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NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

BARKER, C.J. AUGUST 17TH, 1909.

FENETY ET AL. v. JOHNSTON.

Contract—Specific Performance—Memorandum of Agreement—Statute of Frauds—Construction of Will—Title—Conveyance by Executors.

A. J. Gregory, K.C., and J. J. Fraser Winslow, for the plaintiffs.

J. D. Phinney, K.C., for the defendant.

BARKER, C.J.:—The bill in this case was filed for the specific performance of a contract for the purchase by the defendant of a certain property in the city of Fredericton known as "Linden Hall," a part of the estate of the late George E. Fenety in his possession at the time of his death in September, 1899. Mr. Fenety left a will dated December 29th, 1895, with three codicils, dated respectively August 26th, 1898, December 9th, 1898, and March 10th, 1899. The will and codicils were duly proved and letters testamentary were granted to William T. H. Fenety, Georgina C. Fenety and Frederick S. Sharpe, the executors and trustees appointed in the will, on the 26th October, 1899. Sharpe died sometime before this transaction arose and the plaintiffs are the two surviving executors and trustees, who are also two of the testator's children. The testator left him surviving four sons and three daughters and his widow,

who is still living. In December, 1907, the plaintiff, William T. H. Fenety, acting with the consent and authority of his co-trustee and mother, entered into negotiations with the defendant for the purchase by him of a portion of the Linden Hall property. Mrs. Fenety, the widow, had continued for some years after her husband's death to reside on this property, but at the time in question she was occupying a house elsewhere in Fredericton and Linden Hall was in the occupation of a tenant. The negotiations in question resulted in an agreement to purchase being made, a memorandum of which was made and signed by the defendant and by the plaintiff William H. Fenety acting for and by authority of his co-trustee and mother. The first question to be disposed of is one of fact. Was there a concluded and complete agreement arrived at between the parties and signed so as to satisfy the Statute of Frauds, and if so what are its terms? The memorandum, of which there was but one copy, which was retained by the defendant, was destroyed by him after he had knowledge and full notice that the plaintiff intended to enforce the contract. The defendant claimed the right to withdraw his offer, as he calls it, when he could not get a conveyance signed by all the beneficiaries, and he says he then destroyed the memorandum as being of no further use. There is, however, in my opinion, no substantial difference between the two versions given of it—one by the defendant, and one by the plaintiff William H. Fenety. The latter in his evidence gives the following as his recollection of it:—

December 13th, 1907.

"Johnston to purchase from Fenety estate property on Brunswick street, 76 x 185, 25 feet to be clear on upper side, 15 feet on lower side; estate to give an unencumbered title; Johnston to hand the estate 25 shares of Toronto Street Railway and 10 shares Fredericton Gas stock—all furniture, including that belonging to Mrs. Roberts, to be removed from the premises. Stock not to be transferred before January, 2nd, 1908.

(Sgd.) L. W. Johnston
Wm. T. H. Fenety."

The defendant in his answer states the memorandum as follows:—

"Johnston agrees with Fenety estate to exchange 10 shares Fredericton Gas Company stock and 25 shares of Toronto Street Railway stock for a satisfactory deed, free

and unencumbered in every way, of the Linden Hall property, so called, with a lot of land 76 x 185 feet, beginning at a point 15 feet east of a line to Brunswick street, parallel with the west side cellar wall line of Linden Hall. The buildings of said lot to be delivered in the same condition as now, nothing to be removed but the furniture of the present tenant and that belonging to Mrs. G. Roberts.

L. W. Johnston.
W. T. H. Fenety."

In his evidence the defendant stated the memorandum as in his answer down to the word "feet." He omitted the clause "beginning at a point 15 feet east of a line to Brunswick street parallel with the west side cellar wall line of Linden Hall," and then proceeded, the "property" instead of "the buildings of said lot," to be delivered, &c. There is no essential difference between these three versions. If there were I should feel at liberty to adopt the plaintiff's version in view of the defendant's destruction of the writing when he knew it was to be made the basis of proceedings against him. Each is amply sufficient to satisfy the Statute of Frauds as a written memorandum of an agreement capable of being enforced. They state the names of vendor and purchaser, the property to be sold and the price to be paid: Catling v. King, 5 Ch. D. 660; Shardlow v. Cotterell, 20 Ch. D. 90.

It is not denied that the parties actually agreed upon the sale and purchase of this property on the terms mentioned in this memorandum which they signed. The defendant, however, sought to shew that this memorandum was not intended as an agreement but merely as instructions drawn out by himself to his solicitor by which he was to be guided in carrying the verbal agreement into effect. It does not seem to me of much importance what particular use the defendant intended to make of this memorandum. The important question is, did it in fact contain the terms of the verbal agreement to purchase, so as to satisfy the requirements of the Statute of Frauds? If it did this is all that the plaintiff requires as to that branch of the case. Before referring to the evidence on this point I shall mention another point strongly relied on at the hearing. It was there contended that it was one of the conditions of the contract that the question of title was to be altogether subject to the decision of Mr. Barry, the defendant's solicitor, so that no question of that kind could ever come before the

Court, Mr. Barry's opinion upon that point, so far as this transaction is concerned, being conclusive upon both parties. It is true that Mr. Barry was acting for the defendant as his solicitor, in the way usual in transactions of this kind, and that the defendant was relying upon his opinion as to the title. Mr. Barry was, however, not to draw the conveyance, or, so far as I can see, do anything which required this written memorandum for his guidance, however useful it may have been. He certainly was not acting for the plaintiffs in any way. I think the defendant's own evidence on this point is directly at variance with his contention. In his direct examination, after telling of their negotiations as to the terms and their final agreement verbally, which seems to have taken place on the 20th December, 1907, the defendant's evidence proceeds thus:—

"Q. Did you tell him (i.e., the plaintiff Fenety) to come in the next day? A. Yes. Q. About what date was that, the next day? A. Well, as I have it in my mind it was the 21st of December. Q. What took place on that occasion? A. Well, I had the securities with me and prior to his coming there. Q. This was in the assessor's office? A. Yes, and prior to his coming there. I had drawn up a memorandum and when he came in I shewed him the securities and shewed him the memorandum and told him that I intended Mr. Barry should investigate the title and pass upon the validity of the deed they would offer and that I had made a memorandum for Mr. Barry's guidance, which was there, which I would like him to read to see if it was correct and he read the paper, and after he had read it, he asked me if he would sign it, and I told him I dare say he might as well, it would do no harm. Q. Did you sign it yourself? A. I had signed it before he arrived. Q. This was a paper of your own preparation? A. Entirely so. Q. You told him Mr. Barry was to pass upon the title? A. Yes, I did. Q. Did he assent to that or make any objection? A. I presume he assented to it; he raised no objection at all. He asked me if the matter was to be entirely in Mr. Barry's hands thereafter and I said it was. Q. Was anything said as to the title being satisfactory to Mr. Barry or words to that effect? A. Certainly, I told him Mr. Barry would investigate the title and pass upon the validity of the deed. Q. Mr. Barry had been your solicitor for a good many years? A. He has acted for me on a great many occasions."

This evidence shews that the defendant had selected Mr. Barry as his adviser, but it altogether fails in proving that it was in any way agreed by the plaintiffs that they were obliged as a part of their contract to furnish a title satisfactory to Mr. Barry. They were no doubt to give a good title and one free from encumbrances, but they never agreed that Mr. Barry should be the sole arbiter by whose decision they were to be bound. This evidence shews that at this time the defendant handed this memorandum of agreement and the stock certificates which were to be handed over in payment, to Mr. Barry, in whose hands, as the defendant said, he left the matter entirely. He said nothing whatever as to Mr. Barry's opinion being accepted. It seems strange that if there was so important a condition in the contract as is put forward, that a memorandum written out for Mr. Barry's guidance in closing up the matter should not have been incorporated in it. On his cross-examination on this point the defendant gave the following evidence: "Q. When this memorandum was drawn you had agreed to exchange this stock for that property? A. Under certain conditions? Q. Under conditions of getting a good title? A. Conditions regarding a title satisfactory to Mr. Barry, my solicitor. Q. There was nothing said in the agreement, this memorandum itself, as to it being satisfactory to Mr. Barry? A. Nothing at all. Q. And that memorandum was drawn up to embody the terms of the agreement? A. It was." It seems that the plaintiff and defendant went to Mr. Barry's office immediately after this memorandum was signed and Mr. Barry thus describes what took place: "I remember the occasion. I have no means of fixing the day absolutely, but I have no doubt it was at the time stated, the 21st of December in the year 1907. Mr. Johnston and Mr. Fenety came into my office, my private office. . . . They came into my own office and Mr. Johnston had a package with him in a brown envelope and told me that he was treating for the purchase of the Linden Hall property and wanted me to search the records and investigate the title and see it was satisfactory in every way, and he left the papers with me. I put them in my safe." (The papers were the memorandum of agreement and the two stock certificates in an envelope) . . . "Q. You say Mr. Johnston asked you to complete the matter and see the title was satisfactory, did he? A. Yes, that is what he came to me for, to investigate the title and see that it was in every

way satisfactory." Mr. Barry says that he drew up a description of the property and made searches at the Record office. He was asked on cross-examination: "Q. Did you form an opinion that the conveyance by the trustees without the heirs joining would be an inadequate or invalid deed? A. I formed the opinion it would be very doubtful. There is a very grave doubt in my mind as yet. I think I would not take a title to-day without it." It will be seen that these instructions given by the defendant to Mr. Barry were nothing more than any one purchasing property usually gives to his solicitor. There is nothing in the conversation to suggest that by his decision the plaintiff was to be bound. I find as a fact that there never was any such agreement at all.

In Hussey v. Horne Payne, 4 A. C. 311, an action similar to this, it appeared that this provision, "subject to the title being approved by our solicitor," was sought to be introduced into a contract entered into by correspondence. In reference to it Lord Cairns says: "I feel great difficulty in thinking that any person could have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it virtually would reduce the agreement to that which is illusory. It would make the vendor bound by the agreement but it would leave the purchaser perfectly free. He might appoint any solicitor he pleased, he might change his solicitor from time to time. There is no directio personarum, there is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitors, at liberty to say from caprice at any moment: We do not like the title, we do not approve of the title, and therefore the agreement goes for nothing. My Lords, I have great difficulty in thinking that any person would agree to a term which would have that operation. But it appears to me very doubtful whether the words have that meaning. I am disposed to look upon them—and the case cited from Ireland would be authority, if authority were needed for that view—I am disposed to look upon the words as meaning nothing more that a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser." See Andrews v. Calori, 38 S. C. R. 588.

Admitting that parties might bind themselves by so one-sided a contract as such a condition would create, it would never be inferred from evidence such as I have quoted, especially where we have the contract drawn up by the defendant himself, "to embody the terms of the agreement," as he says, and it contains no such provision. In addition to this I think this memorandum of agreement signed by the parties and drawn up by the defendant for the purposes I have mentioned is available for the plaintiff as a foundation for this action, though the defendant intended giving it to his solicitor for his guidance in carrying out the agreement of which the signed memorandum was the legal evidence. If two parties negotiate by correspondence and eventually arrive at a point where all the essential terms of a contract have been determined and agreed upon, the contract is enforceable though it appears by the correspondence that it was the intention of one of the parties that the agreement was to be put in due form by a solicitor. Rossiter v. Miller (1878), 3 A. C. 1124.

The defendant, however, says: The title which you offer me is not good; at all events it is not such a title as I can be compelled to accept. In the first place the beneficiaries under the will must join in the conveyance and in the second place there are memorials of judgment on record against one or more of the beneficiaries. As to the first question the evidence shews that a conveyance duly executed by the plaintiffs as trustees, and by the widow and children except one, was tendered to the defendant and he refused to accept it. Though six of the beneficiaries joined in the conveyance it was not because that was necessary, but only in order to meet the wishes of the defendant's solicitor. And the plaintiffs now claim that a conveyance executed by themselves as surviving trustees and by the widow will give a good title to the defendant, free from all incumbrances, and satisfy all the requirements expressed or implied in the contract of sale.

The testator by his will, after making a specific legacy and giving directions as to the payment of his debts, gave to his wife "Eliza A., during the term of her natural life, the household stores, furniture and effects of every description whatsoever, which may be found in my dwelling-house or belonging thereto at the time of my death, as well as all animals, carriages, sleighs, waggons, harness, stable implements, goods and effects contained in and about the barn in connection with my premises, with full power to my said

wife to sell any or all of the above mentioned property." Whatever of this property remained at the death of the widow the executors were directed to sell and divide the proceeds equally among the children then living. The proceeds of any sales of this property by the widow were to be added to the principal sum to be set aside for her maintenance, as is hereafter mentioned, and the income was to go to the widow during her life. Then follows this clause: "I give, devise and bequeath all my other property both real and personal, whatsoever and wheresoever situate, of which I may be seized or possessed or otherwise entitled, to my executors and trustees herein named upon the trusts following, that is to say, (1) upon trust that my trustees will invest (or set aside investments already held by me and yielding interest), such of my property as will be sufficient to yield interest amounting yearly to $1,200, and upon trust that my trustees shall pay the said amount of $1,200 to my wife quarterly during her lifetime for her sole benefit and support, &c." Then follow certain directions as to keeping up this fund so that the annual income may be maintained at $1,200. On the death of the widow this fund was "to be dealt with by my trustees as follows:" Then follows a direction for the trustees to divide it amongst the testator's children. The second clause of the will has reference to the Linden Hall property and is as follows: "Upon trust that my trustees will hold my residence known as 'Linden Hall' and the grounds connected therewith (but not to include the property purchased by me and known as the Grammar School property), during the will and pleasure of my wife, and there she may live as long as she desires, free from rent, she paying one half of the taxes, insurance, water rates and such like—also the paying in full the running expenses in keeping up the establishment, during her occupancy, it being my intention that she may live in her present home so long as she may so wish. If, however, the above property be leased or sold during my wife's lifetime, with her consent, then in such a case I desire, if leased, the rent derivable therefrom shall be used as rent for a home for her to live in and such house is to be as good as one of my present houses situate on College road, Sunbury street, Fredericton, and if after paying such rent with the money received from the rent of the said Linden Hall property, there remains a balance from time to time, this balance shall be added to the principal sum already set aside for my wife's mainten-

ance, the income in the meantime being paid to my said wife. Should, however, the said property be sold during my wife's lifetime, with her consent, the purchase money shall be used as follows: so much of it shall be invested as will yield enough interest to pay rent for as good a house as one of my College road houses, and in such a house my wife may live, such interest being used to pay the rent therefor, and the balance of the said purchase money shall be divided equally among my children then living."

It is clear, I think, from this clause in the will that it was optional with the testator's widow either to continue to reside at Linden Hall or to do as she in fact has done, select a residence elsewhere. If the property was leased she was entitled out of the rents to sufficient to pay the rent of another house, and if it was sold sufficient of the purchase money to produce interest equal to the rent was to be invested for that purpose. In view of these facts and of the special direction that the trustees to whom the property was devised "were to hold it during the will and pleasure of the widow," I should be disposed to think, though it is not necessary to decide that point for the purposes of this case, that the widow had the right to have the property leased or sold, quite irrespective of the wishes of anyone else; she had a right to occupy Linden Hall free of rent; she had a right to abandon it and live elsewhere, and if she did she had the right to have the rents of Linden Hall or the interest of a part or all of the proceeds of its sale appropriated to the payment of her rent. It was impossible for the trustees to carry out these trusts without leasing or selling, and the widow's consent was all that was required.

Section 24 of chap. 160 respecting Wills (2 Con. Stat. p. 1950) provides that "where any real estate shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication." By virtue of this provision the trustees took the fee simple in this property which the testator had at the time of his death. Apart from this it is abundantly clear I think that the testator intended to vest the fee in his trustees as necessary for them to have in order to execute the trusts declared in the will. I have already mentioned those referring to the Linden Hall property, but there

are others. By a codicil to the will the testator directed that the houses built by him in Fredericton bringing in rents should not be sold during his wife's life, but that the rents should be devoted toward her $1,200 a year allowance. This portion of the real estate will therefore form part of the property distributable on the widow's death. Clause 4 of the will deals with the residue of the property, that is what is not specifically devised in clauses one and two, and as to this residue the will provides that it be held "upon trust that my trustees will deal with all the residue of my property—or estate—both real and personal in manner and form following—that is to say, that they shall divide it as fairly as possible into seven equal shares, which shares are to be dealt with by my trustee in the following manner." Then follow specific directions which I may state generally. The trustees, or the survivors, are to pay over to each of the four sons, one share, but if either of them predeceased him leaving children under age then the trustees are to hold the share and pay the interest to the guardian of the youngest child for the benefit of all until the youngest child became of age, when the trustees were to divide it among the children. Similar provisions were made as to the widow of a child who was to have the income for life or during widowhood. The other three shares the trustees were to retain and keep separate—one for the benefit of each daughter, and to pay the annual income to such daughter during life for her separate use. Then followed provisions to be observed in case of the death of a daughter before the testator leaving children, similar to those made in the case of the sons. By a second codicil the testator directs that on the division of the estate property as far as it can be, his three children, G. Linden Fenety, Walter Pierson Fenety and Georgina C. Fenety should be provided for first—that is to say, each shall receive $10,000 as their first instalment, which sums shall be severally paid to them in cash or as otherwise may be agreed upon or as may be most convenient to the executors. The trustees were also empowered to vary and transfer any security or securities they may hold and each of them was only responsible for his own default. The testator also declared that all trusts and powers reposed and vested in the trustees might be exercised by the survivor or survivors of them or the heirs, executors or administrators of such survivor or other the trustees or trustee for the time being of the will.

In Davies v. Jones and Evans, 24 Ch. D. 190, on an application under the Vendor and Purchaser Act for a decision of the Court as to title, Pearson, J., after referring to the rule as laid down by Lord Mansfield in Oakes v. Cook (Burr. 1686), and by Bayley, B., in Anthony v. Rees (2 Cr. & J. 83), says: "Now, in my opinion, there were two things required, one was that the executors were to carry out all the intentions of the testator and another was that they were to distribute the residue of the estate among the wife and daughters in the manner pointed out; consequently the wife and daughters take nothing absolutely, and the only way in which I can give effect to the whole of the will is by saying that the executors must in the first place raise so much as may be necessary for paying the testator's debts and funeral expenses, and after that they are to provide for the legacies, and then to have in their own hands whatever remains and to divide that between the wife and children in the manner directed by the will. I must therefore hold that they had the legal estate for the purpose of the will, and my opinion is that they can make a good title to the purchaser." In that case there was no devise of the property to the executors as there is in this, but it was held that they took the title to the residuary estate, which they were to distribute, that being necessary to enable them to discharge their duty under the will, and having the title they could give a good title to a purchaser. See Young v. Elliott, 23 U. C. Q. B. 420; Collier v. Walters, L. R. 17 Eq. 252.

It is true that this will contains no direction or express power of sale of the real estate. There is, however, a clearly implied power for that purpose. Such a power would be implied when it was necessary for the trustees in order to carry out the trusts imposed upon them. I have already cited the clause as to the Linden Hall property, and that the testator himself considered that he had conferred and intended to confer such a power as to all of his real estate, appears from the codicil to which I have already referred, by which he directed that his Fredericton houses should not be sold or disposed of during the lifetime of his wife, thereby placing a limitation on the power given by the will. In Glover v. Wilson, 17 Grant 111, Strong, J., says: "It is clearly established by many authorities—amongst which may be cited the following—Forbes v. Peacock, 11 Sim. 152 and 11 M. & W. 637, Ward v. Devon, 11 Sim. 160, Tylden v. Hyde, 2 S. & S. 238; Curtis v. Fulbrook, 8 Hare, 25; Wil-

liams' Real Assets, 84, Dart, Vendors, &c., 400, and Sugden on Powers, 118, 119—that where a testator by his will directs real property to be sold, without saying by whom, and the proceeds to be distributed or applied by his executors, they take a power to sell and convey the fee. Now in this informal will, we find a clear though clumsily expressed power to sell in the following words: "Also, it is my will that, when the aforesaid property be sold, that the interest be put to the clothing and schooling of my children and to the support of my wife, so long as she remains my widow," and the proceeds being directed to be applied to maintenance indicates that an immediate and not a postponed sale was intended. Strong, J., then points out how that the executors were to apply the estate and effects, and proceeds thus: "I think, therefore, that Eliza Glover, the testator's daughter, born after the making of this will, is not, either as one of the co-heirs at law or as entitled to the benefit of the trust for maintenance, a necessary party to the conveyance, inasmuch as the executors take a legal power of sale, and I must, therefore, allow the appeal with costs."

In Mower v. Orr, 7 Hare 472, the testator gave his estate, including copyhold of inheritance, leaseholds, merchandise, money in the funds, and cash, to his children and grandchildren, in twenty shares, and directed some of such shares to be invested in the government funds for the infant legatees, and requested his executors on his death to get his property together and divide it, it was held that the will must be taken to direct a sale and conversion of the copyhold estate. There was no devise of the estate or any part of it to the trustees as in the present case. The Vice-Chancellor held that the testator must be understood as directing the conversion of the copyhold estate into personalty. The division of the entire property into a number of shares and the directions contained in the will as to the investment and disposition of some of such shares, precluded the supposition that the testator intended the copyhold should remain unsold—and a sale was accordingly ordered.

In Hamilton v. Buckmaster, L. R. 3 Eq. 323, a bill was filed for the specific performance of a contract to purchase a leasehold house, raising the question whether the executrix, who had entered into the contract, had power to sell under her testator's will. The executors were directed to sell "all his (testator's) stocks, shares, and securities, and such other part of his personal estate as was in its nature saleable, and

collect and get in all money due and owing to him, and all other his estate, and convert the same into money and stand possessed of the proceeds upon trust to pay debts, funeral and testamentary expenses and invest the residue thereof upon the trusts therein declared." After the date of the will the testator became possessed of the freehold house in question. It was put up for sale by the executrix, who, in in the absence of the executor (the testator's heir-at-law) in India, had alone proved the will. The defendant purchased the property but refused to complete the purchase on the ground that the title was defective inasmuch as the will contained no power to sell this freehold property and that at all events the concurrence of the devisee (if any) or the heir-at-law should be procured. Wood, V.-C., said that he never had any doubt that the executrix had power to sell the house and he made a decree in favour of the plaintiff, holding that the words " and all other his estate " included this freehold property. See Flux v. Best, 31 L. T. N. S. 645; Cooke v. Simpson, 46 L. J. Ch. 463.

In all of these cases, and many others of the same kind can be found, it is clearly held that where a testator devises real estate to trustees upon certain trusts so as to vest the absolute interest in them and directs or authorizes a sale of the property, the trustees have the sole power to sell, to convey to the purchaser, to receive the purchase money and give a discharge for it. And if instead of thus devising the estate to the trustees, the testator gives such directions to his trustees as render a sale of the property necessary in order to carry out the directions, the trustees take the estate for that purpose and their conveyance to the purchaser is good. In none of the cases, so far as I have examined them, has the conveyance been executed by others than the trustees. In this present case the testator made special provision for grandchildren under age in case of the death of any of his children dying before him leaving children. If the defendant's contention can be sustained, had such a case happened, this property could never have been sold, as the minors could not have joined in the conveyance and without it the title would be imperfect. The testator's intentions as to his wife's maintenance would have thus been in a great measure frustrated. I have no doubt myself that the trustees' conveyance was quite sufficient to pass the title without the concurrence of any one except the widow to signify her consent to the sale.

The defendant's counsel contended that at least the title offered to the defendant was so doubtful that this Court would not force it on a purchaser; and in support of that contention he cited two cases. One is Francis v. St. Germain, 6 Grant 636, in which the Court sitting on appeal sustained the decision of Esten, V.-C., against the title. The facts of the case were not at all similar to the facts of the present case, and it therefore has no bearing on this case, for no one disputes the general proposition that a doubtful title will not be forced on a purchaser. The other case is Osborne v. Rowlett, 13 Ch. D. 774, and so far as it bears upon the present case is an authority against the defendant. It supports the rule to which I shall presently refer by which Courts of first instance in dealing with this question are bound to decide according to their view, whether they have doubts or not, leaving it to be decided by a Court of Appeal. In that case Jessel, M.R., says: "The case is one which I am bound to decide, as between vendor and purchaser, whether a good title can be made or not." Two or three other cases will illustrate the rule I have mentioned. In Hamilton v. Buckmaster, 3 Eq. 323, already referred to, which was decided in 1866, Mr. Dart, one of the conveyancing counsel to the Court, had given an opinion against the title. Wood, V.-C., said that he never had any doubt that the title was good, but the question was whether the title could be forced upon a purchaser. He says: "With respect to enforcing specific performance against the purchaser it has been contended that, having regard to the difference of opinion between the eminent counsel who have advised upon this title, there is such a reasonable doubt that I ought not to force the title upon the purchaser. But am I to make this estate unmarketable, for that will be the effect of refusing specific performance? If, in deciding in favour of the vendor, I am wrong, my decision can be set right by the Court of Appeal. But if I decide in favour of the purchaser, then I shall be condemning the title beyond the power of appeal, as the Court of Appeal has always held that the simple expression of doubt in the Court below is sufficient to prevent the title from being forced upon a purchaser." The latter part of this passage is scarcely borne out by Beioley v. Carter, 4 Ch. Ap. 230 (1869). The Master of the Rolls, in that case, decided that the title was bad and dismissed the plaintiff's bill for specific performance. Selwyn, L.J., on delivering the opinion of the Court of Appeal,

said: "We have not lost sight of the fact that this is a suit for specific performance nor of the fact that the greatest weight is due to the opinion of the Master of the Rolls, nor of the observations of the Lords Justices in Collier v. McBean (L. R. 1 Ch. 81), in which the danger and difficulty of forcing a doubtful title upon a purchaser are dwelt upon. At the same time it is the duty of a Court of Appeal to form an opinion upon the question of title and to act upon it, as is well expressed by Lord St. Leonards in the case of Sheppard v. Doolan (3 D. & War. 8)." His Lordship then says: "With respect to the common cases of doubtful title, I cannot agree with the proposition that an unfavourable decision in the Court of inferior jurisdiction renders the title doubtful. The Judge of the Superior Court would still be bound to exercise his own discretion, and decide according to his own judgment. I have myself often argued at the Bar in support of the proposition, but always without success; for although I have urged that no Judge could consider a title to be free from doubt when one or two Judges competent to decide the question had pronounced it to be defective, I have been ever met by this answer—that to adopt such a doctrine would be in effect to leave the ultimate decision of the question to the Court below, while the law provides an appeal to the Court above. We therefore consider it to be our duty to decide the case, and in doing so there are two questions to be considered." The Court there overruled the Master of the Rolls and decided the title to be perfectly good and decreed specific performance.

If, therefore, I had doubt as to the correctness of the conclusion at which I have arrived it would be my duty to act on my judgment as in other cases and leave it to a Court of Appeal to correct me if I am wrong.

There was one other objection raised to the title, though on the argument the defendant's counsel did not, I think, mention it. That was as to the memorials of judgment on record against some of the cestui que trusts. These beneficiaries, however, take no interest in this Linden Hall property. It was devised to the trustees with a power of sale and whatever they might eventually receive from the trustees under the trusts of the will as their portion of the proceeds of the sale, they had no interest in the property itself leviable under an execution. See Re Lewis and Thorne, 14 Ont. R. 133.

The result is that in my opinion there was a completed binding agreement for the purchase and sale of this property; that the objections to the title are unfounded; that the trustees' conveyance to the purchaser will pass a good title free from any of these objections, and that the concurrence of the beneficiaries other than the widow is not at all necessary for the validity of the conveyance to which the defendant is entitled. There will, therefore, be a decree in favour of the plaintiffs and a reference as to the dividends received on the shares, &c.

Reserve costs and other questions till report.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

BARKER, C.J. JULY 13TH, 1909

DYER v. McGUIRE ET AL.

Land—Conveyance—Fraud—Stat. 13 Eliz. Cap. 5—Valuable Consideration—Bona Fides.

M. N. Cockburn, K.C. and L. A. Currey, K.C., for the plaintiff.

M. MacMonagle, K.C., for the defendants.

BARKER, C.J.:—This suit was brought for the purpose of setting aside certain conveyances of real estate as having been made to delay, hinder and defeat the plaintiff, a creditor of the defendant Robert McGuire, and which are therefore fraudulent under the Statute 13th Eliz. cap. 5. On the 10th February, 1908, the plaintiff commenced an action at law against the defendant Robert McGuire for the recovery of the sum of $504.58, alleged to be due to the plaintiff for goods sold and delivered by him to McGuire. The action was tried at the Charlotte circuit held in May, 1908, and resulted in a verdict by the jury for the whole amount. The postea was stayed until the first Monday in the Trinity Term following, which was June 3rd. No motion was made for a new trial, and on the 5th June, 1908, judgment was

signed for $764.58, which remains unsatisfied. A writ of fi. fa. was issued to the sheriff of Charlotte county on June 6th, 1908, which was afterwards returned nulla bona." At the time the action was commenced the defendant Robert McGuire owned a house and some land on which he was living, in Saint Patrick, Charlotte county, valued at $900. On the 20th May, 1908, the defendant Robert McGuire conveyed this property to his son the defendant Archibald E. McGuire for the consideration of $900. This conveyance was acknowledged the same day and registered on May 22nd, 1908. That at the same time, that is May 20th, Archibald E. McGuire and his wife executed a mortgage to Robert McGuire to secure the sum of $500 in three years with interest at 5%, accompanied by his promissory note for the same amount and of a like tenor and date. This mortgage was acknowledged by Archibald McGuire on May 20th, and by his wife on May 21st, and it was registered May 22nd. On the 21st May, McGuire assigned this mortgage and the mortgage debt to one Melbourne McMonagle for the consideration of $500. It was acknowledged the same day and registered on the 22nd May. On July 8th, 1908, McMonagle assigned the mortgage and note to his daughter, the defendant Millie I. Hunt, for an alleged consideration of $506.84, the amount then due on it. That assignment was acknowledged July 8th and registered July 9th. The bill alleges that all these conveyances were made without consideration and fraudulently as against the plaintiff as a creditor of Robert McGuire's, and in order to prevent him from realizing the amount of his judgment, and that they are void under the Statute of Elizabeth.

The case set up by way of answer is this. It is alleged that the defendant Robert McGuire was indebted to his son in the sum of $400 for money lent and for work and labour, and that he and his father agreed upon the sale of this house and premises to him for $900, to be paid for as follows: $400 in satisfaction of the debt, and the balance of $500 to be secured by his note and a mortgage payable in three years. Robert McGuire was also indebted to McMonagle in the sum of $154.40 for costs incurred in the defence of McGuire in the Dyer suit, and in settlement of that sum and in consideration of the balance to be paid in cash he assigned the mortgage and note to McMonagle. The evidence shews that

McMonagle on the 21st May, 1908, when the mortgage was assigned to him, gave his note to Robert McGuire on demand for $345.60, the difference between the $500 and his bill of costs. This amount McMonagle swears he paid to McGuire in cash on the 2nd June, 1908, and his note was given up. The evidence also shews that the defendant Mrs. Hunt, who is a daughter of Mr. McMonagle and resides somewhere in Maine, was entitled under her grandfather's will to a legacy of $500. Isaac McElroy the grandfather died in 1890, and by his will, which is dated December 5th, 1890, he gave to his three granddaughters, children of his daughter Mrs. McMonagle, $500 each. Letters testamentary were granted to the testator's daughter Mrs. McMonagle as executrix, and his son William McElroy, as executor. The evidence shows that money for the payment of these legacies had come into the hands of Mrs. McMonagle as executrix, and on her death it came to McMonagle, who became liable to the legatees for the amount due them. He said that he had sometime since settled with the two other daughters by assigning them mortgages, and he settled with Mrs. Hunt in the same way by assigning to her this mortgage and note, which he considered a perfectly good security for the amount. This account is corroborated by the evidence of Mrs. Hunt and there is nothing to contradict it in any way. The case depends mainly upon the evidence as to the indebtedness of Robert McGuire to his son, for I take it to be long since settled by Wood v. Dixie, 7 Q. B. R. 892, and numerous other cases, that a conveyance by way of sale for a valuable consideration will be upheld, although the vendor's object may have been to defeat an execution creditor, provided the sale is made bona fide and with the intention to pass the property. In Whelpley v. Riley, 2 Allen 275, Parker, J., directed the jury, "on the authority of Wood v. Dixie, that the circumstance of Hall (the debtor) selling the hay in order to prevent its being taken in execution on the expected judgments in the suits then pending (no judgments or executions being then in existence), although he then intended to run away from the province, would not constitute such fraud as to deprive him of the power to sell, and thus make the sale void; nor would the knowledge of these facts by the plaintiff (that is the vendee) prevent his becoming the purchaser, and thereby obtaining the property in the hay for a full valuable consideration, although it might cast suspicion on the whole transaction and call for a careful

inquiry into the reality of the bargain and sale. The property was not bound until the executions were delivered to be executed, and therefore Hall, although in debt or even insolvent, might lawfully dispose of it for a valid consideration." This charge was sustained by the full Court. In Alton v. Harrison, L. R. 4 Ch. Ap. 622, the law is thus laid down: "In this, as in all other cases of the same kind, the question is as to the bona fides of the transaction. If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect." Gifford, L.J., adds: "If this appeal were to succeed the result would be that on creditor would be paid in full, and the other creditors entirely left out, which is exactly that which the appellants now complain of as unjust. I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is bona fide, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth." See Dalglish v. McCarthy, 19 Grant 578; Mulcahy v. Archibald, 28 S. C. R. 523.

This is not the case of a voluntary conveyance nor is it the case of a business man in insolvent circumstances making a conveyance of his property in order to defeat certain or all of his creditors. McGuire does not seem to have owed any person but Dyer the plaintiff for the goods, and his son for his work and for money lent, and McMonagle for the costs of his defence to Dyer's action at law. Robert McGuire was not produced as a witness. It appears that in the action to recover the price of the goods, he, by way of counterclaim, set up a claim against the present plaintiff for alienating his wife's affections from him. It seems that McGuire's wife left him a year or two ago and he, rightly or wrongly, attributed it to the plaintiff's influence and charged him with having illicit intercourse with her. The jury found in favour of the plaintiff on this charge and after the trial was ended McGuire was arrested on a charge of perjury as to his evidence at that trial. He was tried and found guilty. A case was reserved as to the improper admission of some evidence and a new trial was ordered. When the present hearing took place he was confined in the gaol of Charlotte awaiting the argument of the case re-

served. He was not sworn as a witness in the present case. The only evidence that we have as to the indebtedness from Robert McGuire to his son is that of the son and his wife. Archibald McGuire the son is about twenty-seven years of age, has been married some three years and has been earning his own living since he was seventeen or eighteen years old. He says that about a month before these conveyances were made, he was living at Woodland, which is, I understand, somewhere in Maine, though not far from Charlotte county, and his father sent for him to go and see him. The father was then living alone on this land in question. Elmville is the name of the place. His evidence then proceeds:—

"Q. Was he there living on the land? A. Yes.

"Q. Had he anyone living with him on the land at that time? A. No, he was living alone.

"Q. What took place at that time between you and your father with reference to this land? A. He told me he was going to sell his place, he wanted me to buy it.

"Q. You said he wanted you to buy the land? A. Yes.

"Q. Go on and state what took place between you and your father about it. A. He said he owed me a little bill and I might as well buy the place, he was going to sell it, he was there alone and he was tired staying there alone, and I told him I didn't have the money just then, and he said I could give him a mortgage for the balance he owed me and I could pay it sometime. I thought it over and agreed to take it.

"Q. How much did he want for the farm in the first instance? A. He told me about a thousand dollars he would let me pay for it.

"Q. Did you agree to give a thousand dollars? A. No, we agreed on nine hundred.

"Q. Then you got a deed of it at that time? A. No.

"Q. How long after that before you got a deed of it? A. It must have been a month anyway.

"Q. At any time before you got the deed of it did you make up a bill against your father? A. He said he owed me he didn't know how much and we made up the bill between us to see how much he did owe me.

"Q. Did you make up the bill? A. Yes."

This conversation McGuire says, and there is nothing to contradict it, took place about a month before the conveyance was made. It must, therefore, have been before

the trial took place, as the verdict was given on the 14th May. He alleges a very natural reason for selling his home —his wife had left him and he was alone. The account which Archibald made up against his father amounts to $400 and consists of six items. The first is for four months work in 1904, $100. There is a charge of $150 for five months' work with him in 1905. A charge of $24 for two weeks' work at $2 a day in 1906. A charge of $48 for a month and twenty-four days' work in January, 1907, and a charge of $37.50 for a month and a half's work in March, 1907. The last item is a charge of $40.50 for money lent. As to this the evidence is not very satisfactory except as to about $20 or $30. But as to the other items, the evidence of Archibald McGuire is positive as to the work being done, and as to the amount there is no suggestion that it is excessive. Mrs. McGuire corroborates her husband's evidence as to several of the items. It is true that the account was not kept in a very regular way, but on the other hand the charges relate to work the particulars of which it is not difficult to recollect. It is also true that $400 seems a large sum for Archibald McGuire in his circumstances of life to allow to accumulate as a debt due by his father. No doubt it is and that is a feature of the case to be considered. The dealing, however, was between father and son—Archibald says that he did ask for his money at times but his father never seemed to have any money. Reliance is also placed on certain admissions which the defendant Archibald McGuire is said to have made to the plaintiff and Mr. Cockburn, his solicitor, in a conversation apparently brought about by the latter. Mr. Cockburn gives this account of it in his evidence: "I told Mr. McGuire, speaking of these transfers, that I considered them all fraudulent and made for the purpose of defeating Mr. Dyer in obtaining satisfaction of his verdict for the judgment which he had then signed, and Archibald E. McGuire said when the property had to pass out of his father's hands, his father had to lose the property, he felt he had as good a right to be paid for his work as Mr. Dyer to be paid for his bill. I said, for what work do you claim you have a right to be paid? And he said, for work on the farm. I asked if his father had ever agreed when working on the farm to pay him wages and he said no, and I asked if he had ever asked or demanded wages from his father during that time and he said he hadn't, and I asked if previous to bringing suit by Dyer against his father Rob-

ert McGuire, had he ever asked or demanded wages, and he said no, and I asked if Mr. Dyer hadn't sued his father and obtained a verdict against him would he have asked for wages or for a deed of the property, and he said 'no, I wouldn't.' I said: 'Archie, this matter will have to be brought up in Court to set aside those transfers, and I hope you will tell the same story there as you are telling now, and he said, I wouldn't tell any other story for I wouldn't tell a lie for the whole thing, and he further asked if the deed should turn out to be a fraud what responsibility he would have in the matter, and I said, 'Archie, you will have to take your chances in that.' I also stated, if he expected to be allowed to hold this property, he would have to satisfy Mr. Dyer's claim. I further stated to him I thought it was rather a poor way for a young man like him to be starting life, to be mixed up in a transaction as shady as I regarded these proceedings." It seems to me that if McGuire's claim is a good one, as I think the evidence shews it to be, his right to be paid is just as good as that of the plaintiff. I never feel much impressed with evidence of admissions brought about as these were, but take them as Mr. Cockburn has given them, what do they amount to? McGuire then, as before and since, put forward his claim for work which the evidence shews to have been done, and his right to be paid for it does not rest on his worrying his father or asking for security.

There is one other piece of evidence given by the plaintiff to which I should refer. One P. E. Mills, a provincial constable living at St. Stephen, went to Woodland, a town in Maine, on the 28th January, 1908, to serve Robert McGuire with an order to appear in this suit. He found McGuire at a house there sawing wood. McGuire was a stranger to him and instead of serving the paper which he went there to do, he engaged in a long conversation with him about the Dyer suit and the transfer of the property. The whole conversation is inadmissible against anyone except himself, and if any part of the case rested upon the evidence of this interview I should not act upon it. It seems that Mills, who, according to his own testimony, has not taken anything in the way of intoxiating liquor for three years, that day took a flask with him, gave McGuire a drink and then gave him the flask. He returned a second time on that day and then served the order for appearance. The same witness arrested McGuire on the charge of perjury on the 14th of

April last, and on their way from St. Stephen to St. Andrews on the steamer "Aurora" a conversation took place between Mr. Cockburn and McGuire which Mills describes as follows: "Mr. Cockburn approached to where we were and entered into conversation with Robert McGuire. He asked Mr. McGuire if his son had paid him anything on the day he received the deed and he said no, he hadn't, that he owed his son for labour performed and for money he had borrowed at various times in small sums as long ago as when his mother was living home, and that he gave the deed to his son for the amount of money, $400, I think he said, and labour the son had done for him, and he received no money at that time, at the time he gave the deed, but that his son had given his note, I think he said for $500, on that day. "Q. What further was stated? A. Mr. Cockburn asked him if McMonagle paid him anything, and he said that he owed McMonagle quite a large bill and that he gave McMonagle the mortgage for the bill and some money, he couldn't remember how much the bill was nor how much money he received from McMonagle." That is evidence given by the plaintiff's own witness on the part of the plaintiff himself. The declaration of the defendant Robert McGuire entirely corroborates the evidence of his son in reference to this transaction.

When the conveyance was made to Archibald McGuire and the mortgage was given back with Archibald's note for $500 and interest, it only paid Archibald's indebtedness and left Robert with a mortgage subject to execution and sufficient to pay the plaintiff's claim less costs. That this mortgage was assigned to McMonagle does not alter Archibald McGuire's position for he had nothing to do with that assignment. It was a transaction between his father and McMonagle in which he had no interest whatever. If that was fraudulent it does not arise here for McMonagle is not a party to this suit.

I think the evidence shews that it was the intention of Robert and Archibald McGuire to pass the estate in the property according to the terms of the conveyance and that it was made bona fide for a valuable consideration and that it was not intended to defeat or defraud the plaintiff, though that is, I think, immaterial. In Harman v. Richards, 10 Hare 89, Lord Justice Turner says: "It remains, then, to be considered whether the settlement, which was thus made for valuable consideration, was also made bona fide;

for a deed, though made for valuable consideration, may be affected by mala fides. But those who undertake to impeach for mala fides a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge."

In Freeman v. Pope, 5 Ch. App. at page 544, Giffard, L.J., says: "I do not think that the Vice-Chancellor need have felt any difficulty about the case of Spirett v. Willows, 3 D. J. & S. 293, but he seems to have considered, that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved —that is, in such cases as Holmes v. Penney (3 K. & J. 90), and Lloyd v. Attwood (3 DeG. & J. 614), where the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, there the intent may be inferred in a variety of ways."

In In re Johnson, Golden v. Gillam, 20 Ch. D. 389, Fry, J., says: "I therefore proceed to inquire, looking to all the circumstances of the case and at the nature of the instrument itself, whether I can or ought to infer an intent to defraud creditors in the parties to the deed. I say in the parties to the deed, because it appears to me to be plain that whatever fraudulent intent there may have been in the mind of Judith Johnson (the vendor), it would not avoid the deed unless it was shewn to have been concurred in by Alice, who became the purchaser under the deed. It has not been contended and it could not be contended, that the mere fraudulent intent of the vendor could avoid the deed, if the purchaser were free from that fraud. . . . It appears plain from the case of Holmes v. Penney, 3 K. & J. 90, that the mere fact of a bona fide creditor being defeated is not of itself sufficient to set aside a deed founded on a valuable consideration." In Mulcahy v. Archibald, 28 S. C. R. 523, already referred to, the Court says: "The goods which were transferred to her (plaintiff) by Wrayton from the proceeds of which the goods levied upon were bought were transferred to her on an account of this indebtedness. No doubt it was the intention on the part of Wrayton to prevent this seizure under the judgment which he expected Blais would very soon recover against him, and for the very purpose of securing his sister at the expense of Blais and with intent either to delay him in his remedies or to defeat them al-

together. The statute of Elizabeth, while making void transfers, the object of which is to defeat or delay creditors, does not make void but expressly protects them in the interest of transferees who have given valuable consideration therefor, and it has been decided over and over again that knowledge on the part of such a transferee of the motive or design of the transferor is not conclusive of bad faith or will not preclude him from obtaining the benefit of his security. So long as there is an existing debt and the transfer to him is made for the purpose of securing that debt and he does not either directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferor, he is protected and the transaction cannot be held void. See also Middleton v. Pollock, 2 Ch. D. 104 at page 108.

Apart from the suspicion which naturally attaches to transfers of property following each other in such close proximity on the eve of a judgment being signed against the debtor, there is nothing in the evidence in this case to shew any fraudulent intent in the McGuires, much less in Archibald, or to shew that the transfers were not made bona fide for the purpose of securing Archibald's debt. To infer fraud so as to defeat these transfers solely from the circumstances under which they were made, and to reject the testimony which has been given on behalf of the defendants as unworthy of credit, solely because it is inconsistent with a mere inference, would be contrary to the recognized practice in judicial investigations, unless the circumstances were entirely exceptional in their character.

The bill must be dismissed with costs.

NEW BRUNSWICK.

BARKER, C.J. OCTOBER 6TH, 1908.

SUPREME COURT IN EQUITY.

NIXON v. CURREY ET AL.

Land—Conveyance to Secure Advances—Mortgage—Payments—Appropriation by Mortgagee—Accounting—Redemption—Sale.

Titus J. Carter, for the plaintiff.

Aaron Lawson, for the defendants.

BARKER, C.J.:—In its original form the bill in this suit was framed with a view of setting aside a certain conveyance made by one William Quint to the defendant Currey, dated February 14th, 1891, as having been made without adequate consideration and as being fraudulent under the statute of Elizabeth. Though this conveyance is absolute on its face it was really given to secure an indebtedness existing from Quint to Currey and a further advance to be made to Quint. For convenience sake I shall speak of it as a mortgage. The expressed consideration is $200 and the property conveyed is valued by the plaintiff at about $400 and by Currey at between $200 and $300. Currey kept a country shop in Carleton county at which Quint was in the habit of purchasing supplies for his family from time to time, for which he paid partly in cash and partly by work. It seems that Quint also became indebted to the plaintiff Nixon, who obtained a judgment against him on the 30th March, 1896, for $239.50, a memorial of which was filed on the 3rd of the following December. The amount of this judgment is unpaid and it is by virtue of the lien created by the memorial that the plaintiff claims the relief asked for. William Quint died May 25th, 1902, intestate, leaving a widow and several children—one of them a son named Alonzo. On the 2nd March, 1903, Currey, for an expressed consideration of $200, conveyed the premises to Alonzo Quint, who at the same time gave Currey a mortgage for $200 and interest. The conveyance to Alonzo Quint has never been registered—in fact the evidence goes to prove that Quint himself destroyed it. The mortgage from Alonzo Quint was registered on the 20th January, 1904. On the 12th June, 1905, the defendant sold or professed to sell under the power in this mortgage. One Alexander Straton became the purchaser. A conveyance was made to him on the 12th June, 1905, and he at the same time conveyed back to Currey. Admittedly this sale was abortive as Straton was acting throughout for Currey and as his agent. Alonzo Quint died on the 28th August, 1906, so the only evidence we have as to the conveyance to him is that of Currey. It is clear from that, that the transaction was merely a means to substitute Alonzo Quint in the place of his father in reference to the property. Currey's evidence on the point is as follows: "Some years afterwards his son came and bargained with me for the place—for the old homestead. I said, "Alonzo, I will tell you what I will do. I will do just as I agreed with your

father; if you give me the $200 he owed me you can have the place." This is a clear notice to Alonzo that although the conveyance from his father to Currey was in its terms an absolute conveyance, it was in fact subject to an agreement that on payment of the indebtedness which he spoke of as being $200, the property was to be reconveyed to Quint. At this time William Quint's equity of redemption was subject to the plaintiff's lien under his judgment. So that if the conveyance from Currey to Alonzo Quint had been recorded the transaction would not have altered the rights of the plaintiff as a second incumbrancer. The representatives of Alonzo Quint who are all parties to this suit do not set up any special interest in the premises—in fact they seem to be willing that all the conveyances should be set aside. When the defendant Currey put in his answer he not only denied all fraud but he set up as a defence that he held the property simply as a security for an indebtedness which then existed and for further advances to be made and which had in fact been made. It soon became evident from the evidence that the bill in its original form could not be maintained and that the sole question of fact which was to be determined was as to the amount necessary to be paid to Currey in order to redeem the property. As the amount involved was small and the value of the property was also small Mr. Currey's counsel waived any objection there might be to amending the bill and treating the suit as a redemption suit, and I consented to take the account in order to avoid the cost of a reference. The bill was therefore amended, and the suit now stands as a redemption suit. As to the account, the evidence is most unsatisfactory in many ways. Quint kept no books and, so far as appears, no accounts of any kind; and except a general statement by his wife as to the work done by him for Currey and which was to go in payment of his indebtedness, there is no evidence on that point except what is supplied by Currey himself. After the mortgage was given by William Quint in February, 1891, Currey went on supplying him with goods and Quint paid him moneys on account, and did work for him. Currey produces an account against Quint; the correctness of it, so far as it goes, is not questioned. It commences November 2nd, 1886, and ends on March 4th, 1896, and the total amount of debits is $693.45. The cash credited during the same period amounts to $224.80, though by an error in the addition, Currey's account as

stated, makes the amount $124.80, or $100 less. This leaves a balance due of $468.65 on the whole account, subject to a further reduction by the value of the work done; and it is in reference to this that the whole dispute arises. As to this part of the case it is to be borne in mind that where a mortgagor seeks to discharge himself from the liability by payment the onus is upon him: Colwell v. Robinson, 23 N. B. R. 69. There are two parts of the evidence which bear upon this point. There are Currey's books in which are entries of times during which Quint worked for him. As I make them out they are as follows:—

In 1891 17 days at $1.00	$ 17 00
In 1892 32 days at $1.00	32 00
In 1893 66¼ days at $1.00	66 25
In 1894 from Dec. 3/93 to July 20/94, less 9 days—say 7¼ months at $20	145 00
	$260 25

Currey says there was more work done than is entered in his books, though, I do not think he had a very correct idea of what was in his books. In addition to the books, Currey speaks of a settlement which he and Quint had as to the amount due him. This took place about a year before Quint's death, and it is admitted that no work was done after that. At that time he says they had the books, went over the accounts, but they had no way of fixing the amount of the work as he had kept no account, thinking that Quint had done so—and he says they then agreed to put the value of the work at $300, and this left a balance due of about $270. This statement is corroborated by the evidence of Mrs. Quint. It is also corroborated by the figures, putting the cash credits as they had them at $124.80, instead of $224.80, as they should be.

Total account		$693 45
Credit cash	$124 80	
Work	300 00	424 80
		$268 65

This balance is only a trifle under the $270 spoken of by Currey, and I think, in the absence of any more precise evidence, I am justified in adopting $300 as the sum to be credited on the account. In other words, the true balance on the whole account after crediting the proper cash payments would be $168.65. As, however, the whole account

was not secured by the mortgage it becomes necessary to separate the two accounts, the secured from the unsecured, and ascertain the balance due on the mortgage. The books shew that the debits on the 14th February, 1891, when the mortgage was given, amounted to $325.25, and the cash paid before that $195.12, leaving a balance of $130.13, which with the value of the advances and less credits on account of work (if any), would represent the principal money secured. It is difficult to tell from Currey's evidence exactly what was intended to be secured by the mortgage in addition to the amount then due, which he says was about $90. It seems fairly certain that the whole amount to be secured was limited to $200—in fact both sides adopt that view—but what was included in the term "advances" it is difficult, if not altogether impossible, to determine. Currey was interrogated on the point by both counsel and according to his answer to me it would rather seem that the advances were confined to supplies furnished in moneys paid distinctly for the erection of the barn. According to his account of the agreement as given on cross-examination, the arrangement was that the advances were not only to include these two sums but also the goods supplied until the time when the barn should be completed, which it was said was two or three years. In the first case the advances, according to the plaintiff's counsel, amount to $34. I confess I cannot tell from the account how this amount was arrived at, but no objection was made to its accuracy. In the second case I assume that the advances would exceed the limit of $200. Seventeen years have passed since this transaction took place, and every person who had any personal knowledge of it is dead except the defendant Currey himself. Instead of taking his security in the ordinary form of a mortgage in which the terms of the agreement were set out, he chose to take an absolute conveyance subject to verbal conditions on the fulfilment of which he was to reconvey the property. If, under these circumstances, he is unable to give positive evidence as to the sum for which the mortgage was to stand as a security, and thus discharge the onus upon him, he cannot complain, if, in taking an account of what is due him on his security, the smaller of the two sums I have mentioned is preferred to the other, as the sum which was originally made a charge on the land. I therefore hold as a matter of fact that the mortgage was to secure what was then due, and the advances which were to be made and which proved

to amount to $34. Irrespective of any work which ought to be credited before the mortgage was given, the mortgage account would stand thus:—

Amount of account to February 11th, 1891	$325 25
Credit cash paid before that.	195 12
	$130 13
Add advances for barn	34 00
	$164 13

It is contended, however, and I think correctly contended, from the evidence, that this sum should be reduced by a further credit for work, as it is clear from the evidence that all of the work was not done subsequent to February, 1891, though Currey's books do not show any memorandum as to work done previous to that date. There is no distinct evidence on this point one way or the other. When the $300 was agreed on as the amount to be credited on the whole account, no distribution of the amount was made as to the sum to be credited before and the sum to be credited after the mortgage was given. We have, however, Currey's evidence in which he swears that when the mortgage was given Quint owed him about $90. That sum could only be arrived at by crediting the account with $40 on account of work, reducing the $130.13 down to $90, and reducing the work to be credited afterwards from $300 to $260. The true amount due on the mortgage as I find it is $124.13. In stating this I have not allowed any interest. I have made no allowance for profits for the year during which it is said Currey was in possession, and I have credited the $260—the value of the work done subsequent to the mortgage—in payment of the unsecured part of the mortgage. As to the first I think the account was not an interest-bearing account, and was never so treated by either party, and the agreement, when the mortgage was given, was that on the payment of the debt, the property would be reconveyed to Quint: Thompson v. Drew, 20 Beav. 49.

As to the second point there is no evidence upon which to base any finding. It does appear that Currey took some hay, but there is no evidence either as to value or amount. As to the appropriation of payments the rule is well established that a debtor owing several debts has in the first place the option of ascribing a payment which he makes to

any of the several debts as he may think fit, the rule being "solvitur in modo solventis." The debtor must, however, make the appropriation at the time of payment, and if he fails in doing this, the creditor may appropriate the payment to any part of the indebtedness he chooses, and such appropriation need not be shown by any specific act or declaration, but may be inferred, as any other inference may be made, from facts and circumstances: City Discount Co. v. McLean, L. R. 9 C. P. 692; Mills v. Fowkes, 5 Bing. N. C. 455; Stevenson v. Ingham, 2 B. & C. 65; St. John v. Rykert, 10 S. C. R. 278, per Strong, J.; Mayberry v. Hunt, 34 N. B. R. 628.

While the creditor cannot recede from an appropriation once made, his right to appropriate exists up to the last moment, or, as it is said in Philpott v. Jones, 2 A. & E. 41, up to the time the case goes to the jury. This is not a case where, in the absence of any appropriation by either party, the law will appropriate the first payments to the earliest indebtedness. It is not pretended here that Quint ever made any appropriation, and at the hearing, and so soon as any question of this account arose, the defendant Currey has claimed the right to appropriate the payments first in liquidation of the unsecured account, that is to that part of the whole account not covered by the mortgage security. There is nothing in the evidence to show any other or any different appropriation than this one, which is the most natural and reasonable appropriation to be made. That part of the account not secured by the mortgage is as follows:

Amount of account subsequent to February 14th, 1891, less the $34 included in the mortgage account		$334 20
Cr.		
Cash paid subsequent to February 14th, 1891	$29 68	
Cash by work	260 00	
		289 68
Balance due on open account.....		$44 52
" " mortgage		124 13
" " all accounts		$168 65

The amount due the plaintiff on his judgment is $239.50, and interest on that amount since March 30th, 1896.

The defendant Currey must have his costs after answer, added to amount due under the mortgage.

The plaintiff will have the right to redeem in three months. Ordinarily the order would be that in default the bill would stand dismissed without costs, but under the peculiar circumstances of this case and the parties wishing a sale, there will be a sale in case the plaintiff fails to redeem: Hallett v. Furze, 31 Ch. D. 312.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

BARKER, C.J. OCTOBER 6TH, 1908.

PICK v. EDWARDS ET AL.

Practice—Exceptions to Answer—Costs.

William B. Chandler, K.C. for the plaintiff.
Peter Hughes, for the defendants.

Exceptions to answer.

BARKER, C.J.:—The first exception arises out of an answer to the sixth interrogatory, in which the defendants were asked as to whether or not on or about the 16th of October, 1906, or on some other or what date, and immediately before the hearing in a certain suit between the same parties, a conveyance was made by one Isabella L. Murray and the defendant Alice Edwards. The defendants state their belief that a conveyance of that date was made, but they do not state whether or not this was immediately before the hearing in this other suit. It is objected that the answer is insufficient inasmuch as whether such a conveyance was made or not is a fact within the personal knowledge of at least one of the defendants, the plaintiff is entitled to distinct admissions of the fact, and that a statement of mere belief in such a case is insufficient. It is unnecessary for the decision of this case to express any opinion on that point. The real question involved in exceptions to answers is whether the defendants have substantially and fully answered the interrogatory. I think these defendants have done so. In the first place we have their belief that the

conveyance in question was made, and it is, at all events, the general rule that the defendants' belief will be as against them accepted by the Court as its belief. But in addition to this in another part of the answer the conveyance is set out at length. And as to the question whether or not it was made immediately before the hearing in the other suit, it is stated in the answer this hearing was adjourned from October 2nd, 1906, until the 30th of the same month. The rule as laid down in Reade v. Woodrooffe, 24 Bea. 421, is, that where the substantial information is given, though not strictly and technically, it is sufficient when there is nothing to suggest that the defendant is seeking to avoid giving the information. I think this exception must be overruled.

I think the other five exceptions must be allowed. The answers to which they are directed are altogether insufficient.

The first exception will be overruled with costs, and the others allowed with costs. The clerk will tax the costs of both parties and deduct the one sum from the other and certify the balance due, which balance is ordered to be paid as certified. The defendants will have thirty days after settling minutes of this order to put in amended answer.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

BARKER, C.J. MARCH 2ND, 1909.

MORRISON v. BISHOP OF FREDERICTON ET AL.

Will—Construction—Trusts—General Intention of Testator —Costs.

Albert J. Gregory, K.C., for the plaintiff.

Havelock Coy, for the University of New Brunswick.

H. B. Rainsford, for Mrs. Bliss et al.

J. Fraser Winslow, for Bishop of Fredericton et al.

R. B. Hanson, for Miss Fisher et al.

BARKER, C.J.:—The position of the several estates whose affairs are involved in this suit is so entirely exceptional, and the directions and decree which I am about to announce are based to so large an extent upon compromises and mutual concessions altogether unavoidable under the circumstances, that it must not be regarded as a precedent. The property belonging to the estate of Miss Fisher and her sister Mrs. Fraser, seems to have been at the time of Mrs. Fraser's death in such confusion and uncertainty that, without explanations, which there was no living person to give, it was impossible to tell how these two estates stood in relation to each other. Those who are interested are, I think, indebted to the counsel, through whose good sense and judgment the conclusion embodied in the referee's report on the questions referred to him, and upon which, I understand, all parties are agreed, were arrived at.

There are two or three points upon which I am asked to give directions, upon which I shall make a few observations indicating in a general way my reasons for giving the directions contained in the decree I am about to pronounce.

In the first place as to the legacy to Madeline Fisher by Miss Fisher. The direction in the will is "that the sum of twenty dollars per annum be paid annually to Madeline Fisher, daughter of G. Frederick Fisher, formerly of Fredericton, now deceased, as long as she lives and remains single." It is admitted that this lady was a near relative of the testatrix, a cousin I think, that she had been in the habit of visiting the testatrix; that she had been married, but before the date of the will had been divorced a vinculo. This fact was well known in Fredericton where the testatrix lived, and there seems to be no doubt that it was known to the testatrix. She had not been married again. I think she is entitled to her annuity. She certainly was not married, and was therefore single because she was free to marry. "Single," as the testatrix used the word, means that the legatee was to have the annuity "until she married."

As to the Doherty mortgage. Mrs. Fraser's will contains the following clause: "I release, and direct my executors to cancel, without collecting the money, the mortgage to me from John Doherty." There is clearly a mistake in the name, it should be William Doherty. Parol evidence is admissible to correct such a mistake: Smith v.

Coney, 6 Vesey 42; Doe d. Cook v. Danvers, 7 East 299. The evidence shows that the testatrix held no mortgage from John Doherty, but she did hold one from William, and there was no John Doherty known in the vicinity.

The other and more difficult question arises out of the provisions in Mrs. Fraser's will, providing for the establishment and maintenance of "Fanaline Place," her late residence, as a home for old ladies. The provision in the will is as follows: "My property on Queen street, known as Fanaline Place, I leave upon trust to E. Byron Winslow, executor, and Frances A. Fisher, executrix, to be held by them for such purposes as may be mentioned herein, or in any memorandum of directions which may be signed by me now or hereafter. I desire that the house called Fanaline Place be rented, and after deducting from rent such money as will be required to pay all necessary taxes, insurance and repairs, the residue of the money accruing from the rent be placed from time to time in savings bank to accumulate, or invested in some way as may be deemed best by my executor and executrix, for purposes hereinafter mentioned in this my will. And after the decease of my sister Frances I do will and bequeath my house known as Fanaline Place and all the land fenced in around it, to the city of Fredericton, upon trust to be used entirely and altogether as an old ladies' home, and known as the J. J. Fraser Fanaline Home, in memory of my dear husband, subject to conditions and directions set forth in this my will, or in any memorandum of directions in reference thereto which may be signed by me at the time of making this my will, or in any future or additional memorandum of directions which may at any future time be signed by me. And I hereby declare and direct that each and every of such memorandum shall be as valid and effectual for the declaration of such uses, purposes and interests as if the same had been incorporated in and made part of this my will, or contained in a codicil or codicils thereto." Then follows a provision for the payment to her sister Frances during her life of $500 a year out of the income of her bonds, mortgages and other property, except Fanaline Place, and the will then proceeds thus: "And I further direct that whatever further interest may be obtained from the aforesaid bonds, mortgages, bank shares or whatever other source, shall be taken from time to time by my executor and executrix and placed in savings bank, with rent money aforesaid, and left to accu-

mulate till after decease of my sister Frances, when I will, bequeath and devise all bonds, mortgages, bank shares, or from whatever source belonging to me, interest may be drawn to the city of Fredericton upon trust, the interest to be used as a fund, the principal in no wise to be touched, to go towards the maintenance and keeping up of the Home for Old Ladies, called the J. J. Fraser Fanaline Home, and I further hope and humbly pray that the government will grant a sum sufficient for the full maintenance of the Home." Between the date of this will and the codicil, which is dated October 20th, 1907, Mr. Winslow and Miss Fraser, who were named executor and executrix, both died. The codicil makes the following provision:—"All the residue of my estate given to the city of Fredericton by the said will, I give and bequeath to T. Carleton Allen and J. Albert Gregory, both of the said city, barristers-at-law, in trust, for the purpose of founding an institution to be called the J. J. Fraser Fanaline Place for a home for old ladies, and for that purpose to execute a deed of settlement containing such provisions and regulations and appointing such trustees, including themselves, if they see fit, as they shall consider expedient, at which home I direct that the said Sarah F. Bliss shall have a comfortable living for her life." Mrs. Fraser in the same codicil gave Mrs. Bliss a legacy of $200 which has been paid her.

It turns out that the funds applicable for the establishment of this Fanaline Place Home are at present inadequate for that purpose. The net annual interest of the fund will probably not exceed $600. The testatrix seems to have had that idea in mind, for she expresses the hope and prayer that the government will grant a sum sufficient for the full maintenance of the Home. Until, therefore, the fund shall of itself have accumulated sufficiently or been augmented from other sources, some portion of the public, who would otherwise have benefited by the institution, must be disappointed. Does that, however, apply to the particular case of Mrs. Bliss? I think not. She is now nearly eighty years of age, and there is, I think, a clearly expressed intention in this codicil, made by Mrs. Fraser only two days before her death, that Mrs. Bliss should have a comfortable living at this Home for the rest of her life. In cases like the present, in administering the trust, the general intention of the testator will not be allowed to be defeated by the failure of the particular

mode prescribed for effecting it. It is true that the living with which it was supposed Mrs. Bliss would be furnished was one as a resident of this Home. But is she to have none at all because the fund is at present insufficient for the full purpose for which it was intended and will likely remain so until after Mrs. Bliss's death? Should the intention of the testatrix as to Mrs. Bliss, to whom she gave a prior right to the benefit of this fund, be defeated either because for want of money the Home cannot at present be carried on as intended and support furnished for more than Mrs. Bliss herself, or because the living cannot be furnished in the particular house intended for the purpose? I think not. This Court, in such cases, will see that the charitable wishes and intentions of the testator are not thus defeated. If a sum is allowed her for her living until the Home is established, not in excess of the cost of furnishing her a living in the Home, if it were in operation, the fund will not have suffered, and the object of the testatrix will have been accomplished: Biscoe v. Jackson, 35 Ch. D. 460; Re Davis Trusts, 61 L. T. N. S. 430; Incorporated Society v. Price, 1 J. & La T. 498.

Ordinarily the matter would be referred for inquiry as to the amount, but it is unnecessary to incur that expense here. I shall fix the sum at $300 annually, and the trustees will pay that sum annually to Mrs. Bliss during her life, or until she be furnished a living at Fanaline Place, when established as a home for old ladies under the trusts of the will.

The costs of all parties will be taxed and paid one-half by the plaintiff out of the estate of Frances Fisher, and the other one-half by the executors, etc., of Mrs. Fraser out of her estate.

EXCHEQUER COURT OF CANADA.

APPEAL FROM NOVA SCOTIA ADMIRALTY DISTRICT.

SEPTEMBER 7TH, 1909.

ISAIAH WATTS, ET AL. v. THE SS. "JOHN IRWIN."

Admiralty Law—Collision—Evidence—Liability.

The case in the Court below is reported at p. 7, *ante*, to which reference is directed for the facts. The trial Judge dismissed the action.

A. G. Morrison, K.C., for appellant.
H. Mellish, K.C., for respondent.

CASSELS, J.:—This is an appeal from the decision of Mr. Justice Drysdale, Local Judge in Admiralty at Halifax. The appeal was argued before me at Halifax. By consent of both parties, Captain Neil Hall was requested to sit with me and hear the appeal as nautical assessor.

The appellants' case was forcibly argued by Mr. Morrison, K.C.

Captain Hall made his report, which reads as follows:—

"Having been requested to act as nautical assessor herein, and after hearing with your Lordship the argument of counsel both for plaintiffs and defendant, and after carefully perusing all the evidence, I am of the opinion that the evidence goes to shew the night was dark, the sky clear, and the wind blowing a stiff breeze northerly. Under such circumstances lights should be seen their full range.

"The steamer 'John Irwin' going down Halifax harbour, sights a green light on his port bow, which after proved to be the starboard light of the schooner 'Regina B.' Ordinary precaution seems to have been taken by the steamer 'John Irwin' to clear the 'Regina B.'

"I do not think the 'Regina B.' could have been west of the middle ground buoy that night, or he must undoubtedly have seen the green light of the 'John Irwin.' The crew of the 'Regina B.' say they saw the red light of the 'John Irwin' at the time of the tacking west of the middle ground buoy, and continued to see the red light till just before the collision. This I cannot believe to be correct.

"In regard to the 'John Irwin' porting his helm and going full speed astern, it was the only action he could take in the emergency, and in my opinion the 'Regina B.' tacked almost under the bows of the SS. 'John Irwin.'

"For the above reasons I find the schooner 'Regina B.' in fault."

I have, since being furnished with this report, carefully considered the evidence and documents adduced and produced before the trial Judge.

To a great extent the question involved is one of disputed fact. I think the trial Judge arrived at a correct conclusion on the evidence adduced, and I agree entirely with his carefully considered finding, and also with the conclusions of the nautical assessor.

The appeal is dismissed with costs.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 2. MARCH 18TH, 1909.

CHARLES ABRAMS v. WILLIAM RAFUSE.

D. Frank Matheson, for plaintiff.
McLean, K.C., and Margeson, for defendant.

Sale of Goods—Action for Recovery of Price—Set-off—Jurisdiction of Magistrate—Appeal.

FORBES, CO. C.J.:—This action comes to this Court by way of appeal from a Stipendiary Magistrate's Court for the county of Lunenburg. Briefly, these are the facts: On the 19th November, 1908, Abrams sued Rafuse in Justice McGuire's Court for $39.75, the price of four mink skins, two fox skins and fifteen muskrat skins. The defendant filed an offset for meals supplied to plaintiff and for six watches and ten chains sold plaintiff, valued all at $55.40. After trial judgment was given for plaintiff for $39.75 and costs, $2.45, making $42.20. The defendant has appealed. On the hearing of the appeal the plaintiff's solicitor urges that the set-off is not proven and if it is that it cannot be allowed because, under secs. 36 and 37, chap. 156, County Courts Act, the party who divides his claim for the purpose of giving jurisdiction to a Court does thereby abandon the balance of his claim unsued for, and the facts proven before me are that the defendant Rafuse, on November 11th, 1908, sued the plaintiff Abrams before Justice Corkum, J.P., at Petite Riviere, for a balance of an old account of $19.98, while at the same time and since April, 1908, the plaintiff Abrams has owed the amount of the set-off in this appeal suit. The evidence given before me on this appeal proves the sale of the skins sued for by the plaintiff by one witness to the plaintiff's sale, and the defendant proves his off-set of six watches, and ten chains, by himself and two supporting witnesses, and in fact the plaintiff does not deny the sale of the watches himself. As to the $5.40 claimed by defendant for price of nine meals to self and horse, I do not allow these as the wife of defendant swore she never intended to charge for them. The defendant does not keep an inn or hotel, but on this occasion they entertained friends during

the keeping of a religious feast according to the Jewish practices. There was no admitted or implied contract and the defendant cannot recover for the meals. But as to the item of $50 the evidence establishes to my mind, and I find, that the defendant submitted his whole claim or plaint against the plaintiff, including the items now forming the set-off, to Edward Corkum, J.P., for suit, and the Justice reduced the claim so that he could get jurisdiction, without the knowledge or consent of the defendant, and the question now is, under such a state of facts, did the defendant abandon that portion of his claim not sued for before Corkum, J.P.? The authorities on the point are very conflicting. There is not very strong or satisfactory evidence of the suit before Corkum, J.P.; the summons is produced, but not proven, the account B/F is proven, and plaintiff swears it is the account sued for before Justice Corkum. I think the account is well enough established, and the account does not show the set-off to have been included in the suit. I have examined the authorities cited, and while they support the principle of common law that a party cannot split up his claim so as to get jurisdiction in one Court without abandoning the balance not sued for, yet there are many exceptions. The Justices' Court has no such statute as s. 36, s.-s. 2 of the County Court Act, and nearly all the English cases are based on English statutes. In Bath v. Dennison, 12 N. S. R. 303, the action was in the County Court, and under a very strict rule like 36 or 37 of the County Court Act probably the trial Judge would have decided differently, but ss. 36 and 37 came into the Act in 1889, and Bath v. Dennison was heard in 1878. But this latter case only decides that the plaintiff's claims on instalments on a bond were not divisible, and, if united, the Court had no jurisdiction. It was so decided.

Avards v. Rhodes, 22 L. J. Ex. 106, also cited by the plaintiff, is along the same lines and this case supports Vines v. Arnold, 8 C. B. 632, where it was held "that the levying in a County Court of a plaint for a sum less than £20, being part of a larger demand exceeding that amount, is not per se an abandonment of the excess." Again under Hill v. Swift, 10 Ex. 726, 24 L. J. Ex. 137, it was held that abandonment of the "excess above £50 of the claim of a plaintiff in order to give the Court jurisdiction under c. 95, s. 63 of 9 and 10 Victoria, etc., must be the act of the plaintiff himself or some person authorized by him and not

the act of the Judge. The case of Bagot v. Williams, 5 D. & R. 87, was a case of the voluntary abandonment by plaintiff himself, and after final investigation of defendant's accounts and suit by plaintiff, it was held that the first action was a bar to a suit for any balance.

Under the authorities cited and in the absence of any such Act as s. 36 and s. 37 of C. C. Act, binding the Magistrates' Courts, I must and am compelled to come to the conclusion that the set-off of $50 is good and well pleaded and proved in this Court, and should have been received in the Court below. Perhaps it was not proven below, as all I know is that the set-off was filed and not allowed. The defendant will recover judgment on his counterclaim for $10.25, which he should have recovered in the Court below, and the appeal is allowed with costs to defendant in both Courts.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 2. MARCH 27TH, 1909.

JAMES BURKE v. DAVID VEINOT AND ARTHUR VEINOT.

Contract—Sale of Horse—Warranty—Promissory Note—Failure of Consideration.

D. Frank Matheson, for plaintiff.

McLean, K.C., and Margeson, for defendants.

FORBES, Co.C.J.:—This action is brought to recover the sum of $35, amount of a promissory note made by the two defendants to plaintiff as a difference or amount of boot given to plaintiff on a horse trade by David Veinot and the plaintiff, the defendant Arthur Veinot having joined in the note at the request of both the other parties. No defence is made to the plaintiff's suit on the note, and he will have judgment against both of defendants on his suit on the note with costs, but the defendants counterclaim for damages on a breach of warranty of the horse given defendant David, and the plaintiff's reply against denial of the warranty and that the horse died from abuse and neglect and cruelty by the defendants. The facts shew

the plaintiff was a professional horse trader, and the defendants were not. Also that the defendant Arthur had no interest in either horse, and has no right of counterclaim against plaintiff, and his claim will have to be dismissed with costs if any are incurred by plaintiff against him separate from the other defendant. Also it is proved that Burke approached David Veinot to make a horse trade which was finally agreed on by the parties on the 23rd December, 1907, when Burke gave a horse called "Billie" in exchange for another horse, and a note for $35, signed by the defendants, which is the note plaintiff sues on, and at the time of the trade Burke admits he told the defendants his horse "was a good driving horse and went free, but he went lame on his spavin," and I find he also said to defendant at the time of the trade that his horse "Billie" was a good roader and had one spavin, and outside of that he was thoroughly sound and was 9 years old. These representations are established by the evidence of the two defendants, and except for the representations as to age the statements are not denied by plaintiff Burke. "Although a person may disclaim against making a warranty of a horse, yet if he give him a character for a particular quality as by saying he is quiet in harness and do it in such a way as reasonably to make an impression on the mind of the buyer, he will be bound by that representation and if not true an action will lie to recover back the price of the horse."

Hart v. Newry, 1 L. J. (O. S.) K. B. 237.

"A verbal representation by the seller to the buyer in the course of the dealing that the horse is quiet and free from vice is a warranty."

And if the seller warrants the horse, he does so at his peril if the horse was unsound at the time of the sale, "whether he knew it or not."

The horse was bought on the 23rd December, and then driven 5 miles. The horse was not a good roadster as he walked about all the way. He pulled 3 young men in a carriage, and bad roads and careful driving may account for the long time, but the next day he was driven 8 miles to New Germany in 4 hours and he fell down twice on the way, and in the evening he was driven 4 miles back on road home to Dorey's, and at every opportunity the horse would lay himself down as soon as stalled and have to be helped up on his feet; he could not be driven at a trot or beyond a walk, and I find he was not a good roadster or a good driver as

represented. The plaintiff only drove him once before he sold him to defendants; he had the horse two weeks and once Burke's wife drove him to a funeral. The plaintiff gives no satisfactory evidence by himself or any witness of the good roading qualities of the horse and in fact on cross-examination, plaintiff says the horse should not have given out on 24th, (day after he was sold), "unless something was wrong with him." The evidence shews the defendant fed and cared for the horse well. Counsel for the plaintiff asks me to hold that the defendants overdrove and underfed the horse. I would be only too glad to find that way and to punish the defendants, if I had the evidence to warrant such a finding. The evidence shews the horse was not a good roadster or driver at the time plaintiff sold him to defendants. The horse was not a sound horse except for the spavin at the time of sale by plaintiff. The horse developed a running at the nose the very next day or two, which one witness (Robar) swore indicated glanders. Evidence shews the plaintiff knew the horse was an old one, and that he let the horse stand in a rain storm hitched to a fence on the 23rd December, while his wife attended a funeral. I have no evidence to shew the horse was covered or rugged in any way that day. One witness swears a horse is unsound if he has a cold, as it may lead to glanders or worse. The plaintiff says horse had no cold on 23rd, or running nose; it is possible or reasonable that the cold did not shew or develop till after the sale, but I am bound to find from the evidence, that a cold did develop and from exposure happening while plaintiff owned the horse. The horse was evidently a sick horse or rather an unsound horse at time of sale, or he would not lay down in his stall on every occasion and get up with such difficulty as the evidence shews. I have not any evidence to shew neglect or ill-treatment between time of sale on 23rd, and first development of unsoundness on 24th and 25th, and it was possible for the horse to be ill and unsound and plaintiff not know of it, and yet plaintiff be liable whether he knew of it or not if he gave a warranty at time of sale. The defendant brought back the horse to plaintiff on 28th, and asked for his note to be given up. The plaintiff says the defendant brought the horse to him on the 28th, and tried to sell him back to plaintiff for $35. Why does the plaintiff give this version when the two defendants deny it, and at once publicly protested the note. The plaintiff says he then tried to

get rid of the note to several people and failed to do so, because of the protest published. I do not believe the testimony of the plaintiff and I think he traded off an unsound horse on defendant at the trade on December 23rd, 1907. I so find. No damages were proved before me except the giving of the note for $35. I find the plaintiff makes no claim for interest on the note, so the plaintiff's judgment would be for $35 only, and I allow the defendant David Veinot damages on counterclaim to amount of $35 and costs, and one shall be off-set against the other and judgment entered for the difference.

NOVA SCOTIA.

SUPREME COURT. JULY 12TH, 1909.

TRIAL.

DEAN v. McLEAN.

Promissory Note—Part Payment—Action for Balance Due—Defence of Illegality of Consideration—Sale of Shares on Margin—Criminal Law—Code, sec. 231.

Action on a promissory note.

R. G. McKay, for plaintiff.

G. A. R. Rowlings, for defendant.

GRAHAM, E.J.:—This is an action on a promissory note dated April 10th, 1906, payable one year after date, for $812.40. It was a renewal of a former note made in 1904, payable 2 years after date. The original note was given to the defendant as the result of a compromise of a claim which the plaintiff had placed in the hands of his solicitor for collection from the defendant, some $1,300 claimed to have been loaned to the defendant by the plaintiff.

There have been small sums paid from time to time on the note in action, but that fact is not material.

The defence now raised to the action is that the money loaned was lent to the defendant with knowledge that the de-

fendant was about to use it for an illegal purpose. The illegal purpose was an alleged violation of a statutory provision, now section 231 of the Criminal Code. That is aimed at making a contract purporting to buy shares without the bona fide intention of acquiring the shares with intent to make gain by the rise or fall of the shares.

The transaction was in respect to 40 shares of the Dominion Coal Company in respect to which the defendant had made a deposit by way of margin, with one Ross Cameron & Co., correspondents of Curtis & Sederquist, of New York, of the sum of $200 which the defendant had to his credit in connection with a transaction in Union Pacific shares.

This loan consisting of three sums was paid in as follows: August 3rd, 1903, $500; August 7th, $300; August 22nd $500, and were required by Ross Cameron & Co. as further deposits by way of margin to avoid being closed out.

The plaintiff himself paid in the last sum of $500 to Ross Cameron & Co. But the transaction was afterwards closed as the shares continued to decline.

It is quite clear upon the evidence that the defendant was engaging in an illegal transaction with Ross Cameron & Co., and that no receipt or delivery of the shares was intended. This is constituted a crime under the provisions of the Code already mentioned. It was, therefore, an illegal transaction as distinguished from a void transaction, as a betting transaction would be in England under English statutes. That distinction has to do with this matter of lending money to be used for the purpose indicated.

The only question is whether the plaintiff at the time knew of the purpose to which the money was to be applied when he made the loans. If he did he cannot recover; the consideration of the note is an illegal one.

I have come to the conclusion, from the evidence and under the circumstances that the plaintiff did know of the purpose to which the money was to be applied, and that there was no real transaction in shares or the contemplation of the receipt of shares. The plaintiff, therefore, cannot recover. I refer to the cases of Cannon v. Bryce, 3 B. & Ald. 179; McKinnell v. Robinson, 3 M. & W. 434; Pearson v. Carpenter, 35 S. C. R. 380; B. C. Stock Exchange v. Irving, 8 B. C. 186.

It is contended by the plaintiff that this was a past matter; the money was already lost and he was borrowing money to pay it back. I think that was not the transaction. It appears to me it was to be applied in the hope that the

price of Dominion shares then falling would go up and enable the defendant to win.

Then it is contended that the compromise and the forebearance constitute a consideration for the note.

My conclusion, as already stated, is that the plaintiff knew of the illegal purpose to which the money was to be applied, hence that this loan was illegal and not recoverable in law.

A person knowing that his claim is illegal cannot by compromising or giving time for its payment, supply a valid consideration.

The action will be dismissed, but without costs, as the defendant is setting up his own criminal conduct.

EXCHEQUER COURT OF CANADA.

CASSELS, J. SEPTEMBER 9TH, 1909.

REX v. DANIEL J. McDONALD.

Expropriation—Lands Covered with Water—Special Adaptability for Harbour Purposes.

McIlreith and Tremaine, for plaintiff.
J. D. Matheson, for defendant.

CASSELS, J.:—This case came on for trial immediately after the case of The King v. The Inverness Railway and Coal Co., Ltd. (Reported infra.) It was agreed between counsel that the evidence taken in the case of The King v. The Inverness Railway and Coal Co., Ltd., as far as applicable, should be used in this case.

There were two expropriations, one on the 13th July, 1908 when one and three-fifth acres were taken; the second on the 7th May, 1909, when seven acres, more or less, were taken.

The land taken comprises a knoll to the east of the channel of about one-fifth of an acre. The balance comprising nine acres, as stated by Arens, is land covered with water forming part of McIsaac's pond referred to in the Inverness Railway and Coal Co.'s case.

It is not necessary to consider the two expropriations separately. The Crown offered $260 for the whole. The defendant claims $3,000.

Mr. Matheson, at the opening of the case, stated as follows:—

"We have set out particularly and depend mainly for the value of the property by reason of its natural adaptability for the purpose of a harbour—that is our main ground of claim."

I have dealt with this claim in the reasons for judgment in the case of The King v. The Inverness Railway and Coal Co. Ltd. I had also occasion to consider the claim of special value by reason of natural adaptibility in the case of The King v. Hayes (unreported). I do not propose to repeat what I have stated in these cases. I do not think any additional sum can be allowed on this head, but what I have to consider is the market value. A claim for loss of bait fishing is also set up. The evidence as to the claim under this head is of a loose kind, making it difficult to arrive at a conclusion. A claim is also put forward of special value of the little knoll containing one fifth of an acre. I think if the $35 per acre, as found in the Inverness Railway and Coal Co.'s case is given for the nine and one-fifth acres and an additional $78 allowed for compulsory expropriation, loss of fishing, etc., making in all the sum of $400, the defendant will be fully compensated.

There will be judgment vesting the lands in the Crown with a proper description if the parties cannot agree, and for $400 with interest from 7th May, 1909. The plaintiff to pay the defendant's costs.

EXCHEQUER COURT OF CANADA.

CASSELS, J. SEPTEMBER 9TH, 1909.

REX v. THE INVERNESS RAILWAY AND COAL COMPANY, LIMITED.

Expropriation of Land—Beach Lots—Special Adaptability for Shipping Purposes—Compensation Claimed for Stone in Disused Wharf.

McIlreith and Tremaine, for plaintiff.

Mellish, K.C., for defendants.

CASSELS, J.:—This is an information filed on behalf of His Majesty the King by the Attorney-General of Canada, to have the value of certain lands and lands covered by water ascertained.

The property sought to be expropriated consists of about twenty acres of dry land and thirty-two acres of land covered with water. The expropriation is for the purpose of forming a harbour at the town of Inverness situate on the west coast of Cape Breton.

The date of the expropriation is the 29th April, 1909. At the trial it was suggested that the description of the lands taken did not accord with the lands expropriated as shewn by the plan. It was agreed to by counsel that the plan should govern, and if the description as furnished is erroneous a new description should be prepared in accordance with the lands as delineated on the plan.

The lands in question comprise three acres of what is known as uplands, situated to the southwest of the former piers, constructed for the purpose of marking a channel into what is known as McIsaac's pond; about seventeen acres of beach lands situated between the Gulf of St. Lawrence to the north and McIsaac's pond on the south; and about thirty-two acres of land covered with water comprising a portion of what is referred to in the evidence as McIsaac's pond. The other portion of McIsaac's pond necessary for the purpose of a harbour and situate to the west of that part of the pond owned by the Inverness Railway and Coal Company, Limited, is owned by one D. J. McDonald, the value of McDonald's interest to be ascertained in an action against him tried at the same sittings as the action in question. (Reported supra.)

The Crown offered as full compensation for all the lands taken and damages to adjoining lands the sum of $1,500. By their defence the defendants claimed the sum of $7,000 for the value of the lands taken, and $2,000 for injury to the adjoining property.

At the trial an amendment was allowed increasing the claim for value to $17,000 instead of $7,000, it being shewn that it was a clerical slip making the claim $7,000 instead of $17,000.

The claim of the defendants is for $17,000 and $2,000, in all $19,000.

The defendants the Inverness Railway and Coal Company, Limited, are the owners of the greater portion of the

town of Inverness, and are working coal mines. Most of the lands owned by them were purchased for them by the county of Inverness. The lands in question were purchased from one Hussey, who acted as agent for some Swiss capitalists. It appears from the evidence of Bernasconi that in 1897 two piers were constructed by Hussey extending from McIsaac's pond to the Gulf of St. Lawrence, and a certain amount of dredging performed permitting an entrance from the gulf to the pond, and through the pond to the wharf at the eastern end of the pond. By means of this work a harbour was formed and vessels of light draught could enter from the gulf and be loaded at the wharf. Since the acquisition by the defendants a railway has been constructed running along the west coast of Cape Breton. The defendants ship the coal mined by them over this railway as far as the Strait of Canso, where the coal is loaded on to vessels.

The entrance constructed from the gulf to McIsaac's pond has for years been allowed to fall into disuse, and at the time of the commencement of the expropriation proceedings the channel was completely filled up with sand. The woodwork on the piers from the low water to the top has rotted.

Considerable evidence was given at the trial to shew the quantity of stone in the piers. Arens, the engineer of the defendants, places the quantity at about 6,000 yards above low water level. Bernasconi, the engineer for the Crown, places the quantity at $3,000 yards at a value of 45 cents a yard, after allowing 15 cents a yard for removal.

For the defendants it is contended that compensation should be allowed on the basis of the special adaptability of the premises in question for harbour purposes. It was not claimed by Mr. Mellish that the stone should be paid for as stone.

The Crown has admitted the title of the defendants, and I therefore assume they or their predecessors in title acquired a right to construct the piers in question.

In my view the question of special adaptability should not be taken into account. I do not think the defendants bring themselves within the rules enumerated by the Court of Appeal in England in Lucas v. Chesterfield Gas and Water Board ((1908), 1 K. B. p. 571), decided by Bray, J., and (1909), 1 K. B. p. 16. In this latter case the auth-

orities are collected and commented on. Most of them will be found in Browne & Allans Law of Compensation, 2nd ed., 1903. There could be no competition as in the case of water reservoirs, which might supply several different localities and where competition might arise.

In this case the market value of the land and land covered by water has to be arrived at. If, in fact, its peculiar adaptability for harbour purposes be taken into account, it would add to its market value. I am left in ignorance on this point. The price paid by the defendants for this particular harbour right has not been furnished. I do not know that they have allowed it to be disused and filled up and no harbour existed at the time of the expropriation. According to the evidence of Arens, the engineer of the defendants, it would cost $150,000 to dredge for harbour purposes, and $40,000 additional for the construction of piers, and McDonald's interest in the pond would have to be acquired.

I deal with the question irrespective of the special adaptability for harbour purposes. The value of the stone I do not take into account. See Streatham & General Estates Co. v. The Commissioners of Her Majesty's Works and Public Buildings (before the Divisional Court), (1888), 52 J. P. 615; (and before the Court of Appeal), 4 Times L. R. 766.

In a case of this nature it is difficult no doubt for counsel to furnish evidence as to values. I am inclined to accept the evidence of the witnesses for the Crown. McLean, McInnes and McIsaac place a value of $75 an acre for the three acres of upland to the west of the pier. McIsaac places a value on the 17 acres of beach at $30, and on the 32 acres of land covered with water at $35 an acre.

In all 3 acres at $75	$ 225 00
17 acres at $30	510 00
32 acres at $35	1,120 00
	$1,855 00

If the defendants are allowed $2,000 and interest, I think they will be fully compensated.

The defendants are entitled to their costs.

EDITOR'S NOTE:—See the case of Gillespie v. The King, reported post p. 299.

NOVA SCOTIA.

SUPREME COURT (CROWN SIDE). SEPTEMBER 10TH, 1909.

REX v. WALKER.

Liquor License Act—Second Offence—Imprisonment—Irregularity in Conviction—Release.

Donald McLennan, for prisoner.

J. D. Matheson, for the Crown.

A. MACGILLIVRAY, CO. C.J., MASTER:—On the 29th of June, 1909, an order was granted on application of counsel for the prisoner, and upon sufficient cause shewn whether or not the defendant is detained in jail, with the day and cause of his having been taken and detained, as provided by sec. 3 (2) of chap. 181 R. S. N. S. 1900, "of Securing the Liberty of the Subject."

The prisoner was taken and detained on a warrant of commitment on a conviction for a second offence against the provisions of the Liquor License Act, then in force in the county of Inverness, and was adjudged to pay a fine of $80 and costs, and for non-payment thereof imprisonment in the common jail with hard labour for the space of ninety days.

The convicting magistrate, in obedience to an order in that behalf, returned the proceedings in the trial of the complaint the information, evidence and conviction and further the information and conviction in the first offence.

On the return of the papers so ordered, counsel for the prisoner on the day fixed for the hearing of the application, after taking the ground, amongst others, that the prisoner is illegally convicted because the conviction on the second offence was made subsequent to the date laid for the offence for which he had been first convicted, produced certificates from two medical practitioners to the effect that the prisoner is suffering from chronic inflammation of the hip; and that if he should be confined in jail for the above period such confinement would materially affect his health, particularly as a consequence of want of proper nursing which the defendant daily requires. I did not think that this would be a sufficient ground for his discharge from jail,

though from its unsanitary condition it is hardly a fit place for invalids at least. It was then suggested that upon the prisoner, who is a hotel keeper, undertaking not to violate the provisions of the Liquor License Act by selling intoxicating liquors within the town of Hawkesbury in the said county (in which town he resided), he might be discharged. But I observed that I had no jurisdiction to entertain such a proposition, but agreed to send the above-mentioned undertaking to the Lieutenant-Governor, who is given "the power of committing and remitting sentences for offences against the laws of this province or offences over which the legislative authority of this province extends." (R. S. N. S. 1900, c. 7, s. 2).

The prisoner entered into the proposed undertaking, and I sent the same to the Lieutenant-Governor for executive action, and adjourned the further hearing in the meantime of this application. The Attorney-General, however, returned the undertaking, suggesting that I decide first the legal ground taken by the prisoner's counsel.

The application was finally heard, counsel for the Crown opposing.

At the argument, prisoner's counsel urged that I had power to discharge the prisoner in view of his physical condition, and cited from Kenny's Criminal Law under the head of Reprieve and Pardon. The author, treating of the the subject of reprieve which may be granted not only by the Crown but by a judge, remarks: "But a pardon lies, of course, beyond all judicial discretion and can be granted by no authority below that of the Crown." I therefore decide that I have no power to discharge the prisoner on his undertaking to sin no more, as such discharge would be tantamount to the exercise of the pardoning power possessed only by the authority representing the source of the law.

It is urged also on behalf of the prisoner that proof should have been given on the trial of the complaint against him, and conviction for the offence, that there was no license in force at the time in the town within which the offence had been committed. As the accused admitted the charge I held that I could not give effect to this objection.

The ground that the defendant was convicted on the 30th of April for an offence against the Liquor License Act committed between the 12th of February and the 24th of April, as a second offence subsequent to a conviction on the

19th of February for the first offence, is one that requires careful consideration in view of previous decisions interpreting the law as to increased punishment for these offences.

Crankshaw (Cr. Code, 2nd ed. p. 536), on punishment after previous conviction, says on the authority of Lambe v. Hall, Q. B. Montreal (unreported), and 1 Hawk. P. C. 72:—

"A second offence to be punishable as such must be one committed after previous conviction for a previous offence. . . . The principle upon which the law proceeds in providing a severe punishment for the repetition of an offence being this, not because the offender has committed the offence more than once, but because when an offender has committed and been convicted of an offence he is looked upon as incorrigible, and as treating with contempt his first conviction, if afterwards he repeats the offence; but if the repetition of the offence takes place without his having been convicted he cannot be said to have treated with contempt a conviction which has not yet taken place."

The principle was followed substantially in ex parte McCoy, 7 Can. Cr. Cases, 485. Landry, J., in his decision with which Hannington concurred, gave full effect to the principle. Gregory, J., limited himself to the fact that an information for a second offence had not been laid before commission of the offence for which Mr. McCoy was convicted as a third offence. With this view Barker, J., agreed, McLeod, J., dissented from the opinion of the majority of the Court, holding that the increased penalty for a second and third offence is in all cases the result of the statute which provides that:—

"Conviction for several offences may be made under this Act, although such offences have been committed on the same day; but the increased penalty or punishment hereinafter imposed shall only be recoverable or liable to be imposed in the case of offences committed on different days and after information for a first offence." R. S. C. 1906, c. 152, s. 143 (2). Sec. 134, chap. 100, R. S. N. S. 1900.

In Rex v. Jordan, 7 E. L. R. 53, recently heard before Russell, J., on application similar to the one under consideration, the principle above cited was applied in interpreting the section of the statute hereinbefore quoted. The conviction was quashed and the defendant was ordered to be released; counsel representing the Crown in this application advanced the view that giving effect to the principle

the result would be that defendant could not be punished for offences committed between the laying of the informa- victing magistrate. I must therefore decide that the convict- thereon. The answer to this objection is that under the statute he can be convicted as for a first offence.

Courts administering the Criminal Law invariably, on applications of this nature, give effect to grounds disclosing irregularity in procedure or want of jurisdiction in the convicting magistrate. I must therefore decide that the convicting magistrate had no jurisdiction to hear the complaint herein and convict the defendant as for a second offence; although I would prefer that the question raised herein was decided by the full Bench, so that an authoritative decision could be had on the point involved in the ground now discussed. Had I been aware at the time of the unsatisfactory and conflicting interpretation of the clause of the Act (sec. 143), I would have made this application returnable before the Court in Banco. However, "in criminal cases where there is doubt, the benefit must be given in behalf of the person charged with an offence." Beauchamp's Juris, P. C. p. 761; Ditcher v. Dennison, 11 Moo. P.C. 343.

The conviction, in my view of the law, of the defendant for a second offence was made by a convicting magistrate without jurisdiction. The conviction shall therefore be quashed and the prisoner released upon his undertaking not to institute civil action against the sheriff of the county and the jailer.

The prisoner has been out on bail since the order herein was granted. His bail will be discharged upon the order for his release being granted.

EXCHEQUER COURT OF CANADA.

CASSELS, J. SEPTEMBER, 14TH, 1909.

DANIEL GILLESPIE, J. WILLIAM GILLESPIE, AND D. PAUL GILLESPIE v. HIS MAJESTY THE KING.

Expropriation of Land—Foreshore — Title — Special Adaptability of Property for Wharf Purposes — Value — Compensation.

This was a petition of right tried at Halifax on the 23rd June, 1909.

T. R. Robertson, for suppliants.

H. Mellish, K.C., for respondent.

CASSELS, J.:—The suppliants, Daniel Gillespie, J. William Gillespie and D. Paul Gillespie, claim as against the Crown the sum of $2,500 damages for the value of certain lands expropriated for the purpose of forming the shore end of a wharf extending out into the harbour of Parrsboro at the upper end of the basin of Minas, in the Province of Nova Scotia.

The area of land taken by the Public Works Department is one rood eight poles, slightly over one-fourth of an acre.

The evidence as to that portion of the basin of Minas where the wharf is constructed, forming a portion of the harbour of Parrsboro, is meagre.

It was asserted by counsel for the Crown that the title to the soil is vested in the Crown as representing the Dominion. This is not contradicted by counsel for the suppliants, and the evidence tends to shew that the water at the point in question formed a part of the harbour prior to Confederation. The only evidence adduced was on the part of the suppliants. Dyas says vessels had always used the beach at the point in question when covered with water for harbourage purposes. Locke, an official of the Department, states he surveyed the harbour, and places the entrance to the harbour at a point further east than the place in question.

In Bligh's Orders in Council, ch. 80, page 706, an order in council is set out defining the limits of the harbour. It appears that the order in council is dated the 30th October, 1880. It was passed pursuant to 36 Vict. ch. 9, sec. 14, as amended by 37 Vict. ch. 34, sec. 14. The harbour is stated to extend east to Moose Creek. I think although the evidence is not clear that this Moose Creek is shewn on the plan, Exhibit No. 11, further to the east than the location of the wharf marked at point "L" on the plan, Exhibit No. 11. I think it should be held that the place in question formed part of the harbour of Parrsboro and is vested in the Crown for the Dominion under the British North America Act. If it did not form part of the harbour, then at the time of Confederation it would have been vested in the Crown representing the Province of Nova Scotia under the judgment of the Board of the Privy Council in the Fisheries Case. (See (1898) A. C. 700.)

The suppliants claim no title to land covered with water at medium high tide water.

The navigability of the harbour depends on the flow of the tide, which raises to a very great height at the point in question. The wharf in question is about half a mile from the centre of Parrsboro town, a town containing between 3,000 and 4,000 inhabitants and is situate within its limits. The contention of the suppliants is that the place where the wharf is constructed is the only reasonable available spot in the locality for a wharf. An equally available situation for a wharf is about three chains further west, but a wharf built at that point would require to have an additional length of 125 feet to reach deep water. A wharf or wharves could be built further east, but would be exposed to the prevailing westerly and south-westerly winds sweeping in from the Bay of Fundy, and a wharf exposed to these winds would cost a much larger sum of money, as an L would have to be constructed to afford shelter at such a wharf. The wharf at the point in question is protected by the neck of land on the point of which Partridge Island Lighthouse is erected.

The advantage of the wharf at the point in question is claimed to be that there is a period of navigability for about four hours permitting steamboats to reach the wharf, unload or land and depart and return with the same tide.

Possession of the land in question was taken by the Crown on the 30th April, 1902, and the wharf constructed. The plan and description were filed on 9th April, 1907.

The suppliants base their claim for the large sum claimed on the fact of the special adaptability of the land in question for wharf purposes. The Crown denies the title of the suppliants. The title in one Owen McGuirk is admitted, but it is contended that the land in question did not form part of lot six, and did not pass by his will. Owen McGuirk died prior to the 25th May, 1900 (see will and certificate, Exhibit No. 6). Between the beach lot in question and lot six, as set out on the plan, a public highway appears to have been reserved but not in fact laid out on the ground.

Owen McGuirk's will reads: "Fourthly, I give and bequeath to Charles Henry McGuirk, lot No. 6 on said deed, dated 23rd of March, 1881, from Caroline Ratchford to Owen McGuirk as shore lands."

This deed of the 23rd March, 1881, granted the lands as follows: "All those certain tracts, pieces or perceels of land lying and being in Parrsboro, aforesaid, on the eastern side of Partridge Island river, known as lots numbered five, six and seven in the division made by I. Olney Lewis, deputy surveyor, of the lands originally granted to James Cameron and John Law, the said lots fronting on a line of road reserved for the accommodation of all the lots in said division, and which extends from the south of lot No. one at the inside of the beach, north forty degrees west, eighteen chains to the western angle of lot No. nine in the same division, each lot having a frontage of two chains on said reserved road, and extending back the same width, north fifty degrees, east thirteen chains more or less to the south-western side of another road reserved along marsh on the front of Owen McGuirk's land, the latter road to have also a right of way to the main road to Mill village and likewise to the shore of said river. Also so much of the mash and gravel beach in front of the lots five, six and seven as will be comprehended within an extension of the side lines of said lots to the said river, together with all and singular the easements, tenements, hereditaments and appurtenances to the same belonging or in anywise appertaining with the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim, property and demand both at law and in equity of the said Caroline Ratchford, Julia Anne Ratchford and Charles Edward Ratchford of, in, to or out of the same or any part thereof."

The division plan cannot be found. The suppliants contend that the effect of this will coupled with the deed is to extend lot six so as to comprise the land in question, and that Owen McGuirk in devising the lands as shore land intended to pass the beach. I incline to the view that this contention is correct. If the beach in question did not pass by the will then Owen McGuirk died intestate as to these beach lands in question and the title passed to his heirs. All the heirs have conveyed to the suppliants prior to the filing of the petition. The Crown in the description attached to the registered plan describes the beach lands in question as part of lot six. I find that the suppliants have proved their title.

As to the damages to be allowed, Mr. Robertson in his argument presented a very forcible and plausible case in favour of his contention that the special adaptability of the land in question for wharf purposes should be considered as adding a very large value to the land expropriated.

Reliance is placed upon the case of Lucas v. Chesterfield Gas & Water Board (1909), 1 K. B. 16, and the class of cases there cited, most of which are reported in full in Browne & Allan's Law of Compensation (2nd ed., p. 659). In most of these cases the intrinsic value of the land taken was on or in the land itself. The land formed by itself, or in connection with other lands, a natural reservoir. There were also possible purchasers, as in the Countess Ossalinsky case.

In the Lucas case Vaughan Williams, L.J., refers to the property in question touching "the natural and peculiar adaptability thereof for the construction of a reservoir." At page 25 he refers to the case of lands adjoining large works, the owner of which would likely be willing to pay a larger price, etc. There would be no right of expropriation in the case put. At page 27 it is laid down: "Arbitrators are not to value the land with reference to the particular purpose for which it is required. . . . You must not look at the particular purpose which the defendants . . . are going to put land to when they take it under parliamentary powers . . . for any special purpose."

Again, at page 28: "They should value the possibility and not the realised possibility."

Fletcher Moulton, L.J., at page 29, says that it must be estimated on "the value to him and not on the value to the purchaser."

And at page 31: "The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase, it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it."

Cripp's Law of Compensation (5th ed., 1905), at page 117, puts it thus: "An owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return, and the term 'special adaptability' only denotes that the probable use from which the best return may be expected is special in its character."

Cases such as Paint v. The Queen (2 Ex. C. R. 149, affirmed 18 S. C. R. 718), merely affirm the proposition that what has to be arrived at is the market value having regard to the potential or prospective capabilities. Land used as a farm within a short distance from a large city may be expropriated. If it were merely valued as farm lands the owner would lose the added value of the almost certain possibility of within a short period the lands coming into the market as city lots.

Had the suppliants in this case owned the water lot as well as the beach and merely acquired assent to the erection of a wharf and interference with navigation, the case might be different.

The Crown in this case owns the land covered with water opposite the land expropriated, and has exercised its right to construct a wharf.

To allow the contention of the suppliants would be to allow the value to the Crown, and not to value the property at its proper value to the owner. It is said that in any event the minimum value should be $900 as recommended by Locke. I do not agree. It is quite evident that Locke had in view the gain to the Crown. It would be an absurdity to allow such a sum for one-fourth of an acre of nearly useless land, if my view of the law is correct. If I am in error then I should say $900 is the maximum amount. The Crown refused to accept Locke's recommendation.

It is difficult on the evidence to place any value on the fourth of an acre in question.

I think if the suppliants are allowed $50, each party paying their own costs, justice will be done.

Judgment accordingly.

EDITOR'S NOTE:—See the case of Rex v. The Inverness Railway and Coal Company, Ltd., reported at p. 291, ante, where the element of "special adaptability" in compensation for lands expropriated is also considered.