was included within the limits of the *Seigneurie* so originally granted; but from the view taken by the judgment of the Court below and on appeal, this point was immaterial.

By the Imperial Statute, 6 Geo. 4, c. 59, for the extinction of Feudal and Seignioral rights in the Province of *Lower Canada*, it was enacted by section 1, that whenever any person holding of the Crown as proprietor any Fief or Seigniory, and having legally the power of alienating the same, which Fief or Seigniory lands had been granted and were held, "*à Titre de Fief*," in "*Arrière Fief*," or "*à Titre de Cens*" should by petition apply to the Crown for the commutation of, and release from, the *Droit de Quint* and other feudal burdens, and should surrender into the hands of the Crown all such parts of the Fief as should remain in his possession ungranted, it should be lawful for the Crown to commute the said feudal burdens, and to cause a fresh grant to be made to the person so applying of the lands, to be thenceforward holden in free and common socage, as lands are held in *England*. And by section 6 it was further provided, that public notice should be given for three months before such grant, calling on all persons who might have or claim to have "any present or contingent right, interest, security, charge, or incumbrance, either by mortgage or under any other title, or by any other means whatever, in or upon the land,"

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to signify in writing within three months their assent to, or dissent from, the surrender, regrant, and change of tenure of the lands.

Shortly after the passing of this Statute, *Ellice*, the *Seigneur* of the Fief, made application to the Crown for a commutation of its feudal burdens and a re-grant of such of the lands of the Fief as remained ungranted, to be held in free and common socage, and on the 20th of October, 1832, surrendered to the Crown all the ungranted portions of the Fief. On the 10th of May, 1833, his then Majesty, King *William* IV., by Letters Patent under the Great Seal granted to *Ellice* the lands that had been surrendered, to be held by him in free and common socage.

The Plaintiff founded his title under a deed of sale, dated September 25th, 1855, made between *Silas Rozier Ball*, *Edward Ellice* and the Plaintiff, by which *Ball* sold to the Plaintiff a lot of land, forming part of Lot No. 17 in the 5th range of *Russeltown*, and alleged by the Plaintiff to be one of the lots of land in dispute; and that *Ellice* confirmed such sale, and conveyed to the Plaintiff all and every the title and interest which he, *Ellice*, might have in and to the land. *Ellice's* title was traced back to the Letters Patent of 10th of May, 1833.

The Defendant relied on his right to the land by prescription, admitting that neither he nor his predecessors in estate had obtained, or even asked for, any grant of the land, either from the proprietor of the *Seigneurie* of *Villechauve* or *Beauharnois*, or from the Crown. In support of this title by prescription, the Defendant gave evidence shewing, that in the year 1807 one *Levy Petty* was in possession of Lot No. 16 in the 5th range of *Russeltown*, and continued in such possession till 1811, when he was succeeded in possession of it by one *David Goodwin*, who continued to occupy it till September, 1833, being a few months subsequently to the surrender of the land by *Ellice* to the Crown, and the re-grant of it; that in September, 1833, *Goodwin* gave up possession of the land to the Defendant, who had continued to occupy it up to the commencement of the action. It was admitted that no legal conveyance of the land by *Goodwin* to the Defendant had been executed, but a certificate of sale in the following form was given in evidence:—

"*Russeltown*, Sept. 21st, 1833.

"This may certifey that I do this day sell, convay and give up,

ll right, title and clame that I have, or ever had, to the lot of and I know receide on to *James Lamb*, being lot No. seveneteneth n the third section.

"*David Goodwin.*
"*James Richardson* } Witeness."
"*Patrick Mahon* }

in virtue of which certificate the Defendant claimed to be entitled to join the possession of the land by *Goodwin* to his own possession of it, for the purposes of the plea of prescription. It was admitted that "No. seveneteneth," in the above mentioned certificate, was put in mistake for 16th, and the Defendant called witnesses to prove, that there never was a Lot No. 17 in the 5th range of *Russeltown*, but that the land in question formed part of Lot No. 16, which was so occupied by the Defendant and *David Goodwin*, and that the possession of the Defendant and *David Goodwin* extended over the whole of the land in question. The Plaintiff also admitted that, previously to the year 1834, the land called Lot No. 17 formed parts of Lots Nos. 15 and 16 which then extended to the boundary between *Russeltown* and the Township of *Hemmingford*, and that the number had been altered by *Livingstone*, a Surveyor employed by the *Seigneur*.

The case came on for hearing on the 27th of May, 1861, and on the 28th of June, 1862, the Judge of the Superior Court (The Hon. Mr. Justice *Smith*), gave judgment, dismissing the action with costs, on the grounds: first, that *Edward Ellice* was not in possession of the land in question at the time of the alleged surrender of it, but that *David Goodwin* had been so for twenty years; and that, therefore, *Ellice* could not legally surrender it, or obtain a re-grant of it from the Crown; secondly, that the grant by the Crown to that extent was null and void; thirdly, that by the law of *Lower Canada*, *Ellice*, having allowed *Goodwin* to settle on the land, could not eject him from it, but only claim from him the accustomed dues; fourthly, that the Plaintiff traced his title only to the Letters Patent, which conferred no new title on him, and that the Defendant had proved his plea of prescription; fifthly, that as the Plaintiff claimed through *Mary Ball*, he was estopped by the judgment given against her as set out in the Defendant's first plea.

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A similar judgment was given in the other action.

From this judgment, as well as that in the other action, the Plaintiff appealed to the Court of Queen's Bench at *Montreal*, and on the 6th of December, 1864, that Court (consisting of the Chief Justice *Duval*, and the Judges, *Aylwin*, *Meredith*, *Drummond*, and *Mondelet*) gave judgment, affirming the judgment of the Court below on the single ground that the Defendant had proved his plea of prescription. Mr. Justice *Meredith* dissented from the majority of the Judges, on the ground that the certificate of sale of the 21st of September, 1833, operated as a conveyance by the law of *Lower Canada*. As there was a difference of opinion on this point, the Court pronounced the following judgment:—"Considering that the Defendant's plea of peremptory exception filed in the Superior Court, alleging that he, the Defendant, hath held and possessed publicly, and in good faith, for more than thirty years immediately before the institution of this action of the said *James Macdonald*, hath been proved by the evidence adduced in this cause, and that by reason of such possession the Defendant Respondent in this Court, hath acquired a title by prescription to the said land, and that in the judgment pronounced by the Superior Court at *Montreal* on the 28th of June, 1862, dismissing the action of the Plaintiff, Appellant in this Court, with costs, there is no error, this Court doth confirm the said judgment, and doth condemn the Appellant to pay to the Respondent the costs by him incurred in this Court (the Honourable Mr. Justice *Meredith* dissenting)."

Against these judgments the present appeals were brought, and were heard together.

Sir *R. Palmer*, Q.C., and Mr. *H. M. Bompas*, for the Appellant:—

First, as to the Appellant's title. The Letters Patent of the 10th of May, 1833, are sufficient *primâ facie* evidence of the facts stated in them, and conclusive on all points, if not contradicted or bad on the face of them: *Jackson* v. *Lawton* (1); *The People* v. *Mauran* (2); *The Case of the Alton Woods* (3); *Buller's* N. P. p. 76; especially as

(1) 10 Johns. Amr. Rep. 23. (2) 5 Denio's Rep. 398.
(3) Co. Rep. Pt. 1, pp. 51-3.

in the recitals in the grant it is stated that the lands in question formed part of the *Seigneurie* of *Beauharnois* or *Villechauve*, and remained ungranted at the date of the surrender to the Crown by *Ellice*. In the answer of the Seigneurial Court to question, No. 17, all the Judges, except Mr. Justice *Mondelet*, adjudged that the *Seigneurs* "had full and entire property (*dominium plenum*) in the ungranted lands in their *Seigneuries* (1): *Ordonnance* of *Louis* XIV., 6th July, 1711; Edicts and *Ordonnances* of *Seigneurial* Tenure in *Canada*, p. 272 [*Quebec*, 1852]. These facts not having been disproved by the Defendant, the Crown must be held on the surrender to have been entitled to grant, and to have granted an absolute title to the lands in dispute to *Ellice*. But an important question arises with respect to the governing law of prescription to be applied, we contend that the Court below miscarried in applying the ancient French law to the case. The law that governs it is the English law. The Proclamation made on the cession of *Canada* in the year 1763 introduced the English law by right of conquest: *Campbell* v. *Hall* (2). It is true the effect of the Proclamation, as to the full extent of the introduction of that law, has been doubted, as it does not mention in express words "English law." The Statute, 14 Geo. 4, c. 83, however, by implication, makes the Proclamation to this extent apply to English law, even if it had not been so before. The Statute, 6 Geo. 4, c. 59, was passed to remove doubts as to certain matters, but section 8 does not abrogate the English law, being the governing law. So the preamble to the *Colonial Act*, 9 & 10 Geo. 4, c. 77, implies the English law to be the rule. The Court in *Lower Canada*, in the case of *Paterson* v. *McCallum* (3), held, upon an investigation of the Proclamation of 1763, that the English law relating to mortgages applied to *Lower Canada*. The *Colonial Act*, 20 Vict. c. 45, does not apply, as, first, it contravenes the Imperial Statute; and, secondly, it was subsequent to the date when these actions were brought. These points are fully discussed in *Stuart* v. *Bowman* (4); *Wilson* v. *Wilson* (5). That being so, the lands in dispute, subsequently to the change of tenure,

(1) Low. Can. Rep. Seign. Ques. vol. A. p. 62a.
(2) 1 Cowp. 204.
(3) Stuart's Low. Can. Rep. 429.
(4) 3 Low. Can. Rep. 310.
(5) 8 Ibid. 34.

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must be held to have been subject to the English law of prescription as it existed at the time of the Act, 6 Geo. 4, c. 59, and it is clear no prescriptive right could have been acquired by the Respondent under that law. Under the English law there was no title in the Respondent. Prescription must be proved, or presumed, immemorially by holding, or a lost grant, but the right would not be barred under sixty years: *Shelford*, R. P. Stat., p. 145. Here the alleged adverse possession was not continuous, as required by the English *Statute of Limitations*, 3 & 4 Will. 4, c. 27, secs. 2, 7, 34: *Doe d. Carter* v. *Barnard* (1); *Dixon* v. *Gayfere* (2); and the prescription was broken by the grant of the Letters Patent. So by the French law prescription must be continuous and uninterrupted: *Troplong, Traité de la Pres, Tom.* i., p. 568, Nos. 400, &c.; *Duranton, Tom.* xxi. No. 240, p. 563; *Pothier, Traité de la Pres*, No. 111; *Dunod, Traité de la Pres*, pp. 19, 20; *Marcadé, Traité de la Pres*, p. 100; Nos. 435, 119, 123, 124, *Code Civil*, B. iii., tit. xx., Art. 2242; *Coutume de Paris, Tom.* ii., p. 299; *Herrick* v. *Sixby* (3).

Second, assuming the French law to apply, what is the effect of the plea of prescription? The mere possession of waste land forming part of a Fief without a grant, for less than thirty years, the time required by the old French law of prescription, does not, by the law of *Lower Canada*, give any right to the land as against the *Seigneur*, but, as in this case, was a mere holding for him. *Goodwin*, not having received any grant of the land in question, nor held it for the time required by the law of prescription, *Ellice* lawfully surrendered it to the Crown, and by the Letters Patent the Crown re-granted it to *Ellice* free from any right of *Goodwin*. Neither the Defendant nor *Goodwin* entered on the land under a just title, or held it *bonâ fide*, and a possession of thirty years was, therefore, necessary to give them a title to the land, which neither *Goodwin* nor the Defendant held for that time.

Next, the Defendant is not entitled to join the possession of *Goodwin* to his own for the purpose of prescription, without proving a good legal conveyance of the land to him by *Goodwin*. The certificate of sale produced by the Defendant, being "*sous seing privé*," has no date as to third parties, and there is, therefore, no proof

(1) 13 Q. B. Rep. 945. (2) 17 Beav. 421, 429.
(3) *Ante*, p. 436.

that the date referred to therein took place at the time the Defendant entered on the land, or that, during his possession, he was the successor "*à titre particulier*" of *Goodwin*. Again, the surrender of the *Seigneurie* to the Crown, and the holding of it by the Crown for seven months, prevented the Defendant being entitled to join the possession of *Goodwin*, before that surrender to the possession of *Goodwin* and the Defendant, subsequent to the surrender, so as to make up the thirty years' prescription required. So again, previous to the change of tenure, *Goodwin* could only prescribe for the "*domaine utile*" over the land, the land itself being inalienable; and, after the change of tenure into common socage, *Goodwin* could only prescribe for the absolute ownership of the land; subinfeudation being unlawful, and possession in two different rights cannot be united to form the period required by the law of prescription. Now, the Defendant's plea of prescription alleges a right acquired by prescription to the absolute ownership of the land, and a right to hold it of the *Seigneur*. No such prescriptive right has been proved, or could be, the land having been inalienable till within the thirty years at the commencement of the actions.

Mr. *Manisty*, Q.C., and Mr. *Wills*, for the Respondent:—

Although the lands formed part of the *Seigneurie* of *Beauharnois*, yet the Appellant has failed to establish a title to the lands in question, or possession of the lots in *Ellice* anterior to or since *Goodwin's* possession, which was necessary to maintain the action: *Pothier*, tit. *Proprieté*, No. 317. On the other hand, the evidence of uninterrupted possession by *Goodwin* and the Respondent is conclusive. He must, by the French law, be presumed proprietor: *Code Civil*, B. III. tit. xx., Art. 2230; and can join possession: *Ib.* Art. 2235; *Code Civil du Bas Canada*, tit. "Prescription," Art. 2195, p. 599. By the English law a purchaser must shew seisin within thirty years. No writ of right applies; Statute, 32 Hen. 8, c. 2. It was proved that *Lambe* was entitled at the time the actions were commenced.

No serious doubt can be entertained that the law to govern the case is the old French law prevailing in *Lower Canada*. Such a point was never before taken in the numerous appeals to this Tribunal from *Lower Canada*, where the rights of the parties have always been regulated by the old French law. As prescription was

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established according to the principles of the ancient French law, the Plaintiff's right to recover the land, if he, or those through whom he claims, ever had a right to it, was barred by lapse of time, and by adverse enjoyment by *Goodwin* and the Respondent, which was continuous, for upwards of thirty years next before the commencement of the present actions. As to prescription, the law is clearly stated in *Ferrière*, Art. 118, *Cout.* p. 425; 1 *Duplessis*, p. 500; *Troplong*, "*Privileges*," p. 919, Nos. 119, 187; *Vazeille*, *Pres.* p. 42, as relied upon in the Court below. *Herrick* v. *Sixby* (1) is in point, and was decided by this Court upon the French law.

1867 July 12.

LORD CAIRNS:—

The actions in which these appeals are brought were petitory actions to recover possession of two pieces of ground in the 5th range of *Russeltown*, in the *Seigneurie* of *Beauharnois*.

These pieces of ground have been stated in the proceedings, and in the arguments, as Lots 16 and 17; but it is clear that the whole formerly went by the description of Lot 16, and that the division into two lots did not take place until some time about the year 1834, at which time the division was made by *Livingstone*, the Agent of the *Seigneur*, in his own plans.

It was admitted in the argument before us on behalf of the Respondent, that the land in question formed a part of the *Seigneurie* of *Beauharnois*, as originally granted in 1729 by the French King, *Louis* XIV.; and one of the points in dispute in the Court below has thus been removed.

The judgment delivered in the primary Court of *Lower Canada* by Mr. Justice *Smith* in favour of the Respondents proceeds upon the principle that the Respondent and *Goodwin*, his predecessor, had been in possession of this land from 1807, and that this possession must be taken to have been by permission of the *Seigneur*, and that, therefore, the *Seigneur* could not eject the Respondent, but only claim from him rights and dues such as a tenant should render to his *Seigneur*. This view of the case was again pressed in argument upon these appeals, but their Lordships are of opinion that, although there may be some facts appearing in the evidence

(1) *Ante*, p. 1

which would form a ground for such an argument, the pleadings between the parties render the argument inadmissible. The Appellants in both the appeals allege in their declaration that the Respondent wrongfully, and without any title, took and obtained possession of the land, and has kept illegal possession of it, and pray delivery of the land. The Respondent, on the other hand, after certain objections to the Plaintiffs' title, which are now out of the case, alleges a seisin of the lands in 1807 by *Goodwin*, a transfer in 1833 from *Goodwin* to the Respondent, and that the land has been peaceably, openly, and uninterruptedly possessed and enjoyed by *Goodwin* and the Respondent, *animo Domini*, from 1807 to the present date, and that the Respondent has a right to be declared proprietor and owner of the land.

Their Lordships are of opinion, with the Court of Queen's Bench of *Lower Canada*, that the case is thus put on both sides as one of adverse possession, and that what the Respondent has undertaken to prove is not a tenure, express or implied, under the *Seigneur*, but a title by prescription, for thirty years and upwards, against the *Seigneur*.

The first question, therefore, is one of fact: in whom has the possession of the land—meaning thereby Lots 16 and 17 (formerly styled Lot 16)—been for thirty years prior to 1855? If possession has been *de facto* in *Goodwin* and the Respondent, that possession is admitted to be an adverse possession.

The piece of land which, before the year 1834, had been known as Lot 16, had on the north and east, or, more accurately, on the north-west and north-east, the natural boundary of the *Black River* and *English River*. On the west, or south-west, it was bounded by Lot 15, and on the south it extended, according to the evidence, to the line called the *Hemmingford Line*. Taking the parol evidence in the case, and more particularly that of the witnesses, *Stafford*, *Allard*, and *Porcheron*, it appears that one *Levy Petty* was in possession of the lot in 1807, in which year *Goodwin* took possession of it; that a house was built upon it in *Petty's* time, which *Goodwin* at first occupied, but afterwards built a house for himself; that there was a pretty large clearing when *Goodwin* came; that *Goodwin* laboured and cropped the land, and was a married man living with his family; that *Goodwin* paid the bridge-tax for the

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lot; that when a road crossing Lot 16 was projected by the inhabitants *Goodwin* was asked, and upon certain conditions consented, to give the land required for it; and that the whole of the lot from the north end of it to the *Hemmingford Line* was known as No. 16, and as the *Goodwin Lot*.

The possession of the whole by the Respondent from 1833 is still more clearly proved, and was, in fact, little, if at all, disputed.

There is, however, a piece of evidence coming from the *Seigneur* himself, or his Agents, which their Lordships look upon as still more conclusive on the fact of possession. It appears that in the year 1828 steps were taken, upon the death of Mr. *George Ellice* the former *Seigneur*, to require from the persons then holding the lands an exhibition of the titles under which they held. A list is given of the persons then found in possession of the lots in *Russeltown* on whom circular notices from the Agents of the *Seigneur* were served, and the name of *David Goodwin* is there entered as the person in possession of Lot 16 of the third section; service being stated to have been made by delivery of the circular to his wife, and speaking to himself afterwards. His possession is treated as a possession of the whole lot, for a distinction is made in other cases where a lot is possessed in halves by different persons; and the proceedings in 1828 are upon the footing of the persons mentioned in the list having been in possession for some time. The result of these proceedings is, for this purpose, immaterial; but what has been stated is evidence of the most satisfactory description that the Agents of the *Seigneur* in the year 1828 found *Goodwin* in possession of the whole Lot (then known as Lot 16), and this evidence, coupled with the testimony in the case, establishes, to the entire satisfaction of their Lordships, a possession by *Goodwin* and the Respondent of the whole lot for upwards of thirty years.

The other questions in the case are questions of law. *Goodwin* gave up possession to the Respondent in 1833, making over his title by the document dated the 21st of September, 1833:—[His Lordship read it (1).]

It is admitted on both sides that it must be taken that the word "seventeenth" is in this document to be read as "sixteenth," but it was contended that the document was insufficient to connect the

(1) *Ante*, p. 542.

possession of *Goodwin* with that of the Respondent: First, because it was a document *sous seing privé*, and, therefore, without date as regards third parties; and, secondly, because it was not an instrument amounting to a conveyance and *translatif de propriété*. Both these objections were overruled by the Court of Queen's Bench, and, as their Lordships think, rightly. The first of the objections, viz., that the document is *sous seing privé*, was little argued by the Appellant; and their Lordships do not think it necessary to add anything to the reasons for disallowing it given by Mr. Justice *Meredith*.

As to the objection that the paper is not a conveyance *translatif de propriété*, it would, their Lordships think, be somewhat remarkable if, where the real object is to shew that an incoming occupier claims under and by way of direct continuation of the occupation of an outgoer, and where at the time there is no real title to be conveyed, an instrument adapted to pass a real title should be required. Their Lordships think, however, as did the Court below, that there is no foundation for this objection in any of the authorities which have been cited. The authorities speak of a predecessor and successor, of the successor claiming by contract or by Will, and of a legitimate continuation of possession; and they are careful to negative as a sufficient connection the mere fact that one possession has immediately preceded the other, and they do no more than this. There is in the present case ample proof from the paper, and from the parol testimony, of a *bonâ fide* sale from *Goodwin* to the Respondent, and of possession taken and continued under that sale; and this, in their Lordships' opinion, is sufficient.

The Appellants contended, however, that inasmuch as under the Statute, 6 Geo. 4, c. 59, Mr. *Edward Ellice*, the *Seigneur*, had, by the surrender of the 20th of October, 1832, vested the *Seigneurie*, and the ungranted lands thereof, including, as was said, those now in question, in the Crown, to be re-granted in common socage, there was an interruption in the prescription, since no prescription would run against the Crown. Their Lordships do not think it necessary to consider how far, under any circumstances, this argument could be maintained, inasmuch as in the present case they find that no acceptance of the surrender by the Crown was made until the grant of the 10th of May, 1833, so that the land was surrendered

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and re-granted *uno flatu*, and merely as a mode of converting the tenure, and there never was any possession or ownership of the land by the Crown.

Their Lordships have assumed, as was ultimately conceded by the Counsel for the Appellant, that the case falls to be decided, so far as any question of law is concerned, by French law. But if principles of English law were to be applied, the prescriptive title of the Respondent would not, in their Lordships' opinion, be less strong.

Their Lordships will humbly advise Her Majesty that both these appeals should be dismissed with costs.

Solicitors for the Appellant: *Bischoff, Coxe, & Bompas.*
Solicitors for the Respondent: *Ashurst, Morris, & Co.*

J. C.* 1867 June 28, 29.

ANN SCOTT . . . . . APPELLANT;

AND

MARIE MARGUERITE MAURICE PAQUET, AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Lower Canada, law of—Ordonnance 1639, *Art.* 6, *construction of—Marriage in extremis.*

Art. 6 of the *Ordonnance* of *Louis* XIII. (26th November, 1639), in force in *Lower Canada*, is in these terms:—"*Voulons que la méme peine (de la privation des successions) ait lieu contre les enfans qui sont nés de femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie:*"—*Held*, first, that as the above article of the *Ordonnance* was a restrict of natural liberty and penal in its nature, it was to be strictly interpreted, and only when the fact of a party being *in extremis* at the time of the solemnization of the marriage was clear and beyond doubt could it be applied. Second, that although death had taken place two days after a marriage had been celebrated, such Article of the *Ordonnance* did not affect the validity

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* *Present*:—SIR JOHN TAYLOR COLERIDGE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, SIR FITZ-ROY KELLY (THE LORD CHIEF BARON), and SIR RICHARD TORIN KINDERSLEY.

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of the marriage, unless the party was at the time sensible that he was in his last illness, and in immediate danger of dying.

Suit for nullity of marriage, and to set aside a marriage contract, on the ground that at the time of its celebration the husband was delirious and of unsound mind, arising from an attack of *delirium tremens*, from which disorder he died two days afterwards. The evidence in chief of one of his medical attendants being to the effect that he was unconscious, and, in his opinion, from the nature of the disease, incapable at any time of contracting such marriage:—

Held, on a general review of the evidence, to be rebutted, especially, by the conduct of the same medical witness in speaking of the probability of deceased's recovery; and by the evidence of the Priest, Notary, and witnesses at the marriage, of his capacity; and the judgments of the Courts in *Lower Canada* sustained.

THIS was an action brought by the Appellant in the Superior Court for *Lower Canada*, District of *Montreal*, against the Respondents, *Paquet* and others, the Widow and children of *William Henry Scott*, late of the Village of *St. Eustache*, in the county of *Two Mountains, Lower Canada*, Merchant, deceased, to have the marriage of *Scott* with the Respondent, *Paquet*, declared null and void, as regarded its civil effects, and also to set aside the marriage contract executed on the occasion thereof. The Appellant claimed as his sister and heiress-at-law. The Superior Court, by its judgment, sustained the marriage and contract, and that judgment was confirmed on appeal by the Court of Queen's Bench in *Lower Canada*. Hence the present appeal.

The facts were these:—

Scott, a member of the Presbyterian Church, had for many years cohabited with the Respondent, *Madame Paquet*, a Roman Catholic, by whom he had a family of five children, whom he recognised and treated as his own children. In 1845 a marriage was contemplated and intended between *Scott* and *Madame Paquet*, which was to be celebrated according to the rites of the Roman Catholic Church, and all necessary preparations were made for that purpose, but the completion was prevented by *Scott's* refusal to give a preliminary engagement, required by the Priest before celebration, that he would cause his children to be educated in the Roman Catholic religion.

On the 15th of December, 1851, *Scott* went to the house of *Madame Paquet*, who resided in the Village of *St. Eustache*, just

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opposite to his own, and there sent for a Roman Catholic Priest, for the purpose of proceeding to a marriage; and finding that no other engagement was now demanded of him than that he would leave his wife and children free in point of religion, he caused a marriage to be celebrated between himself and *Madame Paquet* on the evening of the following day, the 16th, according to the rites of the Roman Catholic Church. By the Act of marriage, the consorts acknowledged as legitimate their five children. The marriage was accompanied by a contract or settlement prepared by a Notary.

Scott was of intemperate habits, and had indulged in drinking during the course of a contested election which took place three days previous to his marriage. He was unwell at the time, and his Physician, Dr. *Jamieson*, was with him during the greater part of the day of his marriage. His illness increased, and, according to the medical testimony, although the nature of his disorder had not been originally understood, yet it ultimately declared itself to be *delirium tremens*. As late as the 17th of December, Dr. *Jamieson* considered that the disease, though of an aggravated character, would give way to the treatment which he and Dr. *Fisher*, another Physician, recommended. But the prescribed treatment was not followed, and *Scott* sank and expired on the 18th of that month.

From the death of *Scott* to the period of the institution of the action, his children publicly enjoyed the character of being his legitimate heirs, and were judicially admitted to accept his succession with benefit of inventory. The Respondent, *Paquet*, had also, since *Scott's* death, been in possession of the immovable property which he by the marriage contract settled on her in case of her surviving him, and which contract was, in April, 1852, duly registered.

On the 4th of March, 1854, the Appellant brought an action against the Respondent, *Paquet*, and the five children of *Scott*, in the Superior Court for *Lower Canada*, in the District of *Montreal*. The declaration stated, that *Scott* had died intestate, leaving three sisters, his only surviving relations and heirs-at-law, two of whom had renounced his estate, the Appellant accepting it as sole heiress-at-law; that in December, 1851, he fell ill of the malady that caused his death; that his disease became so aggravated that, on the 15th

of December he was delirious, and so continued up to his death; and that, while in that state, he was quite incapable of entering into any contract or granting any valid consent; that he had lived many years in a state of concubinage with the Respondent, *Paquet*, without marrying her or acknowledging her as his wife; that while in a state of delirium, and incapable of consent, she, profiting by his condition, on the 16th of December, 1851, procured a pretended marriage to be solemnized between her and *Scott*, and, on the same day, procured a pretended marriage contract to be executed; that by the register of the marriage it was endeavoured to recognise as legitimate the children of the illicit connection and the provisions of the contract; that *Scott* was at the time of the marriage in a state of delirium, and *in extremis*, and afflicted with the malady whereof he died; and the pretended marriage was clandestine, celebrated without the knowledge or consent of *Scott's* relations, and was neither publicly solemnized, nor accompanied by the necessary formalities, nor followed by consent on his part, and that the Respondent, *Paquet*, and the other Respondents, had assumed to be the heirs of *Scott*, and had taken his estate into their possession, and the declaration prayed that the pretended marriage and contract of marriage might be declared null and void.

The Respondents filed their pleas, consisting of two sets of exceptions *peremptoires* and a *defense en fait*. The first set of exceptions referred to the capacity of the Appellant to maintain her action, and was, in substance, to the following effect:—That the Appellant being only a collateral relation, could not maintain such an action; that ever since the death of *Scott* the Respondents had assumed the character of his representatives, and that their right to that character had been publicly recognised, and had been acquiesced in by the Appellant; that the Appellant had recognised their right to such character by transferring to *Barbara* and *Jane Scott* her rights as one of the legatees of *Scott's* father, in a sum of money due on a judgment obtained by *Scott's* father, on the 24th of April, 1824, against *Scott* and another, and that the Appellant could not maintain her action without joining her sisters as co-Plaintiffs. The second set of exceptions referred to the merits, and was to the following effect:—That for many years *Scott*

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and the Respondent, *Paquet*, lived together as husband and wife, under promises frequently reiterated by *Scott* that he would marry her; that the Appellant and her sisters were aware of this, and recognised the position of the Respondent, *Paquet*, and her children; that about twelve years previously *Scott* had intended to fulfil his promise of marriage, and had assembled his friends and the Priest for that purpose, but was prevented from so doing by understanding that the Priest required him to make oath that he would allow his children to be brought up as Roman Catholics; that it was with the view of carrying this intention into effect that he contracted the marriage complained of; that such marriage was contracted legitimately and lawfully in the presence of a Roman Catholic Priest duly authorized to celebrate such marriage; and that *Scott* was at the time sound in mind. The *defense en fait* put in issue all the statements contained in the Appellant's declaration.

Witnesses were examined on behalf of the Appellant and Respondents. The Appellant objected to the reception of the evidence of the Respondents' witnesses, so far as it went to prove that a marriage had been celebrated, on the ground that verbal evidence of a marriage was inadmissible by law, and such objections were reserved, but the evidence was afterwards admitted. The evidence as to the capacity of *Scott* was conflicting. On the part of the Appellant, *Scott's* medical attendants, Dr. *Jamieson* and Dr. *Fisher*, declared as their opinion, that in the case of a person suffering from *delirium tremens* there could be no lucid interval during which he could have the use of his faculties, or be fit to contract any kind of business; that *Scott* was in a state of *delirium tremens* just before and immediately after the alleged ceremony, and that it was a scientific fact that this disease never leaves the patient until it leaves him finally; that there may be times at which it is more intense than at others, but that the patient is never perfectly sane. The evidence for the Respondents consisted of the depositions of the Notary, Priest, and others who were present at the marriage ceremony, and they deposed to the perfect sanity of *Scott* at that time. It was proved that Dr. *Jamieson* had said, when attending the deceased, that he considered that the disease would give way to the treatment he and

Dr. *Fisher* recommended. No medical evidence was produced by the Respondents in answer to evidence given by Drs. *Jamieson* and *Fisher*.

The cause came on to be heard, and by the judgment of the Superior Court, delivered on the 30th of May, 1856, the action was dismissed with costs, on the ground that the Appellant had failed to establish the material allegations of her declaration.

The Appellant appealed from this judgment to the Court of Queen's Bench for *Lower Canada*. The appeal was heard before the Justices *Aylwin*, *Duval*, *Caron*, and *Meredith*, and on the 5th of October, 1857, the Court delivered judgment, dismissing the appeal with costs. Mr. Justice *Duval* and Mr. Justice *Caron* considered that all the questions raised by the pleadings ought to be decided in favour of the Respondents, and Mr. Justice *Meredith* agreed with them so far as related to the questions put in issue by the declaration. Mr. Justice *Aylwin* dissented from the opinion of the rest of the Court, and considered that all the questions raised on the pleadings ought to have been decided in favour of the Appellant (1).

The present appeal was brought from this judgment of affirmance. It was twice argued (2).

Mr. *Garth*, Q.C., and Mr. *A. T. Watson*, for the Appellant:—

Three questions arise:—First, we insist that the marriage has never been celebrated with the forms and ceremonies required by the ancient law of *France*, in force in *Lower Canada*, so as to con-

(1) See case reported, Low. Can. Jur. vol. iv. p. 149.

(2) This appeal was twice argued, first, on the 24th, 25th, and 26th of June, 1861, before Lord *Kingsdown*, Dr. *Lushington*, Sir *Frederick Pollock* (The Lord Chief Baron), and Sir *John Romilly* (The Master of the Rolls), but their Lordships not being satisfied, directed the case to be re-argued. It was stated at the Bar that the re-argument was delayed by the poverty of the parties not enabling them to bring it on for hearing.

On the case now coming on, application was made by the Counsel for the Appellant for the admission of fresh evidence said to have been obtained since the former hearing, relative to the mental capacity of *Scott*. A petition, shortly after the first hearing, had been lodged in the Council Office for that object. The Respondents' Counsel objected to the affidavit in support of the application being read, or the reception of new evidence after the long delay, and their Lordships were of opinion that in the circumcumstances such an application could not be entertained.

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stitute a valid marriage. [The LORD CHIEF BARON:—If there was a marriage *de facto*, it lies on you to shew it was invalid in law.] To be valid it ought to have been performed by the Parish Priest: *Dagusseau, Tom.* v. pp. 150, 151, 152, 153; *Pothier*, verbo "*Mariage*," *Partie* I. Ch. i. No. 3; *Pothier, du Contrat de Mariage, Partie* IV. cap. 1, sec. 3, Art. 1, par. 5, No. 350 [Ed. 1781]; *Danty*, p. 102; *Durand de Maillanne*, Dict. Can. *voce* "*Clandestin*," *Tom.* i. p. 523 [Ed. *Lyons*, 1770]; *De Hericourt, Loix, Eccles.* Ch. v. Art. 1, No. 27, p. 474. [The Respondents' Counsel objected to this point being now raised, as in the declaration the Appellant had admitted the marriage, and only sought to avoid it as being celebrated when *Scott* was *in extremis* and unconscious, and submitted that it was not for the Respondents to give formal proof of the *factum* of such marriage; but that if it were necessary the proofs were sufficient according to the Provincial Statute, 35 Geo. 3 c. 4, sec. 4, which only requires the presence of two witnesses.] This point was not further argued.

Second, the evidence of the medical attendants of *Scott* shews that at the time the marriage took place between *Scott* and the Respondent, *Paquet*, which was only two days before his death, *Scott* was *à l'extrémité de la vie*, so as to render such marriage null and void by the *Ordonnance* of *Louis* XIII. of 1639, Art. 6, and the Edict of the year 1697; depriving of civil effect marriages *in extremis*: *Pothier, Tom.* v. p. 238, *Partie* 5, Ch. ii. p. 429; *Ib.* 239; *Merlin's Rep. de Jur. verbo* "*Mariage*," *Tom.* xix. sect. 9, Art. 3; *Ib. Tom.* viii. sec. 19, par. I. No. 3, p. 47; [Quarto Ed.].

Third, the evidence establishes the fact, that at the time of the pretended marriage *Scott* was delirious and unconscious from an attack of *delirium tremens*, and then incapable of entering into any valid contract. In *Dimes* v. *Dimes* (1); *The Attorney-General* v. *Parnther* (2); *Dew* v. *Clark* (3), the principles relating to lucid intervals are fully explained, and those authorities shew that the party claiming must establish that fact.

Sir *R. Palmer*, Q.C., and Mr. *Westlake*, appeared for the Respondents, but were not called upon.

(1) 10 Moore's P. C. Cases. 422. (2) 3 Bro. C. C. 440.
(3) 1 Add. Ecc. Rep. 279.

July 10. Their Lordships' judgment having been reserved, was now pronounced as follows by

THE LORD CHIEF BARON:—

This is an appeal from a judgment by the Court of Queen's Bench for *Lower Canada* affirming a decision of the Superior Court of that Province in an action brought by the Appellant against the Respondents, and in which the question to be determined was, whether a marriage between *William Henry Scott*, deceased, and the Respondent, *Marie Marguerite Maurice Paquet*, on the 16th of December, 1851, was valid or void,

Several questions were raised (but disposed of during the argument) upon the alleged non-compliance with the formalities essential to the validity of a marriage by the law of *France*, which prevails in *Lower Canada*. The objections to the marriage upon these grounds (which appeared when duly considered to be unsupported by the authorities) were abandoned by the Counsel for the Appellant. Two questions alone remain: The first, whether this marriage was contracted while Mr. *Scott* was "*à l'extrémité de la vie*," within the meaning of the 6th Article of the *Ordonnance* of 1639; the second is, whether, at the time when the marriage was so contracted, Mr. *Scott* was of sound mind and in possession of his faculties.

Both these questions have been decided in favour of the Respondents, unanimously by the three Judges of the Superior Court, and by three Judges out of four of the Court of Queen's Bench in *Lower Canada*. And we think that this Court ought not, unless there be manifest error in the judgments under appeal, to overrule these decisions so pronounced in the Country in which the law of *France*, by which the first question must be determined, prevails, and must be known and continually acted upon by the Courts of Law; and in which also the witnesses on both sides reside, and may have been more or less known to, or seen, when under examination, by the Judges, or some of them, who likewise are familiar with the usages and customs of the place in which all the circumstances which formed the subject of the evidence occurred.

The language of the *Ordonnance* is this:—"*Voulons que la même peine (de la privation des successions) ait lieu contre les enfans qui*

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sont nés de femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie."

Pothier (No. 430) says: "*Il faut que ceux qui attaquent ces mariages pouvent deux choses—*

"1. *Le mauvais commerce qui a précédé le mariage.*

"2. *Que la personne était in extremis lorsque le mariage a été contracté.*

"*Le mariage est censé contracté in extremis lorsque la personne était au lit, malade d'une maladie qui avait un trait prochain à la mort, quoiqu'elle ne soit morte que quelques mois après.*"

Several cases appear to have been decided upon this *Ordonnance*, the effect of which is well expressed in *Merlin's* "*Répertoire*," verbo "*Mariage*," sect. 19, par. 1, No. 3, p. 47, vol. viii. in quarto:—"*Le véritable, l'unique cas d'appliquer l'Ordonnance est lorsqu'un homme se marie dans un tems où il se sent frappé de mort, ou la violence du mal et l'impuissance des remèdes lui fait sentir que la mort est prête à lui échapper.*"

It seems, from this commentary upon the law, that the patient must himself feel that he is dying, or that the violence of the disease, and the inefficacy of all remedies, impress him with the belief that life is about to depart. There is nothing in the evidence to shew that Mr. *Scott* thought he was a dying man. Neither Dr. *Jamieson* nor Mademoiselle *Paquet* thought so—at least, until after the day of the marriage. Dr. *Jamieson* himself says:—"From the beginning of his disease I expected that he would recover from his disease."—"On the first, second, and third day I did not look upon the disease as a decidedly mortal one."—"I never conveyed to *Scott* the idea that he was or might be in danger." And in another part of his deposition he says:—"On the morning of the 17th, the Defendant, Miss *Paquet*, inquired of me as to the state of the late Mr. *Scott*. I informed her that he was in a dangerous condition, and she appeared surprised that the disease was at all connected with danger."

Besides, this law is in restraint of natural liberty, and it must, therefore, be clear, beyond doubt, that it is applicable to the particular case, before a Court of Justice can hold it to be of force and effect to avoid a marriage.

The great question in the case, however, is, whether Mr. *Scott* was in a state of mind, memory, and understanding, to enable him lawfully to contract marriage.

On the one hand, we have the evidence of Dr. *Jamieson*, who visited him first on the afternoon of the 15th of December, and found him suffering under erysipelatous inflammation in the face, arising, as it appears, from his having come in contact with a heated stove while dozing or sleeping in a chair. Strong aperients were administered, and at a later period of the afternoon the Doctor concluded that *delirium tremens* was approaching. At this time he quitted the house in which he resided with his sister, and proceeded to the house of the Respondent, *Paquet*, shewing signs of great excitement and irritability, with delusions, as he went along.

At a later hour he was again visited by the Doctor, who remained with him during the greater part of the night. Saw him again the next morning, and left him about two in the afternoon, when, as he says, he was labouring under *delirium tremens*, developing itself by mental hallucinations. He then again left him in the house of the Respondent for some hours, and returned in the evening; and from this time until the morning of the 18th, it is asserted he was wholly incapacitated by this disease from doing any act whatever requiring the exercise of his faculties; and in the night of that day, the 18th, he died.

If Dr. *Jamieson* be correct as to the existence of *delirium tremens*, and the consequent incapacity of Mr. *Scott*, although he does not expressly declare that it was impossible he should have been competent to exercise his faculties in a rational manner either on the afternoon of the 15th, or during an hour or more on the 16th, it is certainly to be inferred from the whole of his evidence, taken together, that no such intervals of capacity could have existed, and that it was only during the time necessary to answer one or two questions, or some other very short period of tranquillity, that he can be said to have been capable of exercising his reason and understanding.

On the other hand, we have the testimony of at least three witnesses of unimpeached character, and having no interest whatever in the perpetration of a fraud, or in the misrepresentation or

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suppression of the truth, who depose to a series of acts done by the deceased, which, if truly narrated and described, prove incontestably that Mr. *Scott* was during the space of an hour and more, within which the marriage was solemnized, and the marriage contract prepared under his instructions and executed by himself, in a perfect state of capacity, memory, and intelligence. We may pass by the communication between *Ancey*, the Roman Catholic Priest, and Mr. *Scott* on the afternoon of the 15th, merely observing that the deceased upon this occasion expressed himself rationally while informing the Priest of his having had an altercation with his sister, that he was desirous that he should marry him to *Mademoiselle Paquet*, that he had sent to him for that purpose, and when told that a dispensation was necessary, he desired that a Bishop should be written to immediately in order that it might be obtained. The following day, the 16th, upon the arrival of the dispensation, the Priest proceeded again to the house of Mr. *Scott*, and found him, as he positively and distinctly swears, in perfect possession of his understanding; and here begins a series of acts on the part of the deceased, which, if really done, prove to demonstration a state of perfect mental competency and capacity. He received the Priest's explanation of the oath or engagement required, that his wife should be left to the free exercise of her religion, and that the children might be brought up in the Roman Catholic faith; he observed that at a former period (and in this statement he is confirmed by *Mons. Père Martin*, the Priest), he was about to marry *Mademoiselle Paquet*, but objected to this engagement on the ground that he was required to pledge himself that the children should be so brought up, and not merely that he would permit them to use their own free will as to their religion; he gave the necessary information as to the names of his relatives, and the ages of his children, in order that the usual registration should be made; he took the pen in his hand and wrote the name of one of his Parents, because the Priest was unable to spell it; he sent for a Notary and his Clerk; he gave instructions for the marriage contract, informing the Notary that his wife was to be required to give up the *communauté de biens*, and that in consideration of this renunciation he conferred upon her and her heirs all his immoveable or real estate, which he described as situate in the several parishes of *St. Eustace*,

and *St. Martin*; he gave also to his wife, but in trust only, in equal thirds, for two of his sisters, *Anne Scott* and *Jane Scott*, and his daughter by *Paquet, Caroline Scott*, a large sum of compensation money to which he was entitled by reason of losses sustained in the rebellion of 1837; and, besides disposing of the remainder of his property under this marriage contract, it is sworn upon the evidence of *Archambaud*, the Notary, that upon a suggestion that he should dispose of his property by Will, he himself declared that he had determined to do so by a marriage contract; and the contract was drawn up and executed accordingly. All this, together with the celebration of the marriage itself, is confirmed by the independent testimony of *M. Féré*, a friend of the deceased residing at *St. Eustache*. It is impossible, unless these witnesses are guilty of deliberate perjury, that the deceased was at this time otherwise than in perfect possession of his mind, memory, and understanding, and of perfect capacity to contract a lawful marriage. It is true that, during this proceeding, upon a noise being heard from the agitation of the shutters by the wind, he is proved to have cried out, "They are coming! they are coming!" If this were, as suggested by the Respondents, an expression uttered under an idea that the intelligence of the result of his election had arrived, it requires no comment. But if it were, as insisted by the Plaintiff, the manifestation of a delusion created by *delirium tremens*, it appears to have been dispelled, and to have ceased upon his being convinced, a few moments afterwards, that the noise was occasioned by the wind.

We think, therefore, on the whole, that whatever degree of suspicion may naturally arise from the very cogent and circumstantial evidence of Dr. *Jamieson*, coupled with the testimony of the witnesses who spoke to the wildness and excitement of his demeanour during certain portions of the three days in question, that all this together is insufficient to outweigh the positive and distinct evidence of so many witnesses to the whole scene of the solemnization of the marriage, and the preparation and execution of the marriage contract, or to warrant us in setting aside the united decisions of the Superior Court and the Court of Queen's Bench in *Lower Canada*, by which the judgment in favour of the Respondents, and now under appeal, has been pronounced.

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Their Lordships will, therefore, humbly report to Her Majesty as their opinion that the judgments of the Court of Queen's Bench of *Lower Canada* and of the Superior Court ought to be affirmed, and this appeal dismissed; but under all the circumstances of the case, without costs of this appeal on either side.

Solicitors for the Respondent: *Wilde, Rees, Humphrey, & Wilde.*
Solicitors for the Appellant: *Ashurst, Morris & Co.*

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Held, that in order to make the "*Commettant*" responsible for damage occasioned by the negligence of the "*Préposé*," it is necessary to establish that the "*Préposé*" was acting "*sous les ordres, sous la direction et la surveillance du Commettant.*"

"*Préposé*," in Art. 1384, means a person who stands in the same relation to the "*Commettant*" as "*Domestique*" does to "*Maître*"—namely, a person whom the "*Commettant*" has instructed to perform certain things on his behalf.

A. hired certain Indians, who were the heads of gangs of labourers, to clear a piece of land of weeds and brushwood, at a job price, to be paid to their gangs. Through the negligence of the persons employed, the sparks of fire kindled on *A.'s* land set fire to and burnt down a house in the immediate neighbourhood belonging to *B.* It was proved in evidence that *A.* interfered with the work, and directed the Indians where to work:—

Held, affirming the judgment of the Supreme Court at *Mauritius*, that *A.* was the "*Commettant*" and the labourers "*Préposés*," within the meaning of the Art. 1384 of the *Code Civil*, and that as the fire was occasioned by the men employed by *A.* he was responsible for their negligence, and liable to *B.* for the damage sustained by the fire. *Sérandat* v. *Suisse* 152

5. The *Code Civil* of *France*, which is in force in the Island of *Mauritius*, *Liv.* III. Ch. IV. *tit.* i. "*Des successions irrégulières*," Art. 765, provides as follows:—"*La succession de l'enfant naturel décédé sans postérité est dévolue au père ou à la mère qui l'a reconnu; ou par moitié à tous les deux, s'il a été reconnu par l'un et par l'autre:*" and Art. 76 provides, "*En cas de prédécès des père et mère de l'enfant naturel, les biens qu'il en avait reçus passent aux frères ou sœurs légitimes, s'ils se retrouvent en nature dans la succession: les actions en reprise, s'il en existe, ou le prix de ces biens aliénés, s'il est encore dû, retournent également aux frères et sœurs légitimes. Tous les autres biens passent aux frères et sœurs naturels, ou à leurs descendants:*"—

Held, that the word "*descendants*" in Art. 766, is not limited to legitimate descendants, so as to preclude the natural children of a natural brother succeeding to their natural uncle's property:—

Held, further, that there is no restriction with respect to the word "descendants" in Art. 766: that natural children are "*descendants*" within the meaning of Arts. 765 and 766, which constitute a special law for determining the succession of natural children dying without posterity; and that "*postérité*" and "*descendants*" in those Articles are convertible terms.

B., an illegitimate child duly acknowledged, survived his parents, and died domiciled in the Island of *Mauritius*, of which he was a native, intestate, leaving self-acquired property. He had no legitimate relations, but had two nieces, illegitimate daughters of an only illegitimate brother, who predeceased him, by whom they were duly acknowledged, as also by *B.* One of the nieces died shortly after *B.*, having previously constituted her sister *Légataire universelle*. The Government claimed the succession of *B.*:—

Held, that the surviving niece was entitled to succeed to *B.'s* property in preference to the claim of the Government on the ground of bastardy. *Her Majesty's Procureur and Advocate-General* v. *Bruneau* 169

6. It is no answer to the rule, that persons standing in the situation of Trustees or Agents must account to their *Cestui que trusts*, or Principals, or for all benefit which they themselves obtain by virtue of that character, that in the course of acquiring the benefit which has been derived by the Trustee or Agent, he incurred a possibility of

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those Courts were wrong in their construction of the deeds and evidence as to the boundaries, the rule being that, if in a deed conveying land the description of the land intended to be conveyed is couched in such ambiguous terms that it is very doubtful what was intended to be the boundaries of the land, and the language of the description equally admits of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making the quantity altogether different, the former construction must prevail.

Held, further, that the case differed from a conveyance of a certain ascertained piece of land accurately described by its boundaries on all sides, with a statement that it contained so many acres, "or thereabouts," when, if the quantity was inaccurately stated, it did not affect the transaction.

By the law of *Lower Canada* the term of prescription is thirty years.

To sustain a plea of prescription, the evidence must shew peaceable uninterrupted possession and ownership for upwards of thirty years. *Herrick* v. *Sixby* 436

10. Action by *Seigneur* to recover possession of a piece of ungranted land forming part of his *Seigneurie*, against a party claiming under an informal deed from one who had no title deed, but who, with the Defendant, had been in undisturbed possession for thirty years:—

Held (affirming the judgment of the Court of Queen's Bench for *Lower Canada*), that a plea of prescription of thirty years' possession was a bar to the action, as:—first, that it made no difference that during the time of such adverse possession the *Seigneur* had, under the Statute, 6 Geo. 4, c. 59, for the extinction of Feudal and Seignioral rights in the province of *Lower Canada*, surrendered the *Seigneurie* to the Crown for the purpose of commuting the tenure into free and common socage, the issuing of the Letters Patent regranting the same being *uno flatu* with the surrender to the Crown, and that, both by the ancient French law in force in *Lower Canada* as by the *English* law, prescription ran in favour of a party in actual possession for thirty years; and, secondly, that such adverse possession enured in favour of a party deriving title to the land through his predecessor in possession:—

Held, further, that such junction of possession did not require a title, in itself *translatif de propriété*, from one possessor to the other; but that any kind of informal writing, *sous seing privé*, supported by verbal evidence, was sufficient to establish the transfer. *Macdonald* v. *Lambe* 539

11. Art. 6 of the *Ordonnance* of *Louis* XIII. (26th November, 1639), in force in *Lower Canada*, is in these terms:—"*Voulons que la même peine (de la privation des successions) ait lieu contre les enfans qui sont nés de femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie:*"—*Held*, first, that as the above article of the *Ordonnance* was a restrict of natural liberty and penal in its nature, it was to be strictly interpreted, and only when the fact of a party being *in extremis* at the time of the solemnization of the marriage was clear and beyond doubt could it be applied. Second, that although death had taken place two days after a marriage had been celebrated, such article of the *Ordonnance* did not affect the validity of the marriage, unless the party was at the time sensible that he was in his last illness, and in immediate danger of dying.

Suit for nullity of marriage, and to set aside a marriage contract, on the ground that at the time of its celebration the husband was delirious and of unsound mind, arising from an attack of *delirium tremens*,