*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nye v. Macdonald, from the Court of Queen's Bench for Lower Canada; delivered* 19*th July*, 1870.

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Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

IN this case the Appellant, about twenty-one years ago, brought an action in the Courts of Lower Canada against the Respondent, for the recovery of a lot of land which is described in the pleadings. The Appellant claimed title to that lot under a grant originally made to a person of the name of John Rankin, and proposed to deduce his title from that John Rankin.

It is necessary to consider in the first place what was the character of the issue raised by the pleadings with regard to the title of the Plaintiff, because it has been contended that certain matters of evidence with regard to his title, which it otherwise would have been necessary to have proved in the regular course, were removed out of the region of proof, by reason of admissions which are said to have been made in the pleadings between the parties.

The Declaration had stated a deed of sale, by which this lot of land had been conveyed to the Appellant from those who had the right to convey it, and in answer to that Declaration, the second plea, after alleging possession for a certain length of time by the Respondent of the lot in question, averred distinctly, "that the persons from whom "the Plaintiff pretends to have purchased the said "real estate, never had, nor hath the Plaintiff ever "had, nor have they, or either of them, any right, "title, interest, possession, or property of, in, or to

" the said real estate, or any part thereof." It is possible (their Lordships express no opinion upon the point) that at that stage of the pleadings the Appellant might have taken issue upon this part of the second plea, and gone to trial upon those general allegations as they stood up to that point, putting in evidence the proof of the different links of the title under which he claimed; but in place of doing that, the Appellant met the second plea by an extremely special replication or answer. He professed on the face of that answer to answer the second plea, and the character of his answer (it is unnecessary to read it at length) was in substance a statement of what may be termed his abstract of title. It was a statement in an abstract form of the various stages of the title commencing with the Letters Patent to John Rankin, then setting forth the Will of one David Rankin, then stating the seizin of persons of the name of Alexander, otherwise called James Lake and Mary Lake under the Will of David Rankin, and stating further the execution of a power of attorney to one Teeples, by Lake and his wife, under which power of attorney, and a deed executed in virtue of it, the Appellant claimed.

To that answer a replication was put in by the Respondent saying, "that all and every the allega-" tions, matters, and things in the said special answer " contained and set forth, save and except in so far " as they corroborate and confirm the allegations, " matters, and averments of the Defendant in his " said second plea contained and set forth, are, " and each and every of them is false, untrue and " unfounded in fact."

Now without turning to the *défense au fonds en fait*, or considering what the effect of that would have been, if it had stood alone, either by statute or otherwise, in the lower Courts of Canada, their Lordships are clearly of opinion, that both upon the most technical construction which can be applied to pleading, and also upon the substance and sense of these pleadings, there was here the clearest putting in issue on the part of the Respondent, of every stage and point in the title which was alleged on the part of the Appellant. It may be added, that there appears no reason to suppose that the Respondent could possibly have

known anything with regard to the particulars of the title of the Appellant, and it would indeed have been strange if he had taken upon himself in a suit of this kind to admit any links of that title; but in point of fact he did not do so. On the contrary, in the plainest way that words could do, he traversed every stage of the allegations which the Appellant had made.

Their Lordships, therefore, are obliged to approach the further questions in the case, the questions which have arisen with regard to the evidence, and the sufficiency of the evidence, with the clear opinion, that so far as pleading could go, there was no admission of anything which could otherwise be the subject of evidence; but on the contrary, the Appellant was challenged to produce, in the strictest form, the evidence necessary to support his title.

Now there were two most important links in the chain of the Appellant's title. David Rankin had made a Will by which, assuming him to have a good title to the lot in question derived from the grantee under the letters patent, he devised and bequeathed this lot to Mary Lake, whom he described as the "wife of James Lake, of Loughborough, yeoman, "and adopted daughter of the late James Bleakaby, "of Loughborough, yeoman, deceased." It appears that in the power of attorney under which the Appellant claimed, the persons giving and executing that power of attorney called themselves "Alexander "Lake, and Mary Lake his wife;" and on the face of the power of attorney it was stated that this Alexander Lake was the same person who, in the Will of the testator, David Rankin, was called "James Lake." That may be perfectly true. Mistakes of that kind not unfrequently happen, and although such mistakes are by no means fatal to the devise in which the mistake may occur, yet it would be obviously necessary for the person claiming under a Will of this kind, to adduce some evidence that the mistake which he alleges had actually taken place, and that he who now calls himself "Alexander Lake," was really the person whom the testator meant to describe when he used the name "James Lake." Of course there are many ways in which that could have been done. Evidence might have been given as to the identity of Mary Lake. The person who was the adopted

daughter of James Bleakaby might have been traced, evidence might have been given with regard to her history, and it might have been shown that she who appears thus to have been minutely described in the Will of the testator, had married a person whose name was really Alexander Lake. Evidence of that kind, and I might say evidence, if uncontradicted, of a very slight kind, would probably have been sufficient to satisfy the Court that the mistake was the mistake of the testator, and that the person who really was called Alexander Lake, was the person whom the testator meant to describe when he called him "James Lake," the husband of this Mary Lake.

However, no evidence of that kind appears to have been adduced; and at this point their Lordships consider that there was a complete hiatus in the title of the Appellant, and that there is no identity made out between the devisee and the husband of the devisee named in the Will of David Rankin, and the persons who profess to execute the power of attorney at page 21 of the Appendix, and who there are called Alexander Lake and Mary his wife.

But then, this power of attorney professes to have been executed by this Alexander Lake and Mary Lake before a notary public in the town of Kingston, in Upper Canada, and to have been executed by Alexander Lake and Mary Lake, in the presence of two witnesses, of whom the notary public was one. The first attesting witness, Henry Smith, is not produced. The notary public is not produced. But a certificate is produced, given in the Province of Upper Canada, professing to come from this Samuel Rorke, the notary public, and to be vouched by Sir Richard Jackson, the Administrator of the Government of the Province of Canada, who states in his certificate that "Samuel Rorke, "whose name "is subscribed to the foregoing notarial cer-"tificate, is a notary public, duly appointed in "and for that part of the Province of Canada, "formerly called Upper Canada." Now, the question arises whether in the Courts of Lower Canada, regulated by French law, the production of a power of attorney not proved by the attesting witnesses, but certified by the certificate—not upon

oath—of the notary public before whom it appears to have been past, is sufficient inpoint of evidence.

Their Lordships may say that upon this point there appears to have been no real difference between the learned Judges of the Courts below. There has been a difference between these learned persons, and one of them has thought the title of the Appellant sufficiently made out; but that, as their Lordships consider, is not because he differed from his colleagues as to the effect of the evidence, but because he thought that upon this point evidence was altogether unnecessary, by reason of the form of the pleadings, a question upon which their Lordships have already expressed their opinion. The learned Judges may, therefore, be taken as agreeing that by the law of Lower Canada this certificate, given by a notary public of Upper Canada, was not sufficient proof of the execution of the power of attorney.

In that opinion their Lordships entirely concur. A notary public in the Province of Upper Canada, a province regulated by English law, has no power, by English law, to certify to the execution of a deed in such a way as to make his certificate evidence, without more, that the deed was executed, and that it was attested in the manner in which the deed professes to be attested.

It is familiar that according to the law of England, the mere production of the certificate of a notary public stating that a deed had been executed before him, would not in any way dispense with the proper evidence of the execution of the deed. The circumstance that by French law a French notary public has a greater power, and that his certificate has a greater validity, does not appear to their Lordships to carry a power to the act of the English notary upon English soil, so that that act when brought into question upon French soil should have the effect given to it there which is given by the law of France to the act of a French notary public. The circumstance that an officer is called in France a notary public, with certain powers assigned to him by French law, and that in England there is also an officer called a notary public, with much more limited powers assigned to him by English law, would not in any way make the

act of the English notary public, when it is called into question in France, have the effect which it would have had if it had been an act done by a French notary public, upon French soil.

Their Lordships, therefore, are of opinion that upon these two points, without going further, the Appellant failed altogether to make out his title in the Court below, and they will humbly recommend to Her Majesty that the Appeal be dismissed with costs.

Their Lordships can only express the surprise they feel that if these points, which may appear to be and are to a great extent points of technicality, were points upon which the defects in the evidence to which they have referred, could have been remedied, the much shorter and more inexpensive course was not taken of treating the action as having failed (as the learned Judges said it did fail) for want of evidence, and of bringing a new action supplying these defects, in place of going to the great expense and delay of an Appeal to Her Majesty in Council.