

ly by the Chancellor (Vankoughnet):

"Mr. Smart having obtained judgment against the Niagara and Detroit Rivers Railway Company, and having issued execution and procured a return of 'nulla bona,' proceeded against the plaintiff, a shareholder in the company, by force of the 80th section of c. 66 of the C. S. Canada, for the recovery of an amount equal to what remained unpaid on his stock. The plaintiff had previously, and while he was indebted to the company in £875 on his stock, and also, as was alleged, liable to the company as surety in a bond for Mr. Morton for a very large amount, accepted certain bills drawn upon him by Mr. Smart, as secretary of the company, and also paid moneys for the company. He attempted a set-off at law, but failed; and he instituted this suit in order to obtain in effect the same benefit."

Vankoughnet, C., (whose opinion was delivered orally said): "Shortly after this case was argued and more than two years ago, I prepared a written judgment, which for some cause or other was not allowed to be read during my absence in England; and changes since in the personnel of the Court rendered a second argument necessary. That judgment has been mislaid after having passed through several hands, and having been once rejected I am not inclined to write another. I think it unnecessary to discuss the vexed question of equitable set-off, so much debated in this case, for, in my opinion, on a very plain principle every day recognized in Courts of Equity, the plaintiff is entitled to succeed. That principle is, the right to retain in his own pocket for payment of his own debt money already there, and which

another creditor in no better position than himself seeks to extract from it. I need only refer to one case in my memory at the moment, *Cherry v. Boulton*, as illustrative of the doctrine, which without authority, however, is so plainly dictated by common sense that it could scarcely escape adoption.

"It is every day's practice to allow executors to retain out of the testator's assets debts due to themselves in preference to other creditors. What better right than Macbeth has Smart to be paid with Macbeth's money? The statute puts all creditors on an equal footing, and in the eye of a Court of Equity it can make no difference whether their position is or is not ascertained or confirmed by a judgment. The creditor is required to obtain a judgment, and exhaust against the company the process of execution at law, before he can call on an individual shareholder to pay. Then what do we see here? Smart, the plaintiff at law, tells us that he has exhausted this legal process, that the company is bankrupt; and that therefore the individual shareholders are responsible; and he calls on Macbeth to pay. Is not the position of Macbeth impregnable when he says to Smart, "You show a state of things in which I, equally with yourself, am entitled to be paid by the individual shareholders. I am a creditor—I cannot issue execution against myself, and I need not obtain a return of nulla bona to an execution against the company to test their solvency, because you have done this; but I have in my pocket money which as a shareholder I am liable to pay to the company, and out of which I will now, under the state of circumstances you show, re-