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NOVA SCOTIA

MEAGHER, J. FEBRUARY 17TH, 1911.

GIFFORD v. CALKIN.

Foreign Judgment—Judgment in the Supreme Court of New Brunswick by Default — Action upon in the Supreme Court of Nova Scotia—Implied Agreement to Submit Jurisdiction.

This action was tried upon the following statement of facts:—

1. That sec. 52 of the Consolidated Statutes of New Brunswick, 1903, is as follows, and was the law of the province of New Brunswick prevailing in the city of Saint John in said province on the day of the issue of the writ and recovery of the judgment in the action in which said writ was issued, which judgment is sued upon herein:—

"Section 52. Defendant residing abroad.

"In case any defendant being a British subject in a suit to be brought in the Supreme Court is residing out of the jurisdiction of the said Court, the plaintiff may issue a writ of summons in the form (4) in schedule (A), which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the Court, and the time for appearance by the defendant shall be regulated by the distance from New Brunswick to the place where the defendant is residing, having due regard to the means of and necessary time for postal or other communication; and it shall be lawful for the Court or a Judge upon being satisfied by affidavit that there is a

cause of action which arose within the jurisdiction, or in respect of a breach of a contract made wholly or in part within the jurisdiction or in respect of any contract executed, or to be executed, in whole or in part within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon him, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ or that he is living out of the jurisdiction of the said Court in order to defeat or delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to the Court or Judge may seem fit (having regard to the time allowed the defendant to appear being reasonable, and to the other circumstances of the case); provided always, that the plaintiff shall be required to prove the amount of the debt or damage claimed by him in such action, either before a jury on a writ of enquiry, or before a Judge, according to the nature of the case, as the Court or a Judge may direct and the making of such proof shall be a condition precedent to his obtaining judgment," and that the plaintiff recovered said judgment under authority of and pursuant to the provisions of said section as upon a contract to be in part executed within New Brunswick.

2. That the exemplification of judgment hereunto annexed is a true exemplification of the judgment sued upon herein.

3. That the plaintiff at the time the writ was issued in the action in which said judgment was recovered and previously thereto, was at, and was and is ordinarily resident at, Saint John in the province of New Brunswick.

4. That on and previous to the 27th, 28th and 29th days of July, 1904, and up to the present time, the plaintiff was and is ordinarily resident and domiciled at Saint John aforesaid.

5. That the said judgment was recovered upon a promissory note referred to in paragraph 5 of the reply herein, which promissory note was in the following words and figures:—

"$600.00 Lawrencetown, N.S., July 28/04.

On demand for value received I promise to pay to Mrs.

Mary Gifford or order the sum of six hundred dollars with interest at 6%.

(Sgd.) J. E. Schaffner
T. P. Calkin & Co.
per N. K. Parson
E. C. Schaffner
L. R. Morse."

6. That Mrs. Mary Gifford named in said note is the plaintiff, that J. E. Schaffner, E. C. Schaffner and L. R. Morse who signed the said note are three of the defendants, and that T. P. Calkin & Co. who signed said note by procuration is a co-partnership consisting of the defendants Thomas P. Calkin and Wiley Rockwell.

7. That the plaintiff advanced the said sum of six hundred dollars ($600) to the defendants and received the said note from the defendants under the following circumstances:—

(a) That on or about the 27th day of July, 1904, the defendants applied to one W. L. Archibald of Wolfville, N. S., for a loan of $600 upon their joint and several promissory note.

(b) That on or about the 28th day of July, 1904, said W. L. Archibald agreed to advance the defendants the said sum of $600 out of moneys of the plaintiff in his hands, upon the security of their joint and several promissory note payable to the plaintiff then resident and being at Saint John as aforesaid.

(c) That on the 28th day of July, 1904, the defendants made their said joint and several promissory note for $600 payable to Mrs. Mary Gifford with interest at (6%) six per centum and mailed said note to the said W. L. Archibald at Wolfville, aforesaid, and on the 29th day of July, 1904, said W. L. Archibald sent to the defendants a cheque on a bank at Lawrencetown, N.S., for the said sum of $600, and on the same day mailed to the plaintiff the said promissory note identified in the 5th paragraph of these admissions, and which is the note upon which the plaintiff recovered the judgment sued upon in this action.

8. That the defendants have paid interest on said note annually at the rate of 6% by cheques addressed to and received by the plaintiff at Saint John.

9. Previous to September, 1909, and since, the plaintiff by herself and her agents, by means of letters written from

Saint John aforesaid, have demanded payment of said note, but that the same has not been paid. That during the month of September, 1909, the plaintiff's agent, one Henry W. Robertson of Saint John, N.B., presented the said note for payment to the defendants or some of them at Lawrencetown aforesaid, and also demanded payment of the further sum of $20 for his expenses in proceeding from Saint John to Lawrencetown aforesaid for the purpose of presenting the said note for payment as aforesaid. The defendants were then ready and willing to pay the plaintiff the principal money and interest due on the said note.

10. That the defendants are not, nor is either of them, and were not, nor was either of them, at any time in the course of the action in which the plaintiff obtained the judgment sued on herein, subjects of or resident or present or domiciled in the province of New Brunswick, nor did they or any of them at any time in the course of said action owe any allegiance to the said province of New Brunswick, nor did they or any of them appear in the said action or otherwise submit to the jurisdiction of the Supreme Court of New Brunswick, saving, however, in this admission the powers of said Court, if any, under sec. 52 of the Consolidated Statutes of the province of New Brunswick, 1903, and the general statute law prevailing in the province of Nova Scotia.

11. That this Honourable Court shall be at liberty to take judicial notice of the laws of the several provinces of the Dominion of Canada purporting to empower or authorise the Courts of the respective provinces to give judgment in actions brought against defendants who are not resident, or present or domiciled in, and owe no allegiance to, the respective provinces, and were not subject to the jurisdiction of the Courts of the respective provinces and who did not appear in the said actions or otherwise submit to the jurisdiction of the said Court.

W. F. O'Connor, K.C., for the plaintiff.

F. L. Milner, for the defendants.

The following cases were cited and relied on by the counsel for the defendants: Schibsby v. Westenholz, L. R. 6 Q. B. 161; Rousillon v. Rousillon, 14 Ch. D. at p. 371; Emanuel v. Symon (1908), 1 K. B. 302; Dicey on Conflict

of Laws, 361 and 369; Sirdar v. Faridkote (1894), A. C. p. 674; Deacon v. Chadwick, 1 O. L. R. 351; Vezina v. Newsome, 14 O. L. R. 664; Brennan v. Cameron, 15 O. W. R. 331; Dakota Lumber Co. v. Rinderknecht, 2 W. L. R. 275; Walsh v. Herman, 7 W. L. R. 389; McLord v. Stanning, 7 W. L. R. 701 and Moritz v. Canada Wood Specialty Co., 17 O. L. R. p. 73.

MEAGHER, J.:—The judgment sued on is founded on a note made by the defendants in the plaintiff's favour to secure a loan made by her agent in Wolfville. At the time the loan and note were made she resided in Saint John, and has continued to reside there ever since. The defendants during all that time resided in Nova Scotia and are British subjects. No place of payment was fixed by the note; it was, under the law, therefore, payable at her home in New Brunswick and not elsewhere.

In December, 1909, she commenced an action upon the note in the Supreme Court of New Brunswick against the present defendants, and recovered judgment in April, 1910.

The only defence pleaded or urged is that the defendants were not at any time in the course of the action in New Brunswick, subjects of or present or domiciled in it, and were not subject to the jurisdiction of the New Brunswick Court. They did not appear in the action or otherwise submit to said Court's jurisdiction. I pass by the term "allegiance," as having no meaning in regard to a mere province of the Empire. Piggot, in his work on Foreign Judgments, speaks of it as a so-called intermediate allegiance; but its nature and extent do not appear to me to be susceptible of definition.

The statute in force in New Brunswick when the action was brought, and which is still in force there, authorised the service of process in an action like the present, where the defendant resided out of the province, and the action was brought for breach of a contract to be performed in whole or in part within it. Appropriate steps were taken in that behalf and the defendants were duly served with process under the authority of the statute. Mr. Milner, in answer to an enquiry on my part during the argument, admitted that service was regularly made under that statute. The judgment was given upon proof of the cause of action

and the breach. The statute made that a condition precedent to recovery.

No question was raised as to the regularity of the proceedings in the New Brunswick Court. The observations of Lindley, M.R., in Pemberton v. Hughes (1899), 1 Ch. at 792, are quite pertinent, as to the competency of the New Brunswick Court.

The stenographer, at my instance, took a full note of the argument of counsel which I shall file with this, and as forming part of the proceedings on the trial.

Inasmuch as there was a breach in New Brunswick of the contract to pay there, the Court, in which the judgment was rendered, so far as the subject matter of the action is concerned, was a Court of competent jurisdiction. The judgment so far as New Brunswick is concerned must therefore be deemed to be valid and enforceable there.

The liability to pay at the plaintiff's home arises from a general principle of law that the debtor must seek his creditor and pay, and this is, I take it, supplemented by the Bills of Exchange Act, which applies equally to the place of payment as well as the place where the contract was made. I regard it therefore as, in effect at least, an express contract to pay in New Brunswick.

The judgment must of course be regarded as a foreign one, nevertheless I submit it cannot be fairly said that the sense in which foreigners, that is aliens, are referred to or regarded in the various decided cases relating to judgments of a foreign country against foreigners, I mean aliens, should be held applicable to British subjects living in different provinces of Canada, and who are affected by the Bills of Exchange Act in the same degree. If I correctly apprehended what Lord Selborne said in Sirdar v. Rajah of Faridkote (1894), A. C. at the top of page 684 it supports this distinction. The judgment sought to be enforced there was recovered in a country not forming part of the British Empire against a party who was an alien as to that forum; if I am right as to this, then Lord Selborne's observations must be regarded in the light of that situation alone, and should not be held to extend beyond that. Piggott, at pages 7, 207 and 208, points out a conflict between the case just mentioned and that of Ashbury v. Ellis (1893), A. C. 339. I understand the law to be that a judgment recovered in a foreign country against an alien who has

not in any way submitted to the jurisdiction and was not resident in it when the action was commenced nor served with process while within it, does not create any duty or obligation against him to satisfy it. That seems to be the principle of Schibsby v. Westenholz, L. R. 6 Q. B. 155.

In Copin v. Adamson (1874), L. R. 9 Ex. 354, Amphlett, B., said: "I apprehend that a man may contract with others that his rights shall be determined not only by foreign law but by a foreign tribunal, and thus by reason of his contract and not of any allegiance absolute or qualified would become bound by that tribunal's decision."

Fry, J., in Rousillon v. Rousillon (1880), 14 C. D. at 371, enumerates the following amongst others as a ground for holding a defendant in a foreign judgment under the duty of obeying the decision of a foreign Court: "Where he has contracted to submit himself to the forum in which the judgment was obtained." Buckley, L.J., uses much the same form of expression in Emanuel v. Symon (1908), 77 L. J. K. B. 180, (1908), 1 K. B. p. 309.

Lord Selborne in the case adverted to, says that such a contract cannot be implied; but there would be greater reason for not implying it in regard to an alien towards the country of the agreed or intended forum, and of whose laws he might well be deemed ignorant, than in the case of a Nova Scotian in relation to New Brunswick, and especially as he knew, or must be taken to have known, that the law governing the contract there was identical with that in Nova Scotia. I refer, of course, to the Bills of Exchange Act.

Perhaps it is going too far to say that Lord Selborne's qualification appearing in the second paragraph on page 684, namely: "To the jurisdiction of which the defendant has not in any way submitted himself," means the same thing as that said by Fry, J., above quoted. But it may not be an unfair reading of it. Much the same thing was said in Schibsby v. Westenholz, where it was said: "Or by agreement or appearance or otherwise to have voluntarily submitted to the jurisdiction."

Lord Halsbury in Re Missouri S.S. Company (1889), 42 C. D. at 333, in the course of the argument said: "All the cases go on the footing that what law is to govern depends on a variety of circumstances. Among these we must consider the place which the parties must be supposed to have

regarded as the place where a remedy for a breach of the contract would be sought." Lord Westbury in Cookney v. Anderson, 1 D. J. & S. 365, said: "That as contracts ought to be applied and interpreted by the law of the place where they were made and where it is intended they should be performed, it would seem reasonable that the Courts of that country should receive jurisdiction and the power of citing absent parties, though residing in a foreign land." See also Piggott, sec. 14, pp. 266-270, for a full discussion of this aspect, and the concluding paragraph on contractual jurisdiction at p. 277.

Lord Halsbury, L.C., in Comber v. Leyland (1898), A. C. p. 527, said: "Now let us see what the rule is with which we are dealing here. (Order XI. Rule 1 (e)). It is a somewhat artificial provision which is apparently intended to extend the power of suit by persons in this country against persons in foreign countries. For very obvious reasons, reasons which indeed have been made very apparent by the view which foreign countries have taken of an attempt to exercise the jurisdiction of Her Majesty's Courts in places beyond Her Majesty's dominions, it is provided that the action must be founded upon a 'breach within the jurisdiction of any contract, wherever made, which according to the terms thereof ought to be performed within the jurisdiction.' That is the limitation of this effort to extend the process of these Courts to foreign countries. One can see exactly what was meant by that: that where the parties have agreed that something is to be done in this country, some part of the subject-matter of the contract is to be executed within this country, it is a sort of consent of the parties that wherever they may be living, or wherever the contract may have been made, that question may be litigated in this country."

Cookney v. Anderson is said to have been overruled, but I have not seen anything conflicting with the statements above quoted, unless Lord Selborne's language in the Sirdar case is to be regarded in its widest sense and without referencce to the class of case then under discussion.

Lord Abinger, C.B., in Russell v. Smith (1842), 9 M. & W. 818, said: "The maxim of the English law is to amplify its remedies, and, without usurping jurisdiction, to apply these rules to the advancement of substantial justice. For-

eign judgments are enforced in these Courts because the parties liable are bound in duty to satisfy them."

Parke, B., said: "Where the Court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country." See also the same eminent Judge in Williams v. Jones (1845), 13 M. & W. 633. These expressions of opinion have time and again been regarded as stating the law accurately.

I feel quite justified in saying that when the parties contracted for the payment of the note in New Brunswick they regarded and intended that province as the place where a suit to enforce payment would be brought; the defendants knew or must be taken to have known what the contract meant in that respect and what might be done under it. They quite understood if they failed to pay the note that it constituted a breach of the contract and that breach would necessarily occur in New Brunswick, consequently applying the language of Lord Halsbury in 42 C. D. above quoted, they must be taken to have regarded New Brunswick as the place where a remedy would be sought for such breach, and therefore there was ground for saying they contracted to submit to the forum of the plaintiff's residence with all the procedure and consequences incident to the exercise of jurisdiction by the Courts of that province.

I am unable to perceive why under such circumstances it was not competent for the New Brunswick legislature to enact laws prescribing how such a contract should be enforced, through the agency of the Courts of that province. The New Brunswick Court had jurisdiction over the subject-matter of the note, at any rate over the breach of the contract it evidenced, and upon proper service being effected it could legally proceed to judgment. Consequently the Court was a competent one and its judgment effective, and created an obligation or duty upon the defendants to pay such judgment. Annual Practice, 1911, pp. 18 and 19 and cases there cited. In this aspect the observation of Cave, J., in Heineman & Co. v. Hale & Co. (1891), 2 Q. B. at the top of p. 87, and centre of p. 88, are pertinent. It is true his decision was reversed on appeal, but merely upon the application of the order (XI) to the facts of the case.

In Reynolds v. Coleman (1887), 36 C. D. 464, Cotton, L.J., said: "It was not contended that in this case defend-

ant was not bound by the legislation which enabled this order to be made, and as that is so, in my opinion there was jurisdiction in the Judge to make the order if he thought fit," &c. Both were foreigners but the contract was made in London and to be performed there. See Corse v. Moon, 22 N. S. R. 191.

If the judgment is not effective and one which should be so regarded in this Court, the cause of action having arisen within the ambit of the jurisdiction of the foreign Court, then in every case, a creditor, who is entitled to have his debt paid at his own door, must of necessity at a great disadvantage and at very largely increased expense, inconvenience and loss of time, for which he cannot recover compensation, seek the forum of his debtor to obtain his just rights.

If the defendants' contention is sound there is no necessity for the enactment of order 35, rule 38, because if there was no defence made to the original action and no express submission to the jurisdiction of that Court, the judgment was a nullity. Such apparently was not the view of the Crown law officers of England who advised the disallowance of this statute, first passed in Nova Scotia shortly before Confederation, and which was of the same purport as Rule 38. Our legislature in enacting sec. 27, or ch. 13 of 1880 must have deemed a foreign judgment like the present valid, and enforceable here, or it would not have passed it.

I regret the original cause of action is not sued upon because if not barred the case would probably be easy of solution. If an application to amend were made I should grant it as a matter of course.

Upon the whole case, though considerably impressed with the defendants' contention, I am of opinion the plaintiff is entitled to recover and there will be judgment accordingly and with costs and interest.

I have devoted as much time as I could to this case consistent with my other duties in the short time since the trial, and have hastened my decision so that the parties may have an appeal heard at the approaching term and not be obliged to wait until next autumn.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 5.

JANUARY TERM, 1911.

McDONALD v. HAMILTON.

Landlord and Tenant—Dwelling House—Parol Agreement —Tenancy from Month to Month—Damages to Premises Alleged to be Owing to Tenant's Negligence—Permissive Waste — Liability of Tenant — Implied Covenant — Evidence.

H. R. Fitzpatrick, for plaintiff.

R. H. Graham, K.C., for defendant.

PATTERSON, Co.C.J.:—This is an action of a rather unusual kind. The defendant rented a house from plaintiff in October, 1909, and occupied it from that time until January 7th, 1910, as a tenant from month to month. There was no written agreement of lease. The house was heated with hot water. On the night of 5th of January (there is some dispute as to whether this should be the 5th or 6th, but the date, in my opinion, is of no importance), two of the coils broke or burst open, owing to the water in them having been frozen. The weather was particularly severe at that time, but there is no defence of vis major or anything of that sort. It cost the plaintiff $33.75 to repair the damage and for this sum he sues defendant alleging: (1) permissive waste, and (2) breach of implied covenant to use house in a tenant-like manner. His first claim may be dismissed at once, but his second is good in law if the facts sustain it. A short passage from Woodfall's Landlord & Tenant may be appropriately cited here; "The contract of tenancy usually contains some express stipulation of repair by the tenant, but if it contain no such stipulation, or only contain a stipulation for rent, and whether it be by deed, writing without deed, or by parol only, a stipulation is implied by law—in the absence of any express stipulation but not otherwise—that the tenant will use the premises in a tenant-like manner. . . . A tenant at will is clearly not liable for permissive waste nor is a tenant from year to year."

(Woodfall, 15th ed., 632). And, as we all know, a tenancy for a fixed period less than a year is governed by the same principles as a tenancy from year to year. Applying this quotation to the present case—if these coils burst in consequence of negligence of defendant, he is liable for breach of his implied covenant to use the house in a tenant-like manner; but if the bursting was accidental and without negligence on defendant's part, it will be regarded as permissive waste for which, as we have seen, he is not liable.

The plaintiff's case for negligence is this:—The former owner of the house, who left it six years ago, testifies that the heating apparatus was then in good condition. Plaintiff himself, put on a fire in November, 1909, and found that apparatus worked all right. The plumber, who was called in after the bursting, found coils and every thing in good condition. Then plaintiff says he saw defendant's wife away from the house during the afternoon of January 4th, and the inference is that the fire was allowed to get low, if not to go out. But the bursting, plaintiff says, did not occur until night of 5th, which proves, I think, there can be no connection, whatever, with the fire being low or out on the 4th —assuming for the moment it was—and a break on the 5th. It is a matter of such common knowledge in this country, that I might be justified in taking judicial notice of it — I do not need to do that here for we have the positive evidence of an experienced man, McKenzie — that coils if frozen will burst whenever a good fire is put on and they begin to thaw. Now there must have been a good fire on between afternoon of 4th and night of 5th, or, remembering what the weather was like, every coil in the house would have been frozen, and if freezing took place when plaintiff would have us believe, the bursting would have occurred earlier. Defendant's wife on the other hand says, she met plaintiff not on afternoon of 4th, but of 6th, and that the bursting took place not on night of 5th but on night of 6th, and there might, if we take her dates, be some connection between her being out and the breaking, though I am obliged to find there was not. It speaks well for the honesty of both parties that their evidence on this point is against their own interests.

There is, of course, a presumption of continuance, and evidence that heating apparatus was in good condition six years ago could not be rejected; but it is of little weight

in proving that this apparatus was in good condition in January, 1910. All plaintiff says he did in the way of testing the apparatus was to put a fire on in it the first cold weather the preceding fall, and wait to see that it was all right. He did not try individual radiators to see that they heated, or do anything more than put a fire on and see that it burned. Surely that alone could not be taken as a sufficient test. The plumber's evidence is stronger. It is that of a man of wide experience, thoroughly honest and disinterested. He says everything was in good condition; but it must be remembered he first saw the apparatus after the accident had occurred and the water been run off, and so in another place he explains that all he did was to look over outside and so far as he could see everything was in good condition. If the matter ended here, I suppose, applying the doctrine of res ipsa loquitur, I would be justified, upon this evidence, in inferring that there must have been negligence on defendant's part or otherwise bursting would not have occurred; but in the face of the direct evidence we have from defendant and his wife, I do not think I can do so.

Defendant swears that good fires were kept on at all times but still they could not keep the house warm. He says he complained to plaintiff who promised to see about it. In particular, he said the radiators that broke would never become heated—never more than warm, and at most times not even warm. He admitted that both on the day before the accident and the day before that, he was out of the house in the afternoon for an hour and a half or two hours, but he swears that on both occasions he banked fire when he went out and found a good fire on when he returned. His wife's evidence is even stronger. She swears they left plaintiff's house on account of it being cold (notice of their going was given before the breaking happened) —that at different times she complained to plaintiff generally about house being cold and particularly about these radiators that subsequently broke—that with her, at different times, he went over these radiators and could not account for their not heating, and promised to see to them. She corrobates her husband as to their keeping at all times a big fire on, and as to their banking it the day they met plaintiff.

It is impossible not to believe the story of defendant and his wife. I am glad that doing so involves no discrediting of plaintiff or his witnesses, for plaintiff does not deny these complaints to him, and of course could not know whether good fires were kept on or not. I find that the heating apparatus in plaintiff's house was not in good condition before and at the time of accident—that there was some defect in it, not apparent from an outside inspection, that prevented a proper circulation of the water—the defendants doing everything that could be expected of them in the way of keeping on fires—and that the breaking was due not to anything done or omitted to be done by defendants, but to this defect. And from these findings of fact, it follows as a matter of law that there has been no negligence on defendant's part—nor breach of his implied covenant to use plaintiff's house in a tenant-like manner.

The defendant will have judgment and with costs.

At the trial Mr. Graham asked leave to amend his defence by pleading an estoppel based on defendant's complaints to plaintiff about defects in the heating apparatus, and plaintiff's promises to fix them, and also upon his directions to defendant that if he kept good fires on there would be no danger of freezing. I gave him the leave asked for. He has filed a plea and Mr. Fitzpatrick has replied. But in the view I have taken in the matter this defence was not necessary and I have not discussed it. I merely make this note because I observe the stenographer has made no mention whatever of Mr. Graham's application, and in view of an appeal I thought it only proper he should not be deprived of any advantage there may be in such a defence.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 5.

JANUARY TERM, 1911.

CROCKET ET AL. v. McKAY.

Contract—Sale of Goods—Furnace—Defective Construction Condition Precedent—Warranty.

R. G. McKay, for plaintiff.

H. V. Jennison, for defendant.

PATTERSON, Co.C.J.:—This is an action for the price of a wood-burning furnace sold by plaintiffs to defendant and set up in his house. The defendant refuses payment on the ground that the furnace was improperly made and defective in that each time fire was put on in it, his house was filled with smoke, with the result that he never used the furnace except in extreme cold weather, when he had to choose the lesser of the two evils, suffering from smoke or suffering from cold. There can be no doubt whatever that defendant was troubled with smoke, but plaintiff says this smoke was not caused by any defect in the furnace itself, but must have been due to the poor inadequate draught in the flue of defendant's house. Though many other points, chiefly as to the nature of the sale, were raised at the argument, as I view the matter, really the only qustion for me is, was this smoke due to some defect in the furnace itself or to defendant's flue?

I think I can make my meaning clearer, if before discussing this question, I refer for a moment to some of these points. Plaintiffs for example argue that this is just the well-known case of Chanter v. Hopkins (4 M. & W. 399). over again—it is a sale of a known, described and defined article, in which though it is stated that it is required for a particular purpose, there is no warranty that it shall answer the particular purposes, if the known, described and defined thing be actually supplied. And there is some evidence that the sale was of this nature. The plaintiff, who made the sale, swears that it was—that they sold the defendant an "Emperor" wood furnace—a patent furnace that has been on the market for some time and was well known, but whether he did so or only contracted, as defendant says, to supply him with a wood furnace that would heat defendant's house and give satisfaction, it is unnecessary to decide. If the sale were of an "Emperor" furnace, undoubtedly the plaintiffs supplied an "Emperor" —if it were merely a sale of a furnace to heat defendant's house and give satisfaction, I find on the facts that the furnace plaintiffs supplied would do that. On his part defendant says, either this case is that of a sale by description, where the article sold does not correspond with that description and there has, therefore, been a breach of a condition precedent and consequently no contract; or it is a case not of Chanter v. Hopkins but of the almost equally

well-known one of Brown v. Edgington (2 M. & G. 279), where a dealer contracts to supply an article in which he deals to be applied to a particular purpose, so that buyer naturally trusts to the judgment or skill of the dealer, and there is then an implied warranty that the article will be reasonably fit for the purpose. In passing I might say, that I do think this a case rather of Brown v. Edgington than of Chanter v. Hopkins, but that does not help defendant much, for upon the facts I have to hold that the implied warranty has been fulfilled. Similarly, if this were a sale by description, I would have to hold and do hold that the furnace satisfied the description.

Coming now to the facts, it is clear in the first place, I think, there was nothing wrong with the furnace itself. It was made by the same people from exactly the same pattern as a large number of others were made which are giving good satisfaction. The maker personally examined furnace when it was completed and found everything all right. One of the plaintiffs, a practical man of large experience, examined it not only before it was set up but afterwards, and said there was nothing wrong. And the witness, Sullivan, who has had twelve years' experience in setting up furnaces and who set up this one, says the same thing.

Smoke or no smoke depends upon the draught—there is no draught in the furnace itself, and whether the draught is good or not depends upon the flue. Of course, if there were a stoppage in the smoke passage of the furnace, there would be smoke, but the evidence of one of the plaintiffs, of Fraser and Sullivan, satisfies me there was nothing of that sort. A puff of smoke, it is true, would come out the door when you went to feed it, but that is so of all wood furnaces and is not counted a defect. This is caused, I understand, by the fire place in wood furnaces being on a level with the door, and not as in a coal furnace some inches below that level. It is rather hot air than smoke and not the result of any stoppage in the smoke passage, and is clearly in this instance not what the defendant is complaining of. That the flue was the whole cause of the trouble there can, I think, be no doubt. Direct and positive evidence that it was defective we do not have—no one seems to have examined it—but from such evidence as is before me the inference is irresistible that the flue was too small to give a good draught. We have, first, the fact that the

furnace was all right both in its making and setting up—that it was exactly the same as many others that, connected with other flues, were not smoking. This evidence I take it is no violation of the maxim, res inter alios, etc. These furnaces were only made in one size, were all made by same maker from identically the same patterns. And it seems to me this evidence is rather evidence of the same furnace in other flues than of similar ones. Then we have the fact that defendant himself admits he had a suspicion the flue was too small—that he had it cleaned out and later had a larger one built.

But defendant will say, furnace was connected with new flue and tested, and would still smoke. I cannot so find. What happened was this. On the occasion of one of Sullivan's visits he, at defendant's request, did connect furnace with new flue and put on a small fire. There was the smoke customary in all wood furnaces when the door was opened, but none when the door was closed. When defendant saw smoke come out the opened door, he said he wouldn't have the furnace at all and the matter ended there. As Sullivan says, "We didn't give it a practical test." Defendant says also that Hayman, the man who subsequently put in another furnace, tested the old one, but I cannot accept what Hayman is described as doing as a proper test. And it is a remarkable thing that Hayman, though in Court, was not called.

On two of the minor issues raised, my findings must also be for the plaintiffs. I find that it was not part of the bargain that the pipes were to be covered with asbestos. I find that the bolt that afterwards came out, or was lost, was in the damper when set up in defendant's house. Neither the want of the asbestos nor of the bolt had anything to do with causing the smoke—the want of them was alleged by way of set-off in the reduction of the amount plaintiffs claim.

The plaintiff will have judgment for $65, the full amount of the contract price and costs.

NOVA SCOTIA.

SUPREME COURT.

MARCH 1ST, 1911.

WOLFE v. CROFT.

Land — Intestacy—Widow's Dower — Deed—Condition — Conveyance for Maintenance — Mortgage by Vendor — Foreclosure—Sheriff's Deed to Mortgagee—Action to Set aside—"Charge upon Lands."

Arthur Roberts, Esq., for plaintiff.

V. J. Paton, K.C., for defendant.

LAURENCE, J.:—Martin Croft died intestate, being seized in fee simple of several parcels of land at West Dublin in Lunenburg county. He left surviving him, his widow Mary Croft, five sons and one daughter. On February 26, 1895, Foster, one of the sons, conveyed his interest in his father's property and estate to "Binney," another son, and on the same day by another conveyance the widow Mary conveyed her share and dower in the property of her deceased husband to said "Binney." These two conveyances were registered on 27th December, 1897, and on March 12th, 1895, three of the sons, Hibbert, Milledge and Cornelius, and the daughter Melissa, conveyed to said "Binney" their interest in all the parcels of land owned by their father at his decease—by a deed—registered March 14th, 1895. On March 12th, 1895, "Binney" mortgaged one of the said lots (No. 8, in the last mentioned deed) to the plaintiff for $100. After some years the plaintiff foreclosed and at the foreclosure sale bid in the mortgaged lot and received a deed thereof from the sheriff, dated August 7th, 1909. Finding Mary Croft and Foster—the defendants in possession of this lot—after demand for possession—the plaintiff on March 13th, 1910, commenced this action to recover possession.

The defence pleaded, shortly stated, is that the three conveyances herein before referred to contained a provision for and were subject to the support and maintenance by the said Binney Croft of the said Mary Croft and Foster Croft,

and subject to a reservation of certain rooms for the use of the said Mary Croft and Foster Croft in the building upon the land so conveyed. That at the time the mortgage to the plaintiff was given the said Mary Croft and Foster Croft were residing on the property mortgaged and in possession of the rooms reserved for them—that Binney failed to support and maintain his mother and brother—and that the plaintiff as assignee of Binney acquired this land subject to these conditions or reservations; or that by reason of the failure to support and maintain Mary and Foster the said conveyances are void.

The deed of 12th March, 1895, Hibbert and others to Binney, is an absolute fee-simple conveyance containing after the words "To have and to hold the said lands, &c., unto the said 'Binney' and his heirs and assigns, &c., forever," these words, "he to support and maintain Mary Croft and Foster Croft, his mother and brother, respectively, and to have one room and bedroom reserved for their own use during their natural life."

This is an absolute deed unlimited by the clause in it quoted. It is neither a condition, exception or reservation. It may be at most a covenant by the grantee alone, and there are many authorities it is not even that. Courts always construe clauses in deeds as covenants rather than conditions if they can reasonably do so. There is no condition of forfeiture, and no right of re-entry: Washburn, 5th ed, vol. 3, p. 331; Labaree v. Carlton, 53 Me. 211; Ayer v. Emery, 14 Allen 67-70. Reservations must be to the grantor and not to a stranger, and if so are void: Washburn, 5th ed., vol. 3, sec. 57.

Do these words constitute a "charge" upon the lands conveyed for the support and maintenance of Foster and his mother? There are certainly no express words creating a charge, and I do not think there is such a charge by implication. Nothing more than a covenant by Binney by his acceptance of the conveyance. I am referred to McRae v. McRae, 4 N. S. R. 76. Here there was a contemporaneous agreement between grantor and grantee, which was held a defeasance which defeated the deed. Also to Swainson v. Bentley, 4 Ont. R. 572. In this case the support and maintenance of the daughters was specifically, and in terms, made a charge on the land. Also to Wilkinson v. Wilson, 26 Ont. R. 213. Here the land was conveyed in terms "sub-

ject to the use by another son of a bed—bedroom and board" —and which the grantor in words "granted" to said son: —Held, a charge on the land. Also to Millette v. Sabourin, 12 Ont. R. 248, and in this case there was a condition expressed—making the conveyance null, if condition not complied with. The recent case of Pratt v. Balcom (9 E. L. R. 274) is, I think, very different from this. As to the reservation so called of "the room and bedroom." I cannot see how a grantor of only an undivided interest in land can reserve to himself or another a particular or specific part of such land. I think such reservation cannot be supported. I may say I have no agreements before me except what appears from the conveyances. Story Eq. Juris, sec. 1233; Clark v. Royle, 3 Symons 499.

The deed Foster Croft to Binney: The material part of this deed in relation to this suit is "have given and granted, and by these presents do freely give and grant unto the said Binney Croft, his heirs, executors or administrators, all and singular my goods and chattels and all my share or part of property commonly known as the estate of Martin Croft, deceased, he, the said Binney Croft to become the sole and only possessor of the same barn and property at my death, he the said Binney Croft to maintain and support the said Foster Croft in food, clothing and medicine in sickness if necessary, and at my death by the defraying of all funeral expenses, reserved however one room and bedroom for my use during my natural life, of which by these presents, I have delivered him, the said Binney Croft, an inventory, signed with my own hand and bearing date—To have and to hold all the goods, chattels and my share in the said property to him, the said Binney Croft, his heirs, executors or administrators, from henceforth as his and their proper goods and property absolutely, without any manner of condition."

I think Foster Croft has in this deed reserved to himself a life estate by the words "he, the said Binney, to become the sole and only possessor of the same house, barn and property at my death."

"The reservation by a grantor of the use and control of the granted premises during his life creates in him a life estate with all its incidents:" Washburn on R. P., 6th ed, sec. 252; Richardson v. York, 14 Me. 216.

The stipulation for the grantor's support and maintenance is, if enforceable, only a personal obligation upon the

grantee, and is no charge or lien upon the premises granted, or liability upon Binney's "assigns." The reservation of the room and bedroom I think is void—as the deed is without condition (except as to the grantor's life estate before mentioned), and because the grantor (Foster) only had an undivided share (1-6th) in the lot and he could not reserve a specific portion, and as to the deed, Mary Croft to Binney Croft, the only interest which this grantor had in the land in suit is the right of dower as widow of Martin Croft. This was not assigned or set off to her and she could not convey it. The deed did not convey anything and of course reserved nothing.

Washburn on R. P., vol. 1, p. 313; Am. & Eng. Ency. 2nd ed., vol. 11, p. 146, &c.; Cameron on Dower, p. 297-298; Allen v. Rever, 4 O. L. R. 309; Croade v. Ingraham, 30 Mass. 35.

In the results, then, plaintiff is owner of Binney Croft's 1-6th share under the mortgage and foreclosure deed. He has 4-6th shares under the deed, Hibbert Croft and others, and the mortgage and foreclosure, and he has Foster's 1-6th share in like manner subject to Foster's life estate therein, and the whole subject to the right of dower in Mary, The decree will be accordingly. Costs reserved until decree is taken out.

NOVA SCOTIA.

AUGUST 30TH, 1904.

SUPREME COURT.

BALCOM v. BALCOM.*

Voluntary Conveyance of Three Lots of Land—Subsequent Conveyance for Value of One of the Lots—Improvements by the First Grantee on the Lots not Comprised in the Subsequent Conveyance—Ex Post Facto Consideration—Effect of.

In 1884 Warren D. Balcom conveyed three lots of land to the defendant in consideration of natural love and affection,

* EDITOR'S NOTE.—The importance of this case is deemed a sufficient reason for its publication, although it was decided over six years ago.

and upon the condition that the defendant should pay to some of the other children of the grantor certain sums of money after the grantor's death, and the grantor reserved the management and control of the lots to himself and his wife during their lives and the life of the survivor of them. In 1889 the grantor conveyed one of the said lots of land to the plaintiff for a valuable consideration. Upon the death of the grantor, which occurred in 1902, the plaintiff found the defendant in possession of the land comprised in the deed of 1889, and brought an action to recover possession. After the conveyance to the defendant he had made improvements on the faith of his deed upon part of the lands, but he had not made any improvement on that part which was subsequently conveyed for value to the plaintiff, but he claimed that his improvements constituted an ex post facto consideration which would support his conveyance not only in respect to the lands upon which he had made the improvements, but also in respect to the lands subsequently conveyed to the plaintiff for value and upon which he had not made improvements.

J. J. Ritchie, K.C., for the plaintiff.

O. S. Miller, for the defendant.

TOWNSHEND, J.:—This is an action for the recovery of land in which the plaintiff has in his statement of claim joined an action for trespass. No exception was taken to this procedure by the defendant, and as it in no way affects the question tried I make no further reference to it.

The plaintiff and defendant are sons of the late Warren D. Balcom, who was the owner of the lot of land in question, with other lands. On the 16th June, 1884, Warren & Balcom conveyed to the defendant and Edgar O. Balcom the lot in dispute with two other lots of land. The consideration as expressed in the deed is as follows: "Being desirous of settling his worldly estate and business as well as for and in consideration of the love and affection which he has and bears to his said sons Edgar C. Balcom and Charles B. Balcom as for the further consideration hereinafter named, and for the sum of one dollar." The further consideration is as follows: "And first it is the true intent and meaning of these presents and of the parties hereto that the said parties of the first part (Warren D. Balcom and wife) shall have the management and control of all property herein conveyed during their lives or the life of either of them and further

the said Edgar O. Balcom and Charles B. Balcom shall pay or cause to be paid the following legacies." Then follow five legacies amounting to $1,000 each, which were to be paid at different dates after his decease. The deed was not signed by the defendant nor by Edgar O. Balcom, who is since dead. According to defendant's evidence he was on the property, or that part of it where the dwelling was situated, at the time the deed was made to him and his brother. He did a considerable amount of work on it such as repairing an old house, building a stable, a hog pen, and other things, and he cleared up a portion of the land He began building the barn in 1884, but did not then finish it for want of money. All that he did on the property was with his father's knowledge and approval. In 1887, between March 1st, 1887, and April, 1888, he informed the plaintiff, who he heard was trying to get a deed of the lot in dispute, that he had a good title to the property — that he had consulted a lawyer on the subject who so advised him. They both went to their father and stated the same thing to him, who replied to plaintiff that he could hold on to the property until he got square or satisfied and plaintiff replied that was all he wanted. He says that the value of his improvements since 1884 amount to $500; this refers to the buildings erected only, but he has done other work besides.

All that he did was from the year 1884 up to a year ago, and on the faith of the deed. The father died 28th Dec., 1902.

According to plaintiff's testimony his father proposed to him in 1887 to buy the lot in dispute, to which he agreed, and paid him $800 for it by transferring a judgment he held and paying the balance, and on the 2nd February, 1889, a conveyance of the lot was made to him by the father. He went into possession of it and in that spring built a barn on it after he got his deed

It was, as he testifies, in 1887, in consequence of the verbal bargain with his father, that he went into possession of the lot in question, set out an orchard at a cost of $50, built a barn on it, and one year, 1890, he rented it for $70. He does not appear after that date to have done any work on it, but after his father's death in 1902 on going to the place he found the defendant in possession, who refused to permit

him to occupy the same and who has since retained the property.

The plaintiff claims that the deed to defendant was merely voluntary without valuable consideration, and is therefore as to the lot in question void against his subsequent deed made for valuable consideration. There is no doubt that plaintiff gave valuable consideration for this lot, and did the work, and rented it as stated. It is also evident that defendant gave no further or other considerations than those expressed in the conveyance to him and his brother. The work and improvements made by defendant were no doubt made on the faith of the deed, on the other lands mentioned in the deed, but there is no evidence of any work by defendant on the lot in question prior to plaintiffs deed, while plaintiff did the acts already mentioned as well as built a barn on it.

Whether plaintiff knew of defendant's deed at the time he negotiated for the purchase of the lot and took his deed is in controversy, but it would seem strange that plaintiff should have been ignorant of such an important family transaction, and defendant swears that he told him of it before he took his deed, which plaintiff as strongly denies. The defendant contends that admitting his deed was at first purely voluntary, yet that the subsequent expenditures and work done on the faith of it constitute a good ex post facto consideration which will support the deed, especially when this takes place with the knowledge and approval of the grantor; and secondly, that in accepting the deed from his father he became bound by the terms of it which could be enforced against him by the several beneficiaries and that this of itself forms valuable consideration.

As to the first point it is urged by plaintiff that while ex post facto consideration may avail, it will only be to the extent of the work performed or money expended, that is to say, where as here the lots are separate and apart, and the expenditure has not been on the lot subsequently conveyed to the plaintiff, the deed should be declared void as to it, while it may stand good as to the rest of the land. I have not the particular case before me on which the text in May on Voluntary Conveyances is based, but assuming its correctness at page 209, he says: "It must be borne in mind however that the statute invalidates such settlement only to the extent of the interest of the mortgagee or purchaser."

I can find no case in which the doctrine laid down in this passage, and cases supporting it, covers facts such as are found in the one under consideration, that is to say, that where the grantee under the voluntary conveyance has confined his labour and expenditure to part only of the land conveyed, while it may subsequently become good and valid as to those, it becomes void as to the other portions on which there has been no expenditure. It seems to me that if the voluntary deed is made valid by ex post facto consideration, it must extend to the whole deed. It would be impossible in most cases to apportion it, and especially here where the whole land conveyed is bound by the charges imposed by the grantor. I say this while I do not forget that the donees of the legacies are merely volunteers, and in no better position than the defendant originally. Here the distinction sought to be drawn by the learned counsel for plaintiff was that it was a separate and distinct lot of land, but in view of what has already been said, this cannot affect the principle. There is no pretence of actual fraud on the part of the grantor and grantee in this case, and it was evidently intended as a family settlement. These are circumstances to be considered: While it may be granted that in accepting the conveyance the defendant undertook no personal responsibility, yet the land would be bound, and the donees could enforce their rights against it. If part of it stood and part of it did not, a difficult question would arise as to how these were to be adjusted—in fact without making them parties to the action I think it doubtful whether the rights of the several parties under this deed could properly and legally be decided in this action.

I have therefore come to the conclusion that this action must be dismissed with costs.

PRINCE EDWARD ISLAND.

PROBATE COURT.

FEBRUARY 15TH, 1911.

IN RE MARGARET TRYON MURPHY'S WILL.

Will—Execution—Compliance with Provisions of Statute—Mental Capacity—Suspicious Circumstances—Knowledge and Approval of Contents of Will—Onus Probandi.

Citation to have will of Margaret Tryon Murphy in favour of Kathleen Murphy propounded in solemn form, and in event of same being pronounced against to have a previous will in favour of Matthew William Murphy proved per testes.

D. C. McLeod, K.C., and W. E. Bentley, for the petitioner M. W. Murphy.

A. A. McLean, K.C., and D. A. McKinnon, K.C., for Kathleen Murphy.

REDDIN, J.:—An instrument purporting to be the last will of Margaret Tryon Murphy of China Point, in Queens County, bearing date the 28th February, 1908, and made in favour of Kathleen Murphy, her daughter's child, was brought into the Registry of Probate on or about the 15th July last, and some days later another will of the same testatrix of the date of the 19th September, 1904, was also presented for probate by Matthew William Murphy, a son of testatrix, in whose favour the last mentioned will was made.

On learning of the filing of the first will, Mr. Murphy by Mr. D. C. McLeod, his attorney, then filed a caveat against the will of the 28th February, 1908, on the grounds that is was not signed by the testatrix, and that at the time of the making of the same, testatrix was not of sound disposing mind and memory, and that if testatrix did sign the will, she did so under improper and undue influence.

Following this a petition also was filed by said Matthew William Murphy praying that said Kathleen Murphy and all other proper parties should be cited to shew cause why the said will of the 28th February, 1908, should not be propounded per testes in solemn form, and why in the event of the last mentioned will being pronounced against and

disallowed by the Court, the said will of the 19th September, 1904, should not then and there be propounded in solemn form, and, upon the same being pronounced for, why probate thereof should not be granted to the petitioner, the executor therein named, and further that a guardian ad litem for the said Kathleen Murphy should be appointed by the Court. A citation was accordingly issued returnable the 12th September last past.

After several postponements and the disposal of certain preliminary questions, and Mary M. Vessey having been allowed and appointed the guardian ad litem for the said Kathleen Murphy, the case finally came on for hearing on the 17th October, 1910.

Evidence in support of the will of the 28th February, 1908, was then adduced by the parties cited. The witnesses John J. McDonald and Frank M. Vessey were called and testified as to the manner in which the will had been executed. Mrs. Mary Vessey also testified as to the execution, being, as she stated, present when the will was signed. Evidence opposing the will was then given on behalf of the petitioner and this was followed by further evidence on behalf of the parties cited. Several witnesses also were recalled by the parties to the proceedings.

Mr. McLeod, K.C., and Mr. Bentley with him, for the petitioner, contended that the onus is on the parties propounding the will to prove that the testatrix acted of her own free will and understood what she signed. That is always the case where a person draws up a will in his own favour and procures its execution, and the rule extends to all cases where any suspicion attaches to a will: Brown v. Fisher, 63 L. T. 465; Parker v. Duncan, 62 L. T. 642; Fultan v. Andrew, L. R. 7 H. L. 448, 461; Tyrrell v. Painton (1894), P. D. 151.

It was urged by Mr. McKinnon, K.C., and Mr. McLean, K.C., with great ability, on behalf of the parties cited that the will had been properly executed, that instructions had been given for the preparation of it, and that the rule ought not to be extended to cases where the party himself takes no benefit, that the evidence of the attesting witnesses was given in the most satisfactory manner and was corroborated by the testimony of Mrs. Vessey, who was present when the will was signed: Guardhouse v. Blackburn, L. R. 1 P. & D. 109; Atter v. Atkinson, L. R. 1 P. & D. 665; Goodacre

v. Smith, 1 P. & D. 359; Perera v. Perera, 1901, A. C. 354; Kaulbach v. Archibald, 1901, 31 S. C. R. 357; Garrett v. Batfield, 1901, Prob. Div. 340, 341.

This concluded the case as to proving the will of the 28th February, 1908, in solemn form.

The petitioner by way of counterclaim and as prayed for in his petition, then propounded the will of the 19th September, 1904, made in his favour by his mother, and proved the same in solemn form. This will was made in the office of Mrs. Murphy's solicitors, and was witnessed by Mr. W. E. Bentley, solicitor, and Mr. James L. McMillan, veterinary surgeon, and Alice M. Trainor, and the evidence shewed that the will had been duly made and executed in every way according to the provisions of the Statute of Wills. The witnesses to the will were shortly cross-examined by Mr. McLean on the part of the parties cited.

The case was then taken under consideration.

I have considered this case carefully. The testatrix, Mrs. Murphy, lived with her son Joseph until his death in 1904. Her son M. W. Murphy, the present petitioner, then left his own place and went to live with her in the old homestead at China Point, and there they lived together until her death on the 4th of July last.

Testatrix was in the habit of making visits to her daughter, Mrs. Mary Vessey. She made several long visits to her and it was on the occasion of one of these visits that the will in favour of Kathleen Murphy (her daughter's child, who was always known by the name of "Kathleen Murphy") was signed. The will was prepared by Frank M. Vessey, her said daughter's husband, with whom the said Kathleen Murphy lived as a member and inmate of his family; it was signed at Vessey's house and Vessey himself is one of the witnesses. The old woman was then in her 84th year, and this is the will now being propounded for probate.

The evidence is very voluminous, and I will only refer to such parts of it as have bearing upon the preparation and execution of the will, and the question as to whether testatrix knew what she was doing when she executed it, which is the issue I am now deciding.

I will first refer to the evidence relative to the execution of this will. John J. McDonald, the first witness, testifies that Mr. Vessey asked him to go to his house and witness the will, and that he did so. He states that Mr. Vessey,

Mrs. Murphy (the testatrix), and himself, only were present in the sitting room where the will was signed. It was not read to the testatrix while he was there. Witness says that he himself signed first, that Vessey signed next, and that the testatrix signed last. He would not say that testatrix knew what she was signing. He drew his inference that she knew of the contents of the document from what Vessey had told him, but not from anything said by testatrix. She never asked him to witness her will. The only mention of its being a will was when Mr. Vessey told witness it was grandma's (meaning Mrs. Murphy's) will, and he would not swear that testatrix heard this as she was some distance from them when Vessey made this remark, and she was old and deaf.

This is the evidence of an independent witness. He is strong and confident as to his having signed before the testatrix. He was cross-examined and re-examined but his evidence was unshaken.

Frank M. Vessey, the other witness, then testified as to the execution of the will. He at first stated that he was not sure whether McDonald or he signed first, but that Mrs. Murphy, the testatrix, signed after he signed. Later he stated that testatrix made her mark, and then he and McDonald signed their names. Upon being pressed by the Court as to these different statements, and as to having changed his mind regarding what he had at first stated, his memory seemed to fail him. He became confused, and left the impression upon the Court that he did not have any clear or definite recollection as to this fact. As to the will having been read over to the testatrix, Vessey says that it was read over at a time previous, but he does not attempt to say that it was read to her at the time of the execution.

Mrs. Mary Vessey swears that she also was present when her mother made her mark to the will, but she does not swear positively as to who signed first. She says, "I think McDonald signed it after she signed it."

This evidence, so far as it goes, is very unsatisfactory and leaves grave doubt in my mind as to whether testatrix knew what she was signing, and as to whether the provisions of the statute relating to the execution of wills were complied with.

Again as regards the preparation of the will, Vessey and his wife swear that instructions were given by testatrix to

her family physician, Dr. A. H. Beers, who wrote them down in a scribbler, and that Vessey afterwards copied out the will from the form made by the doctor, that the doctor brought seals which were placed upon this will to which testatrix attached her mark.

Dr. Beers flatly contradicts this. He says that Kathleen Murphy went for him and she said that her grandmother was sick and wanted him to come up. When he arrived at the house, he found the old lady in her usual health, and Mrs. Vessey asked him to draw her mother's will, but he did not do so. The old lady gave him no instructions to prepare her will, and so far as he could remember, she did not even speak to him when he went in. He would not draw her will because he did not consider her competent to make a will. He states that he had been her physician for about twenty years. At this time when the will was made she was in a weakened mental condition. She was in her dotage. He noticed this condition first in 1907, before she went to Vessey's, and she was growing worse. She was physically and mentally weak and very deaf. The doctor did not consider her capable of making a will or of understanding the meaning and purport of a will. He had been asked to draw and witness her will, but he had declined to do either. On the contrary the old lady had told him that she did not wish to change the will she had already made. A seeming doubt in witness' mind as to him having given some form or other for the will was cleared away by the doctor's positive statement that he had no hand or part in the drawing of the will.

It would appear from the evidence above referred to and especially from that of Doctor Beers, that not only did Mrs. Murphy give no instructions for the making of this will, but that she was incapable of giving such instructions or of understanding the meaning or purport of them. After testimony of this kind, can any one doubt that testatrix did not know what she was doing when she made her mark to the will?

In addition to this the petitioner testifies that his mother requested him to give all her personal belongings to Kathleen. This I consider evidence of adhesion to the first will. The petitioner also testifies that he had a conversation with Frank M. Vessey at the house of the postmaster, William S. N. Crane, after the will had been filed, and that in the presence of Crane, Vessey stated that testatrix was not fit to

make a will, that the will was no good, that he had been annoyed so much by the people at his own home and pressed about it, that he had been forced to bring the will in to the registry of probate for peace sake, that if he had known how the matter was he would not have done so, and he would take it back if he could.

The evidence of the petitioner as to this conversation with Vessey is fully confirmed and corroborated by Mr. Crane, who is a brother of the testatrix. Crane also testifies to the effect that for the last two or three years of her life testatrix was very deaf. There was no use talking to her, she could not hear. She would talk to herself incessantly, and that her conversation would not always be sensible. She was pretty good, he says, till 1904, but after that her memory began to fail and she gradually grew worse.

Mrs. Willock, her next neighbour, testifies to a like effect as to testator's condition and her conversation during the last two or three years before her death, that her mind was very much impaired, that you could not converse with her nor understand her. She would talk "silly" and was subject to all kinds of delusions.

This evidence of the petitioner, together with the evidence of Mr. Crane, and that of Mrs. Willock, leaves great doubt in my mind as to whether the document now being propounded is the true will of the deceased, and the doubt and suspicion I have as to its being the will of the deceased is further increased by the evidence of Mrs. Vessey to which I must again refer. She testifies to a conversation between her and Doctor Beers as to the advisability of her mother's making a will, and it would appear from this conversation that the testatrix had not that spontaneity of volition necessary for the making of a will. A statement of Mrs. Vessey's to which I have not referred is to the effect that Mrs. M. W. Murphy came to her and asked her to take her mother to live with her, as otherwise matters might end badly. Mrs. M. W. Murphy contradicts this directly and another witness, David Wright, indirectly contradicts this statement, and besides the testimony of Mrs. Murphy and Mr. Wright, there is the fact that the testatrix, when her end was approaching, returned to her son Matthew William's house to be cared for and attended in her last sickness.

Now in Barry v. Butlin, 2 Moo. P. C. 480, Park B., delivering the opinion of the Judicial Committee of the Privy

Council, said: "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal. The rules are two: The first, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded is the true will of the deceased.

In Tyrrell v. Painton (1894), P. D. p. 151, Lord Justice Lindley, applying the rule laid down in Barry v. Butlin, said that the same principle was laid down and acted upon in Fulton v. Andrew and Brown v. Fisher. Further on in his judgment he says: "The rule is not in my opinion confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court, and whenever these circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document.

Now this is the law governing cases of this kind such as I am now considering. The circumstances under which the will now propounded was prepared and signed are such as to excite the gravest doubt and suspicion, and this doubt and suspicion is not to my mind removed by the evidence and it has not been affirmatively established that testatrix knew and approved of the contents thereof, and I am not judicially satisfied that the will of the 28th February, 1908, is the true will of the deceased, and I therefore pronounce against it and refuse probate thereof, and I pronounce in favour of the will of the 19th September, 1904, which has been duly proved in solemn form as already stated, and the same is accordingly admitted to probate.

NOVA SCOTIA.

SUPREME COURT.

APPEAL.

FULL COURT. JANUARY 31ST, 1911.

DIMOCK v. GRAHAM.

Municipal Election—Councillor—Voters' List—Removal of Names—Irregularity—R. S. N. S. ch. 71, sec. 71—Acts of 1907, ch. 55—Construction.

Appeal from the judgment of the County Court Judge for District No. 7, dismissing a municipal election petition.

J. M. Cameron, in support of appeal.

L. A. Lovett, K.C., contra.

GRAHAM, E.J.:—This is an appeal from a Judge of the County Court for District No. 7, dismissing an election petition in respect to the return of a councillor for one of the wards of the town of Glace Bay. The ground, among others, was an alleged irregularity of the town clerk in the preparation of the voters' list. He scored in red ink from the list a number of persons whose names it is claimed should have been left on.

It is helpful to look at the provision of the statute as it was before it was repealed and then at the substituted provision.

R. S. ch. 71, sec. 71, of the Towns Incorporation Act was as follows:—

"Every person resident or rated upon property within an incorporated town shall be qualified to vote at an election for mayor or councillor, who

(a) Is a British subject of the full age of 21 years or upwards (and is registered upon the list of town voters in force at the time of such election), including women on such list, and

(b) Unless by law exempt from taxation, has been rated upon the previous year's assessment, and has fully paid his

rates and taxes of all kind for the previous year at least ten days before the day for nominating candidates."

The following provision has been by Acts of 1907, ch. 56, sec. 1, substituted:—

"Every person shall be qualified to vote at an election of mayor or councillor who

(a) Is a British subject of the full age of 21 years or upwards, and

(b) Is registered on the list of voters of the Nova Scotia Franchise Act, including women on such list, and

(c) Had fully paid his rates and taxes of all kinds for the previous year at least ten days before the day for nominating candidates.

(2) Before delivering a list of voters to a presiding officer for the purposes of an election of mayor or councillor under the provisions of said chapter 71 (the principal Act) the town clerk shall strike off such list by scoring the same with red ink the name of every person who has not complied with sub-section (c) of section 71 of said chapter 71, as hereby amended (i.e., has not paid his rates and taxes), and said list when so corrected by the town clerk shall be filed in the town clerk's office and open to inspection on or before nomination day."

Under this provision the municipal clerk struck off the names of those persons on the Nova Scotia franchise list who had not paid poll taxes for the previous year. While they had not been entered on the assessment roll or the rate book for poll tax the idea then prevailing was that the poll tax was payable whether entered or not against the person on the books, therefore that these persons were in arrear for poll taxes. In the opinion delivered by me in the case of Kelly v. McNeil, 43 N. S. R. 393, an application for an injunction to restrain the town clerk from striking off these names, I combatted that view and advanced this one that unless a person was charged on the roll or rate book with a poll tax that a poll tax could not be collected from him; therefore that he was not in arrear for taxes. I refer to it to avoid repeating the argument here. The injunction was however refused, mainly on the ground that it was not a proper case for one.

The clerk red-lined the names and an election was held on those lists.

The election petition was then filed and the learned County Court Judge puts a construction on the provision different from either view then advanced.

He reads into the Act a provision something like this:

"(c) Had been entered on the rate book as a poll tax payer, and had fully paid his rates and taxes of all kinds."

Therefore that the names were properly struck out by the town clerk, for although they were upon the Nova Scotia franchise list of voters they were not also on the rate book.

I think that provision is not there and it is not to be implied. Something like it was in the provision that has been repealed.

I think that a reasonable construction of the provision is: "Had fully paid his rates and taxes of all kinds" (if any) "for the previous year."

There would be, under ch. 73, sec. 6, a number of persons exempt from poll taxes, members and former members of fire companies, and all persons over 60 years of age. There would be no poll tax against them, and unless that interpretation is adopted their names would have to be struck from the list. The assessor when he goes around finds out the age and the other ground of exemption, and these men are not entered upon the roll and rate book. No poll tax can be levied upon them. But the legislature never intended to disfranchise them. The Nova Scotia franchise list is not wholly made up of those who are either rated or taxed. There are others such as certain tenants where the owner of the land is assessed, and the sons of certain persons who have property although they have not appeared on that list but are not upon any assessment roll or rate book. There are those who are exempt, or exempt to a certain extent, from taxation. There are those who are placed on the list because they derived income but were not assessed for income and would not appear on the rate book. I think that the object of the amendment was to give these persons votes in town elections notwithstanding they were not on the town rate book. And you cannot read into the Act that they must also be on the town rate book as well as on the Nova Scotia franchise list. That list is carefully prepared. Notices are given and revisors add and strike off names and the final list is adopted. The legislature apparently intended that this list was to be used for towns, but

in order perhaps to assist the collection of taxes and disable from voting any delinquent in that respect by a certain date, he was to be struck off by the clerk and deprived of the privilege of voting in towns.

The town clerk is not to add names to the town voters' list because he finds them in his rate books. He simply strikes off delinquents. The entry and payment of a poll tax does not qualify a person to vote. The non-payment of it where one is due disqualifies a person from voting. The learned Judge has admitted that the only evidence the clerk could have as to whether a person had paid his taxes is the rate book. Well, if he finds his name there as not having paid his taxes he strikes out the name. All others he leaves on. They may be exempt from taxes and so on. The franchise list is prima facie the list for the town, but it was to be "corrected" by striking off the delinquent tax payers. Glace Bay, being a mining town, there would be many not assessed or rated who would be legitimately placed on the franchise list under the provisions of the Franchise Act, but whom the assessors do not enter on poll tax. I do not think it is the fault of the person liable to pay a poll tax that he is not charged with one on the rate book. The names could be ascertained by the assessor from the franchise list in many cases if he wishes to charge them with a poll tax. But generally the poll tax is so small a matter that not much trouble is taken about it in some towns, and I think it is not reasonable to disable a person from voting because he has not been charged for a poll tax by the assessor on the assessment roll and the charge entered up from there into the rate book. The clerk in giving evidence, says:

"There are some on the voters' lists which I did not find on the rate or poll books of the town. I red-lined these names."

I have endeavoured to shew that this was a wrong view of the statute.

Then the learned Judge thinks that in order to make the point good the petition should have shewn that these men who were struck off "attempted to poll their votes but were prevented from doing so by the action of the clerk in red-lining them."

That is clearly not so.

The learned Judge makes another point. Under sec. 131 (2) of the ch. 71, it is provided:

"Every voter whose name has been inadvertently omitted by the town clerk may have his name inserted on the list of voters on making application to the town clerk at any time before the close of the poll. And the clerk on application therefor at any time shall give to any person whose name has been inadvertently omitted from the list for any ward a certificate that such person is entitled to be placed on the list of voters for the town ward or polling division, etc."

And the Judge says there was no harm done; the voters could have come in under that provision. The clerk could be induced to give a certificate that they were entitled to vote but were inadvertently omitted when a few days before he had decided that they were not entitled to vote, and that the law obliged him to strike their names off. It would be impracticable to give so many certificates at the last moment, and I do not think that the voters should be driven to any such trouble to secure their votes. That is no remedy.

Then it is contended, and the learned Judge has held, that striking off these names was an irregularity which may not have effected the result of the election. The majority was 82 out of a total of 382. But the learned Judge has ruled out the very evidence which would tend to shew that the irregularity may have affected the result.

On this trial the first evidence the Judge ruled out was the rate and poll books. They would have shewn how many of the persons scored out on the lists were delinquents in respect to payment of poll tax. And if more names than those were scored out whose names were on the franchise list they were, as I have endeavoured to shew, wrongly scored out.

There was admitted in evidence, however, a certified copy of a list prepared by the deputy clerk and on file in the clerk's office, and on comparing the lists it will be found that the clerk has red-lined 343 more names than the deputy clerk had done. And counsel states that he could have shewn that the case of the defence was that the clerk struck off the names on the ground I have mentioned, viz., that they were not in the rate book.

The lists prepared by the clerk are in evidence, and more than 343 names were red-lined, the ground not shewn.

The learned Judge refused to have the deputy clerk sworn.

The case must go back to the Judge of the County Court to enable the petitioner to shew that the persons whose names were red-lined on the lists were not delinquents in respect to the poll tax not having been charged with a poll tax.

I do not wish to be considered as dissenting from the views contained in the opinion of Mr. Justice Russell, which I have seen too late to consider fully, but I do not feel sufficiently sure on the subject to reverse the judgment below without granting a new trial, which is the judgment I have thought should be given.

DRYSDALE, J., concurred.

MEAGHER, J., concurring, was of opinion that the rate book was improperly rejected. If received it might, perhaps would, have supplied a foundation for further evidence tending to shew that the election was not conducted in due course.

LAURENCE, J.:—This is an appeal in a controverted municipal election case from the decision of the County Court Judge for District No. 7, dismissing the petition and confirming the respondent in his seat as a councillor, of the town of Glace Bay. There are a number of objections to the return of respondent alleged in the petition, but the only one on which the petitioner relied at the trial was the illegality of the "list of voters" furnished by the town clerk, and upon which the election was held. Two exceptions are taken to this list:

1st. It was not prepared and on file within the time prescribed by law, i.e., before nomination day, and not until two or three days before election, and,

2nd. That the town clerk in preparing this list, or striking names therefrom, proceeded on a wrong principle under the law by striking off or "red-lining" from the list of voters as prepared by the revisors under the Franchise Act the names of a large number of persons whose names did not appear in the rate book or poll tax book of the town.

As to the first exception the learned County Court Judge held that the statute prescribing a time before which the lists should be prepared was only directory, and I think correctly.

As to the second exception the statute defining the qualification of voters at the time the town clerk prepared the list

in question was as in ch. 55, Acts of 1907, and fixed the qualification of a voter as follows:—

"A British subject 21 years and upwards of age registered on the list of voters under the Franchise Act, and has fully paid his rates and taxes of all kinds for the previous year."

The town clerk has interpreted this provision respecting the payment of rates and taxes to mean that a voter must be on the rate roll liable for some rate or tax and in default as to payment. In carrying out the direction of the statute to strike off the revisor's list of voters by scoring with red ink the name of every person who has not fully paid his rates and taxes of all kinds for the previous year, the town clerk not only so struck off the name of every one on the voters' list and the rate roll who was in arrear for rates and taxes, but also the name of every one on the voters' list whose name was not found on the rate book, although they owed no taxes or rates or were not liable for any and none could be collected from them.

I regard the assessment and rate book as the foundation of a legal liability to pay rates and taxes, and it cannot be said a person has not paid something he is not and never was liable to pay. This, I think, must be also true of poll taxes having regard to the statute, notably ss. 6, 14, 20, 77, 91, 93, 95, 97, 99, 100 to 106, 109, 110.

I think the town clerk was wrong in his view of the statute and should have struck the names off 9 some 300 in number, it is alleged. Were it possible to hold that his view was correct then the list might be a correct and legal list, and that would be an answer to the petition and the decision appealed from could be upheld on that ground. But, as stated, I think the list made up in this way was not a legal list. The petition alleges that the list was bad by reason of this large number of names of persons being so struck off, and the petitioner had a right to shew on the trial that the names were so struck off and how many were so struck off, and the best evidence for this purpose was the rate book tendered in evidence so that by examination and comparison of them with the list so prepared by the town clerk the truth of the allegation of the petition could be ascertained and how many names were struck off. The town clerk in his evidence says:—

"There are some on the voters' list which I did not find on the rate or poll books of the town. I red-lined these names."

How many he means by "some" does not appear, but comparison of the list as completed by the town clerk and given to the election officers with that prepared by the deputy town clerk which had not erased from it the names of the persons I have been referring to, shews that the number of the persons referred to was about 300. More than enough to have possibly changed the result of the election if one fourth of them had voted. This, however, is assumed in the correctness of the McDougall list of which there is no evidence in the case. The only way by which the correctness of the list on which the election was conducted can be determined is by comparison with the rate roll and revisors' lists. I think the learned County Court Judge should not have rejected the evidence tendered, and therefore there should be a new trial and the case remitted back to the said Judge who tried the same.

RUSSELL, J.:—I agree with everything in the opinion of my learned brother Graham, except the conclusion. The clerk, in my opinion, erred in red-lining names appearing on the voters' list because he could not find them entered on the rate book. He had a right to red-line any name appearing on the rate book of a person whose taxes and rates had not been paid. But a voter whose name appeared on the revisors' list could not be disfranchised because his name was not on the rate book. The list prepared for the purpose of the election was prepared therefore on a wrong principle. There can be no doubt about this. He says he found some names on the voters' lists which he did not find on the rate or poll books (meaning, I suppose, poll tax books) of the town—the latter not being, I think, provided for by statute but probably in use as a convenience. "I red-lined these names." If the irregularity was merely that of the accidental omission of a few names it would not be a vital matter, because the petitioner must establish that it was reasonably probable that the result could be affected. But where the foundation of a valid election is shewn to be altogether wanting, as I think it is shewn when the lists are made up on a wrong principle, I incline to the opinion—in fact I have no doubt whatever—that the burden is upon the respondent to shew that the irregularity did not affect the result. If the rate book had been admitted it is stated by counsel for the petitioner that it would have shewn that several hundred qualified voters had been red-lined and thus disfranchised. The majority of the

successful candidate being 82, that result could not have stood. The election must have been declared void the moment it was shewn that this number or more had been improperly red-lined. The only question in the case before us is the one occasioned by the unfortunate rejection of the rate book, but I think there is enough shewn in the case to put the burden upon the respondent who seeks to uphold the election notwithstanding the irregularity. Suppose that this had been an election for a member of the House of Commons and the returning officer had used the wrong lists of voters, could the respondent retain his seat without shewing that the difference between the lists was such as could not have affected the result of the election? I think not. It would be opposed to the common law of parliamentary elections to sustain an election under such circumstances. Statutes have been passed to save elections where the irregularity has not affected the result, but I have always understood that under the statutes the burden is held to rest upon the respondent. See the remarks of Grove, J., in the Hackney case, in which, referring to the argument of Mr. Bowen, as he then was, the learned Judge said:—

"The argument of Mr. Bowen was that the onus probandi that the irregularities in question really affected the result of the election and that another candidate would have been chosen instead of one of the sitting members if things had gone on regularly, rested with the petitioner," plainly indicating that in his judgment the onus was upon the respondent.

In Woodward v. Sarsons, L. R. 10 C. P. at p. 744, Coleridge, C.J., formulates the principle of the common law applicable to parliamentary elections in words which seem to me exactly to cover this case. Referring to the various accidents by which an election may be rendered void, and speaking for the Court of Common Pleas, he says:

"We think the same result should follow if by reason of any such or similar mishaps the tribunal, without being able to say that a majority had been prevented from recording their votes effectively according to their own preference, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate preferred."

The words are chosen with precision, and the verb is italicised in the report. He means exactly was he says, that

if there is reasonable ground for believing, not that the majority has actually been prevented from making its choice, but that it may have been prevented, the common law declares the election void. That surely means that to prevent this result in such a case as the present the respondent must shew that the irregularities did not affect the result. Who can say that if the lists were made up on the principle admitted by the town clerk, and every voter on the revised list was disfranchised unless his name was also on the rate roll, there is not reasonable ground for believing that the result may have been affected by the irregularity? I greatly doubt if there is one of the Judges who heard the appeal in the former case who does not believe that the result would have been different if the proper lists had been used. The evidence then before the Court is not available here. It would be if the learned trial Judge had not rejected the evidence tendered by the petitioner, and I think it is a most remarkable contention for a respondent to make, that because he has obtained from the trial Judge a ruling that has excluded the petitioner's evidence, or at least acquiesced in that ruling, he should ask us to infer against all the probabilities of the case that the excluded evidence might shew that the result had not been affected. The question as to the burden of proof can easily be answered, it seems to me. Suppose that for some reason the rate book could not be produced and that no further evidence could be given than that already before the Court, could the election be sustained? The answer seems to me too clear for argument that in consequence of the erroneous principle on which the lists were made up, disfranchising all the voters named thereon whose names were not also on the rate book, the election would have to be declared void. If this be so the burden was clearly upon the respondent to bring forward some fact that would save it, instead of asking us to infer that the evidence which the petitioner sought to introduce, and which must have been excluded at the respondent's instance, or with his concurrence, might possibly have that effect.

The appeal should, in my opinion, be allowed, and the election declared void.

New trial ordered.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 2.

MARCH 10TH, 1911.

ZWICKER v. PEARL.

Life Insurance—Premium—Failure of Insured to Pay — Payment by Company's Agent on Insured's Behalf—Recovery against Insured.

C. W. Lane, for plaintiff.

D. F. Matheson, K.C., for defendant.

FORBES, Co.C.J.:—The plaintiff sues to recover the sum of $53.10 being the amount of two half yearly premiums on a policy of life insurance applied for by defendant in the Canada Life Assurance Co., of which company the plaintiff was agent at Mahone Bay, Lunenburg county. The defendant applied on September 25th, 1909, for $1,000 of insurance, and after negotiations between the head office and the agent the policy was finally issued on December 17th, 1909, and on February 26th, 1910, the plaintiff paid to the head office the first half year premium of $26.55 and later on in August 1st, paid the second half year premium under the following conditions:—

In November, 1909, the plaintiff drew for the first half year's premium through the Bank of Montreal, and the defendant refused the draft, and again in February or before the 10th February the plaintiff wrote to defendant and enclosed a note for the premium. It is not clear from either plaintiff or defendant whether the note was for the whole or only a half year's premium, but on the 10th February the defendant wrote to plaintiff a letter 3/F. and refused to sign the note, and on the strength of this letter the plaintiff on February 26th, paid a half year's premium of $26.55 and subsequently wrote defendant threatening to collect it through his attorney, if not paid, to this on May 1st defendant wrote B/5 refusing to pay and denying liability and stating he never authorised plaintiff to pay any premium for him.

A number of minor points are raised by the defendant, such as a change of terms of payment of premium from

yearly to half yearly, and a failure to deliver the policy before demanding payment of premium, and another that the policy had lapsed before payment of premium. There is nothing in the first ground that the payment was changed from yearly to half yearly as this was for an applicant's benefit and at his suggestion although in violation of his written application; and the next two points as to failure to deliver the policy and that the policy had lapsed on 17th February or within 60 days after issue and before premium was paid. If I can find that plaintiff was acting as agent for defendant then the policy was delivered as agent, and if the company accepted the premium after the the 60 days had expired I am sure they could compel the defendant to accept the policy as by the contracts the option or right to reject is entirely on the part of the company, and finally the objection is taken that the letters of February 10th, and May 1st, and the one lost do not give any express or implied right on plaintiff's part to pay the premiums for defendant. This claim is founded on an implied promise, as contained in the letter of February 10th, 3/F, on defendant's part to repay plaintiff the premiums if he would first pay the company for defendant. Does 3/F contain an implied promise: Mr. Lane urges the following view of 3/F: "I wish you would oblige me by holding the policy until the end of the present quarter," i.e., this implied, that the plaintiff would pay the premium and get the policy and hold it for defendant, and at the end of the quarter I will pay you. "Circumstances will not permit me to pay that policy just now." i.e., this implies, the defendant will pay it later on, and "I will explain why I have not remitted my payment," i.e., implies my payment due to you again. "I will make it all right when I see you," implies, "I will repay you the premium when I see you if you pay or advance it for me. If this construction can be given to C/F then the plaintiff's claim should prevail, but after looking carefully into the authorities including those cited, I cannot accept that view.

The facts proven on, set out in B/F letter May 1st, and defendant swears to the same effect, that he never authorised payment of the premium, and I must accept this evidence as explaining 3/F which if it can be construed to mean what the plaintiff by his counsel urges, then it is certainly very ambiguous. If the ambiguity is under the last clause "I will make it all right when I see you," then I consider it

latent, and extrinsic evidence is admissible to explain it. The latency consists in the plaintiff using the words as applying to the premuim and the defendant to "examiners' fee" and "money out of pocket."

Leake, on Contracts, says p. 141: "But if it appear upon the extrinsic evidence given of the intention of the parties, that the one party meant one thing and the other party another both equally within the words of the contract there is then a mistake and the agreement as the basis of the contract fails altogether." Again, on p. 217, "extrinsic evidence of the mistake is thus admissible to prevent the contract being enforced against the intention of either party."

It is admitted that the right of the plaintiff to recover for the first half year premium arises solely under 3/F February 10th, my view of that letter is, that the defendant thought he was writing to an officer of the company and he said: "I wish you would not cancel that policy of insurance hold it open for me to pay for up to end of quarter (or March 31st), I cannot pay for it now, but at the end of the quarter I will see if I have any money left. I will tell you then why I have not paid you (meaning the insurance company.) I will make up any loss out of pocket when I see you."

I cannot find an implied promise to pay on defendant's part in the letter at all. Mr. Zwicker very fairly said he construed the letter in connection with a conversation of defendant at the time of the application, but he did not give me the conversation further, than, the defendant said: "he expected to marry the young lady the beneficiary in the policy," and Mr. Zwicker's fair judgment and anxiety to help a friend under such circumstances led him to pay the premium, and then he must fall back on 3/F which does not support him. As to the second premium, I cannot find any promise to pay that as proven at all. The plaintiff's brother very properly says, "my belief is," "I cannot speak positively," "I would not have paid unless the letter authorised me," &c. I can hardly conceive the defendant writing such a letter in face of B/F May 1st. I would like to be able to find in plaintiff's favour as I believe he acted at the time in good faith, but the facts and the law prevent it.

Leake, p. 43: "Accordingly, where a person has voluntarily paid the premiums necessary to keep up a policy of insurance without having any request, contract, or duty or

interest to do so, he can neither recover the amount paid against the owner who takes the benefit of it, nor claim any lien upon the policy for the money paid."

The cases cited here are a good deal more in point than any cited by counsel. I must dismiss the plaintiff's action. Costs will follow the event.

DOMINION OF CANADA.

EXCHEQUER COURT.

APRIL 14TH, 1911.

MOSES L. MORRIS v. HIS MAJESTY THE KING.

Customs Act—Payment of Duty—Confusion of one Bale of Goods with another—Alleged Loss of Bale—Delivery to Carter for Consignee—Affidavit—Admissibility.

CASSELS, J.:—This was a matter referred to the Exchequer Court by the Minister of Customs under the provisions of section 182 of ch. 14, 51 Victoria. The Minister had found Morris guilty of a contravention of the customs laws, and held that the sum of $123.42 deposited as security be forfeited to the Crown as a mitigated penalty, and dealt with accordingly.

It appears that an information had been filed on behalf of His Majesty, the fact that the reference had been made under the statute referred to being overlooked. On the opening of the case, counsel for the Crown moved to consolidate the two cases, and asked that the pleadings in the case of His Majesty against Morris be made the pleadings in the case referred by the Minister. No objection was made to this application, provided that no more costs should be allowed than if only the one case were being proceeded with. The motion was granted, and the matter was proceeded with before me in Montreal upon the papers and evidence before the Minister, and also on further additional evidence produced before me. At the trial I formed a strong opinion in favour of upholding the decision of the Minister. Since the trial I have gone carefully over the evidence and the various exhibits and still remains of the same opinion.

There are certain salient facts in connection with the case which strongly tend to the conclusion arrived at. It is unquestioned that two bales consigned to Morris arrived in Montreal on the steamer "Canada" of the Dominion Line. These bales were numbered M. 773 and L.M. 450. Apparently no invoice had been received for bale No. 450, but an invoice for bale No. 500 was in the possession of Morris. The agent of Morris, Greene, paid the freight of the Dominion Line for two bales; he also paid the customs dues for two bales. It is proved, I think clearly, that bale No. 450 which arrived by the "Canada" was delivered in lieu of bale No. 500. No doubt this was a mistake; but there is no question on the evidence but that the two bales had arrived, one numbered 773 and the other numbered 450, and that both of these bales were consigned to Morris. Number 773 was detained for examination at the custom house, and was delivered to Morris on the 4th September; and the other bale 450 was delivered to Mullaly's carter, one Wallace, on the 3rd September. In his evidence M. L. Morris stated as follows: He is referring to other bales delivered on the 3rd September. He is asked this question:—

"Q. Where did they come from? A. I think they came from the steamship company's.

"Q. Do you know which company? A. I could not say, because we passed entries for sometimes two or three bales, or sometimes one bale, or sometimes half a dozen bales a day. Sometimes we would get three or four bales from the same place. Mr. Mullaly was our carter, and Mr. Mullaly's men would bring them to the store."

Under section 183 of the statute, it is provided that the Court shall hear and consider such matter upon the papers and evidence referred, and upon any further evidence, etc.

Wallace, the carter, who delivered the bale is dead. His affidavit was before the Minister, and he swears to the delivery of the bale 450 on the 3rd September. I quite agree that there having been no opportunity of cross-examination, the statement in the affidavit are not as effective as if the witness had been examined in Court, and counsel for Morris had the opportunity to cross-examine him. He is corroborated by Bushel, who gave his evidence clearly, and I do not think his evidence in any way is shaken by the cross-examination. There can be no doubt, whatever, on the evidence, that these two bales, 773 and 450, were intended for Morris,

but I think 450 was received by Morris. As stated, 773 was delivered on the 4th September. The duty on the two bales had been paid in the latter part of August. The custom dues on the two bales were paid also in the latter part of August. There is no evidence of any application or request by Morris for a refund of the duty paid upon bale 450, which he states was not received. About two weeks afterwards the "Devona" of the Donaldson Line arrived in Montreal and consigned to Mr. Morris on this vessel was a bale number 5 or 500, which corresponded with the invoice given to Greene upon which bale No. 450 had been handed over. Mr. Greene then went to the custom house with the invoice and shewed that he had already paid duty on bale number 500 or number 5, and the result was that this bale 500 was handed over, the duty previously paid on 450 being credited as against this bale. This left bale 450 in the possession of Morris without the duty being paid. The letter of the 3rd October, 1906, asks for an invoice for bale 450. There is no suggestion that the goods in bale 450 had not been purchased by Morris, nor is there a suggestion in the letter that the goods in this bale 450 had not been received by Morris.

Staton, the agent, in the letter which he wrote to Day & Fox makes no reference whatever to any contention that the bale in question had not been received. Their letter is as follows:—

"Dear sirs,—Kindly send this firm a duplicate invoice for goods invoiced August 13th. They claim not to have received this invoice, and there is some trouble with the cartage company. Kindly mark on the invoice 'duplicate.'"

Subsequently Day & Fox were paid by Morris for the goods contained in bale 450.

The contention is raised that sometimes carters were in the habit of leaving bales at the wrong places, and it was suggested that Wallace, the carter, may have left the bale at some other place. It would not, in my mind, affect the case if it were so. The property passed through the custom house, and was handed to Mullaly's carter, and as between the custom house and the Crown the duties were payable on this table, the bale being the property of Morris, whether he received it or not.

I think there is but one conclusion to be arrived at on the facts, and that the application on behalf of Morris should be dismissed with costs.