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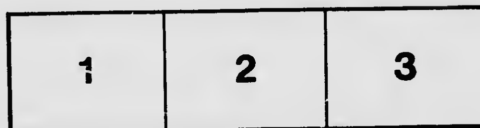

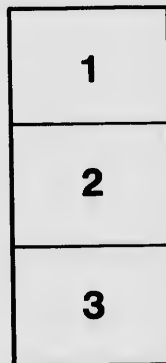

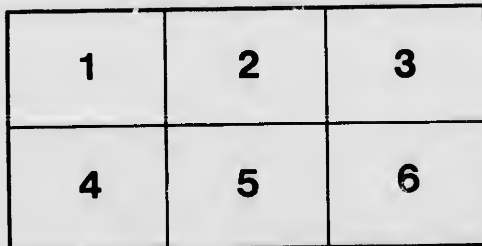

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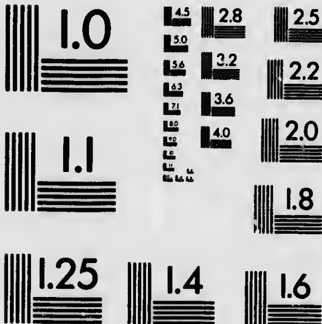

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SUPR

CONTAINING

I

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

AT

COMMON LAW

AND

IN EQUITY.

BY HENRY OLDRIGHT,

BARRISTER,

AND OFFICIAL REPORTER TO THE SUPREME COURT.

Longum iter est per præcepta
Breve et efficax per exempla. —SENECA.

VOL. 2.—PART I.

CONTAINING CASES DETERMINED FROM DECEMBER, 1865, TO JANUARY, 1867.

HALIFAX, N. S.
PRINTED BY CHARLES ANNAND.
1873.

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1865/1866

JUDGES OF THE SUPREME COURT

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS PART.

CHIEF JUSTICE.

The Honorable William Young,
Appointed 3rd August, 1860.

JUDGE IN EQUITY AND SENIOR ASSISTANT JUSTICE.

The Honorable James W. Johnston,
Appointed 11th May, 1864.

OTHER ASSISTANT JUSTICES.

The Honorable William Blowers Bliss,
Appointed 9th April, 1834.

The Honorable Edmund Murray Dodd,
Appointed 19th February, 1848.

The Honorable William Frederick DesBarres,
Appointed 14th November, 1848.

The Honorable Lewis Morris Wilkins,
Appointed 14th August, 1856.

JUDGE OF THE VICE ADMIRALTY COURT.

The Honorable William Young,
Succeeded 1st January, 1865.

CROWN OFFICERS.

ATTORNEY GENERAL.

The Honorable William A. Henry,
Appointed 11th May, 1864.

SOLICITOR GENERAL.

The Honorable John W. Ritchie,
Appointed 11th May, 1864.

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PREFACE.

A sudden and severe illness in the autumn of 1871, which for a time threatened the speedy extinction of life, from the effects of which I have not even now fully recovered (and perhaps shall never wholly recover), compelled me to suspend the publication of this volume, with which I was at the time busily engaged, and of which I had then over two hundred and fifty pages printed. Through the mercy of God I recovered to some extent in a few weeks, but the attack wholly unfitted me for many months for any severe or prolonged mental effort, (and the preparation of Law Reports for the press is one of the severest forms of mental labor), and I was consequently unable until last December to resume publication. All this has tended to produce delay (which no one regrets more than myself) in the publication of this work.

Other causes set out at length in the preface to my first volume,—the bringing up the arrears of the five years previous to my appointment, during which there was no official reporter,—the enormous increase of the work itself, which has grown steadily ever since my appointment, which even in 1869 had nearly doubled, and is now more than three times as great as when I became Reporter,—the extreme pains I have taken to report the arguments and especially the decisions as fully as possible and with the utmost accuracy,—have helped to produce delay.

The simple fact is that the work of reporting for all our superior Courts—the Supreme Court *in banco*, Equity Court, Common Law Chambers, Divorce Court, and the Court of Vice Admiralty—has for years been entirely too much for one man, and I have seriously and probably permanently injured my health in the attempt to perform it, for my physicians say that my illness has been caused by overwork, the strain on the mind of constant reporting, &c , for years having proved too severe even for a naturally strong constitution.

The increase of the work of our superior Courts may be gathered from the fact that the Government of the Dominion considered it necessary in 1870 to appoint two additional Judges, and that in the Term lately closed there were 119 cases on the docket, and the Court was obliged to sit in two divisions for several weeks to overtake the work. The docket for the Term immediately after my appointment contained only 42 cases.

Some persons may think that I have reported the decisions too fully, and have taken too much pains to ensure the most minute accuracy. I can only say that I have felt deeply impressed with a remark of one of my learned predecessors who says: "There is no species of publication which demands more scrupulous accuracy than those histories of judicial proceedings and decisions to which the name of Reports has been long appropriated." It is comparatively seldom that second editions of Law Reports are published, and there is, therefore, not often an opportunity of correcting an error. A learned writer has said that on the fidelity and accuracy of Law Reporters the evidence of a very great part of the law entirely depends. I have often spent hours over the preparation of a single head note, carefully weighing every word in order that the note, as is necessary, might be as brief as possible and yet exhaustive and perfectly accurate. I may remind non-professional readers that these notes are expected to contain *the law* on the points to which they refer, and law as binding as a Statute.

If the reporting for our superior Courts is to be continued, it is now absolutely necessary that the entire system should be changed. As already intimated, no one man can do the work, and an additional reporter, or reporters, must be appointed, or the work of the reporter considerably lessened. Indeed, during the last two years, I have been compelled to employ one and often two assistants whom I have paid out of my own means. In other countries each Court has its own distinct reporter with a salary very much larger than mine, and in England there are generally two reporters to each Court.

When, and in what manner, then, this volume will be completed will depend very largely upon the provision which may

be made therefor during the present session of the Provincial Legislature.

I shall take another opportunity of putting my views before the Legislature on this whole subject of Law Reporting, and of suggesting the provision which I think should be made for bringing up the arrears, and for a satisfactory continuance of the work, and I shall then contentedly leave the whole question to their decision.

This work contains all the decisions of Michælmas Term, 1865, all the judgments of the Judge in Equity and the Associate Judges in an important Equity case involving the disposition of real estate worth over £30,000,—several Equity decisions,—all the judgments of Trinity Term, 1866, except a few of the oral ones, and several decisions of December, 1866, and January, 1867. As I was anxious that this Part should contain as many decisions as possible, and as several of the oral decisions of Trinity Term, 1866, some of which are of considerable importance, would require more time to prepare them for the press, than I can spare just now, I have determined to publish the work without the oral decisions just referred to. The pages from 336 to 369 will be occupied with these decisions, and will (D. V.) appear in the second part of this volume.

Among the decisions will be found the important case of *McIntosh* v. *Cullen*, in which the whole Bench, for the first time, as far as my knowledge extends, decided that a contractor could recover on a written contract, although he had avowedly departed to some extent from its terms, provided he had *substantially* performed the work, and had not fraudulently or wilfully deviated from the terms of the contract.

In this work will also be found the case of *The Queen* v. *Dowsey, Douglas, and others*, commonly known as the *Zero* case. This was so very remarkable a case that I judged it worthy of permanent preservation even in a historical point of view. I thought it was also worthy of being permanently recorded, from the fact that the Court under the Dominion Acts still retains the power to reserve a case, as was done in this instance.

In the following pages there is also the remarkable case of *Hartshorne et al.* v. *Wilkins et al.*, the decision in which, as to

the question of survivorship under the very singular circumstances of the case, was based upon the judgment in *Underwood v. Wing*, decided in February, 1860, in the House of Lords.

HALIFAX, *April*, 1873.

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CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

IN

MICHAELMAS TERM, XXIX VICTORIA.

BLACK *v.* SAWYER.

December 5, 1865.

A preferential assignment, no matter how slight or meritorious the preferences may be, and though made for the benefit of all the creditors of the assignor, is not an "assignment for the general benefit of all the creditors," within the meaning of the sixth section of chap. 119, Revised Statutes, and has, therefore, no effect until registered.

TRESPASS against a sheriff for taking a sleigh and robes. Pleas, justifying the taking under execution against one H. B. Mitchell, etc.

At the trial before Bliss, J., at Halifax, in May, 1865, it appeared that the Plaintiff claimed, under an assignment from one H. B. Mitchell, the execution debtor, dated 6th October, 1862. The Solicitor General for the defendant contended that this assignment was void for want of the registration required by the Provincial Act of 1862, ch. 7, (now Revised Statutes, chap. 119,) sec. 1, it not being, as he argued, an assignment for the general benefit of creditors within the meaning of the sixth section of that Act, and, therefore, not within the exception in that section.

The learned Judge reserved the point, and the case went to the jury, who found for the plaintiff.

It appeared that the assignment was made between H. B. Mitchell, of the first part, the plaintiff, one of his creditors, of the second, and the several other creditors executing the instrument, of the third part. It conveyed to the plaintiff all the real and personal estate of the assignor, with the usual powers of sale and collection, upon trust, after payment of

the costs, disbursements, and charges to pay the several persons named in the schedule the full amount of their respective claims, or such part thereof as therein particularly specified, and then to pay the residue ratably and without any priority or preference to the creditors executing the deed. The trustee was then empowered to pay all creditors in full whose claims did not exceed, or who would accept ten dollars in full; and to give Mitchell the absolute property in his household furniture, and goods not exceeding the value of $100. The assignment also contained a release from the creditors, and provided that no creditor should be allowed to execute the assignment after the expiration of two months from its date, or such extended time as the trustee should deem reasonable and just. The schedule of preferential creditors comprehended : "First—Mary Mitchell, for the full amount of her claim, secured by judgment, on which execution was sued out previous to any assignment of effects ; Second—The plaintiff, also a judgment creditor, with execution issued, binding goods previous to any assignment, to be paid the full amount of his claim ; Third—George A. Chapin, of Boston, U. S., to be paid $200, part of his claim, being for goods entrusted for sale on pledge of security therefor."

Solicitor General, for defendant. Certain creditors are preferred by the assignment, and are to be paid in full before the balance of the property is divided among the other creditors, etc. The fact is, there was not enough property assigned to pay the party having the first lien. Our Act (Rev. Statutes, chap. 119) is similar to the Imperial Act, 17 & 18 Vict., ch. 36. The latter Act differs from ours in a single word only. The question is, is this assignment an assignment for the general benefit of the creditors of the assignor. The Imperial Act omits the word "general." The preferences prevent this assignment from being an assignment for the general benefit of creditors. Where there is no preference, there is no person to be protected by registration. Where there is a preference, registration is eminently necessary. The creditors here are called upon to release, though they would have got nothing. The two executions—probably the first, would have taken every-

hing. These preferential assignments are a crying fraud. 1 *American Leading Cases*, 93. This assignment contains a reservation for the benefit of the debtor himself. In 20 *Johns. Rep.* 442, a deed of assignment was held fraudulent and void, under the Statute of Frauds, because it contained a stipulation that the shares or proportions of the creditors neglecting to execute it within the time limited should be paid to the assignor himself. (Cites *Burrill on Assignments.*) The assignment here is really for the benefit of the debtor. In 14 *Johns. Rep.* 458, it was held that a reservation to the assignor of part of the property assigned made the assignment fraudulent and void. In 5 *Johns. Chan. Rep.* 332, it was held that a particular provision in a deed that the creditors were not to be paid in proportion, etc., unless they should execute and deliver a complete discharge of their demands, was rigorous, coercive, and unjust. How can that be called an assignment for the *general* benefit of creditors, when only one particular class—perhaps only one particular creditor—can receive any benefit under it?

Sutherland, Q. C., contrà. The assignment here is an assignment for the general benefit of creditors. All the cases cited on the other side are American cases. We are governed by the English law. In England a stipulation in an assignment for the release of the debtor, as a condition of receiving the benefit of the deed, has been held valid even against a claim of the crown. *Burrill on Assignments*, 144; *Rex.* v. *Watson*, 3 Price, 6. A deed of assignment has also been sustained there containing a clause that creditors not coming in within six months should be peremptorily excluded. *Gould* v. *Robertson*, 4 DeGex & Smale, 509. (Cites *Angell on Assignments*, 114.) The right of giving preferences to creditors in deeds of assignment, in cases not within the Bankrupt law, is admitted in England. *Burrill on Assignments*, 107. An assignment containing clauses enabling the trustees to employ the debtor in winding up the affairs of the estate, and in carrying on his trade, and to allow him out of the trust estate therefor, has been sustained. *Ibid*, 173; *Coate et al* v. *Wil-*

liams, 9 Eng. Law & Eq. Rep. 481. (Cites also *Burrill on Assignments*, 107, 8.)

Blanchard, Q. C., follows on the same side. The schedule only makes preferential those creditors whom the law had already made preferential. The Act does not say "for the general and *equal* benefit of creditors." The Legislature never could have intended to shut out assignments containing a release for the debtor. The statement of some time in the assignment within which creditors must come in is indispensable for the protection of the trustee. [BLISS, J. The "general benefit of creditors" means the benefit of all the creditors. WILKINS, J. It is the duty of a Judge, in construing a Statute, to give effect to every word. The word "general" must have some meaning. BLISS, J. Is not this assignment, in effect, a particular assignment for the benefit of certain creditors and general for all the rest.] (Cites *Williams on Personal Property*, 46; *Janes* v. *Whitbread et al.*, 5 Eng. Law & Eq. Rep. 431.)

Solicitor General, in reply.

Cur. adv. vult.

YOUNG, C. J., now (December 5) delivered the judgment of the Court.

Several cases were cited at the argument for and against the allowing of preferences in deeds of assignment for the benefit of creditors, most of which are collected by Burrill in two very full and instructive notes to his work on Assignments, fol. 106, 108.

In my mind, I must confess the weight of argument is entirely against all preferences, and I would be well pleased if our Legislature would follow the example of the great commercial States of Massachusetts, Pennsylvania, and Ohio, by abolishing them altogether. But that is not the question here. Preferences are clearly allowed by our law, and in point of morality, the preferences in the deed in this case (though it is likely that the executions would sweep off most of the effects, if not all) seem unexceptionable. The ten dollar and one hundred dollar clauses, though there is more to be said about them, seem reasonable enough; and the limitation to

creditors coming in, and the release have been often recognized, though their legal effect has not been formally determined in this Court.

The *bona fides* of the deed has not been attacked—the point is, was registry essential to it—was it a deed for the general benefit of the creditors? This is a matter of some consequence, and I have looked into it carefully.

Our Act of 1862, repealing that of 1861, and forming chapter 119 of the Revised Statutes, third series, is taken from the English Act of 1854, 18 & 19 Vict., chap. 36. It is simpler, however, and omits some of the provisions on which several questions, I see, have arisen in England. The first section of the English Act, giving 21 days for the registry of the bill of sale (which our Act does not give,) makes the unregistered bill of sale "null and void, to all intents and purposes, as far as regards the property in, or right to the possession of any personal chattel comprised in such bill of sale," while our Act merely postpones the operation till the filing. Our second section, again, is framed as if we had adopted the expressions "null and void" in the first, and our ninth section gives the meaning of the words "apparent possession," so well known in Bankruptcy law, and used in the first section of the English Act, but omitted in ours.

It is to be noted, also, that the first section of our Act of 1861 and of the English Act speaks of an assignment for the benefit of the creditors; but our Act of 1862, in the first section, inserts the words "general benefit." The same distinction is found in the clauses of exception—section 6 of our Act, and section 7 of the English.

There have been several decisions on the construction of the Statute; most of them, however, on the strict and technical requirements incorporated with the English Act, and which we have wisely, as I think, avoided in ours. These cases are reported in the *Law Times*, new series, and in the *New Reports*, and bear only incidentally on the point now in hand. They have a certain value, however, as illustrating the Statute, and, therefore, I will shortly refer to the more important of them.

In *Allsopp* v. *Day*, 5 Law Times Rep. 321, the defendants, the trustees of a married woman, purchased the goods under

a power in the deed of settlement from the husband, and paid for them out of trust money settled to her separate use, taking the following receipt:—"Received of Mr. J. D. and Mr. C. J., the trustees under the deed of settlement, for the benefit of my wife, the sum of £95 18s. 6d. for the purchase of my household goods and effects contained in the enclosed inventory and valuation as purchased this day by Mr. J. D. and C. J. as trustees named in the deed of settlement, and empowered so to purchase by such deed. The date of such deed is 8th Nov., 1858. George French." The goods remained in the husband's house, and were subsequently seized under *fi-fa* at the suit of the plaintiff, when the defendant claimed them. The question was, whether the receipt, with the inventory, was not in substance a bill of sale, and as such requiring registration under the Act of 1854; and it was held that it was not. Per Pollock, C. B. : "We cannot carry this case one jot beyond the strict letter of the Act." And per Bramwell, B.: "The mischief of which the counsel has spoken may take place by a parol contract; but it is sufficient to say that the Statute has not spoken of parol contracts." Wilde, B.: "A bill of sale must be some document by which the property passes. This was clearly not such a document."

In the *London Loan Company* v. *Chace*, 6 Law Times Rep. 781, upon the same Act, but on a point not applying to ours, Williams, J., said: "The Legislature have fettered such transactions by imposing certain conditions, on which alone bills of sale are allowed to be valid. We have no right to lighten those fetters, or diminish, by any means, the stringency of the conditions by any reference to the hardship of the particular case, or the difficulty of complying with those conditions which the Legislature chooses to impose."

Again, if a deed of assignment for the benefit of creditors purports in its language to be, and is intended for the benefit of all the creditors, it is sufficient to bring it within the exception of the Act of 1854, so as not to require registration under that Act, although the deed does not appear to be executed by all the creditors. This was held in *The General Furnishing Company* v. *Venn*, 8 Law Times Rep. 432, where the form of the deed is given in a note providing for the payment of a composition of seven shillings and six pence in

the pound, and containing a release to the assignor, but no reservation or preferences. The deed was attacked under the Bankruptcy Act of 1861, section 192, and was upheld by the Court,—Bramwell, B., however, entertaining great doubts about the matter. "The question is," said he, "whether the exception to the Bills of Sale Act applies to assignments for the benefit of all the creditors, or those made for such a number as is substantially all,—for the benefit of the general body of creditors.

Looking at these decisions, I know not that much is to be made of the distinction between our Act and the English in our insertion of the word "general." But wherever preferences are given, however meritorious they may be thought, or special clauses introduced for the payment in full of small sums as in this case, or for the protection or comfort of the assignor or his family at the cost of the creditors, I am of opinion that the exception does not apply, and that the bill of sale has no effect till it is registered.

The deed contemplated by the Act seems to be that which we find in *Pickstock* v. *Lyster*, 3 M. & S. 371. "Such an assignment," said Lord Ellenborough, "arises out of a discharge by the party of the moral duties attached to his character of debtor, to make the fund available for the whole body of creditors." "This was not a deed," said Le Blanc, J., "by which the party stipulated for a benefit to himself, but all the property of the party is fairly to be distributed amongst his creditors."

I am sensible that this decision will necessitate the registration of almost every assignment made for the benefit of creditors in this Province. But this is not an evil, nor will it lead to any injustice so soon as our decision is known and acted on. Creditors, where there are any pecuniary reservations of any kind in such assignments, ought to have the freest license and opportunity to inspect them, which I have known sometimes to be refused; and the expense of providing a copy for registration is nothing compared to the convenience and advantage of such inspection by the creditors and their counsel.

Judgment for defendant.

Attorney for Plaintiff, *Richey*.
Attorney for Defendant, *Kirby*.

CARRIGAN *v.* CARRIGAN.

December 5, 1865.

A will is sufficiently proved by the production of a certified copy, where the notice required by Revised Statutes, chap. 135, sec. 36, has been given.

It is also sufficiently attested where the testator could see the witnesses sign, had he chosen to do so, though there was no proof that he actually did see them sign, and they were in an adjoining room at the time.

EJECTMENT for lands in the County of Antigonish. Plea. denying the right to the possession, &c.

At the trial before DesBarres, J., at Antigonish, in October, 1864, it appeared that the plaintiff claimed under the will of one Patrick Carrigan. A notice, dated 30th June, 1864, of the intention to produce a copy of this will on the trial was put in and read. A certified copy of the will was received in evidence, the defendant's counsel objecting and producing an affidavit stating that the original was required.

The defendant's counsel also contended that the will had not been legally executed.

It appeared that the testator, having previously signed his name to the will, requested the witnesses, while he was sitting up in bed, to attest its execution. As there was no table in the room on which they could write their names, they retired to an adjoining room and there signed their names to it, the door of the testator's bed-room being open at the time, and the testator being able to see the feet of the two principal witnesses as they knelt down by the chest to sign their names. The learned Judge told the jury that if they thought the testator, by sitting up in bed, or by inclining his head over the side of the bed, might see the witnesses subscribe their names, though there was no proof that he actually did see them do so, the will was, in his view, sufficiently executed.

The jury found for the plaintiff, and a rule having been granted to set the verdict aside, it was now (July 3, August 1,) argued.

W. A. Johnston, in support of the rule. The main questions are the due execution of the will and the reception of evidence. The original will should have been produced. Sec-

tion 36 of chapter 135 of the Revised Statutes, third series, has a wider scope than section 28 of the corresponding chapter in the Revised Statutes, second series. The former section says that the probate of a will, or a certified copy thereof, shall be received as evidence in all cases. Under the latter section the probate or certified copy could not be received in cases relating to real estate. In such cases the original will must always be produced. That was the rule in England until the passage of the Imperial Act of 1857. *Taylor on Evidence*, 1405. What was produced was not the probate, but a certified copy not stating that probate had passed. Section 28 in the second series of the Revised Statutes extends to certified copies, but it does not make the certified copy proof of the probate. The word "may," in that section, should be read as "shall." The affidavit here was clearly sufficient, (though, I admit, it was made at the trial,) and the Judge should have ordered the original will to be produced. [DesBarres, J. My reason for declining to do so was that the defendant had had long notice of the intention to produce the certified copy; and that he might have given the plaintiff notice that he required the original will.] Due cause was shown on affidavit, as required by the Statute. [Bliss, J. The Judge, at the trial, must judge of that due cause. Young, C. J. If a Judge exercises his discretion at the trial, can the Court control it? I think not.] There is no evidence of the testator having signed or acknowledged the will. [Bliss, J. It was signed by a person whose name was Patrick Carrigan, and taken to the testator, who said it was all right. Young, C. J. Is not that an acknowledgment? The Statute says the signature shall be acknowledged; in other words, it requires not the will to be acknowledged, but the signature. Bliss, J. A person saying, "that is my will," his name being signed to it at the time, is an acknowledgment of the signature. Acknowledgment is a fact, and does not depend on the word "acknowledge."] The signature must be acknowledged. 1 *Vesey Jr.*, 11; *Selwyn's Nisi Prius*, 883; 11 *Law Times Rep.*, 781; 3 *Peere Wms.*, 254; *Sweetland* v. *Sweetland*, 13 Weekly Reporter, 504, (March 18, 1865,); 2 *Rob.* 295. There is no proof of the due execution of the will by the witnesses. The witnesses could not have

seen the testator. 2 *Saunders on Pleading and Evidence*, 1264; 1 *M. & S.*, 295.

Miller, contrà. Section 28, referred to, was intended to introduce a change in the law. Section 20 of the same Act (Revised Statutes, second series, ch. 135,) makes certified copies of any document, etc., filed in any Court in this Province, evidence to the same extent as the originals. Section 36, in the third series, merely removes any doubt as to the meaning of section 28 in the second series. An original will cannot always be obtained. Security must be given before it can be taken from the Probate office. Revised Statutes, chap. 127, sec. 92. There was an acknowledgment, in fact, of the signature, though not in words, and that is sufficient.—6 *Bing.*, 310; 7 *Bing.*, 467. It is not necessary that the witnesses should see the testator sign, or that he should sign in their presence; it is sufficient for him to declare to the witnesses that the instrument offered to them to be subscribed is his will, and that the signature is his hand-writing. 2 *Saunders on Pleading and Evidence*, 1263. The English cases recognize a constructive presence as sufficient. 4 *Kent*, 631; 3 *Salk.*, 395. It is not necessary that the testator should actually see the witnesses sign; it is sufficient if he were in such a situation that he might see them do so. 2 *Carr. & Payne*, 488; *Williams on Executors*, p. 74, note; 2 *Salk.*, 688. "In the presence" is synonymous with "within view." *Powell on Devises*, 90. Present or not present, is a question for the jury. *Ibid*, 98; *Comyns' Rep.* 531. Whether there is any evidence is a question for the Judge, whether it is sufficient is for the jury. *Buller's Nisi Prius*, 290 b; *Fraser* v. *Cameron*, James' Rep. 192. The defendant entered under the plaintiff, and cannot dispute her title.

Blanchard, Q. C., follows on the same side. In 2 *Curteis*, 320, it was held that a codicil was signed in the presence of the testator by the witnesses, when they were in the same room with him, although he was in bed and the curtains were drawn so close that he could not see them sign. The testator's acknowledgment, in fact, of his signature is sufficient. *Ibid*, 334; 3 *Curteis*, 452, 558. The English Act of 1857

requires four days' notice of the intention to dispute the will. The original will was produced here before the close of the trial.

W. A. Johnston, in reply. In 1 *Rob. Eccl. Rep.* 14, Dr. Lushington, in a very elaborate judgment reviewing all the cases, refused to admit a will to probate because the witnesses did not see the testator sign. An attestation, not made in the room in which the testator is, is *primâ facie* not an attestation made in his presence. 1 *Greenleaf on Evidence*, p. 355, sec. 272. The devise will be void unless the testator is in a position in which he can, if he pleases, see the witnesses subscribe without changing his situation. *Powell on Devises*, 92. In 2 *Curteis*, 326, it was held that the deceased saying to two witnesses, "sign your names to this paper," was not an acknowledgment of her signature. (Cites also *Ibid*, 331, 395, 3 *do*, 118, 243.) In *Tribe* v. *Tribe*, 1 Rob. Eccl. Rep. 781, it was held that a will signed by the witnesses in the same room where the testatrix lay in bed with curtains closed, was not signed by them in the presence of the testatrix, and probate was refused. This is a later case than that in 2 *Curteis*, 320. (Cites 1 *Curteis*, 908, 14.) I have cited sufficient to show that the cases vary, and that each case must stand on its own circumstances.

Cur. adv. vult.

DODD, J., now (Dec. 5) delivered the judgment of the Court. There were several points taken by the counsel for the defendants in this case against the verdict being retained. In the first place, he contended that as the action was for the recovery of real estate, the original will should have been produced at the trial, and that the Revised Statutes, second series, chap. 135, sect. 28, did not make a copy sufficient, as it applied only to cases where personal property was involved; and if not correct in this view of the Act, then, under the application, during the trial, founded upon an affidavit that the original will was required, it should have been produced. Upon both points, I think, the law is against the defendant, and, in my mind, too clear for argument. The 28th section of

the Act referred to is express, and declares that the probate of a will or a copy thereof, certified under the hand of the Judge or Registrar of Probate, or proved to be a true copy of the original will, when such will has been recorded, shall be received as evidence, but the Court may, upon due cause shown on affidavit, order the original will to be produced in evidence. In the construction of this clause of the Act we find no exception, such as that contended for by the counsel for the defendant; but it refers to all cases where the original will has been recorded, and then it equally applies and makes a copy evidence, reserving to the Court the power of ordering the original will to be produced upon due cause shown by affidavit. In this case, it is true, an affidavit was made as well as an application to the discretion of the Court for the production of the original will; but I think, under the circumstances of this case, the learned Judge who tried the cause exercised a very sound discretion in refusing to stop the cause until the original will could be produced, and admitting the copy as evidence. The cause was tried on the 13th October, and the attorney of the defendant was served on the 30th June with notice, under the 29th section of the Act, of the intention of the plaintiff to produce a copy of the will and give it in evidence on the trial; and with this fact within his knowledge for nearly four months, he took no step to compel the production of the original until towards the close of the first day's trial of the cause. He has, therefore, no cause to complain of the decision of the Court. If the will was not produced, it was his own fault, and he must abide the consequences of his own laches.

The other objections to the verdict require more consideration. The first, that the will was not signed by the witnesses in the presence of the testator, I will now investigate. The Provincial Act requires that the will shall be in writing, signed at the end or foot thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation is necessary. The plaintiff rested her case upon the produc-

tion of a certified copy of the will, and no evidence was adduced on her part as to the manner in which the will had been executed. The only witness upon that point was Murphy—one of the witnesses to the will,—and he was produced on the defence. The learned Judge who tried the cause submitted the question to the jury as to the signing of the will by the witnesses, and told them that if they thought the testator, by sitting up in his bed, or by inclining his head over the side of the bed, could see the witnesses, though there was no proof that he actually did see them subscribe their names to the will, it was, in his view of the law, a sufficient execution of it, and the jury, by their verdict, found in favor of the due execution of the will, under the charge of his Lordship. If the law, as laid down by him, is correct, and there is evidence to sustain it, then, upon this point, the verdict cannot be disturbed. At the execution of the will the testator was ill sitting up in his bed, and there not being any table or other convenience for the witnesses to sign the will in the bedroom, they adjourned to an adjoining room, and there, on their knees, signed the will upon a chest, the door leading to the room being open, and the testator in the position the witnesses left him—sitting up in his bed, and could see their feet at the chest when witnessing the will, but could not see them write their names unless by altering his position and leaning over the bedstead. Such, in substance, is the evidence of the witness Murphy, and the only evidence upon which the jury could find that the witnesses subscribed the will in the presence of the testator. Upon a reference to the cases that have been decided upon this point, *Williams on Executors*, vol. 1, page 80, says: "That their result is, that it is not requisite that the testator should actually see the witnesses sign, but that it is sufficient if he might have seen them if he chose to look." And as the provision of the Statute of Frauds, requiring that the witnesses shall attest and subscribe in the presence of the testator, is continued in the Statute of Victoria, from which our Provincial Act is borrowed, the decisions under the Statute of Frauds are still applicable. *Williams* refers to several of the older cases in support of the general principle he has referred to, included in which is *Casson* v. *Dale*, 1 Brown's Ch. Cases 99, where a will was executed by the

testatrix in her carriage, and the witnesses subscribed in the attorney's office, opposite to the window at which the carriage was, so that she might have seen them through the window while subscribing, and it was held that the Statute was satisfied. Several other cases are referred to by *Williams* upon and in confirmation of *Casson* v. *Dale*, and the cases referred to, where it has been held that the execution by the witnesses was not in the presence of the testator, are cases where the testator was in such a position that he could not see them sign their names, as in the case of *Tribe* v. *Tribe*, 1 Rob. 775, where the testatrix lay with the curtains closed and her back to the attesting witnesses when they subscribed, and it appeared that she could not by possibility have seen them do so, even if the curtains had not been closed, by reason of her inability from her state of weakness to turn herself in her bed into a position in which she could have seen them sign. The Judge there held that the Statute was not complied with. But where the testator was in such a position that he could see the witnesses sign, although he did not see them, the Statute is satisfied. As in the case under consideration the testator could have seen the witnesses sign his will by a very slight alteration of his position, and as he was not laboring under a physical disability to prevent him doing so, I think the requirements of the Statute have been satisfied.

The next and last point taken against the verdict was that there was no evidence that the testator signed the will. The Provincial Act, in following the English Statute, does not make it necessary that he should sign it in the presence of the witnesses; it is sufficient if he either sign the will in their presence or acknowledge it in their presence. The evidence upon this point appears to me sufficient. Murphy, the witness already referred to, says that he was in the house of testator when testator was confined to his bed, and he told him he wanted him to sign his will as a witness. "I did not," he further says, "exactly see him sign any papers, but saw his name signed to the paper to which I signed my name, but cannot remember that he acknowledged his signature to it." James Garvie, another witness to the will, handed it to him at the desire of the testator. Upon his cross-examination he says: "I was at testator's bedside when he delivered to Garvie a

paper which he said was his will. I think his name was signed to the will at the time. I know his handwriting, as I had been at school to him. He handed the will to Garvie that he and I might sign our names to it as witnesses. When the will was signed Garvie took it back to testator, and he then looked at it, and read it. He saw our signatures to it, and said it was all right, and closed it up, saying it should be sent to the executors." The authorities upon this point are with the plaintiff. They do not require that the testator should in express terms acknowledge his signature, but leave it to be implied from all that takes place at the time the witnesses sign the will. Here the implication is nearly as strong as if he had pointed to his signature, and said, this is my signature to my will, and I wish you to sign it as witnesses. He handed the will to one of the witnesses and requested them to sign it as witnesses, his name being to it at the time, and known by one of the witnesses to be his handwriting. And after they had signed it and returned it to him, he said, looking at it, and seeing the signatures to it, that it was all right; then closing it up for the purpose of sending it to his executors. In the first place, can there be any doubt that the will was signed by the testator when signed by the witnesses, and if not, then, that fact established, his acknowledgment of it may fairly be presumed from all that took place before the witnesses signed their names to it. *Williams on Executors*, vol. 1, page 77, upon this point of the case says: "A more difficult question arises in cases where the signature is made by the testator, but not in the presence of the attesting witnesses, as to what shall be a sufficient acknowledgment of it by him in their presence." "The result of the cases," he says, "appears to be that where the testator produces the will, with his signature visibly apparent on the face of it, to the witnesses and requests them to subscribe it, this is a sufficient acknowledgment of his signature, but not where they are unable to see the signature, and the testator merely calls them to sign, without giving them any explanation of the instrument they are signing." The cases referred to by Williams are numerous and very distinguishable, and upon reference to them it will be found that the case under consideration comes within what he calls the result of the cases in favor of a sufficient acknowledgment. In the

notes to the pages in Williams that I have referred to will be found most, if not all, the authorities upon the point.

I admit it would have been better if the learned Judge who tried the cause had submitted the question to the jury; but it appears to have been scarcely referred to at the trial, and it was treated by the Judge in his charge as a fact proved. It certainly was not one of the points taken for a non-suit. If the Judge had submitted the question as to whether the will was signed by the testator when handed to the witnesses for their attestation, they would, or ought to have, found in the affirmative, upon the strong evidence in favor of the fact; and his not having done so under the circumstances of this case is not a sufficient ground for now interfering with the verdict.

I am of opinion upon the whole case that the rule for a new trial should be discharged with costs.

WILKINS, J. On all the points argued in this case I concur with the opinions that have been expressed; but there is one of them respecting which I have felt much difficulty—and a difficulty that was not overcome until I read the case of *Blake* v. *Knight*, 3 Curteis, 547. Before I perused it I was quite aware that a virtual acknowledgment of the testator's signature made to, and attested by, the subscribing witnesses, satisfied the Statute, provided there existed sufficient proof that *that* signature was actually subscribed at the time to which the acknowledgment refers. But "whether the then existence of the signature demanded *direct* proof, or could be *implied from circumstances*," was the point on which my mind at first doubted. Supposing in this case that the witness Murphy's *direct* testimony given in these words: "I saw his (the testator's) name signed to the paper to which I signed my name"—must *necessarily* refer to the time of execution of the will; the effect of it was weakened, if not neutralized, by his words uttered in cross examination, viz.: "I *think* his name was signed to the will *at the time*." Now, though I feel how natural and probable it is that a subscribing witness to a will, at a considerable distance of time from the time of his subscription, should speak doubtfully about the point in question, even in cases where but from defective memory no doubt

could exist: still, as the fact of acknowledgment is of immense importance, in view of the policy of the Legislature to prevent imposition on testators, I hesitated long as to the propriety of giving judicial sanction to a will in relation to which no verbal, express acknowledgment of the testator's signature at the time of subscription by the witnesses was made, and no *positive and unqualified* proof of the *then* existence of the signature marked the case. The case, however, to which I have referred, though distinguished by peculiar and exceptional circumstances, is yet an authority to the effect that where proof of the acknowledgment of his signature by a testator is complete, the existence of the signature as a fact at the time of the acknowledgment *may be inferred from circumstances.* The circumstances from which the learned ecclesiastical Judge in that case drew that inference were as follows: 1st. The whole will, including the signature of the testator, was in his own handwriting. 2nd. When the witnesses came into his apartment he not only drew the will from a drawer and expanded it, and told the witnesses it was his will, and requested them to subscribe it as witnesses, but directed their particular notice to interlineations and alterations which *he* had made in it. 3rd. He was of the legal profession. 4th. The attestation clause was perfect as regards form.

The case under our consideration, as respects the point of circumstantial proof of the existence of the testator's signature at the time of his acknowledgment, seems to me to be governed by the authority of *Blake* v. *Knight*, as regards the principle of that decision. In the particular case, though it does not appear that the will was written by the testator, we have proof, which is not less strong, of his having been, at the time of execution, acquainted with the contents of the paper which the witnesses signed. Murphy, on cross-examination, says: "Garvie took the will back to Carrigan after we had all signed it as witnesses, and Carrigan then looked at *and read the will.* He saw our signatures to it, and said 'it was all right,' and closed it up, saying it should be sent to the executors." Now, if it be objected that, notwithstanding all this, the signature of testator may, *as a possibility*, not have been subscribed to this particular will when Carrigan, the testator, read it, immediately after it was brought back to him by Gar-

vie, who, a few moments before, had received it from him. So might an analogous *possibility* have existed in the case cited at the time of execution by the witnesses in that case. An expressed desire of the testator that the chosen witnesses should subscribe a paper that he declared to be his will—the formality of the attestation clause—a knowledge by the testator of the contents of the paper which the witnesses at his desire subscribed as his will—these circumstances are common to the case of *Blake* v. *Knight*, and to *Carrigan* v. *Carrigan;* and I cannot think that the circumstance of the testator in the former case being a professional man, which Carrigan was not, and the fact of there being noticed alterations on the face of the paper in the former case, which did not exist in the latter, so distinguish the two cases as to prevent the case under review being fairly brought within the operation of the English authority.

Rule discharged.

Attorney for plaintiff, *Miller.*
Attorney for defendant, *H. McDonald.*

POPE v. THE PICTOU STEAMBOAT COMPANY.

December 5, 1865.

Defendants contracted with plaintiff for the purchase of a steamboat, the negociations for the purchase being carried on partly by letters between the defendants on the one hand, and the plaintiff and his agent on the other, and partly by verbal communications between the defendants and the plaintiff's agent. The boat was delivered at Summerside, Prince Edward Island, to the plaintiff's agent (who was authorized by the defendants to take delivery of her there for them), and by him taken to Pictou, the domicile of the defendants. The defendants examined her immediately on her arrival at Pictou, and finding that she did not answer the representations made of her by the plaintiff's agent, forthwith notified both the plaintiff and his agent that they would not take delivery of her. An action was brought for the price, to which the defendants pleaded never indebted, never delivered, and misrepresentation and fraud on the part of the plaintiff and his agent, etc. The learned Judge who tried the cause permitted evidence to be given of the verbal representations of the character of the boat made by the plaintiff's agent to the defendants, and the jury found a verdict for the defendants on the pleas of fraud and misrepresentation, etc. Gross misrepresentation by the plaintiff's agent of the character of the

boat were distinctly proved, but there was no proof that the plaintiff himself made any false representations, or was aware at the time of those made by his agent.

Held, first, by all the Judges, that although the contract was partly in writing, parol evidence was properly admitted to prove the fraud.

Secondly, by all the Judges, that the jury were justified in finding fraud, as the principal is bound by the declarations of his agent, and the fraud of the agent was, therefore, in law, the fraud of the principal.

Thirdly, by all the Judges, that the fraud was such as to justify the defendants in rescinding the contract.

Fourthly, by Young, C. J., Johnston, E. J., Dodd and DesBarres, J J.,—Wilkins, J., dissenting,—that the notification given by the defendants to the plaintiff and his agent was a sufficient rescinding of the contract, and that it was not necessary in order to rescind it that the defendants should return the boat to Summerside, or offer to return her thither.

Assumpsit for goods sold and delivered, and upon an account stated, the particulars being a steamboat, hull, engine, boilers, and materials. Pleas: First, never indebted; Second, never delivered; Third, never was any account stated; Remaining pleas, fraud and misrepresentation on the part of the plaintiff and of his agent, by means of which the defendants were induced to purchase the said steamboat, etc., which representations were false and fraudulent within the knowledge of the plaintiff.

At the trial before Dodd, J., at Pictou in June, 1865, it appeared that the defendants agreed to purchase from the plaintiff a steamboat for the purpose of being used as a ferry boat across the harbor of Pictou. The defendants being in want of a steamboat for this purpose wrote to the plaintiff on the 12th May, 1864, stating that they had been informed that he owned, and would sell, a steamboat that had once been on the Charlottetown ferry, desiring to know the price, draft of water, etc., and intimating that in the event of an arrangement being likely one of the company might probably go over to see the boat. To this the plaintiff replied on the 16th May that he had taken the engine and boilers out of the boat with the intention of converting her into a barge, but that he would feel disposed to sell the engine, which he believed to be good, for about £200 Nova Scotia currency. The defendants on the same day addressed another letter to the plaintiff wishing to know if he included the boat in the price mentioned, and, if not, to state the lowest price for the whole. To this second

letter of the defendants the plaintiff replied on the 23rd May, stating that in view of the usefulness of the "Ino" as a barge he was unwilling to dispose of her, and then concluded his letter as follows: "But should you want the whole, Captain Bourke can give you all the information respecting it; and I have given him my views respecting the sale, and full authority to close."

Bourke acting as the agent of the plaintiff then entered into communication with the defendants for the sale of the "Ino," which, according to the testimony of Mr. Dwyer, one of the defendants, he represented as having a zinc bottom in tolerably good order; that the hull was perfectly tight as well as the deck; that the boat was well built and thoroughly fastened, and besides the regular knees, had hanging or diagonal knees; that part of the side of the boat had not been burnt, only slightly singed; and that the boat would suit the purposes of the defendants admirably, and was just the thing they wanted. The defendants, confiding in the representations made by Bourke, addressed a letter to him on the 26th May, 1864, agreeing to purchase the boat, her engines, and all materials belonging to her, for $1360, to be paid one month after the delivery of the boat at Summerside, Prince Edward Island, and authorising Bourke to conclude with plaintiff on these terms, and to bring the boat over to the harbor of Pictou as soon as possible at the Company's expense and risk. The boat was afterwards delivered by plaintiff by Bourke's order to Captain Evans, the master of the steamer "Princess of Wales," and towed to Charlottetown, and after remaining there submerged for ten or twelve days was brought over to Pictou by Bourke, being towed there by the steamer "Heather Belle," of which Bourke was master, and placed alongside the wharf previously pointed out to him by the defendants. Immediately on the arrival of the boat at Pictou the defendants went on board of her, and discovering on inspection that she had not a zinc bottom, and was in many other respects very inferior to and different from the description given of her by Bourke, and worthless for the purpose for which they required her, on the same day addressed a letter to Bourke and another to the plaintiff (the latter of which was admitted to have been received), declining to take any delivery of the boat.

The learned Judge called the attention of the jury to the pleas alleging fraud and misrepresentation by the plaintiff and his agent, and told them that if the plaintiff's representations, or those of his agent Bourke, were false, and they knew them to be false, respecting the steamer, etc., and used them to induce the defendants to act upon them, and the defendants acting upon those representations, believing them to be true, were induced to make the purchase, they were not bound by the contract, but could disclaim it. His Lordship further stated that in that case the defendants were bound to disaffirm the contract without delay, and give the plaintiff notice to that effect. His Lordship concluded by instructing the jury that if they were of opinion that the pleas alleging fraud and misrepresentation had been sustained by the evidence their verdict should be for the defendants.

The jury found a verdict for the defendants, and a rule having been granted to set it aside on the ground of the rejection of material evidence, and as being against law and evidence, it now (July 25) came up for argument.

Wilkins, Q. C., in support of rule. Fraud and misrepresentation are pleaded by the defendants. This is no answer to a complete contract reduced to writing. Plaintiff's letter of the 23rd May, 1864, is fair and frank. He puts the Pictonians on their guard. Evidence of fraud is not admissible here. Misrepresentations by Bourke are no answer to an action by this plaintiff. The vendee must bring his action for deceit. *Pickering* v. *Dowson*, 4 Taunt. 779. The Statute of Frauds cannot be met by charges of deceit. The vendor must not take means to conceal faults. Bourke had no authority to warrant. Exaggerated descriptions do not constitute a warranty. 2 *B. & C.*, 627. There is no practical or moral fraud here. A representation is no part of the contract. 4 *Camp.*, 22. Parol evidence is not admissible to contradict or vary an agreement in writing. 3 *Wils.*, 275; 12 *East*, 6; American notes to *Chandelor* v. *Lopus*, 1 Smith's Leading Cases, 77. In 3 *Harris*, 66, an American case cited in *Smith on Contracts*, Bell, J., says, nothing that was *said* before a written contract can be admitted even to prove fraud. The representations of

Bourke were not fraudulent, but were mere exaggerations not calculated to deceive, and which did not deceive, the defendants. *Simplex commendatio non obligat.* Plaintiff's statements are accurate; they limit Bourke's. Bourke's statements as to the zinc he believed to be true. Representations, to be material, must be believed by the vendee. 1 *Smith's Leading Cases*, 273, (5th Am. ed.); *Story on Sales, sec.* 167. The defendants could not have believed Bourke. (Cites *Scott* v. *Lara*, 1 Peake's Nisi Prius Cases, 296; 12 *East*, 632; 1 *Esp.*, 290.) Whether the representations were material or not is a question for the jury. 8 *B. & C.*, 586; 2 *M. & W.*, 267. This contract has not been, and, under the circumstances, could not be rescinded. The boat was delivered, and has never been returned. Even where a vendee has a right to rescind, if the property cannot be immediately returned, he must give notice to the vendor, and in the meantime he must take care of the property. There can be no rescinding of the contract if the property has been damaged or reduced in value while in the possession of the vendee, or has been converted by him to his own use. The boat could not be returned in the same state in which it had been received. She was full of water at Charlottetown. The defendants could not rescind after they had converted the property. The boat was taken at defendants' risk. (Cites 1 *Smith's Leading Cases*, 238, 5th American edition.) Contracts vitiated by fraud are not void, but voidable. 3 *Esp.*, 82; *Story on Sales*, 427, 20; 1 *Starkie*, 257. Even where a contract is voidable on the ground of fraud the vendee is bound to return the property within a reasonable time. 1 *C. & P.*, 15. Bourke was alternately the agent of both plaintiff and defendants. Smith, one of the plaintiff's witnesses, said that the engine was worth $225,—Davies, one of the defendants, that it was worth nothing. The plaintiff was not obliged to set up the machinery. That was not stipulated in the contract of 26th May, 1864. The defendants, at an expense of £20, might have returned the boat. Even if there had been fraud, they were bound to return her. But admitting that they were not bound to return, they should at least have taken care of the boat. They have done neither, and can now no longer restore it as it was. They have abused the property. To abuse property is to convert it. 3 *B. & Ald.*,

685. Such also is the deprivation of the plaintiff of the property. The defendants ought to have inspected the boat, and having had the opportunity of so doing, are bound when they did not. The rule of *caveat emptor* applies. There was no evidence of fraud; none whatever in plaintiff himself. He gave no authority to Bourke to make false representations; and none of Bourke's representations were knowingly false—they were merely exaggerated descriptions.

W. A. Johnston, contrà. The defendants notified plaintiff of what they wanted. This appears from their letter of 12th May, 1864. There was no contract up to the 23rd May, 1864—no agreement, and no price, till then. There was no perfect contract reduced to writing on the 26th May, 1865. The price mentioned in the letter of that date must have been obtained by parol negociations with Bourke. Where a contract is partly reduced to writing and partly in parol, parol evidence is admissible to explain it. Something else, also, is required beyond that letter to complete the contract, that is, delivery. Plaintiff contracted to sell a *steamer*, not a *wreck*. He agreed to sell not only a vessel, but a vessel capable of being propelled by steam, with all the necessary machinery. To deliver a wreck was not a fulfilment of the contract. Bourke was authorized only to receive a steamer fit for a ferry boat. The testimony shows conclusively that he was the agent of the plaintiff with unlimited powers. (Refers to Bourke's representations, and contends that they show actual fraud in him.) Bourke induced the defendants not to send over and inspect the boat. Fraud vitiates every contract. 3 *Q. B.*, 58; *Addison on Contracts* (1st ed.), 219, 220, 235, 236, 407, 411, 442; 1 *Parsons' Mercantile Law*, 56, 58. The rule of *caveat emptor* never applies to cases of fraud. 1 *Parsons on Contracts*, 461, 462. (Cites 3 *M. & Ryl.*, 2; 5 *B. & Ald.*, 240; 9 *Law Times Reports*, 541; 8 *ditto*, 207; S. C. 2 *New Rep.*, 184, upholding 1 *Excheq.*, 416 (*Welsby, Hurlstone & Gordon*). Parol evidence is admissible in every case of fraud, to prove the fraud, and failure of consideration may be proved in the same way. *Taylor on Evidence*, secs. 1038, 1040; 9 *Law Times Rep.*, 292; 11 *ditto*, 381, 273. There was no delivery to the defendants.

Bourke was their agent, with a limited authority to accept a steamer such as he had represented, at least in all its material parts. He deceived the defendants as to the price. (Cites 5 *B. & Ald.*, 855; 4 *M. & W.*, 155; 9 *B. & C.*, 259.) The contract was rescinded, and, on account of the fraud, there was no necessity for returning the boat. (Cites *Chitty on Contracts*, 459 (ed. of 1841); 1 *Stark. Rep.*, 107, 257; 1 *M. & W.*, 352; 2 *B. & Ad.*, 460.) The fraud of the agent vitiates the contract as much as the fraud of the principal, and even if the agent goes beyond his instructions the principal is still bound. 5 *Esp.*, 72, 134; 4 *T. R.*, 177; 2 *Camp.*, 155; 32 *Eng. Law & Eq. Rep.*, 1. (Cites also 2 *Excheq.*, 538; *Parsons on Mercantile Law*, 142, note; 17 *C. B.*, 617; 2 *Parsons on Contracts*, 192, note.)

James McDonald follows on the same side. A British vessel capable of registry can be transferred only by bill of sale. *Merchant Shipping Act*, sec. 19; *McLachlan on Shipping*, 615; *Taylor on Evidence*, sec. 909. This boat was 90 tons register, she was built in a British colony, and came from one British colony to another. Plaintiff's letter of the 23rd May, 1864, contains no agreement to accept the price. There is no written agreement by Bourke as his agent to accept it. Defendants never accepted, and, therefore, there was in point of fact no actual delivery to them. 2 *Kent's Com.*, 703; 4 *M. & S.*, 264; 5 *B. & Ald.*, 559; *Hilliard on Sales*, 161. The authority given by the defendants to Bourke was only an authority to a common carrier. He towed the boat over with his own steamer. A delivery to a common carrier is not a delivery to an agent at all. The plaintiff could have taken the vessel back during all July and August. She was not under water until the fall. A vendee, when he discovers the fraud, is only bound to give the vendor notice to take back his property. 2 *Kent*, 661, 662; 1 *Camp.*, 190.

W. A. Johnston cites 10 *Com. Bench, N. S.*, 842; 23 *Pick.*, 286; 4 *M. & G.*, 898; 2 *Parsons on Contracts*, 193 n.

Wilkins, Q. C., in reply. Registry is only required to make a ship a British ship. This boat has never been navigated,—she was used only as a ferry boat. She was merely towed

from one port to another. Defendants gave no notice of Bourke's representations to the plaintiff. Their letter of 6th July, 1864, gives him no notice. It describes the "Ino" as a barge. If it was a steamboat they were to receive, there was no necessity of discussing how much it would cost them to restore her to the condition of a steamboat. The moment the boat was in Bourke's possession by and with the assent of Pope, the delivery was complete. Representations, before a written contract, however false, cannot be received. I admit that fraud vitiates a contract; but mere declarations falsely made do not prove fraud. The declarations of Bourke should not have been submitted to the jury. No one has pretended to say that the plaintiff committed any fraud. Bourke explains all the charges of fraud as to the burning, the zinc, the sheathing of the deck, etc. He said he had no interest in the transaction. The delivery being at Summerside, the defendants should have sent back the boat to Summerside. It would have been different had plaintiff sent it to Pictou; but the defendants brought it there themselves. It was worth £300. Now it is worth nothing. Who should bear this loss? The plaintiff limited the authority of Bourke. This is seen by plaintiff's letter to defendants. The information was confined to one point. There was no warranty, as defendants allege, in their letter of 6th July, 1864. The defendants give the plaintiff no intimation of the fraud. Is their letter of 6th July sufficiently explicit? There is an important distinction between general and particular agency. Bourke was not the general agent of plaintiff, but was merely appointed *hac vice*, and only to tell the truth. If Bourke for any purposes of his own made fraudulent representations, the plaintiff is not responsible for that.

Cur. adv. vult.

The Court being divided in opinion now (December 5) delivered their judgments seriatim.

Young, C. J., after stating the facts of the case, said: The first point to be enquired into is the liability of the plaintiff for the misrepresentations and falsehood attributed to his agent.

In his letter of 23rd May the plaintiff says to the secretary of the company: "Should you want the whole (that is, vessel as well as engine,) Captain Bourke can give you all information respecting it, and I have given him my views respecting the sale, and full authority to close, and to make something out of you Pictonians if he can,"—this last expression being evidently jocular, and indicating no evil purpose. In his evidence the plaintiff says: "I did not authorize Bourke to make any representations whatever respecting the boat. I considered I had given all the information required in my letter." And again, "Captain Bourke was my agent only to give information to defendants respecting draft of water, etc. I gave the principal information and Bourke gave the details." But the question is, what authority did Bourke appear to the defendants to have from the plaintiff's letter? He was "to give all information respecting the boat," so that, apparently, he had power equal, at least, to the ordinary power of an agent having authority to sell.

In *Doe* v. *Martin*, 4 T. R. 66, Lord Kenyon says, "the maxim that the principal is civilly responsible for the acts of his agent universally prevails both in Courts of Law and Equity." The familiar examples in the case of horses, and warranties given on the sale are to be found in 5 *Esp.*, 74; 2 *Camp.*, 555, etc.; and in the sale of coals in 5 *Esp.*, 134. In cases of insurance, Buller, J., said in *Fitzherbert* v. *Mather*, 1 T. R., 16: "Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer." In *Murray* v. *Mann*, 2 Excheq. 540, Parke B. says: "The rule of law is, that if an agent is guilty of fraud in transacting his principal's business, the principal is responsible." So in *Story on Agency*, sec. 134: "Where the acts of the agent will bind the principal" (as in this case the agent had authority to close the sale) "there his representations, declarations, and admissions respecting the subject matter will also bind him, if made at the same time, and constituting part of the *res gestæ*." And see also the case of *Cornfoot* v. *Fowke*, 6 M. & W., 358, as explained in 32 *Eng. Law & Eq. R.* 14; and *Fuller* v. *Wilson*, 3 Q. B., 67. Some doubt was thrown on the ruling in this last case in the Exchequer Chamber (Id. p. 77), but it leaves the above propositions untouched.

The next position taken by the plaintiff's counsel was that there being here a complete contract reduced to writing, fraud and misrepresentation could neither be pleaded nor given in evidence to defeat it. If the position had been that such a contract could not be defeated or changed by parol evidence, we would readily have assented to it. That was the ground of decision in *Meyer* v. *Everth*, 4 Camp., 22, where a sale by sample was sought to be incorporated into the contract, the sale note being silent as to it. It was the ground also of the decision relied on at the argument,—that of *Pickering* v. *Dowson*, 4 Taunt., 779. There it was stipulated in the agreement that the ship and stores should be taken with all faults, in the condition they then lay, and there was no evidence of fraud. Gibbs, J., says: "The parties come to an understanding, and reduce the contract to writing. By that alone they are to be bound, unless some fraud can be shown." Chambre, J., said: "The plaintiff, after inspection, agrees to purchase the ship with all faults. Where there is a written agreement it is dangerous to depart from it without evidence of fraud. Where there is such the Courts of Law will interfere—here I see none." Strike the pleas and evidence of fraud out of this case, and the main hinge on which it turns is gone. Now the effect of fraud on the contracts and relations of parties has often been reviewed in this Court, in the cases, for example, of *Newell* v. *Crowell*, M. S., and *Hill* v. *Archbold*, 1 Oldright's Rep., 452. And as it is perpetually occurring on Circuit, and our decisions will now be reported, I will seize the opportunity of referring to a judgment of Sir Frederick Pollock in *Rogers* v. *Hadley*, 9 Law Times Rep., 293, which appears to me at once comprehensive and eloquent:

"I consider that by the law of England fraud cuts down everything. * * The law sets itself against fraud to the extent of breaking down almost every rule, sacrificing every maxim, getting rid of every ground of opposition, and allowing no technical rule or difficulty of any kind to interfere to prevent the success of right and justice and truth. So much does the law of England abhor fraud, that the maxim—than which none is more universal or more stringent—that you cannot aver against the record, is forgotten when fraud is shown. The moment it is ascertained that a matter is founded on fraud,

there is an end of it; be it a record, be it a bond, be it an instrument in writing, be it what it may, it fails as soon as fraud is shown. A man may adopt or not, as he pleases, a contract imposed on him by fraud. It is at his option to say, 'I will repudiate it;' but he cannot play fast and loose—he cannot at one time say, 'I will adopt it,' and then when he has done so, say, 'I will hark back and repudiate it.'"

In confirmation of this strong opinion I may as well cite two significant passages from the older authorities. In *Fermor's* case, 3 Co. Rep., 78, it is said, "the common law doth so abhor fraud and covin that all acts, as well judicial as otherwise, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in law wrongful and unlawful." And in the case of *Wimbish* v. *Tailbois*, Plowd., 54, Monntague, C. J., says: "Covin may be where the title is good, and the title shall not give benefit to him that has it, by reason of the covin; for the mixture of the good and ill together makes the whole bad, the truth is obscured by the falsehood, and the virtue drowned in the vice."

But it was argued that there was no fraud, in point of fact, in this case; that the representations of Bourke were not fraudulent, but mere exaggerations—such as are permitted to a vendor, not calculated to deceive, and which did not deceive the defendants. Now there is no doubt a considerable latitude allowed in the making of a bargain. The morality of trade is not exactly that of the New Testament, and sometimes trenches on the very borders of deceit. The law permits phrases to be used of undue and highly colored encomium of the article on sale; it does not restrain within narrow limits what may be called the eloquence of the counting house or the shops,—it allows a purchaser to outwit or to befool himself, but there is a point where it stops. Dr. Paley in his great work condemns direct falsehood and the designed concealment of faults; he lays down the broad and obvious rule of justice and honesty in contracts of sale. But Dr. Parsons goes into it more searchingly, and draws the distinction with subtlety and vigor. In his Treatise on Contracts, vol. 1, p. 461, he says: "If the seller of an article be not silent, but produce the sale by means of false representations, then the rule of *caveat emptor* does not apply, and the seller is answer-

able for the fraud. * * He may be silent, leaving the purchaser to enquire and examine for himself, or to require a warranty. He may be silent, and be safe; but if he be more than silent; if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud of which the law will take cognizance. * * The seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself."

Apply these principles to the case before us, and can there be a doubt that there was here sufficient evidence to justify the jury in their finding of fraudulent representations?

Then it was said that it was too late to raise such an issue, for the defendants were bound by the actual delivery they had taken through Bourke, as their agent, at Summerside. And here is, no doubt, one of the main difficulties in the case. The defendants committed an imprudence in assuming the plaintiff's agent as their own, instead of one of themselves, or some other person in their interest, proceeding to the Island and inspecting their purchase. The cases upon delivery have arisen chiefly out of the doctrine of stoppage *in transitu*, and its effect upon the Statute of Frauds. There is no doubt that where a buyer sends his servant or commissions his clerk, or empowers any third party as his factor and special agent, to receive delivery of goods bought by him; the delivery so received will be considered as effectual to divest the seller, and effect a complete transfer of the property, as if the delivery were made into his own hands. This, says Bell in his Commentaries, vol. 1, p. 126, is the law of most of the Continental States, and it has never been questioned in England. So also delivery to a third person for behoof of the buyer, and to abide the buyer's orders for their future destination, is a complete delivery as between seller and buyer. This was held by the majority of the Court in *Dixon* v. *Baldwen*, 5 East, 175, where a delivery of goods at Hull for transhipment to a Hamburg house was held to have completed the delivery. The only answer, as I think, that can be given to the delivery in this case as vesting a right of action in the plaintiff, is, that the contract itself having been destroyed by fraud, and that fraud perpetrated by Bourke, his acceptance could not deprive

the defendants of their right to rescind and disaffirm the contract on discovery of the fraud.

And this introduces the main question after all on this argument—the circumstances under which, and the limitations by which, the right of rescinding is permitted and restrained. There is a difference where the price has been paid, and where it has not; and a marked difference where the purchaser has used, or in any way interfered with, the chattel. In the leading case of *Street* v. *Blay*, 2 B. & Ad., 462, Lord Tenterden held that where the property in the specific chattel has passed to the vendee, and the price has been paid, the vendee can exercise the right of returning the property, only where there has been a condition in the contract authorizing the return, or the vendor having received back the chattel has thereby consented to rescind the contract, or has been guilty of a fraud which destroys the contract altogether. He adds in another passage that where the vendee cannot rescind he must sue upon the warranty; and if sued for the price, the breach of warranty may be given in evidence in mitigation of damages. So it is laid down in 1 *Bell's Com.*, 350. "If the buyer have no opportunity of examining the quality, or inspecting the commodity before it is sent to him, or to its destination abroad, he must make his challenge instantly on discovering the defect; or, at least, without any unreasonable delay. In the question of delay the time is to be reckoned from the discovery of the fault,—from the time of delivery where it is palpable; where latent, from the time of its becoming apparent." To the same effect is 2 *Kent's Com.*, 645, citing the case of *Masson* v. *Bovet*, 1 Denio, 69. "If a party has entered into a contract by the fraud of the other party, he may, on discovering the fraud, and on the earliest notice, rescind the contract and recover whatever he has advanced, on offering to do whatever be in his power to restore the other party to his former condition." And again, in 2 *Kent*, 660, "When goods are discovered not to answer the order given for them, or to be unsound, the purchaser ought immediately to return them to the vendor, or give him notice to take them back, and thereby rescind the contract; or he will be presumed to acquiesce in the quality of the goods." In *Campbell* v. *Fleming*, 1 Ad. & El., 40, where the plaintiff had been fraudulently induced

to take shares in a supposed Joint Stock Mining Company, but dealt with them in order to save himself, the Conrt of Queen's Bench held that he could not recover back the price. So soon as he learned that an imposition had been practised on him he ought to have made his stand: knowing of the fraud he had elected to treat the transaction as a contract, and had lost his right of rescinding it. He ought to have elected to repudiate the whole transaction. This doctrine runs through all the cases, as in *Beed* v. *Blandford*, 2 Y. & Jer., 278. Here the plaintiff could not rescind the contract, because he had had an intermediate occupation of the vessel, and derived the profits. The parties could not, therefore, be placed in the same situation in which they originally were before the contract was entered into.

So in *Blackburn* v. *Smith*, 2 Exch., 783, where the plaintiffs paid the deposit on a purchase of land, and took possession, it was held that they could not rescind the contract and recover back the deposit, as the parties could not be placed in *statu quo*. Parke B. said (page 788), "Whether the plaintiffs' occupation was of value to them or not, at all events the defendant has been deprived of the use of the land."

The American cases are to the same effect, as in *Conner* v. *Henderson*, 15 Mass., 322. Casks sold as containing lime, but found to be of no value, and wholly unfit for use. Plaintiff had sold about thirty of the casks, and had not returned the remainder. Held that he could not maintain money had and received. *Per Curiam*, "The casks were of some value, and should have been restored, if the plaintiff would treat the sale as a nullity, and demand his money as paid without consideration."

So in *Perley* v. *Balch*, 23 Pick., 283. An ox sold under misrepresentation, which the defendant, however, neither returned, nor offered to return, but kept it in his pasture for several months. He had given a note for the price, which he could not avoid without returning the ox. *Per Curiam*: "The party cannot rescind the contract and yet retain any portion of the consideration."

From these authorities it is obvious that the defendants were justified in repudiating the contract, and that they did right in repudiating it at once, and in refusing to use or take

possession of the boat. The only question that remains is, were they bound to return it, and if the vendor neglected or refused to receive it back, were they bound to take the same reasonable care of it, as of their own property under like circumstances? Neither of these points, as it seems to me, is free from difficulty, and upon both there is a singular want of authority in the English text books and cases. A notice without an actual return of the goods, where the quality did not correspond with the sample, seems to be recognized as enough by Maule J. in *Fitt* v. *Cassanet*, 4 M. & G. 901. The plaintiff could only give such notice, he says, on the ground that there had been fraud in the original contract. See also *Groning* v. *Mendham*, 1 Stark., 257, where Lord Ellenborough called on the defendant's counsel, before going into evidence of bad quality, to show that he had offered to return the seed on the discovery of its inferiority, and no sufficient proof of this being made, the plaintiff had a verdict, the action having been brought for the price. In the absence of English cases, let us look at the reason of the thing. A Halifax merchant directs his correspondent at Canton or Shanghai to send him 100 chests of black tea at a certain price, and when it arrives it is found to be green tea, of the same merchantable value, but unsalable in this market. The case of *Acebal* v. *Levy*, 10, Bing., 376, decides that the mere circumstance of the goods being shipped in a vessel, indicated or chartered by the person giving the order, does not oblige him to take the goods, if on arrival they appear to be altogether unmerchantable. The Halifax merchant then has a right to repudiate the contract, and must give notice to the shipper by the earliest opportunity. But what is he to do with the teas—return them to Shanghai? That would surely be an absurdity. Who is to pay the freight and insurance money; and if the merchant advance them, how is he to be remunerated? The same principle will apply to shipments from England, which are not unfrequently without order, or at variance with the order sent. I can perceive no principle, therefore, which obliges the party refusing the goods to return them, and in many cases that might easily be put, it would be a hazardous, as well as an onerous, liability. But one obligation, I think, is incumbent on him, and that is, to take care that the goods

are not neglected or lost. In some sort I look on him as a bailee for the absent or distant shipper, whose property must not be left on a wharf to be wasted, or stolen, but must be stored and looked after, and will be liable for the expenses.

The American Courts and writers in this, as in many other cases familiar to this Court, are much more explicit than the English, and I extract a passage from Hilliard which meets some of these difficulties. Hilliard, in his *Law of Sales*, 318-319, lays down the rule thus: "A buyer who would rescind the sale must return the property in reasonable time. And in case of a breach of warranty, the reasonable time, within which the purchaser must rescind by returning the goods, dates from the discovery of such breach. So a party, who seeks the rescission of a contract on the ground of fraud, must act with vigilance and promptness on the discovery of it, by an offer to return the property within a reasonable time, if the parties live at a distance from each other; or by an actual re-delivery of it, or a tender with a view to re-delivery, if they reside near each other, and the property is susceptible of easy transportation. And if he retains the property, after an offer to return, or a tender with a view to re-delivery, he is merely the bailee of the vendor, and must avoid the use or employment of the property in any manner inconsistent with the vendor's rights. And if, upon its not being received by the vendor, the vendee takes it and uses it as his own, he will be deemed to have waived all rights derived from his tender, and cannot afterwards rescind the contract. * * If utensils unfit for the intended use are tendered back on that account, the vendor, upon notice, would be bound to take them away, and they would remain at his risk."

Let us apply these principles, which recommend themselves to one's good sense, to the case in hand. The plaintiff, ignorant of the deception practised by his agent, and thinking honestly, I have not a doubt, that he had made delivery at Summerside, according to his contract, (for I find nothing in the letters that obliged him to set up the engine and convert the barge into a steamer,) sees her unavoidably, but seriously, injured on the passage to Charlottetown, and I can easily understand why he refused to have anything to do with her at Pictou. But he would equally have refused to receive her

back had she been sent over to him at Summerside. Unhappily, as I think, he has mistaken his position—being alike unacquainted with the representations of Bourke, and his own legal liability for them. He was within a few hours' sail of Pictou, and four months of open navigation remained. He acknowledges that, immediately upon the arrival of the boat at Pictou, he received defendants' letter of 6th July, complaining of Bourke's representations, and refusing to accept the boat at any price, explaining also that Bourke's strong assurances had induced them not to send over a person to inspect her. The defendants' letter, of same date, to Bourke, informs him that the defendants decline taking any charge of the boat as she then lay. The plaintiff therefore acted with full knowledge, or full means of knowledge; he made his election to insist on the sale and delivery, and to abandon boat and engine to the care, or to the neglect, of the defendants. I must confess that on one or two of the points in this case,—which are new to us at all events, whatever they may be elsewhere,—my mind has fluctuated more than once. But for the reasons I have given so much at large, I think that the law is with the defendants, and, therefore, that the rule for a new trial should be discharged.

JOHNSTON, E. J. This case is marked by lines so defined as to be free from many questions that often perplex enquiries of this nature. It is not necessary to examine the extent of Bourke's authority to make representations concerning the vessel, as incident to his power to sell; because the plaintiff having referred the defendants to him for information, his was an express, and not implied authority only. Again, the facts and the finding of the jury establish a case of fraudulent misrepresentation, which leaves no room for discussion on the distinction between legal and moral fraud, and relieves from the necessity of examining the law in cases of simple warranty, or representations made without intention to deceive.

The law also, no less than the facts, is clear on the main principles applicable to this case. That fraud vitiates a contract is a fundamental principle. In *Lewis* v. *Cosgrave*, 2 Taunton, 4, the language of the Court is, "A man cannot

recover the price of goods sold under a fraud." In *Street* v. *Blay*, 2 B. & Ad., 462, fraud is spoken of by Lord Tenterden as "destroying the contract altogether." In *National Exchange Co.* v. *Drew*, 32 Eng. Law & Eq. Rep. 5, in the House of Lords, the Lord Chancellor, in giving judgment, says: "Certainly, in this country, and in Scotland, a contract obtained by fraud may be treated as no contract at all."

Equally clear is it that in contracts the principal is liable for the fraud of his agent, while acting within the scope of his authority, as if the fraud were his own. In the noted case of *Cornfoot* v. *Fowke*, 6 M. & W. 358, where the principal was held not answerable in consequence of a mistake in the pleadings, Parke B. says (p. 373): "It must be conceded that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, knowingly commit a fraud in making it, not only is the contract void, but the principal is liable to an action." *Wilson* v. *Fuller*, in Error, 3 Q. B. 68, is to the same effect; and in *Murray* v. *Mann*, 2 Exch. Rep. 538, Platt B. uses a very practical argument. He says (p. 540): "If the principal adopts the agent's act, he adopts the fraud and the effect of that fraud. He cannot say, 'I adopt your contract so far as to make the money mine, but I do not adopt your contract in so far as it was by your fraud defeasible.'"

We are not, however, to understand by the strong language of the Judges, when they intimate that the contract is destroyed by fraud, that it is necessarily so destroyed, or is unconditionally void. Parke B., who in *Cornfoot* v. *Fowke* speaks of the contract being void for fraud, expresses himself, in *Murray* v. *Mann*, in more qualified terms. Here he says (p. 541): "It is true that fraud does not make the contract actually void, but only voidable at the election of the party, but the moment the purchaser chooses to declare it void, the price is recoverable back." And Pollock C. B., in the same case, speaks of the contract as being defeasible by fraud.

The cases, also, are abundant to show that the right to rescind may be waived by the party injured, or be lost by his act or by his neglect.

In enquiring whether, in this case, the right of the defendants to rescind has been lost or restricted by any thing that

has been done or omitted since the contract, the question of the delivery of the vessel comes under review; and it might be worthy of consideration whether a written authority to receive delivery of a steam-boat justifies the receiving of a barge, with the engines and machinery of a steam-boat laid in her hold. Or, supposing the previous correspondence to warrant such a meaning being given to the defendant's letter of 26th May, 1864, then another question arises, whether, under the circumstances of this case, the order to receive delivery was not controlled by the representations of Bourke, so as to justify only his reception of a boat of the character, and in the condition, he had represented, and such as the defendants had agreed to purchase. This latter question is not without perplexity, arising from the double character in which Bourke acted, as agent of the plaintiff to sell, and agent of the defendants to receive, and from his being the perpetrator of the fraud in his former capacity.

If the case turned on these questions, a new trial might be necessary for obtaining the opinion of the jury upon them; but, as from the view I take of this case in other respects, its decision cannot be altered by any mode in which the question of delivery might be determined, it is not necessary to give, and I abstain from giving, an opinion on this part of the case.

Assuming that the vessel, with the machinery laid below, comes within the meaning of the defendants' letter, and assuming that the defendants must be held to the act of Bourke in receiving delivery of the vessel in that state, inasmuch as the plaintiff does not appear to have influenced them in his appointment, we have to consider the effect of that delivery on the defendants' right to rescind.

Up to the moment that the defendants were made acquainted with the fraud, they were under the delusion occasioned by that fraud, and consequently ought to be under the protection of the law provided against such frauds. To give them a right to rescind, and to withdraw that right before they knew they possessed it, or required its protection, would seem a mockery—in this instance the more glaring from the previous conduct of Bourke; but in any case (as I think,) unreasonable, although the delivery had been made to an innocent agent, or to the defendants in person. The choice whether or

not to rescind, which the law gave the defendants, was an act of the mind, requiring knowledge of the facts—a knowledge that, from the nature of the subject, must be actual, not constructive.

In *Hardman* v. *Bellhouse*, 9 M. & W. 600, Alderson B. (speaking, indeed, in relation to a somewhat different object,) says, "To constitute an acceptance in satisfaction, there must be an act of the will. Every receipt is not an acceptance."

Nor can the plaintiff urge that the defendants were bound, before receiving the vessel, to examine and ascertain by themselves or their agent the condition of the vessel, that they might know whether she came up to the representations made of her. The answer is, fraud—fraud that put vigilance to sleep, and threw the defendants off the enquiries and examination that prudence otherwise might have dictated. This, it will be remembered, is one of the consequences of fraudulent misrepresentations, to which Judges again and again have referred.

And to the argument that the losses entailed on the plaintiff are enhanced by the defendants not having rejected the vessel—if she was to be rejected—at Summerside instead of Pictou, the answer is still the same—fraud. The defendants may say to the plaintiff: "We directed the vessel to be received at Summerside and brought to Pictou, because we trusted to your representations of her character and condition, made by your appointed agent, and on the faith of which we purchased; and you, at least, cannot reproach us for believing in the truthfulness of these representations, which, as to us, are *your* representations. Your losses are the result of your agent's misconduct, for which he, not we, should, in law and justice, be answerable to you."

The authorities in support of this view are so abundant as to make the selection the only question. In *Campbell* v. *Fleming*, 1 Ad. & Ellis, 41, Littledale J. says: "*After the plaintiff had learned* that an imposition had been practised on him, he ought to have made a stand." In *Selway* v. *Fogg*, 5 M. & W. 86, the language of Lord Abinger C. B. is: "*As soon as he knew the fraud* he should have discontinued the work and repudiated the contract." In *Street* v. *Blay* the decision of the Court was that the purchaser of a specific chattel, with

warranty, after he had received and accepted it, and the property had become vested in him, could not by his own act revest the property in the seller, on the ground of total failure of the consideration. But certain exceptions were made from this rule, of which fraud is one. In *Murray* v. *Mann*, Parke B. said (p. 540), that he instructed the jury, in conformity with the law in *Street* v. *Blay*, and the Court refused to set aside the verdict. There the money had been paid, and the horse delivered and kept by the purchaser for some time, and then returned for breach of warranty. The jury were told that if the contract of sale was made under circumstances amounting to fraud, the agent of the seller was justified in acting upon the purchaser's right to rescind, and restoring his money.

These two cases determine the question conclusively, and the first has been spoken of as a well considered case. The one settled the general rule, the other was decided on an exception to that rule, being the same in principle as that we have under consideration.

There are cases in which, as in *Street* v. *Blay*, the power to rescind was denied after delivery and acceptance; but in these it will be found that the incident of fraud is absent. Such are *Toulmin* v. *Hedley*, 2 C. & K. 157, and others.

Both, then, from the reason of the thing, and from the authorities, delivery and reception of the articles sold do not of themselves divest the purchaser's right to rescind, when the contract has been tainted with fraud; and I think we may consider it as generally correct to say, that it is not until after the party deceived has become acquainted with the fraud, that he can be held to the exercise of his right to annul the contract for fraud.

There does not appear to be any determinate rule as to the time when this decision must be made; and we find in the cases various intervals of days, weeks, and months, between the delivery and rescinding, without objection to the delay.

I may mention, by way of illustration, *Percival* v. *Blake*, 2 C. & P. 514, where a metal vat was sold, delivered, and put up in defendant's premises in March. In May the defendant, not having then examined it, promised by letter to pay. On examination the vat was ascertained to be unsound. In an

action for the price, the vat not having been re-delivered, Abbott, C. J., left it to the jury to find for defendant, if they thought deceit had been practised.

In the present case, the evidence does not disclose, with any degree of exactness, the period between the delivery of the *Ino* to the master of the *Princess of Wales*, and her rejection by the defendants. The plaintiff says the vessel was not delivered until she was given over to the master of the *Princess of Wales*. There must have been time in the interval to allow the plaintiff to put the machinery on board, and there would seem to have occurred some delay from the state of the weather. It was admitted to have been in the regular course to take the *Ino* to Charlottetown. On that voyage she had nearly been swamped,—from what cause is not sufficiently explained. The plaintiff was on board the *Princess of Wales* at the time, and does not impute fault to those who had the charge of conveying the *Ino*. She reached Charlottetown in a sinking state, and remained there submerged for some time. The period occupied in raising and making her tight is not stated, beyond the plaintiff saying that she was submerged there ten or twelve days. The plaintiff and Bourke were both examined at the trial, and made no complaint of unnecessary delay, or of objectionable means being used in the conveyance of the vessel from Summerside to Pictou. The defendants appear not to have interfered personally, or by letter, in any manner; and no dealing with the vessel by any one is alleged beyond what was necessary for transporting her from Summerside to Pictou.

Being of opinion, as I am, that the defendants had the right to rescind on the ground of fraudulent misrepresentation as soon as they became acquainted with the fraud practised on them; I see nothing in the fact of the delivery of the vessel at Summerside, or in the delay, or in the dealing with her that occurred between that event and her being brought to Pictou —to divest that right.

The only question that remains is, whether the defendants consummated that right in such a manner as was legally sufficient. As soon as the defendants examined the vessel, on the same day that she arrived at Pictou, they rejected the bargain, and gave notice in writing severally to the plaintiff and to Cap-

tain Bourke of their decision not to accept the vessel, on the ground that she did not come up to the representations made by the latter.

It was urged at the argument that this was not sufficient,—that the defendants should have returned the vessel, or at least should have offered to return her. I cannot see soundness in the objection. The defendants were not in fault. Why impose on them an expensive and possibly hazardous undertaking? If the defendants would have had recourse over on the plaintiff for the expense,—as I presume they would have had,—to do so would be unreasonable to the plaintiff also: better to allow him to exercise his own judgment and convenience in the disposition of his own property.

Nothing but the clear and decided authority of the English Courts, to which this Court must submit, would bring me to adopt as imperative law a rule which in many cases—as I think in this case—would be very oppressive and unjust, that of making the right to rescind dependent on the return of the subject of the contract. There are cases indeed in which the return of the property would be reasonable and proper; and we find, accordingly, repeated instances in the books of horses and property easy to transmit, and inconvenient or expensive to keep, returned, on the rescinding of the contract; but we find also multitudes of cases in which the contract was allowed to be vacated, although the property had not been returned: in some cases it could not be returned.

Then as to the letter of the defendants not making a distinct offer to return the vessel, or request to the plaintiff to come and receive it, the plaintiff is told "the company cannot submit to take the property," and again "they have notified Captain Bourke that they will not take delivery," and their reasons are assigned. Baron Parke says, as we have seen, "the moment the purchaser chooses to *declare* the contract void, the price is recoverable back."

Did then the defendants make and express this choice? I think they did so in explicit terms. Their letter throughout conveys the clearest intimation of that purpose. By that act the contract was annulled, and both parties were thenceforward absolutely bound by the rescission. Their contract was then as though it had not been, and neither party alone had

the power to revive it. The vessel was the property of the plaintiff, as if he had never sold it. He needed neither authority nor request to take it. If he allowed it to perish he did so under an unfortunate mistake as to his legal liabilities and position, and there were abundant time and opportunity during summer weather for the safe keeping and disposal of the vessel and machinery, had the plaintiff taken charge of his property on receiving the letter of the defendants, which, in my opinion, revested in the plaintiff his title with all its rights and liabilities.

The counsel on both sides at the argument took a wide range, and discussed subjects which do not affect my decision, and on which I, therefore, give no opinion.

The rule *nisi* for a new trial ought, I think, to be discharged.

DODD, J. The counsel for the plaintiff at the argument took several objections to the defendants retaining their verdict. In the first place he contended that the agreement between the parties having been reduced to writing to satisfy the Statute, parol evidence should not have been received to contradict, vary, or add to the written agreement. His principle of the rejection of parol testimony, where the agreement is reduced to writing, is correct, subject only to fraud or misrepresentation, as the inducement for the party to enter into the contract; and in such cases it is a defence to the action. *Roscoe* in his *Digest*, page 17, states it very broadly, that, in general, matters which in law avoid an instrument, whether it be fraud, forgery, duress, illegality, etc., may be proved by parol, however contradictory to its tenor, provided the proceedings be adapted to such evidence,—and he cites *Doe. d. Chandler* v. *Ford*, 3 Ad. & Ellis, 649, for his authority. In one of the cases cited by the counsel for the plaintiff,—12 *East*, 632, although that case went off upon another point, still Lord Ellenborough in delivering the opinion of the Court says (p. 637): "A seller is unquestionably liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold to be other than it is in some particulars, which the buyer has not equal means with himself of knowing; or if he do so in such a manner as to induce the buyer to forbear

making the enquiries, which, for his own security and advantage, he would otherwise have made." Here, not only did the plaintiff through his agent, Bourke, who was appointed to give information to the defendants respecting the character of the *Ino*, fraudulently misrepresent the quality of the article sold to be other than it was in some particulars, which the defendants had not equal means of knowing; but he induced them to forbear making the enquiry, which, for their own security and advantage, they contemplated. The observations of the Chief Justice refer to an action of deceit, but they are equally applicable to any action where they can be used as a defence, and the authorities are numerous that fraud and misrepresentation are a good defence in an action like the present. Tindal, C. J., in ***Flight*** v. ***Booth***, 1 Bingham's New Cases, 376, says: "All the cases concur in this—that where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether." Here the jury have found that the misstatements were false and designed, consequently the contract, agreeably to the opinion of Tindal, C. J., is void. Another case cited on the same side appears to me strong against the plaintiff, instead of being in his favor. I refer to ***Fisher*** v. ***Samuda***, 1 Camp. 190. It was there decided that where an action has been brought for the value of goods furnished at a stipulated price, and the puchaser does not, either in bar of the action or to reduce the damages, object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross action, on the ground of the goods being of bad quality, and unfit for the purpose for which they were ordered. If this case be still law, then the defendants here, had they not adopted the course they have by defending the action upon the grounds they have, would be excluded from any other mode of obtaining redress, and would be compelled to keep an article imposed upon them by fraud and misrepresentation, and which is perfectly useless for the purpose for which it was ordered. I, therefore, am of opinion that parol evidence was admissible in this case, for the purpose of proving the misrepresentation upon which the contract was founded.

Before referring to other objections against the verdict, I

will dispose of a point taken by the counsel for the defendants. They contended that the contract was not complete by the letter to the plaintiff's agent of the 26th May, that the Statute had not been complied with, as it was still open for him to reject their offer; and, if they are correct in that respect, then it follows, as a matter of course, that the plaintiff has no cause of action. But it appears to me the letter contains everything necessary to satisfy the Statute, and when the *Ino* was delivered by the plaintiff to the agent of the defendants the contract was perfected. The contract may be authenticated and established through the medium of letters and separate writings, provided they refer to each other and to the same person and things, and manifestly relate to the same contract and transaction. *Addison on Contracts*, 80, (1st ed.). Previous to the letter of the 24th May a correspondence had been going on between the same parties respecting the sale and purchase of the same article—that is, the *Ino*,—and the letter of the 26th was an acceptance of the offer of the plaintiff, mentioning the price and when the steamer was to be delivered, and that payment was to be made one month after such delivery. This letter was signed by the chairman and secretary of the defendants' company, for, and on account of the company, and no question was made, either at the trial or the argument, respecting the authority of those persons to negotiate and make the contract for the company. All that the Statute requires has here been complied with, and it is sufficient if the note or memorandum is signed by the party to be charged therewith, notwithstanding the party who sells the article has not signed it. The words of the Statute are satisfied if there be some note or memorandum of the bargain signed by the party charged by such contract: his signature to it is all that the Statute requires. *Egerton* v. *Mathews*, 6 East, 307. And it was held in *Allen* v. *Bennett*, 3 Taunton, 169, and *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735, that the contract is sufficiently authenticated if it has been recognized in writing by the party sued upon it, and that it is no objection to the maintenance of the action that the defendant himself cannot enforce the same contract against the plaintiff because the plaintiff has never signed it. In the case last cited, Vaughan J., refers to what was said by Sir J. Mansfield in

Bowen v. *Morris*, 2 Taunton, 387: that in equity a contract signed by one party would be enforced, and it was not clear that it was different in law, and proceeds to say: "The Courts of Equity, with the exception of the *dicta* of Lord Redesdale and Sir T. Plummer, present one uniform stream of authority, and there is nothing contrary at law. Looking at the words of the Statute, they are: 'No action shall be brought, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized'; and then referring to the case before the Court, says: 'Is not this an agreement which fulfils the requisites of the Statute, inasmuch as it states the consideration for the contract, and the promise, and is signed by the party to be charged?'" And upon referring to the letter of the 26th, it will be found to contain all the requisites named by Vaughan, J., as sufficient to satisfy the Statute. I, therefore, think the contract between the parties in this suit is in accordance with the Statute, and that its requisites have been complied with. In a late case—*Smith* v. *Neale*, 26 L. J. (C. P.), 143—it was held that a parol acceptance by the plaintiff, of a written proposal signed by the defendant, constitutes a sufficient note in writing to charge the defendant.

On the other objection taken by the counsel for the defendants, that no property could pass to them in the *Ino*, she being a vessel of a certain tonnage, which, by the Ship Registry Acts, required a registry, and could be transferred only by a bill of sale, I find it not necessary to give any opinion, as I think, apart from that question, they are entitled to retain their verdict.

It was contended that the misrepresentations made by the plaintiff could not be used as a defence in the present action, but that the defendants were bound to resort to a cross action; and, I admit, some of the older cases favor this view of the subject, but the later ones, and which appear to me the most reasonable, admit that the representations upon which the contract is founded, where those representations amount to fraud, may be used as an answer to the action for the price of the article sold. Lord Ellenborough, in *Fisher* v. *Samuda*, held that it

was the duty of the purchaser of any commodity, immediately upon discovery that it was not according to the order, and unfit for the purposes for which it was intended, to return it to the vendor, or to give him notice to take it back. In that case the beer, the article in question, was delivered in May, and in the following July it was discovered to be of a bad quality, and unfit for the purpose intended; but this was not intimated to the vendor until December. How different from the case under consideration: not an hour's delay occurred after the arrival of the *Ino* in Pictou before she was examined by the defendants, and found not to come up to the representations made of her by the plaintiff's agent, and unfit for the purposes for which she was intended, and immediate notice given to the plaintiff that the defendants refused to take delivery of her. The plaintiff, in his evidence, says: "Immediately upon the arrival of the boat in Pictou I received the letter of the 6th July." This letter repudiates the sale, and refuses, upon the part of the defendants, to take delivery of the boat. It was urged by the plaintiff's counsel that the defendants had received the boat, and if they could rescind the contract, which he denied, they were bound to return her to the plaintiff at Summerside. Had there been an acceptance of the *Ino*, and no fraud had been proved, the argument of the plaintiff's counsel would have been entitled to much weight; but here fraud has been found by the jury. In *Street* v. *Blay*, 2 B. & Adol. 456, Lord Tenterden, in giving the judgment of the Court, suggested that the purchaser of a specific chattel under warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price on the ground of breach of warranty, unless in case of fraud or express agreement authorizing the return on consent of the vendor; but even in that case the Court makes the exception where there is fraud, because fraud destroys all contracts. In one of the cases cited at the argument,—*Young* v. *Cole*, 3 Bing. N. C. 724,—where the plaintiff, a stock-broker, sold for the defendant four Guatemala bonds, and paid him the amount; the bonds, after they had been in the hands of the purchaser two days, were discovered to be not marketable, whereupon plaintiff took them back and reimbursed the purchaser; held, that the plaintiff was entitled to recover from

the defendant, in an action for money had and received, the amount he had paid to the defendant. Tindal, C. J., in that case says, (p. 730): "It seems that the consideration on which the plaintiff paid his money has failed, as completely as if the defendant had contracted to sell foreign gold coin, and handed over counters instead." And may we not use the same language in this case? The plaintiff undertook to sell the defendants a steamer, with a zinc bottom, and he hands them over one without a zinc bottom; can it be said that the defendants were bound to accept her under those circumstances? And it cannot make any difference that the contract was made by an authorized agent of the plaintiff, therefore we may treat it as a contract made with the plaintiff in person at Pictou, and that the defendants had requested him to deliver such a boat as he had sold them—that is, with a zinc bottom—to their servants in Prince Edward Island, for the purpose of being taken to Pictou, and there to be used as a ferry-boat. Could it be said that in that case the plaintiff had fulfilled his contract by delivering to defendants' servants a boat without a zinc bottom, and which so much differed from the boat he had sold to them, that she was valueless for the purpose for which she was purchased, and which purpose the plaintiff was acquainted with? I cannot consider this such a delivery as would compel the defendants, upon the boat arriving at Pictou, to send her back to the Island. Although Bourke was the agent of the defendants, he was an agent only to receive the *Ino* in the state or condition in which plaintiff represented her to be when sold. If the argument is good for anything, then it may be extended to an extreme case, and the plaintiff sending the boat without any part of her engines, or a small sailing vessel in place of the *Ino* as represented when sold, the defendants would be obliged to accept either the one or the other, or send them back to the Island. Or suppose the plaintiff had contracted to sell to the defendants a bale of superior white cottons, and which he was to deliver to the defendants' agent in the Island for the purpose of taking them to Pictou, and upon being brought there, and the bale opened, it contained inferior printed cottons. In that case I think it could not be said the defendants were bound to send the bale back to the Island, and I do not see how it differs from the case under considera-

tion. The act of the plaintiff, in sending to the defendants an
article they had not purchased, was an attempt to perpetuate
the fraud he had in the first instance practised upon them;
and whatever consequences resulted therefrom he must suffer.
If the question had been submitted to the jury whether there
was unnecessary delay on the part of the defendants in giving
notice to the plaintiff that they refused to receive the boat,
they must have found in the negative, and that they used
every diligence, upon the arrival of the boat in Pictou, to
ascertain if she came up to the contract. They took no charge
of her, and no injury was sustained by her until long after the
notice had been given to the plaintiff; under these circum-
stances, I think the subsequent injury to the boat was at the
risk of the plaintiff. The case of *Bannerman* v. *White et al*,
10 Common Bench, N. S., 844, appears to me to put at rest the
principal point raised at the argument by the counsel for the
plaintiff. The plaintiff there brought an action to recover the
sum of £8,350 16s. for the price of certain hops sold and de-
livered by the plaintiff to the defendants. The defendants
pleaded, first, that they were induced to buy by the false and
fraudulent representation of the plaintiff at the time of the
sale, that no sulphur had been used in the growth of the hops;
and secondly, that they did not promise as alleged. At the
time of the purchase the plaintiff gave the defendant the fol-
lowing guarantee: "I hereby guaranty Messrs. Wigan, White
and Wigans against any loss by my 1860 hops, through the
mode of treatment on the poles or curing, and hold myself
liable to pay them any damage caused them thereby." Two
questions were left to the jury—first, whether the plaintiff had
wilfully made a false representation at the time of the contract,
that no sulphur had been used; secondly, whether the affirmation
that no sulphur had been used in the growth of the hops, was
understood and intended by the parties to be a part of the con-
tract, and a warranty to that effect. The jury answered the first
question in the negative, and the second in the affirmative, and
they assessed the deterioration in market value of the hops by
reason of the use of the sulphur, at £4,000. A rule was subse-
quently obtained to set aside the verdict, on the ground that
the stipulation that no sulphur had been used in the growth
of the hops did not amount to a condition that the hops might

be rejected if sulphur had been used. At the argument it was submitted that it was too late to repudiate the contract after the hops had passed to the defendants, and that, at all events, the defendants were not warranted in keeping the hops so long as they did before taking the objection. Erle, C. J., said: "If the question had been put to the jury they would have found that the repudiation was within a reasonable time." The hops were sent to the defendants' warehouse on the 24th October, and weighed on the 26th in presence of the seller and of the buyers. Subsequently the defendants, discovering that sulphur had been applied to a portion of the hops, wrote to plaintiff on the 4th December repudiating the contract. Here a notice was equivalent to returning the hops—at least we may fairly presume so, as the point was not raised at the argument. The argument of the cause was very full, and all the cases cited that appear to have any reference to the point in dispute. The Court held that the jury having found that the representation had been made and was false, but without fraud, and that the buyer had entered into the contract entirely on the faith of that representation, which amounted to a condition, therefore, that the buyers were entitled to repudiate the sale. Here the case is very much stronger, because the jury have found the representations made by the plaintiff were false, knowing them to be false, and that he used them to induce the defendants to act upon them. And that the defendants, acting upon the plaintiff's representations, believing them to be true, were induced to make the purchase, was not a mere legal fraud, as in the case of *Bannerman* v. *White et al*, but a moral fraud, and any consequences resulting from it must and ought to fall upon the plaintiff.

If the next case I am going to refer to may be considered good law—and I do not see how it can be disputed—then, in that case, the plaintiff could not, in the present form of action, recover, notwithstanding the defendants had detained the *Ino* at Pictou an unreasonable time, but would have to resort to a different form of action from the simple one adopted for goods sold and delivered, for any injury he had sustained from the improper detention of the boat by the defendants. I refer to *Grounsell* v. *Lamb*, 1 M. & W. 352, which was an action to recover the price of a cutting machine, manufactured by the

plaintiff for the defendant, and it was held that the defendant might show, under the general issue, that the machine was sold under a condition, that if it did not answer its purpose, nothing should be paid for it, and that, in fact, it turned out useless, and under these circumstances it was also held, that although the defendant was not proved to have returned the article, still the plaintiff was not entitled to any damages on the *quantum valebat*, without showing some new contract to be implied from the defendant's dealing with the article. This case, in principle, does not vary from that we are considering, and if, in that case, the action could not be maintained, although the article was not returned, because sold with a condition that if it did not answer the purpose nothing should be paid for it; here, also, the article has been sold with a condition which has entirely failed, and therefore the present action is not maintainable, although the article had not been returned. In a previous case of *Lewis* v. *Cosgrave*, 2 Taunt. 4, the Court held that a man could not recover the price of goods sold under a fraud. And this ruling is quite in accordance with the opinion of Tindal, C. J., in *Flight* v. *Booth*, already referred to, where he states that all the rules concur that where the misstatement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. (His Lordship here read the passage from *Hilliard on Sales*, 319, previously quoted by the Chief Justice.)

The defendants in this case residing in one Province, and the plaintiff in another, it may be fairly said that they lived at a distance from each other, and, therefore, under the principle laid down by Hilliard, a notice to rescind the contract is all that was required of them, and they were not bound to return the *Ino* to the plaintiff, provided vigilance and promptness were exercised by the defendants in the discovery of the fraud and notice to rescind given to the plaintiff. That this has been done, the evidence in the cause fully establishes, and no part of their subsequent conduct in dealing with the *Ino* brings them within the principle of a waiver of their rights.

I might close here upon the point of rescinding, and be satisfied with the authorities I have referred to upon the subject, but as there is a difference of opinion on the Bench upon this point, I am induced to extend my judgment by a refer-

ence to another case. *Poulton* v. *Lattimore*, 9 Bar. & Cress. 259, was a contract for the sale of seed; the vendor warranted it to be good new growing seed. Soon after the sale the buyer was told that it did not correspond with the warranty, and he afterward sowed part and sold the residue. It was held that in an action by the seller to recover the price of the seed, it was competent to the buyer to show that it did not correspond with the warranty. The jury found for the defendant, and a rule *nisi* was granted to set aside the verdict, which, after argument, was discharged. Bayley, J., said (p. 263): "It seems to me that it was competent to the defendant to show that the seed did not correspond with the warranty. The seller warranted the seed to be good new growing seed, and there was evidence to show, and the jury have found, that it was not good growing seed. The defendant did not then give notice to the plaintiff that it was defective in quality, but proceeded to sow part and to sell the residue. It is insisted that he ought then to have returned the seed, or to have given notice to the seller of its defective quality. As, however, the plaintiff gave an express warranty that it was good growing seed, I think the defendant might, without returning it, show that it did not correspond with the warranty." He says further: "I think by keeping it he has not precluded himself either from bringing an action for breach of the warranty, or from insisting on such breach in this action, in order to show that the seed was of less value than the seller represented it to be. But it is said that, although the warranty was not complied with, yet as the defendant used part, and disposed of the residue, it must have been of some value to him, and, therefore, the plaintiff was entitled to recover something. But there was no evidence to go to the jury that the seed was of any value; besides, the only question made at the trial, was, whether it corresponded with the warranty. The Judge was not called upon to put the other question to the jury; if he had, they probably would have come to the conclusion that the seed was not of any value." Littledale, J., said: "I am of opinion that when goods are warranted, the vendee is entitled, although he do not return them to the vendor, or give notice of their defective quality, to bring an action

of warranty; or, if an action be brought against him by the vendor for the price, to prove the breach of the warranty, either in diminution of damages, or in answer to the action, if the goods be of no value." In the case under consideration, there was an express and positive representation of the character and condition of the *Ino*, which amounted to a warranty, and the jury having found that representation fraudulent, makes it a much stronger case in favor of the defendants than that of *Poulton* v. *Lattimore*, even admitting no notice had been given to the plaintiff that they would not receive the boat; but notice was given, so soon as they had the opportunity of inspection, that they repudiated the sale. I, therefore, think that they did all the law required from them to make the defence they have to this action.

There was another objection taken to the verdict—the rejection of evidence—but I think this is easily disposed of. Dwyer, a witness for the plaintiff, stated, in his direct evidence, that he had previously heard that part of the side of the *Ino* was burnt, and boarded up to conceal it. Upon his cross-examination he stated who the person was that gave him the information, and the counsel then wanted to proceed and ascertain what further the party told him respecting the boat. This was objected to, and I sustained the objection upon the general principle that hearsay evidence is not admissible. Dwyer, in his direct examination, had not stated from whom he received the information; it was therefore quite competent to ask him on the cross-examination the name of his informant; but, as to any general conversation he had with him on the subject, I do not think it was admissible. When improper evidence has been received in the direct examination of a witness without objection, it does not follow that a continuation of such evidence on the cross-examination is admissible; but when the witness stated that he had heard the *Ino* had been burnt, the counsel for the plaintiff might then have asked him if he heard it from the plaintiff or his agent, and if from any other person, then he could have objected to his answering the question, and if the Judge had taken it down, request him to expunge it from his minutes, and, not having done so, did not justify him upon his cross-examination attempting to obtain further improper evidence. I do not think, therefore, there is

anything in this objection to justify setting aside the verdict, and for the reasons I have imperfectly given upon the other points of the case, I think the rule for the new trial should be discharged.

DESBARRES, J. I do not think it necessary, nor do I intend to refer to all the points taken at the argument on both sides. I will confine myself to those only upon which it appears to me this case must be disposed of. Adverting to the letter of 23rd May I must, in the first place, observe that it appears to me clearly to establish the agency of Bourke to give to the defendants, in the place and stead of the plaintiff himself, all the information which they required, and desired to have, as to the character and actual state and condition of the boat, and that it also gave him the power to close the bargain with the defendants for the sale and purchase of the boat.

The first question then that arises is, whether the plaintiff is legally responsible for the false statements and representations which were made by Bourke in relation to the boat to induce them to make the purchase. Upon this point there can, I apprehend, be no difficulty. The general rule, familiar to us all is, that the principal is bound by all representations or declarations made by the agent within the scope of his authority. Now if the letter of the 23rd May authorized Bourke to give the defendants *all information*, and to close the sale, as it unquestionably did, it necessarily followed that all his representations, declarations, and admissions to the defendants respecting the subject matter of the boat made at the same time, and constituting a part of the *res gestæ*, were binding on the plaintiff. *Story on Agency*, sect. 134.

It was, in the first place, contended by the learned counsel for the plaintiff at the argument, that as the contract entered into between the parties was in writing, no evidence of any oral representations made either by the plaintiff or his agent in relation to the subject of the contract was admissible to defeat it, and that if deception had been practised upon the defendants, they must resort to a cross action. In support of that position the case of *Pickering* v. *Dowson*, 4 Taunt. 779, was cited, but I do not think it at all supports the view taken

of it by the learned counsel. That was an action on the case for deceit in the sale of a ship, which the plaintiff declared the defendants had warranted to be copper-fastened. The contract in writing was silent as to the ship being copper-fastened; it stated that the ship and stores were to be taken with all faults, and as there was no fraud, evidence of conversations before the contract was very properly rejected; but, if there had been fraud, it is quite clear the evidence would have been admitted, for Chambre, J., said (p. 784): "Where there is a written agreement and no difficulty as to the meaning, it is dangerous to depart from it without evidence of fraud; where there is such, the Courts will interfere; here I see none." Gibbs, J., in the same case, said (p. 786): "In this case, if there had been any fraud, I agree it would not have been done away with by the contract; but there is no evidence of any fraud at all."

In the case before us, misrepresentation and fraud are imputed to the plaintiff by the pleas,—it was the very issue to be submitted to and tried by the jury, and therefore to hold that parol evidence was not admissible, under the circumstances of this case, would be tantamount to holding that fraud cannot be set up as a defence in any action on a written contract, which would be a violation of a well established legal principle, that fraud vitiates all contracts, whether written or unwritten. Mr. Parsons, in his *Treatise on Contracts*, page 460, says: "If there be no express warranty, the law, in general, implies none. Its rule is *caveat emptor*, * * one important and universal exception to the rule is, that it never applies to cases of fraud, never proposes to protect a seller against his own fraud, nor to disarm a purchaser from a defence or remedy against a seller's fraud." And in 2 *Taylor on Evidence*, 920, it is said, "that fraud practised by the party seeking the remedy upon him against whom it is sought, and in that which is the subject matter of the action or claim, is universally held to be fatal to his title, and it may be established by parol evidence." That is the doctrine laid down in all the cases, and it is too well known to require any authority to be cited in support of it.

It was also contended by the learned counsel for the plaintiff that Bourke's representations were exaggerated descriptions, not fraudulently made, and not calculated to deceive the

defendants, inasmuch as the plaintiff had himself represented the state of the boat. It appears that the jury before whom this cause was tried did not look upon Bourke's representations in that light; they at all events regarded them as deceptive, and fraudulently made; and I confess that, looking at his testimony, contradicted as it is upon all the essential points by the witnesses on the part of the defence, I do not see how the jury could come to any other conclusion than they did. If one could suppose that Bourke made the representations to the defendants which he did, believing them to be true, his evidence would carry with it greater weight than it does. But seeing that the boat had been built for and owned by Bourke, and that from his former connection with her he must have had a thorough knowledge of her structure, and adaptation for the purpose for which the defendants required her, it is difficult to imagine that his representations were made without any intention to mislead or deceive the defendants. Of one fact he was perfectly aware, and that is, that he had formerly sold the boat to the Charlottetown Company as a ferry boat, and that she was returned to him as unfit for this purpose, and how he could state to the Pictou Company that "she was the very thing they wanted," is a matter that does not seem to me to be of easy explanation.

The next point was that the defendants, having, through their agent, Bourke, received the delivery of the boat from the plaintiff at Summerside, and the boat having been submerged at Charlottetown, they were not at liberty to rescind the contract. I cannot doubt the defendants' right to rescind the contract on discovery of the fraud practised upon them by Bourke, which I regard as entirely destructive of the contract. The difficulty that has presented itself to my mind is, whether the defendants, having that right, were bound to return the property, as it is contended they were, to the plaintiff at Summerside.

On this last point I confess the cases do not throw as much light as I would like to have in forming my judgment upon it, yet they lay down certain principles from which a decision may be arrived at. I have not met with any case in which it is laid down that on the disaffirmance of a contract for fraud, an actual return of the chattel must invariably be made; a

notice to the vendor to take back the chattel is, in many of the cases where there was no fraud, considered enough, and equivalent to a return, provided the notice be given immediately on discovering that the article is not according to the order, or unfit for the purpose for which it is intended. That principle was laid down in *Fisher* v. *Samuda*, 1 Camp. 193, where it was held that as the plaintiff knew in July that the beer was unfit for shipment and gave no intimation of it until December, it was to be presumed he had assented to its being of good quality, and the defendant had a verdict. Here not a moment was lost, after discovering that the *Ino* did not at all answer the description given of her by Bourke and the deception practised upon them, in giving the plaintiff notice of their determination not to take delivery of her; and, as the navigation remained open for some time afterwards, he might, if he had chosen, have taken her back. In *Okell* v. *Smith*, 1 Stark. 107, brought for the price of copper pans made by the plaintiff under a contract that they were to be sound, and of good materials, Bayley, J., held that if the defendants, after giving the copper pans a reasonable trial, found them insufficient for their purpose, and gave notice to that effect to the plaintiff, he was bound to take them away; but if no notice was given, and defendants retained the pans, they were liable to pay as much as the materials were worth. In *Groning* v. *Mendham*, ibid, page 257, which was an action brought for the price of clover seed, which was objected to as of an inferior quality, Lord Ellenborough called upon the defendant, at the close of plaintiff's case, to prove *that he had offered to return the seed upon discovery of its inferiority*, before he would receive evidence that it did not answer the order, and no sufficient evidence being given, he directed a verdict for the plaintiff. So in the case of *Cash* v. *Giles*, 3 C. & P. 407, for the price of a threshing machine, which defendant had in his possession three or four years, though only used twice, and proved at the trial to be of no value, because it did not thresh the corn out properly, Park, J., held that if the defendant meant to insist that the threshing machine was not a good one, suitable to its intended purpose, it was his duty to have immediately returned it, or to have given immediate notice to the plaintiff to fetch it away as of no use, but that, not having done so, he

had waived all objections to its goodness, and was bound to pay for it. In *Poulton* v. *Lattimore*, 9 B. & C. 259, brought to recover the price of *cinq foin* seed, warranted to be good, but which, after being sowed, turned out to be bad, Littledale, J., says (p. 265), "that where goods are warranted, the vendee is entitled, although he do not return them to the vendor, or give notice of their defective quality, to bring an action for breach of the warranty; or if an action be brought against him by the vendor for the price, to prove the breach of the warranty, either in diminution of damages, *or in answer to the action, if the goods be of no value.*"

Now if the vendee of goods warranted may, without a return to the vendor, or notice of their defective quality, in an action brought against him for the price, set up as an answer to the action that the goods are of no value, I do not see why a vendee to whom a fraudulent representation has been made, and where the goods are proved to be of no value, as in this case, may not with as much reason set up fraud as an answer to such an action, although there has not been a return of the property. What are the facts proved here in relation to the boat? Dwyer, one of the defendants, states that if the boat had been represented as she really was, they would not have taken her as a present, that she was not worth spending money upon, and was perfectly useless. Mark Talbot, a shipwright for 40 years, says: "I examined the *Ino* two or three days after she came to Pictou, at the request of one of the defendants. I found she had been burnt on one side. The inside ceiling was consumed, and the heads of the timbers were burnt, and the end of one of the beams was burnt. The burning would weaken and injure her; she had once been pretty well timbered, but she was then a complete wreck. The decks were ripped up in some places. From what I saw of her, she was not fit for a ferry-boat; and, if hauled upon a slip, I think she would have been condemned." (His Lordship here referred to *Street* v. *Blay*, and *Campbell* v. *Fleming*.)

The defendants in the present case did not at all hesitate as to the course they were to adopt. They repudiated the contract the moment they discovered the deception that had been practised upon them by Bourke, and took the earliest opportunity of intimating that fact to the plaintiff, and that they

would not accept the delivery of, or take any charge of, the boat. Having done that, I think it was all they were required to do, and that as the contract became absolutely void and of no effect, by reason of the deception so practised upon the defendants, they were, according to my view, under no legal obligation to incur the expense of returning the boat to the plaintiff at Summerside; it being, as it appears to me, his business, under all the circumstances of this case, to take her back at his own expense. I may say that this case is not, to my mind, entirely free of difficulty; but, after giving it the best consideration which I have been able to bestow upon it, I have arrived at the conclusion that, upon the law and evidence in the case, the defendants are entitled to retain the verdict rendered in their favor, and that the rule for a new trial ought, therefore, to be discharged.

WILKINS, J. I concur in the opinions expressed by the rest of the Court, that the plaintiff, by his agent authorized to make representations about the subject of the contract in question, fraudulently misrepresented its condition and quality, and that by reason thereof the defendants had a right to treat it as void, on performing the conditions which, in such a case, the law imposed upon them. But I am of opinion that those conditions have not been performed, and that, as a legal consequence, the contract was in force at the commencement of the action; and that, instead of the verdict being, as it was, for the defendants, it should have been for the plaintiff.

Before referring to the facts, I will state certain legal positions governing, as I conceive, the question. First—Where a vendee of a chattel seeks to annul, *on account of fraud*, the contract whereby it passed into his possession, the law, which is not vindictive, demands that, in avoiding that contract, he shall do as little injury as possible even to the *fraudulent* vendor. Second—The vendee, in the supposed case, is bound, so far as may be consistent with his own necessary right, by inspection and inquiry, to test the condition of the chattel, in order to ascertain whether it is, or is not, conformable to the vendor's representation of it, to restore him to the situation in which he was immediately before the sale. Third—The

vendee, in order to rescinding, must, in every case, save the exceptional, single case of the chattel being found by the jury to be of no value whatever, either to the vendor or to the vendee, return it, or offer to return it, at his (the vendee's) cost, *at the place where he received delivery of it.* "Return," in its connection with this last position, means, and can only mean what in many of the cases in the books is expressed by the equivalent phrase, "take back," "restore," "re-deliver." All these necessarily import "a reinvesting the vendor with that actual possession of the chattel which he had when he invested the vendee with the possession of it." It cannot, possibly, be construed to mean a mere abandonment of the possession by the vendee—a mere saying in *effect* to the vendor, "Come and take your property."

Suppose a negociation conducted between Mr. Tattersall, in London, and A. B. in Falmouth, about the purchase of a horse then in London, concluding with a letter, addressed by the latter to the former, in these words: "I agree to buy the horse, relying on your representation that he is good for my purpose made known to you. You will please deliver him at Exeter, to my agent, his removal from your stable to the last mentioned place, and thence to Falmouth, being at my expense and risk." The horse is delivered at Exeter, where no trial or examination as to his suitableness is made; but, on his arrival at Falmouth, he is found to be the subject of fraudulent misrepresentation by the vendor, and entirely useless for the buyer's purpose. Thereupon the latter, addressing the former, writes: "You have fraudulently misrepresented: the horse is useless; I will not take delivery of him. You, in London, can get him at my stable in Falmouth, when you please, but understand—I will not pay you a farthing for him." This, substituting "boat" for "horse," and "Summerside" for "Exeter," will be found to be precisely the case before the Court. Now, can it be believed that any eminent English lawyer would give Mr. Tattersall, in the supposed case, different advice from this, namely: "If you sue A. B. for the price of the horse, he cannot set up, as a defence, that the contract is avoided by your fraud, even if you have committed it, unless he proves, at the trial, that before action brought, he offered to return to you, at Exeter, where he received it, the

possession of the horse?" Can it be doubted that if such a learned counsel as is supposed were asked to explain the legal principles governing the case submitted to him, he would express himself to this effect: "Fraud only avoids a contract of sale of a chattel tainted with it, at the option of the buyer. There is only one way whereby he can effectually signify his intention to avoid it, and that is by returning, or distinctly offering to return, the chattel to the fraudulent seller, in such a manner, and at such a place, as will, so far as is practicable, after discovery of the fraud, restore him to that position in relation to the chattel in which he was placed when he parted with possession of it to the buyer." It is incontrovertible that such is the law. On the point of a legal obligation to return the chattel, articles of delicate manufacture set up in houses, and not found to answer the purpose for which they were ordered, are clearly exceptional cases, from their very nature. If these defendants must incur costs in returning the property to Summerside, they have obviously themselves alone to blame, since by doing at Summerside what they afterwards did at Pictou, those costs would have been prevented.

I take the case of *Perley* v. *Balch*, 23 Pick. 283, which illustrates the positions that I have assumed. The question in it was, whether there was a rescission in a case marked by the sale of an ox, represented by the seller to be fit for the buyer's expressed purpose of *fattening*, but discovered to be, consciously to the seller, diseased, and incapable of being fattened, and, therefore, useless to the purchaser. He urged his right to rescind, without returning, or offering to return, the animal, his counsel contending that, though it might be, if returned, useful to the seller, yet that the buyer was not bound to subject himself to any trouble or expense in restoring it to the plaintiff. The Supreme Court of Massachusetts laid down these principles, which will be found applicable to this case, and on some points decisive of it, when I come to state the leading facts of the evidence. The learned Judge in his judgment said (p. 285): "Where the purchaser is induced by the fraudulent misrepresentations of the seller to make a purchase, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract." This principle is in conformity with the English authorities,

provided the language of the learned Judge be understood with the obvious qualification, namely, that the obligation to restore the seller to his former position must be viewed in connection with the buyer's necessary privilege of doing to, and with, the chattel all that may be required to ascertain whether it is, or is not, conformable to the seller's representations respecting it. *So qualified*, the English and American rules will be found in perfect harmony.

Hilliard on Sales, p. 319, thus expresses the rule: "A party, who seeks the rescission of a contract on the ground of fraud, must act with vigilance and promptness on the discovery of it, by an offer to *return* the property within a reasonable time, if the parties live at a distance from each other; or by an actual re-delivery of it, or a tender with a view to re-delivery, if they reside near each other, and the property is susceptible of easy transportation." Now the words "an offer to return the property within a reasonable time, if the parties live at a distance from each other," necessarily imply, in such a case as this, an obligation on the part of the vendee, to offer to send the subject of the disaffirmed contract to the distant place—in other words, to the distant residence of the vendor—in order to do which he is allowed the reasonable time mentioned in the rule. If, then, the rule be sound, it settles the question, and shows that the defendants were bound to offer to return the property *to Summerside*. The learned Judge, in *Perley* v. *Balch*, proceeded to say: "If the defendant rely on the fraud (to rescind) it is indispensable that the property be returned." On the point of value the learned Judge most sensibly, in answer to the contention of the defendant's counsel above referred to, expressed himself thus (p. 286): "If the property be of any benefit to the *seller* the defendant is bound to return it." If the contention of these defendants be right, namely, that an abandonment of this property at the Pictou wharf, with notice to the plaintiff to that effect, was all that the law requires in order to a valid act of rescinding for fraud, how can we explain as law the following notices of American decisions, which we find made by Hilliard without question as to their authority? "A vendee, who receives the thing into his possession, cannot sell it at auction, though it does not conform to the contract, *but may leave it at the vend-*

or's door, giving him notice." *Buffington* v. *Quantin*, 17 Penn. 310, cited in Hilliard, 308, n. Again: "In case of exchange between A. and B., if A. elects to rescind for fraud in B., he cannot maintain an action merely by notifying B. to come and receive the goods, but must actually return them." *Norton* v. *Young*, 3 Greenl. 30, and other cases cited at the same place. Now observe that to decide in the last case that A. cannot maintain an action is equivalent to saying that A. cannot rescind, for the action would be necessarily based on an effectual rescinding. The rule which, in cases of rescinding for fraud, makes it imperative, in every case except the proved worthlessness of the chattel, to offer to return it to the vendor, in the sense of re-delivering it to him, how distant soever the place may be where it was received, whether that rule be applied to large mercantile transactions between distant places, or to such a case as this, can entail no unreasonable inconvenience on the buyer, as may be illustrated by the particular case. Suppose this barge delivered at Summerside, removed directly to Pictou, and a fraud discovered there that vitiated the contract, the buyer would inquire: "Will it be more for my interest to incur the cost of sending this vessel back to Summerside, as I am bound to do, if I rescind; or to treat the contract as subsisting, and sue the seller on his warranty if it exist, or for the deceit practised." The fallacy (I say it with deference) which lies at the bottom of a contention, "that these defendants were not bound to offer to send the property back to Summerside," is a notion "that the fraud annulled the contract *ab initio*;" whereas the fraud merely made the contract voidable by the purchaser *at his option*.

I will now mention some of the leading facts of the case, in illustration of my views of the law bearing upon it. In the summer of 1864 a proposal is made *by the defendants*, in Pictou, to the plaintiff in Prince Edward Island, for purchase of a steamboat; a correspondence ensues, which terminates with a letter of the 26th of May, to which I shall presently refer. In the interval, however, the representations concerning the subject of the negociation, which are conceded to have been false and fraudulent, are made by the plaintiff's authorized agent, in oral communication with the defendants' company, at Pictou, whither he was sent by the plaintiff. On the 26th

of May the defendants, by their secretary, address him (who having been employed by the plaintiff to negociate and close a contract with the defendants, had *then* closed it and exhausted his powers, and was, therefore, no longer the plaintiff's agent, save for the purpose of conveying to him the letter under review,) in these terms: "The Pictou Steamboat Company, at a meeting held this day, resolved to accept Mr. Pope's offer for the sale of the steamer *Ino*, the price being $1360, Halifax currency, for the whole hull, engine, boilers, and all materials and furniture belonging to her, the same to be delivered to *you*, at Summerside, P. E. I., and to be paid one month after *said delivery*, and *you* are hereby authorized to conclude with Mr. Pope on these terms, and to bring the boat over to this harbor (Pictou) as soon as possible at the Company's expense and risk." Thus Bourke was selected and appointed by the defendants *their* agent to receive from the plaintiff delivery of the chattels mentioned in the letter; and, of course, it was for him, in that capacity, to determine what he would, or would not, receive *as such*. We must bear in mind that the *defendants* thus proposed and named the place of delivery, and it is a fact, that, neither in this letter, nor in the whole testimony, does it appear that the plaintiff expressly or impliedly consented that the subject of the sale should be taken over *to Pictou*, in order to inspection and examination by the defendants *there*. He knew the boat was intended for Pictou, but there is not a word in the contract from which it can be inferred that he contemplated the boat, when there, being subject to any condition as to rescinding there. Bourke, charged with the letter, proceeded to the Island, and communicated its contents to Pope. The defendants' agent, without instituting any examination at Summerside, or elsewhere on the Island, in order to ascertain whether the representations made by the plaintiff were true or false, took delivery of the boat, etc., at Summerside, and had them brought over to Charlottetown, the capital of the Island. *There*, from what cause, and under what circumstances, does not appear, she lay submerged in the water. Afterwards she was towed over to Pictou.

Subsequently to the delivery at Summerside the plaintiff does not appear to have interfered with the subject of the sale

in any manner whatever. Thus the defendants took delivery of the boat at Summerside, and brought it over to the place of their own residence at Pictou harbor. *Within twenty-four hours after they brought it thither* they caused it to be examined, and avowed their intention to reject it, on the ground of the there discovered fraud of the plaintiff in relation to it.

We have seen that in order to their doing that, so as to disannul the contract, they were bound to return, or, at least, to offer to return the property to the plaintiff *at Summerside.* Let us see what they have done in relation to that condition of law. Pope says in his evidence: "The boat was never returned to me, nor was it tendered or offered to me," and there is nothing in the evidence that contradicts this. On the contrary, the defendants have unequivocally manifested their determination not to re-deliver, or offer to re-deliver. They decided merely to abandon *at Pictou.* The jury, let us bear in mind, have not only not found that the property was worthless to the seller, but there is no proof that it was, as a fact, worthless to the buyer or to the seller. The defendants, after their decision to rescind, address a letter of the 6th July to the plaintiff, which he received as soon afterwards as it could reach him at Summerside, which contains these words: "We cannot submit to take the property." "We have notified Captain Bourke" (with whom, by the way, plaintiff had then no connection) "that we will not take delivery." Thus, respecting the property, which, at their own request, had been delivered to them at least one fortnight previously, they say: "We will not take it." They content themselves with informing the plaintiff of such their intentions, with abandoning the property, and leaving it to go to ruin at a wharf at Pictou, to which they had brought it.

I must not quit this part of the case without observing that the jury were *in effect* told by the learned Judge who tried this cause that no such condition as *that of returning the property* attached to the defendants; and the verdict for them has been found under that impression. I am aware that misdirection is not mentioned in the rule, but, nevertheless, it is to be considered whether, in such case, the ends of justice do not demand that a verdict formed under misapprehension of law on a point of the very essence of the case, is not in effect a

verdict contrary to law in that respect, and one that, therefore, ought not to be allowed to stand. My learned brother's language is this: "If the defendants, acting upon those representations, believing them to be true, were induced to make the purchase, they were not bound by the contract, but could disclaim it." "They were, however," he added, and this is all that he said on the point, "in that case bound to disaffirm it without delay, and give the plaintiff notice to that effect."

The jury could not but infer from this that this was *all* that the defendants were required to do. All this they have done, but, as has been shown, there is another thing which they have not done! Had the jury been told *that the contract, in point of law, had not been disaffirmed, unless they were satisfied that there had been by defendants a return, or an offer to return, we cannot say that their verdict would have been for the defendants!* In *Toulmin* v. *Hedley*, 2 C. & K. 157, where, however, the point of misdirection was in the rule, Pollock, C. B., said (p. 161): "In terms the direction of the learned Judge is not open to exception; in what precise sense he used those terms does not appear. The question left to the jury was certainly *one capable of being misunderstood;* and I believe the Court agree with me in opinion that there ought to be a new trial." In the case under our review my learned brother's language could not but have misled the jury on an essential point of law. The jury should have been told that if there were no offer to return proved, the plaintiff, unless they could believe, under the evidence (which they could not), that the property was worthless even to the vendor, was entitled to a verdict, under the general count, for what they believed the property to have been worth when it was delivered. *Grounsell* v. *Lamb*, 1 M. & W. 352, concedes the rule of law "that, where there is nothing exceptional in the special contract (as there happened to be in that case), a fraudulent seller, where there has been no return, may recover on a *quantum valebat*, the real value of the chattel sold." It was assumpsit for a machine sold and delivered. There was a condition in the contract that *if the machine did not work, nothing was to be paid for it.* It was held that, though it was not proved to have been returned to the plaintiff, he was not entitled to any damages on the *quantum valebat*, without showing some new implied contract aris-

ing from the defendant dealing with the goods. Lord Abinger, C. B., says: "Here the defendant showed a special contract on which the plaintiff had not declared, and *having a condition annexed to it, which prevented the implied contract declared on from arising.*" Parke, B.: "To entitle the plaintiff to any damages on the *quantum valebat*, he should have shown some new implied contract arising from the defendant's conduct or dealing with the goods." *Hilliard on Sales* says, p. 323, n.: "If the contract has not been rescinded, then the purchaser should only pay so much as the chattel, in its unsound state, was worth; or, if it was of no value, he should be entirely discharged."

There is another view of this case which shows that this verdict ought to be set aside. The defendants made their election to stand by, and not to avoid, this contract, when, without examination, they removed the barge, etc., from Summerside. The defendants could have done *there*, in relation to discovery of the fraud, what they afterwards did, to that end, *at Pictou.* This might have been done by means of one of them going over to the Island for the purpose, or by instructing their agent to conduct the inquiry. Had it been made *there*, the course would have been less hurtful to the fraudulent seller than the course actually adopted. As then, they had, at Summerside, the means of ascertaining the facts subsequently discovered at Pictou, they, in legal contemplation, for the purpose of the present investigation, must be taken to have had there *actual knowledge of those facts.* If, in fixing the period for inspection and examination, they were not limited, *as a commencing point*, to the time when they first possessed the means of knowledge, then this absurd consequence would follow, namely, that after they possessed the property at Pictou, they were not bound *to begin to examine* until now. It is unnecessary, in this case, to speculate about the point of a *reasonable* time for examination, since after the eyes of the defendants beheld the property at Pictou, they were, *in fact*, enabled to discover the fraud *in the period of twenty-four hours.* See *Bell* v. *Gardiner*, 4 M. & Gr. 11, per Tindal, C. J. The *rationale* of "reasonable time" in such a case is found in *the necessity for inquiry and examination.* Where was the necessity for keeping this property unex-

amined during the whole period occupied in taking it from Summerside to Charlottetown, and keeping it there twelve days, and afterwards removing it to Pictou? There was obviously none! I, therefore, consider the effect of all these last mentioned acts of the defendants from this stand-point, namely, that, in point of law, *they had actual knowledge of the fraud before the property was removed from Summerside. Parsons on Contracts*, vol. 2, p. 279, has this passage: "A mere lapse of time, if it be considerable, goes far to establish a waiver of a right to rescind; and, if it be connected with an obvious ability on the part of the defrauded person to discover the fraud at a much earlier period by the exercise of ordinary care and intelligence, it would be almost conclusive." The defendants dealt with this property as their own, after they so removed it from the place of delivery; then, on the authority of *Campbell* v. *Fleming*, 1 Ad. & Ell. 40, they had not the right to rescind *at Pictou*. In that case, the question was, whether a party who had been induced by fraudulent misrepresentations of the seller to purchase shares in a Mining Company, and who, after discovering the fraud, sold some of the shares, could rescind. It was held that he could not. Parke, J. (p. 42): "After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; and the fraud could do no more than entitle him to rescind." The question, as to whether these defendants dealt with the property as their own under a contract, may be determined by an obvious answer to another question, which is this: "Did this plaintiff give, expressly or impliedly, authority to the defendants to take the property to *Charlottetown*, or authorize its being kept there for any purpose whatever for twelve days?" *There*, the barge and her engines, from some unexplained cause, were in a situation under water which must have damaged them. What evidence exists that the plaintiff sanctioned this? Absolutely none! Even supposing she sunk at Charlottetown, not from mismanagement of defendants' servants, but from inherent defects existing when she was delivered over by plaintiff at Summerside, and supposing *that* urged to him, what would his natural and irresistible answer be: "You might have ascertained the defects at Summerside, and I, in no respect, consented to your taking her to Charlotte-

town. I contemplated your removing her to Pictou, though *not subject to any obligations or conditions on my part as attached to her there*, but your deviation to Charlottetown, and your keeping her there twelve days, I never even contemplated, much less sanctioned."

The defendants, then, removed the property to Charlottetown, *because it was their own;* and they, by doing what they did, after their implied knowledge of the fraud, as completely dealt with the subject of the contract *as their own*, as did the plaintiff in *Campbell* v. *Fleming* with the shares in the Mining Company. "They did not make their stand, as they should have done, at Summerside."

This case is susceptible of another view, in which it might be necessary to inquire whether it is marked by an express warranty. On that point I am quite clear that there is evidence of express affirmations made by Bourke as to the quality and capabilities of the property sold—affirmations of fact and not of opinion merely,—from which the jury, if the question had been submitted to them, could have inferred an express warranty. See *Hilliard on Sales*, sec. 6, p. 258; also *Chapman* v. *Murch*, 19 Johns. 290. If there was such warranty, then *Toulmin* v. *Hedley*, 2 C. & K. 157, would be worthy of consideration.

Before noticing it, I observe, in passing, that a note in *Hilliard* called my attention to the learned judgment of Lord Tenterden in *Street* v. *Blay*, 2 B. & Ad. 462. His lordship adverts to the doctrine held, he says, in a certain class of cases, to the effect, "that where the property in a specific chattel has passed to the vendee, and the price has been paid, he has no right, on breach of the warranty, to return the article, and revest the property in the vendor, and recover the price as money paid, on a consideration that has failed, but must sue on the warranty, unless there has been a condition in the contract authorizing a return, or the vendor has received back the chattel, *or has been guilty of a fraud which destroys the contract altogether*." Now, these learned remarks are no further applicable to our inquiry than this, that they enunciate a principle recognized in a hundred subsequent cases, namely, that a party who has received into his possession a specific chattel respecting which there has been fraud

on the part of the seller, may (*performing certain conditions*) return the article, and revest the property in the vendor. To that extent only is the case an authority to affect this. If, however, any person would venture to contend that Lord Tenterden's words, used in connection with fraud, namely, "*which destroys the contract altogether*" are to be received *without qualification*, he would find that, taken in that unqualified sense, (in which sense I am quite certain the learned Judge did not mean to apply them,) they are not law in 1865. There is no rule in the law of contracts more absolutely fixed beyond controversy than "that fraud, however gross, in a contract of sale, does not 'destroy the contract altogether,' *but only at the election of the buyer.*"

An express opinion of Lord Tenterden, that a vendee, having *accepted and received* a chattel that came to him by fraud, could, nevertheless, avoid it on the ground of fraud, though there existed a warranty, would be accepted by me, not merely as a positive authority by which I would be bound, but as according with my own humble views of the law; provided the learned Judge meant what I am sure he would intend, an *accepting and receiving*, not for the purpose of dealing with the chattel as the buyer's absolute property, but for the purpose of *examination in order to determine whether fraud existed and affected the contract.*

Lord Tenterden, as we have seen, put the case of fraud *as exceptional* to the general class of cases of accepting and receiving a chattel where there was a warranty, "*because fraud destroyed the contract altogether;*" but we have seen that fraud in such cases does *not* destroy the contract altogether. Where, then, it may be asked, is the distinction *in principle* between the case of a specific chattel sold and *represented untruly* to be fit for a particular purpose, and the case of that same chattel sold and *warranted* to be suitable for that particular purpose? If the two cases are subject to the same legal incidents, then, if the jury could have found an *express warranty* here, *Toulmin* v. *Hedley* is an authority that these defendants, having accepted delivery of the property at Summerside, not merely for the purpose of inspection and examination, but as an absolute delivery of it, intending to rely on their warranty, were bound to keep the property, and have

recourse to the warranty. I make those observations because the question of *express warranty* might have been put to the jury, and, if answered affirmatively, might have materially affected the rights of these suitors.

Before further noticing *Toulmin* v. *Hedley*, I ask if there be a difference in principle between that case and this? It was the case of a cargo of guano *warranted* equal to average imports, and sound and merchantable. This is the case of a boat and engines represented (and the jury might perhaps have found, *warranted*) to be of a certain quality, in a certain contain condition, and suitable for a certain purpose. Now, in order to show the applicability, in the sense adverted to, of *Toulmin* v. *Hedley*, I have only to state, without comment, the instructions of Cresswell, J., to the jury, which, as respects the legal principles involved in them, the Court received without disapproval. Cresswell, J.—"This cargo was *warranted* to be equal to the average imports from Ichaboe, and in sound and merchantable condition. It is true that it was a contract for a specific cargo, but it had not been seen by the defendant; and I think, therefore, that, before accepting it, he was entitled to look at it in order to see whether it corresponded with the terms of the warranty or not, and that, if it did not, he was entitled to reject it. The defendant might either take to the cargo, and run the risk of his action on the warranty, or he might insist on inspecting it, and reject it if it was inferior to the quality warranted. I shall, therefore, ask you, first, if this cargo actually corresponded with the warranty, because, if it did, the defendant was bound to accept it; and if you should not be of this opinion, I shall ask you, secondly, whether the delivery took place under an arrangement that the defendant might inspect the cargo, and then return it if found not to correspond with the warranty; or whether it was delivered to him, he taking it as a delivery of the cargo, and intending to rely for his remedy on the warranty alone. If it was agreed that the cargo should be landed for the purpose of inspection, the defendant had a right to reject it. If it was landed under no such agreement, the defendant was bound to keep the cargo, and rely for his remedy on the warranty only." Now, I will not take upon myself to say absolutely that that case governs this, or would, if an express warranty had been

found; but this I am prepared to say, that if it does apply, the salient points of it are so strikingly similar to those of the case under review, that to draw in words a parallel between them would be an unnecessary waste of time. In connection with a review of the case just considered, I may remark that one of the questions put by Cresswell, J., suggests to my mind a query—"whether this plaintiff, in the most unfavorable view to him of the particular case that could be taken, would not be entitled to the practical application of the following American decision noted in *Hilliard on Sales*, 319": "Where the plaintiff agreed with the defendant to manufacture for him certain utensils of trade at a specified price, and that they should be sound, and made of the best materials, and the articles having been delivered, in an action for the price, the defendant contended that they were unfit for the intended use; held, it was a question *for the jury* 'whether the defendant had used them longer than was necessary to make a fair trial of their quality.'" Assuming, as I have contended, that "the necessary time for a fair trial" began, in this case, when the defendants took delivery *at Summerside*, the application of the principle involved in the case just referred to from *Hilliard*, becomes obvious; and the moral question, at least, obtrudes upon the mind, namely, "is it just that this verdict should stand against this plaintiff, in a case in which the jury have not considered the question of necessary time, relatively to the point of time when the delivery was actually made?"

Whatever speculations may be entertained about some points presented by this case, there is one view of it which all the authorities and text writers, without exception, English and American, place beyond the region of speculation. It may be shortly put thus: There existed a contract of sale—a delivery of the chattel, by defendant's desire, at Summerside, Prince Edward Island. Thence defendants removed it to Pictou, on the mainland of Nova Scotia, and, there, on discovery of the fraud, notified the plaintiff that they disaffirmed the contract on the ground of fraud, but they never offered to reinvest plaintiff with the property and the possession of it, *at Summerside*. The law made it imperative on them to do so; and, not having done it, the contract was never rescinded, and yet a verdict stands, and on it there will be a judgment

against the plaintiff. For the reasons stated, I am of opinion that this rule should be made absolute.

Rule discharged.

Attorney for plaintiff, *Wilkins, Q. C.*
Attorney for defendants, *A. C. McDonald.*

GARVIE *v.* PENNY.

***December* 11, 1865.**

Neither the Court nor a Judge has the power to authorize a party demurring to join in demurrer, unless as a condition for some favor to the opposite party.

McCully, Q. C., for defendant, moved on the first day of Term to strike this case off the docket as having been improperly entered. It appeared that the cause had been entered for argument on demurrer by the plaintiff's attorney, who had obtained an order from Johnston, E. J., on the 20th November, allowing him to join issue and demur to several of the defendant's pleas. The plaintiff's attorney served the demurrers on the 23rd November, with a demand of joinder in demurrer attached thereto; and on the 27th November obtained another order from Johnston, E. J., giving leave to the plaintiff "in consequence of his having been delayed in obtaining his order to plead and demur," to add the joinder in demurrer himself. The plaintiff's attorney thereupon prepared the demurrer-book, (adding the joinder in demurrer thereto himself,) and filed the same on the 28th November. This joinder in demurrer was not served on the defendant's attorney. The first order obtained from Johnston, E. J., was signed: "By the Court, J. W. Nutting, Prothonotary"—the last by the Judge himself. The defendant's attorney joined in demurrer on the 2nd December instant. It appeared that the demurrer-book had to be filed on or before the 29th November (*Revised Statutes*, chap. 134, sec. 228), or the cause could not be argued during the present Term.

McCully, Q. C., contended that the order of 20th November was invalid, as the Equity Court had no power to grant such an order in a common law cause. Our Act (*Rev.*

Stat. chap. 134, sec. 70,) allows ten days for joining in demurrer; the English Act only gives four days. 7 *Dowl.* 660. The Judge had no power to grant the order of 27th November. 3 *Dowl.* 533; 4 *D. & L.* 313. The Court cannot compel a party to join in demurrer before the expiration of the term limited therefor by the Statute. 5 *M. & W.* 341. (Cites also *Rev. Stat.* chap. 134, sec's. 60, 109.)

Lynch, Q. C., contrà. The order of 27th November is binding, until appealed from. It appears from *Bullen & Leake*, 694, note *a*, that although the plaintiff cannot himself add the joinder in demurrer, as he might the joinder in issue, yet he may sometimes obtain the right of doing so where he might other wise be delayed, etc.

McCully, Q. C., in reply. A party dissatisfied with a Judge's order need not appeal, but may apply to the Court to have it set aside. 2 *Ch. Arch. Q. B. Prac.* (10th ed.) 1537; 8 *Dowl.* 387.

Cur. adv. vult.

Young, C. J., now delivered the judgment of the Court.

Referring to *Mullins* v. *Cox*, 7 Dowl. 660, and *Cook* v. *Blake*, 4 D. & L. 313, we are all of opinion that a party demurring cannot be authorized in any case, by the order either of the Court or a Judge, to join in demurrer, unless as a condition for some favor to the opposite party. The Judge's order of 27th November must, therefore, be set aside.

Rule accordingly.

Attorney for plaintiff, *Lynch, Q. C.*
Attorney for defendant, *Blanchard, Q. C.*

GRANT v. HALL.

December 11, 1865.

A rule *nisi* to set aside an award must contain the grounds of objection on which the party moving therefor intends to rely, and must also be drawn up on reading the award, or a copy of it.

E. H. Harrington, for plaintiff, moved to make absolute a rule *nisi* to set aside the award in this case.

Attorney General, contrà, took a preliminary objection that the rule did not contain the grounds of objection to the award, and must, therefore, be discharged.* *Rev. Stat.* chap. 146, sec. 14. *McDonald et al.* v. *Marmaud*, 2 Thomson's Rep. 79; 3 *N. & M.*, 203. There is another objection, that the rule is not drawn on reading the award, or a copy of it, which is indispensable. 2 *Chitty's Archbold's Q. B. Prac.* 1618 (10th ed.); 3 *Dowl.* 349; 5 *Dowl.* 597.

The Court. The rule must be discharged.

Rule discharged.

Attorney for plaintiff, *D. Macdonald.*
Attorney for defendant, *Attorney General.*

PEART *v.* PEART.

***December* 16, 1865.**

Where a plaintiff in ejectment claims the possession of lands by descent from a deceased tenant for years, he must produce either letters of probate or of administration, as he is not entitled to such possession as heir.

The Court will rectify an error in a deed, where there are clear identification and proof of what land was intended to be conveyed,—and where the error has been caused by the fraud of the party seeking to defeat the deed.

Ejectment for lands in Antigonish county. Pleas, limiting the defence to part of the lands claimed.

At the trial, before Dodd, J., at Antigonish, in June last, a verdict passed for the plaintiff, subject to the opinion of the Court.

The case was argued early in the present Term by the *Solicitor General* for the plaintiff, and the *Attorney General* and *McCully, Q. C.*, for the defendant. The facts and the points taken at the argument sufficiently appear in the judgment.

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* The rule merely referred to certain affidavits, and contained no grounds whatever.—Rep.

Young, C. J., now delivered the judgment of the Court.

This ejectment was brought for two lots of land of 15 acres and 6½ acres respectively; but the defendant's claim was limited by his pleas to 5 acres of the one, and 1¾ acres of the other. The defendant laid claim to both as a purchase from the tenant in dower, but it appeared at the argument that the assignment of dower had not been approved of by the Judge of Probate, as required by the 45th and 46th sections of the Probate Act, and the title was, therefore, incomplete. The defendant claimed, also, under an administrator's deed, and the inquiry then turned upon the title of the plaintiff.

As to the 5 acres, Clark, the intestate, had executed a lease for a term not expired at the time of action brought to Thomas L. Peart, the son of the plaintiff, who died after action brought, whereupon the plaintiff, by leave of the Court, under section 46th of the Practice Act, entered a suggestion of the death of the son, and that he was the legal representative, claiming the right so to do as heir at law; but the term did not vest in the plaintiff as heir, but belonged to the executor of the son, if he left a will, and to his administrator if he died intestate. The plaintiff, therefore, ought to have proved the truth of the suggestion at the trial by producing letters of probate or of administration, and not having done so, and it being a fact admitted that neither the one nor the other was in existence, he is not entitled as to the 5 acres to our judgment.

The same objection is fatal to his claim for the 1¾ acre under the lease; but this he claims, also, as heir at law to his son, whom he alleges to have been the owner in fee. The 1¾ acre is part of the 6½ acres which were conveyed by Charles Wheaton to the plaintiff in 1845, by a full description, with metes and bounds. In 1857 the plaintiff sold these lots of land, one of them being the 15 acre lot adjoining the 6½ acres, and fully described in the deed to William Clark. When the description of the middle lot came to be inserted, it agreed exactly with the preliminary part, and with the base line of the description of the 6½ acre lot in Wheaton's deed, but stopped there, omitting the side and rear lines. The description, therefore, is imperfect, though the intention to convey the 6½ acres to Clark is sufficiently obvious.

This mistake being known, it seems, to the plaintiff, though

unknown to Clark; the plaintiff, 18 months after, executed a deed of the 6½ acres to his son, Thos. L. Peart, under whom he now claims. If the question turned altogether on the language of the conveyance to Clark, we would have some difficulty in holding that the 6½ acres, or any particular portion of it, passed under the deed. But it does not turn altogether upon that. The witness who prepared the deed to Clark, at the plaintiff's request, says that the plaintiff had one or two deeds with him at the time the deed was so prepared, from which the plaintiff read to the witness the description of the premises. The witness observed to him when he came to the description of the 6½ acres, or rear lot, that it was deficient, but does not recollect what the plaintiff said, and the witness understood it was all right.

Now, here, beside the identification and proof of what was meant to be conveyed, we have the plaintiff, with Wheaton's deed in his hand, professing to read off a description of the rear lot, and giving an imperfect description, which has led to this question. That there was mistake or fraud is obvious; and if only mistake, it became fraud when the plaintiff executed, and, after the death of Clark, recorded the deed to his son. We think we are not obliged, where the plaintiff's title is thus founded upon his own wrong, to recognize it in this action; and, therefore, as to the 1¾ acre, we also give judgment for the defendant.

Judgment for defendant.

Attorney for plaintiff, *Attorney General.*
Attorney for defendant, *Campbell, Q. C.*

SMYTH *v.* McNEIL.

***December* 16, 1865.**

The Provincial Act of 1863, ch. 17, sec. 8, which provides that "accounts stated" shall be included among the securities made void by the 16th section of chapter 22 of the Revised Statutes, second series, does not extend to actions commenced before its passage.

The word "agreements" in the last-named section does not include "accounts stated."

ASSUMPSIT for goods sold and delivered, and on an account

stated, the particulars being:—"1859. Oct. 14. To amount of balance due on settlement of account—£73 8s. 6d." Plea (among others) that "the balance or amount of account alleged to be stated included intoxicating liquors sold in quantities less than one gallon, and that such alleged settlement was made and agreed upon therefor, and was void in law."

At the trial, before Dodd, J., at Port Hood, in June, 1864, it appeared that the defendant had, in October, 1859, acknowledged the amount claimed to be due, and had signed a memorandum in plaintiff's book to that effect. This balance was based on several former settlements, in the first of which were included a few charges for liquors, in small quantities, between 1839 and 1843. The jury, under the direction of the learned Judge, found a verdict for the plaintiff, subject to the opinion of the Court as to the effect of the License Law, and a rule *nisi* to set aside the verdict was granted accordingly.

Twining, Q. C. (Dec. 2), in support of rule. Section 16 of chapter 22 of the Revised Statutes, second series, enacts that no person shall recover, or be allowed to set off, any charge for intoxicating liquors, in any quantity less than one gallon, delivered at one and the same time, and that all *specialties, bills, notes, or agreements*, given in whole or in part to secure any such charge shall be void. This Act was in force before the action was brought.* It would be no great straining of the word "agreement" to hold that it includes "accounts stated." The Act of 1863, chapter 17, did not except pending actions, and the eighth section of that Act provides that "accounts stated" shall be included among the securities made void by the first named section.

Solicitor General, contrà. A security may be void, and yet the debt may be recovered. *Peake's Additional Cases*, 32; 1 *Esp.* 17; 2 *Strange*, 1249; 3 *Camp.* 119. A *bona fide* debt is

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* The action was brought on the 29th October, 1861, and the second series of the Revised Statutes came into force on the 17th August, 1859.—Rep.

ot destroyed by being mixed up with a usurious contract elating to it. 1 *Hen. Black.* 463. "Accounts stated" being entioned in the Act of 1863 shows that the Legislature id not intend to include them in the former Act. Where a w is altered by Statute pending an action, the law as it xisted when the action commenced must decide the rights of arties, unless the Legislature, by the language used, show a lear intention to vary the mutual relations of such parties. *Ad. & Ellis*, 943. (Refers on this point to cases cited by im in *Coulson* v. *Sangster*, *ante*, vol. 1, p. 678.)

Cur. adv. vult.

YOUNG, C. J., now delivered the judgment of the Court.

The law rendering void all specialties, bills, notes, or agreements given in whole or in part to secure charges for intoxiating liquors sold in quantities less than one gallon, etc., ppears to have been first introduced in the first series of the Revised Statutes (1851), and has continued in force ever since. We all think that the word "agreements" in that Act, and in he Act of 1859 (Revised Statutes, second series,) does not omprehend "accounts stated." We are not called u[pon t]o ecide whether the Acts of 1851 and 1859 are retrosp[ect]ive s to subsisting securities, neither do we decide how far the ebt is preserved, though the security may be gone. We hink, however, that we are perfectly justified in holding that he Act of 1863 does not extend to an action brought before s passage, and we, therefore, give judgment for plaintiff.

Rule discharged.

Attorney for plaintiff, *Macdonnell.*
Attorney for defendant, *J. L. Tremain.*

BOUTILIER AND ANOTHER *v.* KNOCK AND OTHERS.

December 16, 1865.

A lot of land was allotted in 1767 to J. B., as appeared by the drawing or llotment book filed in the registry of deeds for the county wherein the lot as situate, and the accompanying plan; by a card alleged to have been drawn y the said J. B. in 1767 (the date of the allotment book), the card containing description of the lot corresponding with that in the allotment book; and by

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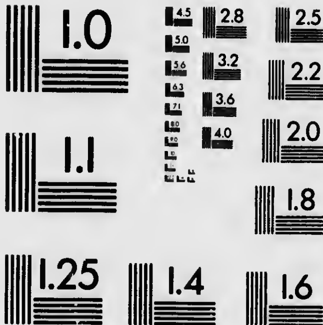

APPLIED IMAGE Inc
1653 East Main Street
Rochester, New York 14609 USA
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the certificate of the registrar of deeds given by the registrar to J. B., and proved to be marked with the registrar's initials. This card and the certificate were proved to have been continuously and consecutively in the possession of J. B. and those claiming under him, and were produced by the plaintiffs at the trial. The block of land allotted by the allotment book contained in the whole 180,000 acres, being the whole township. Nothing was known of this book but its antiquity and the fact of its general acceptance. A grant, which appeared to be a grant of confirmation, passed in 1784, conveying 71,406 acres of the above 180,000. This grant recited a previous grant in 1765 of the whole 180,000 acres, and the grantees under this latter grant (of whom J. B. was not one) were all also grantees under the previous grant, and their title and possession were confirmed by this latter grant. This latter grant, however, stated that the grant of 1765 had not been accepted nor taken out of the Secretary's office. The plaintiffs were H. J. B. and S. B., and they traced their title from J. B. as follows: Deed J. B. to J. G. B.; deed J. G. B. to H. J. B. (one of the plaintiffs); deed from H. J. B. (the last named plaintiff) to S. B. (the other plaintiff). S. B., it appeared, had conveyed the *locus* to one D. R., and the deed to D. R. was executed and recorded before action brought. The plaintiffs' counsel at the trial alleged, in opening, that the action was brought for the benefit of D. R. M., a surveyor, had acted as agent for the plaintiffs, or one of them, or those under whom they claimed, and the defendants had been put in possession by him fifteen years before action brought. The defendants did not attempt at the trial to prove title in themselves, but relied wholly on the alleged weakness of the plaintiffs' title.

Held, the Court being at liberty to draw the same inferences as a jury might,—

First, That, under all the circumstances, a grant of the lot to J. B. in or before 1765 might be presumed.

Secondly, That as the possession of the defendants was not adverse to the plaintiffs it did not prevent the operation of the deed from S. B. to D. R.

Thirdly, That as there was no pretence of title in the defendants, and the plaintiffs would have been entitled to judgment if D. R.'s name had been upon the record, the record might now be amended by adding D. R. as plaintiff.

Fourthly, That the plaintiffs, under all the circumstances, were entitled to the general costs of the cause, neither party to the costs of the trial, and that the defendants should pay the costs of the argument.

EJECTMENT for lands in the township and county of Lunenburg. Pleas, denying the title of the plaintiffs and their right to the possession, and alleging title in the defendants.

At the trial, before Young, C. J., at Lunenburg, in October, 1865, the following facts appeared in evidence. The plaintiffs claimed, under one Jacques Boutilier, to whom the lands had been allotted in 1767, as appeared by the allotment, or drawing-book, filed in the registry of deeds, at Lunenburg, and the accompanying plan; by a card alleged to have been drawn by the said Jacques Boutilier in 1767 (the date of the allotment book), said card containing a description

of the lot corresponding with that in the allotment book, it being described therein as No. 15, Letter F, Third Division,—and by the certificate of the registrar of deeds, given by the registrar to Jacques Boutilier, and proved to be marked with the registrar's initials. This card and certificate were proved to have been continuously and consecutively in the possession of Jacques Boutilier and those claiming under him, and were produced by the plaintiffs at the trial. The block of land allotted by the allotment book contained 180,000 acres, being the whole township. Nothing was known of the allotment book but its antiquity and the fact of its general acceptance. A grant passed in 1784 conveying 71,406 acres of the 180,000 acres allotted by the allotment book. This grant recited a previous grant, in 1765, of the whole 180,000 acres, and it confirmed the title and possession of a number of the grantees under such previous grant. It stated, however, that this grant of 1765 had not been accepted, nor taken out of the Secretary's office. Jacques Boutilier was not one of the grantees in the grant of 1784. The plaintiffs were Henry Joseph Boutilier and Samuel Brookman, and they traced their title as follows:—Deed from Jacques Boutilier to John George Boutilier, 22nd June, 1822; deed from John George Boutilier to Henry J. Boutilier (one of the plaintiffs), 16th June, 1840; deed from Henry J. Boutilier (the last named plaintiff) to Samuel Brookman (the other plaintiff), 12th March, 1849. Brookman had conveyed the *locus* to David Rodenheiser in November, 1863, and the plaintiffs' counsel, in opening, stated that the action was brought for the benefit of Rodenheiser. It appeared that Morris, a surveyor, had acted as agent for both or one of the plaintiffs, or for those under whom they claimed, and that the defendants obtained possession from him. Brookman, however, disclaimed Morris' authority to give the defendants possession, and the demand of possession came from Rodenheiser, whose name was not on the record. Aaron Knock, the principal defendant, appeared to have been in possession of the *locus* for about fifteen years before action brought.

The defendants called no witnesses, but relied on a motion for a non-suit. The learned Chief Justice declined to non-suit, but reserved the points taken.

The jury found for the plaintiffs, under his lordship's direc-

tion, subject to the opinion of the Court,—the Court to be at liberty to draw the same inferences that the jury might have drawn.

James, for plaintiffs. Defendants went into possession under plaintiffs, and, therefore, cannot dispute their title. Leonard Knock said that he and Aaron Knock went into possession under Morris, and it was proved that Morris was acting as agent for some of the plaintiffs. If Morris professed to act for Boutilier, although he had no right to do so, still Boutilier could take advantage of his so acting. There is a legal title in the plaintiffs. If the plaintiffs had not a perfect legal title they had at all events a colorable title, and if so, the acts of possession proved here are sufficient to give them title to the whole lot. The filing of the allotment book in the registry of deeds at Lunenburg was sufficient to give title. Prov. Act of 1760, ch. 8, sec. 3 (Prov. Statutes, vol. 1, p. 61). [WILKINS, J. Was that Act prospective?] I think that it was. The neglecting to improve mentioned in section 3 must be evidenced by inquest of office. The exception in the section is confined to the peninsula of Halifax. *Cunard* v. *Irvine*, James' Rep. 31, is distinguishable from this case. A party occupying lands with the permission of the Crown has sufficient possession to maintain trespass against a wrong doer. 4 *B. & C.* 754. [WILKINS, J. We have settled the point that where there is no adverse possession, a grant gives seisin to the grantee.]

J. W. Johnston, Jr., contrà. It is sufficient in this action to show title out of the plaintiffs and in a third party. No presumption is admitted against a party in possession. The plaintiffs' case is made up entirely of presumptions. Brookman's disclaimer and purchase put an end to Morris' agency. The acts of an agent must be either distinctly adopted or repudiated by the principal. 7 *C. & P.* 406. The plaintiffs did not venture to ask Boutilier a question as regards Morris' agency. A grant may be presumed after a lengthened possession. 1 *Jac. & Walker*, 159; *Cowper's Rep.* 103, note; 8 *Ves.* 129; 11 *East*, 488. The allotment book does not prove any drawing,—it is

nothing but a bald index. Boutilier could not bring the action, because he had conveyed to Brookman; nor Brookman, because he had conveyed to Rodenheiser. Rodenheiser could purchase legally, notwithstanding defendants' possession.

Cur. adv. vult.

WILKINS, J., now delivered the judgment of the Court.

The reasons, upon which the doctrine of presumptions is applied to supply defective evidence, are well stated by Mr. Justice Archer in *Beall's Lessee* v. *Lynn*, 6 Harris & Johnson, 361. (See note (*b*) to *Jackson* v. *Lunn*, 3 Johns. Cases, 124.) "Presumption is often resorted to for the purpose of supplying defective evidence; and in this country (United States) is not oftener applied to any subject than to supply defective title to lands. It would be difficult to make out the titles to many of the elder tracts of land in this State, by a regular deduction of title deeds from the patentees down to the present proprietors, without resorting in some stage of them to presumption. Records may sometimes be lost or destroyed, ancient title papers may be defectively executed, or the proof of them from lapse of time may be impossible." Again: "Proprietary grants, under certain circumstances, are presumed. In general, these presumptions are bottomed upon the existence of certain facts, which can leave but little doubt upon the mind of the truth of the fact which we are called upon to presume. They frequently, too, derive their force and efficacy from that vigilance with which the law guards ancient possessions; which, sooner than that they should be disturbed, presumes that they had in contract a rightful commencement."

In *Jackson e. d. Gansevoort et al.* v. *Lunn*, 3 Johns. Cases 109, the Court, although a grant by letters patent was proved to A. in 1735, drew the presumption of a grant from the original patentee to B., under whom and whose heirs acts of subsequent possession were proved, commencing in the year 1836, which was one year subsequent to the date of the letters patent. Radcliff, J., said (p. 113): "It is no doubt true that a plaintiff in ejectment must prevail by the strength of

his own title, and if a legal title be shown to exist in another, he must be defeated of his recovery. But such an outstanding title must be a continuing or subsisting title. It is not sufficient to show that, at any distance of time, it was vested in another. If that were sufficient, it would be in the power of a defendant in ejectment, on most occasions, to hunt up the original grant or patent, comprehending the premises in controversy, and oblige a plaintiff to deduce a chain of paper title from thence. * * The possession may be shown by acts of ownership applicable to the nature of the property." Kent, J., said (p. 117): "Patents and grants are, in a variety of cases, to be presumed, even within the time of legal memory, for the sake of quieting an ancient possession."

In *Jackson e. d. Gansevoort et al.* v. *Parker*, 3 Johns. Cases, 124–2, it was held that where the legal possession of lands was in the heirs of A. under a claim of title, and a descent in 1752, and B., afterwards, entered on the lands, and made improvement, and his possession was continued for 37 years; but it did not appear that he entered under claim or color of title, or hostile to the heirs of A., whose title was not disputed until after 1783, the legal intendment was that B. entered under the title of the heirs of A., and that the Statute of Limitations could not begin to run till after the possession of the defendant was held adversely to the heirs of A. It was held also in that case that an entry adverse to the lawful possessor is not to be presumed, but might be proved. The Court said "the possession of the premises at the time of the entry of B. being in the heirs of A., under claim of title sanctioned by a descent cast, and his entry not being under any claim or color of title, nor appearing to be hostile, the intendment of law will be that he entered under, and in obedience to the right of the heirs."

Now to apply these principles to the case before us. There appears nothing in it to preclude, but sufficient, on the contrary, to warrant, a presumption that the name of Jacques Boutilier was included in the grant of 1765,—or if not, certainly in some other grant. It appears from the recital to the grant of 1784 that the former grant actually passed the Great Seal, and that it included other names and other interests than the names and interests of those who applied for and procured

the grant of confirmation. The language of the recital in this respect is: "And whereas *many* (not all) of the said inhabitants (to whom it is before recited the grant of 1765 passed) do now pray that the lands so laid out and assigned to them (which words show and recognize a previous allotment to *all* the inhabitants) may be granted to them (that is, to the petitioners) in due form, and the possession thereof *confirmed* to them." It may be that those who did not concur in the petition were content to rely on the title they then had, namely, a title derived from the original grant, which certainly existed, and does not appear to have been avoided, and also in connection therewith on the preceding "laying out and locating" to them—an act which the recital shews to have been done. Unless, indeed, those of *all* the inhabitants who did not apply for and obtain the grant of 1784, had either the grant of 1765 to fall back upon, or some subsequent grant or grants, then they, representing 108,594 acres out of the 180,000 acres of which the whole tract described in the grant of 1784 consisted, had no title at all. That is scarcely conceivable. When the grant of 1784 passed, lot No. 15 of the 300 acre farm lots had been "located and laid out" to Jacques Boutilier in 1767, as appears by the allotment book. The recital to the later grant shows it had been allotted to him as one of the inhabitants, and that the older grant had actually passed to them generally to establish their locations.

We have then but to proceed one step further, and presume, or rather infer, that the name of Jacques Boutilier was in the older grant, or in some other grant which is not now forthcoming. The grant of 1765 having actually passed the Great Seal, the title and constructive possession thereby passed to all the parties therein named, and we know from the recital to the more recent grant that they were the old inhabitants, of whom we know by evidence *aliunde* Jacques Boutilier was one. The recital informs us that from various causes the old grant was not accepted nor taken out of the Secretary's office, "but it had passed the Seal of the Province, and we have no evidence that *all* of the numerous grantees named in it concurred in a determination not to accept it, nor to take it out of the office. In the absence of such evidence, it would seem scarcely possible to presume such a concurrent deter-

mination that would necessarily affect the rights of so many of those who possibly did not desire to reject the grant. On common law principles it would be difficult to conclude that a mere verbal renunciation of their rights, even by all the grantees, without a formal disclaimer under seal could prevent the operation of the patent.

Let us consider, then, what grounds we have for presuming that old Jacques Boutilier was one of the patentees under the grant of 1765, or some other grant. The evidence is certainly very strong. It is proved that he lived in Lunenburg for a number of years; that in the early part of this century he removed to Cape Breton, and about the year 1811; that, sixty or sixty-two years before the trial, the card and the accompanying paper, both indicative of the lot in question having been allotted to him, were seen by the witness, Henry J. Boutilier, to have been handed to Jacques by Rudolf, the then custodian of the county records, the initials of whose name are subscribed to the paper; that these *indicia* of title have been in the possession, consecutively, of all those persons to whom and through whom title purports to have been transmitted to Boutilier and Brookman, the plaintiffs on the record, who have themselves produced them as evidence in the cause. If we go back to the original of these documents we find the name of Jacques Boutilier in the ancient allotment book, and on the accompanying plan, as the designated proprietor of the lot in question. We find that the lot was surveyed when old Jacques originally drew it. We find him in the exercise of assumed dominion conveying, and with the conveyance transmitting the card and paper to John George Boutilier, upwards of forty years before the trial. The defendants' possession began fourteen or fifteen years ago. It was never adverse to the title of the Boutiliers if Aaron Knock entered under Morris as the agent of the Boutiliers, of which there can be no doubt, provided an inference can be fairly drawn, as we think it may, from the evidence that Morris was acting for that family; but even if the possession were adverse in its inception, Jacques and those claiming under him, if they had title, as we think they had, by grant from the Crown, had constructive possession from the ancient date of the grant, and a possession, therefore, against which, of course, Knock's

possession for fifteen years, if adverse, could not prevail. It must be borne in mind, however, that twenty years before the trial, and five years, therefore, before the commencement of Knock's possession, Rhino had, under Henry Boutilier then claiming title and offering to sell, and by his permission entered and cut some trees on the land in question, which is proved always to have been called "the Boutilier lot."

In short, when we see an allotment of lands in the county of Lunenburg to the owners of 300 acre lots made and solemnly registered as far back as 1767, and marked on a plan, showing the name of old Jacques Boutilier as one of those owners, and memorials of that ownership in perfect accordance with that register and plan delivered by the then keeper of the allotment book to him, and those found in his possession in Nova Scotia proper and in Cape Breton for years, and transmitted by him to the successive owners, or pretended owners, of the lot under titles purporting to be derived from him—it seems scarcely possible, even if these facts alone marked the case, to resist an inference that the allotment of the 300 acre farm lots was made under a then existing and producible patent from the Crown.

My learned brothers entirely concur in the conclusion that I have expressed. They are not, however, quite so clear as I am on the point of *a deduction of title from the particular grant of* 1765.

There remains one other point to be disposed of. It was insisted by the defendants' counsel that the plaintiffs on the record, by producing the deed from Brookman to Rodenheiser, had shown title out of themselves. This is true in a strict sense; but we cannot close our eyes to the fact that the deed last mentioned was deliberately put in evidence by the plaintiffs' counsel, and under an impression that its legal validity would be prevented by *the assumed fact of a disseisin by Aaron Knock.* That such a disseisin had existence by no means certainly appeared; and, at all events, the jury did not pass upon it. It being quite apparent, then, that it was in view of this assumed conveyance alone that Rodenheiser was not made one of the plaintiffs, we have concluded that we shall best promote the ends of justice by authorizing, as we do, an amendment by placing his name on the record, and giving

judgment for him in whom the title indisputably is. The plaintiffs must have the general costs, but not the costs of the trial; and they must pay the costs of the argument.

Rule accordingly.

Attorney for plaintiffs, *Creighton, Q. C.*
Attorney for defendants, *D. Owen.*

MILLS v. SMITH.

December 16, 1865.

The purchase and acquisition of real estate in this Province by a party who has never resided or done business therein, either by himself or agents, is not sufficient to bring him within the jurisdiction of the Court as an absent or absconding debtor.

***Cochran* v. *Duncan*, 2 Thomson's Rep. 80 affirmed.**

THE SOLICITOR GENERAL had obtained a rule *nisi*, which he now (December 6) moved to make absolute, to set aside the writ of attachment in this cause, and all proceedings thereon, on the grounds of irregularity and want of jurisdiction.

The rule *nisi* was granted on reading the affidavits of the defendant and of George S. Milledge, and the papers annexed, being copies of the affidavit of E. C. Cowling, on which the writ was issued, and of the writ of summons and writ of attachment. The defendant's affidavit is dated 14th January, 1865, and he states therein that he is now, and has been for six years past, resident in London, G. B., and that he has never been a resident in Nova Scotia, or in any way engaged in business in that Province. He further states that the plaintiff resides and does business in Bangor, Maine, United States of America, and has no place of residence or business in Nova Scotia; that the cause of action, if any, for which the suit was brought arose in London, and not in Nova Scotia, and that the plaintiff has no cause of action against him which arose in Nova Scotia. Milledge's affidavit simply verifies the papers annexed thereto. Cowling swears that the defendant is justly and truly indebted to the plaintiff in

$30,000 for land and premises sold and conveyed by the plaintiff to the defendant, and that the defendant is an absent or absconding debtor. The writs of summons and attachment are in the usual form, and the defendant is described therein as "late of Clements, in the county of Annapolis, gentleman."

Counter affidavits were made by E. C. Cowling, the plaintiff, G. F. Ditmars, and F. Mills. Plaintiff swears that, on or about the 15th August, 1864, he entered into negociations for the sale of a certain property called the Clements Iron Works, situate at Clementsport, in the county of Annapolis, and province of Nova Scotia, with one E. G. Roberts, as the accredited agent of the defendant; that the negociations resulted in the sale of the property to the defendant for £2000 sterling, payable at sixty and ninety days. Plaintiff also states that he carried on the manufacture of iron at the said works, and did business there by his agents, for about two years previous to the sale to defendant, and was himself frequently at Clementsport in relation to said business. He also says that, during the time said works were in operation, E. G. Roberts, as the agent of the defendant, visited the works for the purpose of reporting thereupon with a view to the purchase thereof for and on account of the said defendant. He further says that during the time of the negociation for the sale of the property, and previous to the sale, he was engaged in business at Clementsport; that the negociation was entered into and consummated at Clementsport, and that the deeds conveying the said property to the defendant were, by the request of the said E. G. Roberts, forwarded by him (plaintiff) to G. F. Ditmars of Clementsport, for the purpose of being recorded in the registry of deeds for Annapolis county, which he (plaintiff) believes was done. He also says that the amount sought to be recovered in the suit is the consideration money for the sale of the said property, no part of which has been paid, or security given therefor. Annexed to plaintiff's affidavit are the following letters: Letter from defendant to E. G. Roberts, dated, London, 28th July, 1864; letter from E. G. Roberts to plaintiff, dated, New York, 12th August, 1864; letter from plaintiff to E. G. Roberts, dated, Bangor, Maine, 16th August, 1864. In the first of these letters plaintiff says: "You are hereby authorized to negociate the purchase from

your friend William H. Mills, of Bangor, Maine, of the Clementsport property, for £2000 sterling, to be paid in bills of exchange, to be drawn by William H. Mills at sixty and ninety days after sight." Roberts' letter enclosed this letter from defendant. The plaintiff, in his letter, says: "I accept the offer of Mr. Frederick Smith, of London, through you, for my property in Nova Scotia." Ditmars swears that he has for some time past acted as an agent and correspondent, at Clementsport, of the plaintiff. He also states that while the iron works were in operation by the plaintiff, he (Ditmars) was introduced to Roberts by the managers of the works. Ditmars also corroborates the affidavit of plaintiff as to plaintiff having done business at Clementsport, being the owner of the iron works there, etc. He also states that he had the deeds referred to by plaintiff recorded, and returned to him. F. Mills states that for about two years he lived at Clementsport, and acted as plaintiff's clerk; that he is "well acquainted with Mr. E. G. Roberts, the person who acted as agent for Mr. Frederick Smith of London (defendant), and that he first made acquaintance with the said Roberts at Clementsport while he was there examining the property in reference to negociating the purchase of the same, and that the said Roberts did finally effect the purchase of the property for Frederick Smith, of London, England, as his agent duly accredited." F. Mills also corroborates plaintiff's affidavit as to the sale of the property to the defendant, plaintiff's proprietorship of the works, and his having personally transacted business at Clementsport as proprietor of the said works. Cowling's affidavit contained nothing material that was not stated in the other affidavits.

An additional affidavit from defendant, dated, 5th July, 1865, was also produced and read at the argument.

In this affidavit defendant states that, as he understood, Roberts came to London, in 1863, at the plaintiff's expense, and that he was, in every respect, as to the Clementsport Iron Works, the agent of the plaintiff, and not his (defendant's) agent; that Roberts visited Nova Scotia in 1863 in the interest of the plaintiff, and to enable him (Roberts) to sell the property for the plaintiff. Defendant further states that Roberts returned to London in October, 1863, and from that time until the 28th July, 1864, was endeavouring, as the agent

of the plaintiff, to sell the property,—at which last date, he (Roberts), then the agent of the plaintiff, and not his (defendant's) agent, suggested to defendant to purchase the property, which was the first negociation he (defendant) had for the purchase of the said property, considering him (Roberts) to be plaintiff's agent, and treating with him accordingly. Defendant also states that his letter to Roberts, of the 28th July, 1864, was signed by him in London, and that the body of it was not in his (defendant's) hand-writing, nor was it prepared by him. He also says that the contract of purchase made by him in London was accepted by the plaintiff in Maine, in the United States of America; that the drafts for the purchase were drawn at Bangor on him in London, and accepted by him (defendant) there, and made payable in London. He further affirms that he did not see or know of the letter of Roberts to the plaintiff of 12th August, 1864, and of the reply of plaintiff thereto of 16th August, 1864, until he received a copy of the affidavit of E. C. Cowling, to which copies of such letter were annexed. He also positively states that Roberts was not his known or accepted agent, but the agent of the plaintiff.

Solicitor General, in support of rule. The affidavit of E. C. Cowling, on which the writ issued, is headed in the cause, which is a fatal defect. Rev. Statutes, second series, chap. 141; Prov. Act of 1864, ch. 12; 2 *Dowl.* N. S. 410. In all cases against absent or absconding debtors the proceedings must always have been founded on an affidavit. The sum sworn to by Cowling is too large, by plaintiff's own showing. No place is named in the jurat of Cowling's affidavit, which is, therefore, fatally defective. 7 *Price*, 662; 3 *M. & S.* 494; 2 *N. & M.* 378; 8 *Dowl.* 234; 1 *D. & L.* 698. 1 *B. & P.* 105, is a case contrà. The second Christian name of the plaintiff should have been given in full in the heading of the affidavit. "William H." is not sufficient. 7 *T. R.* 661; 4 *B. & Ald.* 536; 3 *Bing.* 295; 4 *Dowl.* 577. No writ of attachment could regularly have issued in this case, for want of jurisdiction, because one of the parties resides in England, and the other in the United States, and the debt was not contracted within the Province, though it may be said that the subject matter of

the contract is here. *Cochran* v. *Duncan*, 2 Thomson's Rep. 80; *Cood* v. *Cood*, 3 New Reports, 275 (1863).

Eaton, contrà. (Reads affidavits of Edward C. Cowling, of plaintiff, of G. F. Ditmars, and of F. Mills, above referred to.) In the affidavit of defendant his abode is not sufficiently stated. It is merely given as "No. 7, Mincing Lane," without stating of London or of any other place. In the original, "agent" is struck out, and "merchant" inserted, which is not noted by the Judge. 5 *C. B.* 511. The Judge has not indicated his office in his signature to the jurat, as is requisite. Rev. Stat. chap. 135, sec's. 21, 30. The seal is insufficient. The jurat to this affidavit is also defective in not stating the *place* where sworn. It merely says, "Sworn at the Judge's Chambers, Rolls Gardens, Chancery Lane, this," &c. The heading of Cowling's affidavit is sufficient. 1 *Ch. Arch. Q. B. Prac.* (10th ed.), 704; *Hargreaves* v. *Hayes*, 5 Ellis & Bl. 272. Using the initial "H" for the second Christian name of the plaintiff in the heading of his affidavit is sufficient. 2 *B. & P.* 466. The jurat of Cowling's affidavit is sufficient —it was not necessary to mention therein the place where sworn. 1 *M. & S.* 302; 1 *C. B. N. S.* 321; 7 *Ad. & El.* 190.

Weatherbe follows on the same side. The debt is sworn to in Cowling's affidavit, in the form given in the Statute. The *belief* of the agent would not be enough. The grounds stated in the rule *nisi* to set aside this attachment are irregularity and want of jurisdiction. Even if a larger sum is sworn to than is actually due, it is not an irregularity. *Cochran* v. *Duncan* shows that the amount of the debt cannot be inquired into on this application. The Act of 1864 refers to forms not in existence. The jurat to Cowling's affidavit is sufficient. 9 *East*, 467. Rev. Stat. ch. 141, sec's. 8 & 9, apply to a defendant,—or, at all events, he must come in under sec. 13 or sec. 21. As to jurisdiction, the subject matter of the suit being in the Province is enough. The defendant did business here by his agent, and made the bargain in this country. He registered the deed by his agent; it was delivered constructively in this Province. The property was habitable, and that brings the case within the juris-

diction of this Court. The plaintiff has an equitable lien on the property. *Williams on Real Property*, 392; 2 *V. & B.* 306.

Solicitor General, in reply. (Produces the affidavit of defendant, dated, 5th July, 1865 (above referred to), which he contends is admissible now, as being in reply to *new matter* in the affidavits on behalf of the plaintiff. The Court, after hearing *Weatherbe* contrà, receive this affidavit.) Interlineations do not destroy an affidavit. It is only when they are in an important part of the affidavit that they affect it. 2 *Chitty's Rep.* 19. In an affidavit from the defendant himself no addition is required. "The defendant herein" would be sufficient. Roberts, from all the letters, was clearly the agent of the plaintiff.

Cur. adv. vult.

YOUNG, C. J., now (Dec'r. 16) delivered the judgment of the Court.

One of the main objections taken in this case was that the omission, in the jurat of the affidavit on which the writ of attachment was granted, of the name of the place wherein it was sworn was fatal to it. I have examined all the cases bearing on this point, which is one of very great importance. Archbold says that the place and county where an affidavit is sworn, if sworn before a commissioner, or abroad, must be stated in the jurat. 2 *Chit. Arch. Q. B. Prac.* (10th. ed.), 1550.

The case in 1 *M. & S.* 302 was that of an affidavit sworn before the Chief Justice of the King's Bench in Ireland, and though no place was mentioned in the jurat of the affidavit of debt, it was held sufficient foundation for arresting the defendant under a Judge's order on *mesne* process. In the *King* v. *Cockshaw*, 2 N. & M. 378, the place where sworn was omitted in the jurat of an affidavit sworn before a commissioner for taking affidavits in the King's Bench, and the affidavit was held bad. Denman, C. J., said: "The commission for taking affidavits in the King's Bench is confined to particular counties. It does not, therefore, appear that the oath was administered by a competent person." The affidavit was not allowed to be resworn, as it was a criminal information. In *Cass* v. *Cass*, 1

D. & L. 698, the affidavit was sworn before a commissioner of the King's Bench, but the place was not mentioned in the jurat. The affidavit was held bad, but leave was given to amend on paying the costs of the enlargement of the rule. In the case in 7 *Ad. & Ellis*, 190, the place was mentioned in the jurat, but not the county, and the point as to the sufficiency of the jurat was left undecided. In *re Chandler*, 1 C. B. N. S. 321, the affidavit objected to was the verification only of the acknowledgment of a married woman. The place where it was sworn was omitted in the jurat. There was a notarial certificate stating the place where it was sworn, which was in Ohio, and affirming that it was sworn there, and that the magistrate who had signed the jurat was a justice of the peace, and duly qualified to administer oaths. An application was made for a direction to the proper officer to receive and file the affidavit, and Cresswell, J., refused the order, but the Court thought it might be granted. In the case in 9 *East*, 437, which was an indictment for perjury, the question was, whether the jurat of the affidavit containing the false oath stating that it was sworn in London, and there being an averment that it was sworn in Middlesex, the jurat should be held conclusive as to the place of swearing. It was held that the jurat was not conclusive on that point.

From these cases it would seem that the naming of the place in the jurat is essential where an affidavit is sworn before a commissioner. But the accepting of that rule, and of some of the other rules touching such affidavits in 2 *Chit. Arch. Q. B. Prac.* (10th ed.) 1551, in all their strictness, might hamper us in future cases, and lead to great injustice. As it is not necessary for the determination of this case, we prefer, therefore, to leave these as open questions, and to put our decision on the main point of jurisdiction.

Since 1841, the practice in absent or absconding debtor cases has been regulated mainly by the case of *Cochran* v. *Duncan*, 2 Thomson's Rep. 80. This case recognizes the doctrine of constructive as well as actual presence, and persons transacting business through their agents within the Province are held to be within the Act. The debt also must arise out of a contract made in this Province; in other words, the demand must originate out of a transaction in this country.

But whether the fact of a contract made and to be fulfilled here, without any actual or constructive presence of the defendant, gives jurisdiction, and justifies the attachment of his real or personal estate, and the summoning of his debtors, is a point which I do not look upon as settled, and on which it is unnecessary at the present moment to pronounce an opinion.

In this case, the contract for the sale of the lands was made in writing, by letters of the defendant in London and of the plaintiff in Bangor. The plaintiff has been here, and he has been doing business, through his agents, at the mines sold to the defendant at Clementsport. His right to maintain the action, therefore, is clear. But the defendant has never been here, nor has he ever done business here through any agent. Roberts seems to have been rather the agent of Mills than of Smith, and Ditmars acted at the instance of Mills, and communicated with him alone. To give jurisdiction, therefore, we must hold that the purchase or acquisition of real estate in this country brings the party, for all purposes, within our Act, which, we think, would be too dangerous a stretch of authority.

JOHNSTON, E. J. I desired, if possible, to sustain the jurisdiction of the Court in this case, but I found it impossible to do so without holding that the possession alone of land by the defendant would give jurisdiction, and that position could never be maintained.

WILKINS, J. I wish to be understood as not throwing any doubt on *Cochran* v. *Duncan*. The defendant should either be domiciled within the Province, or the debt contracted here, to give jurisdiction against him as an absent or absconding debtor. I think it necessary *stare decisis*.

Rule absolute.

Attorney for plaintiff, *Cowling*.

THE QUEEN *v.* HENRY DOWSEY, JOHN C. DOUGLAS, AND WILLIAM LAMBRUERT.

January 3, 1866.

H. D., J. C. D. and L. were tried for murder. H. D. and J. C. D. were found guilty, and L. acquitted

The following case was reserved as to J. C. D., under Rev. Statutes, ch. 171, sec's. 99 & 100:—

"Admitting the evidence to have been legally before the Court, and to be worthy of credit, as the jury have considered it, is there any legal evidence in this case under which the conviction of the said J. C. D. is sustainable in point of law." *

J. C. D. was mate, H. D. cook (colored), and L. a seaman of the vessel on board which the murder was committed. The murder was committed at sea, and the murdered man was captain of the vessel. There was no evidence that J. C. D. personally committed the murder, and no direct or positive evidence that he counselled or advised it. The evidence against him was wholly circumstantial, and was, in brief, as follows. At 4 o'clock on the morning of the murder he was enquiring for H. D., and went forward where H. D. was sleeping. The captain, while lying in his berth in his cabin, between 4 A. M. and 5 A. M., was struck in the face by H. D. with an iron belaying-pin. The blows were repeated several times, and H. D. then "got on the captain and held him down." L. (who had previously been on deck, but had gone below, being sent for by H. D.) came on deck wringing his hands and saying, "The cook has killed the captain." J. C. D. immediately after this came up from the forward cabin. S. (a boy on board the vessel, and the principal witness for the prosecution,) then asked J. C. D. what was the matter, to which he replied that he did not know. J. C. D. then went forward, lit his pipe, laid down on H. D's. chest, smoked a few minutes, and then, with tears running down his face, told S. to "go to the cabin and help Harry" (H. D.) S. refused to go, and J. C. D. then gave the same order to L., and M. (one of the crew), who also both refused to go. J. C. D. then repeated the order to L., who then went. H. D. and L. then brought the captain up and threw him overboard. The captain was not dead when brought up, but there was no proof that J. C. D. could see that he was still alive. The captain groaned loudly after being thrown over, and lifted his hands up. J. C. D. was at this time crying. He then told M. to throw the captain's bed-clothes and mattrass overboard, directing him and L. to put iron in the latter to make it sink. H. D's. hands and sleeves, and the bosom of his shirt, were bloody, and J. C. D. advised him to wash the blood off. H. D. then brought up the captain's small trunk containing the ship's papers, and handed some of them to J. C. D., who then said: "We cannot do what we intended to do." (S., on cross-examination, said: "I do not think he said 'as you intended;' he might have said so.") S. then asked him what he intended to do, when he said "that he intended to go to the West Indies and sell the cargo of coal; then he intended to go to Mexico and sell the vessel; but they could not do what they intended." J. C. D. then directed S. to burn the captain's private letters. He then said that the best thing they could do was to steer to land and sink the vessel. The vessel's course was then directed to the land by J. C. D's. orders, and when near the land he directed a hole to be bored in the vessel, near the water-line, and her name to be painted out. The whole crew then left the vessel and went on shore. J. C. D. stated to persons whom they met, and also when examined before a magistrate near the place where they

* It would appear that the Court still retains the power to reserve a case in this manner. See Statutes of Canada, 32 & 33 Vict., ch. 29, sec's. 42 & 80.—Rep.

landed, that they had left the vessel because she was leaky, and that they had lost the captain overboard. He denied any knowledge of the vessel having a hole in her side, or her name being painted out. He also told M. that they must not say that the captain was killed. It appeared from the cross-examination of some of the witnesses for the Crown that subsequently, and before his second arrest, J. C. D. had confessed that the captain had been murdered by H. D., and that he was the first who made this confession. This confession was in writing, but it was not given in evidence, and was not allowed to be referred to at the argument. It appeared that J. C. D. and H. D. had sailed together before—the former as mate and the latter as boatswain of a colored crew. The captain's clothes were divided among the crew, in the presence of J. C. D., but J. C. D. took no part of them. S. said, on cross-examination, that J. C. D. seemed to be afraid of H. D.; that he (S.) was afraid of him too; that H. D. followed them up all the time on shore, and when they were in bed, and said that if either J. C. D. or S. peached he would swear them down. S. said that J. C. D. was kind and humane; seemed to be religious—would not allow swearing. He appeared to have opposed the burning of the ship's papers. His cabin was opposite the captain's, and within a few feet of it.

Held, by Young, C. J., Johnston, E. J., Dodd and DesBarres, JJ,—Wilkins, J., dissenting,—that there was evidence proper to be left to the jury, (it was left to them with confessedly proper instructions) and the jury having passed upon it, as they had the constitutional right to do, the Court had not the power to set the verdict aside, and the conviction was, therefore, sustainable in point of law.

By Johnston, E. J.,—that the verdict of the jury was a mistaken one, but that the Court had not the power to set it aside.

By Wilkins, J.,—that as the evidence did not exclude every other hypothesis but that of guilt, there was no legal evidence to sustain the conviction, and that the Court had the power and the right to quash it.

MURDER. The three prisoners were indicted and tried for the murder of Colin C. Benson, when Dowsey and Douglas were found guilty, and Lambruert acquitted.

The following question was reserved with regard to Douglas, under Revised Statutes, ch. 171, sec's. 99 & 100:—"Admitting the evidence to have been legally before the Court, and to be worthy of credit as the jury have considered it, is there any legal evidence in this case under which the conviction of the said John C. Douglas is sustainable in point of law."

At the trial, before Young, C. J., at Halifax, in November, 1865, it appeared that one Colin C. Benson, the captain of the brigantine Zero, had been murdered on board the vessel at sea. There was no evidence that Douglas had personally committed the murder, and no direct or positive evidence that he had counselled or advised it. The evidence against

him was wholly circumstantial, and may be briefly stated as follows. The murder was committed between 4 o'clock and 5 o'clock in the morning, the fatal blows being struck by Dowsey. At 4 o'clock that morning Douglas was inquiring for Dowsey, and went forward where Dowsey was sleeping. Douglas was mate, Dowsey cook, and Lambruert a seaman of the vessel. The captain, while lying in his berth in his cabin, between 4 o'clock and 5 o'clock, having left the deck about 4 o'clock, was repeatedly struck on the right side of the face by Dowsey with an iron belaying-pin. Dowsey then got on him and held him down. Lambruert (who had previously been on deck and had gone below at the request of Dowsey, who had sent a message to him to that effect by Stockwell, a boy, also one of the crew,) came on deck wringing his hands and saying, "the cook has killed the captain." Douglas almost immediately after this came up from the forward cabin. Stockwell then asked him what was the matter, when he replied that he did not know. Douglas then went forward, lit his pipe, sat and then laid down on Dowsey's chest, smoked a few minutes, and then, with tears running down his face, told Stockwell to "go and help Harry." (It appeared that Dowsey was called Harry in the vessel.) Stockwell said that he replied, "You may tell me to jump overboard, and I will do it, but I won't go there." Douglas then told Lambruert to go to the cabin and help the cook, but he also refused to go. Douglas then gave a similar order to Marlberry, another seaman belonging to the vessel, and a witness for the Crown. Marlberry also refused, and Douglas then repeated the order to Lambruert, who then went, Douglas and Marlberry remaining in the forecastle. Dowsey and Lambruert shortly afterwards came on deck carrying the captain between them, lying on the blankets "with his face stove in, and all bloody," and his clothes on, and threw him overboard. The captain made a noise, like talking or groaning, just before being thrown over. There was no proof that Douglas observed that the captain was still alive when brought up. Stockwell, who was the principal witness for the prosecution, stated that he heard loud groans from the captain after he was thrown over, and that he was lifting his hands up. Stockwell also stated that after the captain was thrown overboard, Douglas, Lambruert

and he were crying, Dowsey half laughing and half crying, and that Douglas advised Dowsey to wash the blood off his hands and sleeves, and the bosom of his shirt, which was bloody. It also appeared that shortly after the captain was thrown overboard, and about twenty minutes after Lambruert had said that Dowsey had killed the captain, Douglas told Lambruert and Marlberry to throw overboard the captain's bed-clothes and mattress, which Dowsey was heaving on the main deck, all full of blood. Douglas picked up some pieces of old iron, and directed Lambruert and Marlberry to put the iron into the mattress to make it sink. Dowsey then brought up the captain's small trunk, which held the ship's papers, and handed some papers out of it to Douglas. According to Stockwell's evidence on his direct examination, Douglas, after looking at the papers, said: "We cannot do what we intended to do." Marlberry did not testify to Douglas having said this, and Stockwell, in his cross-examination, said: "I do not think that he (Douglas) said 'as you intended': he might have said so." Stockwell testified that he then asked Douglas what he intended to do, when he said "that he intended to go to the West Indies and sell the cargo of coal, and then he intended to go to Mexico and sell the vessel, but they could not do what they had intended." Douglas then gave Stockwell some private letters to burn. He then said that the best they could do was to steer to the land and sink the vessel. The crew divided the captain's clothes among them, but Douglas got none of them. The vessel's course was then, by Douglas' orders, changed, and directed to the nearest land, and when near the land, he directed a hole to be bored in her side near the water line. He also directed the name of the vessel to be painted over. The whole crew then left the vessel and went on shore, landing on LaHave Island. They had all agreed before leaving to say that the captain had been thrown overboard by the jibing of the main boom, and that they had left the vessel because she was leaking and short-handed. Douglas was the first that told the story. He told some fishermen whom they met at LaHave Island that they had left the vessel because she was leaky, and they had lost the captain overboard. He reiterated the same story before two magistrates at Petite

Riviere, and again at Lunenburg (after being arrested) before a magistrate and a Queen's counsel, when he was discharged. He denied to the fishermen any knowledge of the hole in the vessel's side, or of her name being painted over,—said some other person must have done it. He told Marlberry that they must not tell that the captain was killed, but that he was knocked overboard. From the cross-examination of two of the Crown witnesses it appeared that subsequently, and before his second arrest (which was at Halifax), he had confessed that the captain had been murdered by Dowsey, and that he was the first who made the confession. This confession was in writing (made before a stipendiary magistrate at Halifax), but it was not given in evidence, and was not allowed to be referred to at the argument. It appeared that Douglas and Dowsey had sailed together before, the former as mate and the latter as boatswain of a colored crew. The officers and crew of the Zero consisted of Capt. Benson, Douglas, the mate, Stockwell, the boy, who said he was in the place of the second mate, Lambruert and Marlberry (Germans), seamen, and Dowsey (negro), the cook. Stockwell, on cross-examination, said that Douglas seemed afraid of Dowsey almost all the time. He also stated that Dowsey followed up both Douglas and himself all the time on shore, and when they were in bed, and said that if either Douglas or he (Stockwell) peached he would swear them down, and that he (Stockwell) was afraid of him. Stockwell further said that the mate was kind and humane, seemed to be religious, and would not allow swearing,—that he had seen Douglas trembling in the presence of Dowsey after the murder, but not before,—and that he did not hear Dowsey threaten Douglas. Stockwell also stated that it was left to Douglas to decide what should be done with the ship's papers—that Dowsey wanted to burn them, but that Douglas thought differently. Douglas's cabin, or stateroom, was nearly opposite the captain's, with a pantry and passage-way between. He left the deck and went below about 4 o'clock on the morning of the murder, leaving the captain (who went below about half an hour afterwards) and Stockwell on deck. Stockwell stated that Douglas and Dowsey were often conversing, and Marlberry testified that he saw them together the afternoon before the murder.

No witnesses were called, or evidence put in, by or for the defendants.

The learned Chief Justice told the jury that if they believed that Douglas knew what Dowsey was doing in the cabin,—that they two had actually formed the design of running away with the ship, and that to accomplish this object the murder of the master was the first preliminary,—then the fact that Douglas did not see the crime committed amounted to nothing, and that the law would be a mockery if it did not hold Douglas, under such circumstances, equally guilty with the man who struck the blow. His lordship also stated to the jury that the evidence against Douglas was wholly circumstantial, and he read to them extracts from the language of Baron Alderson in *Rex* v. *Hodges*, in which the learned Baron stated that to enable the jury (the case being supported entirely by circumstantial evidence) to bring in a verdict of guilty, it was necessary not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw. His lordship also read an extract from the charge of Lord Meadowbank in *Humphrey's* case, where his lordship stated to the jury that their duty was to consider what was the reasonable inference from the whole circumstances,—whether it was possible to explain the circumstances upon grounds consistent with the innocence of the accused, or whether, on the contrary, they did not lead to a result directly the reverse.

The jury, as already stated, found Dowsey and Douglas guilty, and acquitted Lambruert.

The reserved case now (December 18th) came up for argument.

W. A. Johnston, for the defendant, Douglas. The defendant must be proved either to have committed the murder, or counselled it. *Starkie on Evidence*, Title, Circumstantial Evidence. If there be any reasonable doubt as to the reality of the connection of the circumstances of evidence with the *factum probandum*, he should be acquitted. *Wills on Circumstantial Evidence*, 175, m. p. 153, 5th rule. The facts must be absolutely irreconcilable with defendant's innocence. Every other

hypothesis but that of guilt must be excluded. *Ibid*, 171 m. p. 149, 4th rule; 1 *Greenleaf on Evidence*, 15. The guilt must be as clearly deducible as a mathematical proposition. Proof that the defendant has previously borne a good character is highly important in a doubtful case. *Wills on Circumstantial Evidence*, 152, m. p. 131. The want of design in the defendant is evidenced by his want of action. He did nothing, and resisted the burning of the ship's papers. He first revealed the murder. He took none of the captain's clothing. The cook's calling on Lambruert in place of summoning defendant is decisive, as it shows clearly that the defendant could not have been his accomplice. The physical state of body and state of mind of the defendant, as proved, are inconsistent with his guilt, or his guilty pre-knowledge. The murder must be shown to be a part of the original design. [YOUNG, C. J. The attention of the jury was expressly called to that point in the charge.] "Any legal evidence" in the case stated means "any sufficient evidence." 12 *Law Times Rep. N. S.* 608; 11 *do.* 643; 10 *do.* 350, 581. Defendant might have entered into a conspiracy after the murder, though he had no part in the murder. When defendant told Lambruert to help the cook, it was to throw over the dead body. Defendant's scuttling the vessel shows that he never meant to run away with her. The cook threatened to swear the defendant down if he confessed, and he did it.

Attorney General, contrà. The functions of the Court and of the jury are perfectly distinct. The power of a Judge, under Rev. Stat. chap. 171, sec. 99, is confined to questions of law. The question is, was there such a case as should have been left to the jury? Have the Court a right to inquire into the *quantum* or amount of evidence? All the decided cases turned on questions of law. 1 *Greenleaf on Evidence*, sec. 49. Absolute mathematical certainty is not essential to justify a verdict of guilty. *Starkie on Evidence* (Sharswood's edition), 724. (Cites also, *Ibid*, pp. 741, 742, 761, 768). Presumptions are for the jury. 6 *C. & P.* 147. The guilt of the defendant is established to a moral certainty. (Cites *Charlotte Winsor's* case; *Starkie on Evidence* (Sharswood's edition), 760.) There

is a strong presumption against a party who destroys papers. *Wills on Circumstantial Evidence*, 91. The defendant's false statements are facts of a strongly criminatory effect. *Ibid*, 76–78. This defendant and the cook had been in the West Indies together before.

Solicitor General follows on the same side. Would any Judge in this case have directed the jury to acquit this defendant? All the facts are consistent, and none inconsistent with guilt. The cases in 10, 11 & 12 *Law Times Reports*, cited on the other side, turned wholly on questions of law. (Cites *Starkie on Evidence* (*Sharswood's* edition), ch., Duty of the Jury.)

W. A. Johnston, in reply.*

Cur. adv. vult.

The Court being, divided in opinion, now (Jan'y 3, 1866) delivered their judgments *seriatim*.

Young, C. J. Independently of the bearings of this particular case, our attention has been called for the first time to the extent of our jurisdiction and authority under Rev. Statutes, chap. 171, sec's. 99 & 100, founded on the English Act 11 & 12 Vict., chap. 78. Previous to that Act, as appears from *Archbold* and *Roscoe*, a practice had long existed where any objection was taken on the part of a defendant, or occurred to the Judge on a criminal trial, which the Judge deemed worthy of more mature consideration, to take the opinion of the jury upon the facts proved, and to reserve the question for the consideration of all the Judges; and if the Judges, or a majority of them, were of opinion that the objection either to the indictment or the evidence was well founded, the defendant was recommended to the Crown for a pardon. This was the system pursued till 1848, and it will be instructive to ascertain the practice under it, as it is found in the Reports.

Leach's Crown Law contains the cases that were reserved and determined by the twelve Judges of England between

* All the counsel referred at considerable length to the evidence, and commented largely thereon.—Rep.

the years 1730 and 1815. They are almost exclusively on questions of law, and I find only some four or five which turn on the sufficiency of evidence. In *Girdwood's* case, 1 Leach, 143, the question was whether there was sufficient evidence of the prisoner's having sent a threatening letter, knowing its contents; and the Judges thinking that the case had been properly left to the jury, the conviction was held legal, and the prisoner received sentence of death. In *Welsh's* case, Ibid. 3[illegible], which was for coining, the Judges were of opinion that [illegible] was a question of fact, whether the counterfeit moneys were of the likeness and similitude of the lawful current coin, and the jury having so found, they held that the want of an impression was immaterial, and the prisoners were convicted. *Henrietta Radbourne's* case, Ibid. 457, is a remarkable one. She was indicted for petty treason and murder, combined in one count. The crime was committed at the dead of night, when no one was in the house but the prisoner, and her mistress, the deceased. There was no positive proof of the prisoner's guilt, but the circumstantial evidence was extremely strong, and the jury convicted her of the murder. Certain legal questions were then raised as to the indictment and the reception of testimony, but none whatever as to the effect of the evidence, and the prisoner was sentenced and executed. It is singular that this case is not mentioned in *Wills.* In *Reeve's* case, 2 Leach, 815, both the questions that were raised were held to be questions for the jury to determine; and from this enumeration it is obvious that, during the eighty-five years covered by these Reports, the only case that at all resembles the present is that of Radbourne, where the decision of the jury was accepted as final.

There is here a break in the authorities to which we have access, and I shall refer only to a few of the cases that are within our reach at the present moment.

In the celebrated case of the *Queen* v. *Serva et al.*, 1 Denn. 104, a question was reserved as to the jurisdiction of an English court to try an offence committed on board a Brazilian vessel, and having been elaborately argued, the conviction was set aside. So also in *Garner's* case, 1 Denn. 329, just before the passing of the Act in 1848, the conviction was set aside for the improper reception of testimony. In the *Queen* v.

Hill, 2 Moody's Crown Cases, 30, an objection was taken for an alleged misdirection by the Judge, but the charge was upheld. In *Rankin's* case, Russell & Ryan, 43, and in *Ayes'* case, in the same volume, p. 166, convictions for murder were reduced to the crime of manslaughter, as was done in our own court in *Kennedy's* case, 2 Thomson, 203. Cases on the reception or effect of evidence seem to have been rare. They occur, among other instances, in 1 *Denn.* 99, 512, 514; in *Denn. & Pearce*, 281; and in *Rus. & Ry.* 519. This last case, that of *Rex* v. *Burrows*, occurred in 1823, where the defendant was convicted of a rape; but the present law, which in England, as in this Province, has superseded such inquiries, having been not then enacted, the Judge doubted whether there was sufficient evidence of the offence having been committed. The prisoner had been interrupted and withdrawn, and the Judge left the question to the jury, whether the prisoner had completed the crime before he withdrew, and withdrew on that account. The jury found that he had, and convicted him, upon which the Judge reserved the case for the consideration of the Judges, and respited the sentence. In Michaelmas Term, 1823, this question was considered by the Judges, who held, that the question whether the prisoner had so committed the crime, was a question for the jury, and was rightly submitted for their consideration.

I look upon this case as throwing a strong light upon the practice previous to the Statute. The Judge who tried the cause entertained doubts whether the crime had been proved, but the Judges held that it was a question for the jury. The Judge having doubts, would, himself, upon the received rule, have acquitted the prisoner, but the jury convicted him, and the conviction was upheld. In the *Queen* v. *Middleditch*, 1 Denn. 99, seven of the Judges thought the evidence of guilt insufficient, and five thought otherwise, the question being, whether there was enough to sustain the verdict on the indictment, which alleged a solicitation to commit a capital offence in the express terms of the 7 & 8 Geo. 4, chap. 29.

Looking to the general scope of these earlier cases, I can find no assertion of a right, nor any inclination on the part of the Judges to control or interfere with the verdict of a jury, where there was conflicting or circumstantial evidence,

and the case had been legally tried and properly and fairly submitted to them. The Judges seem to me to have recognized the well known boundary line between questions of fact and questions of law, and to have interposed only where the law had not been satisfied or had been misunderstood.

Inconveniences and evils, however, arose out of the Judges not sitting as a Court, and the want of an appeal from inferior Courts having criminal jurisdiction, and this state of things, as *Archbold* expresses it, being considered inexpedient and anomalous, a remedy was provided by the Act of 1848. "By recent legislation," says Stephens (4 *Stephens' Comm.* 526), "another method is now provided for protecting a prisoner, found guilty by verdict, from having judgment or execution awarded against him, where, in point of law, it ought not to be awarded." The preamble to the Act declares "that it is expedient to provide a better mode, than that now in use, of deciding any difficult question of law which may arise in criminal trials." And the subsequent Act, 16 Vic. ch. 30, sec. 4, recognizes the Court so established as a Criminal Court of Appeal for the decision of questions of law, and, at the close of the section, provides for cases where "some question of law, of more than usual difficulty and importance, is likely to arise upon the trial." Our own Act adopts almost literally the language of the 11 & 12 Vict., and the same construction must obviously be applied to both. The Supreme Court, sitting *in banc*, is a Court of criminal appeal in every case tried before any one of its Judges, but the appeal is limited, as I have limited this case, to a question or questions of law, as contradistinguished from any question or questions of fact. There is no question here of misdirection or mis-trial, of the improper reception or rejection of evidence, or affecting the constitution of the jury. Numerous objections of that kind were urged, and, having been fully argued on the criminal side of this Court before three of my learned brethren and myself, were overruled. Neither are we dealing with some new offence, created by statute, as in some of the cases, and where the sufficiency, or the effect of evidence to bring the offence within the words of the statute, may be justly considered to be a question of law. We are dealing with a conviction for murder, resting on circumstantial evidence, and the jury having passed

upon it after patient and full inquiry, the question is, whether the conviction is sustainable in point of law? If it be held that we have a right to inquire into this question as a question of law, and further, that in our view, or that of a majority of this Court, the conviction is not sustainable, the verdict will be of no avail, and it will be our duty to make an entry on the record acquitting and discharging the prisoner. This being the practical result to which we are invited by this motion, it demands the most deliberate and serious inquiry.

This inquiry is attended with the more difficulty that we have not as full an access as could be wished to the practice and decisions of the English Court. Most of the cases we have are of recent date, beginning with the year 1861; and the case of the *Queen* v. *Mellor*, which is referred to by Stephens as an authority on the point, is not to be found here, except in a brief note. Three of the modern cases were cited at the argument, but several others are to be found in the *Law Times Reports* (*New Series*), all of which, of course, I have examined, but none of them seem to me to establish the right that is now contended for. In several of them the sufficiency of evidence is inquired into, but chiefly, as I think, if not altogether, with the view of determining whether some statutable offence had been committed. In 3 *Law Times Rep.* 338, the prisoner was tried for abduction: the question was whether any offence had been committed within the Act 9 Geo. 4, chap. 31, and the Court held that there was evidence which justified the conviction. In 4 *Law Times Rep.* 259, a commercial traveller was tried for embezzlement, and the question was whether there was any evidence of his being a servant, as charged in the indictment. Pollock, C. B., said "the evidence is ambiguous; but is not the question one of fact for the jury," and the conviction was affirmed. In 4 *Law Times Rep.* 373, a question of coining, the Court was of opinion that there was enough of evidence to be left to the jury to enable them to say whether the mould was knowingly in possession of the prisoner, and here also the conviction was affirmed. In 7 *Law Times Rep.* 365, the question whether a liquid given to a party which the jury had found to be a noxious thing, was a noxious thing in its nature, and therefore within the Stat. 24 & 25 Vic., chap. 100, and the Court was of opinion it was

not, and quashed the conviction. The strongest case I find was a case of abduction under the same statute (9 *Law Times Rep.* 426). There a majority of the Judges were of opinion that the facts did not sustain the prosecution, and that in point of fact the crime was not proved. There was no difference among the Judges as to the law, but the evidence did not bring the offence within the terms of the Act. In 9 *Law Times Rep.* 454, the conviction was quashed, because the depositions had not been properly taken, and were, therefore, inadmissible. In the same volume, p. 490, where the defendants were prosecuted for the concealment of treasure trove, Wightman, J., was not satisfied that there was sufficient evidence to warrant a conviction against one of the prisoners; but the other Judges thought there was evidence to go to the jury, and the conviction was upheld. So in 7 *Law Times Rep.* 756, Wilde, B., thought there was evidence very proper to be left to the jury. In the same volume, p. 801, Erle, C. J., held that there was no evidence which ought to have been left to the jury. And this, I must confess, appears to me from the scope of these cases to be the true test. If the Court find that a conviction has been had, where there has been *no evidence* that ought to have been submitted to the jury, that conviction ought not to be upheld. But where there has been evidence legally received, as in this case, and proper to be left to them, can this Court interfere and set aside the conviction? The cases that were cited at the argument, decided since the year 1864, do not appear to me to go that length. I will run over them shortly. In 10 *Law Times Rep.* 351, a case for stealing and receiving sheep, Mellor and Martin, BB, say, there was surely some evidence for the jury, and Pollock, C. B., remarked that the Chairman could not have withdrawn the case from the jury, or given them a direction that there was no evidence of felonious receiving by the prisoner, and the conviction was affirmed. In the same book, page 429, which was a conviction for obtaining money by false pretences, the question was on the sufficiency of the indictment. Pollock, C. B., said it ought to have been left to the jury to say, whether the words made use of by the prisoner did really mean that which would make it a criminal offence, and that the Judge ought not to take upon himself to say they meant that. And because the Recorder

had done so the conviction was quashed. In both these cases it will be seen that the distinctive functions and power of the jury are recognized and insisted on. In 11 *Law Times Rep.* 643, which was a conviction of the same kind, one of the questions was, whether there was any evidence to go to the jury in support of the indictment, and it appears from the language of the Court that the words "any evidence" and "sufficient evidence" are employed as equivalent terms. The object was to find out whether they established a false pretence. Upon the facts, says Erle, C. J., I think there was evidence to go to the jury that the prisoner was a fraudulent impostor, and the conviction was affirmed. The last of these cases, *Regina* v. *Smith*, 12 Law Times Rep. 608, decided 6th May last, is regarded by one at least of my learned brethren as the most important on the other side, but for my part I cannot so read it. It was a conviction of manslaughter against a master for neglecting to supply a servant 23 years of age with sufficient food and lodging. The prisoner's counsel objected that there was no evidence to go to the jury, and the whole evidence was reported by the Judge, with two questions, the second of which was as follows: "Whether there was evidence to support the indictment which ought properly to have been left to the jury." Upon argument the conviction was quashed. Erle, C. J., saw no evidence that the servant was so under her mistress' control, or unable to withdraw, as to make her mistress criminally liable for the neglect. Channel, B., thought there was no evidence proper to be left to the jury. Blackburn, J., said, though there is some *scintilla* (that is, some faint trace or glimmer) of evidence, *that* ought not, especially in a criminal case, to be left to the jury. Mellor and Smith, JJ., agreed that the case could not have been withdrawn from the jury, but that there was very little evidence, if any, on the only ground on which the conviction could be supported, and which I have already stated in the words of C. J. Erle.

Now it is possible that a more ample investigation, than time and opportunity will at present allow, might modify my opinion, but these cases, with a full consideration of the whole matter, have impressed me with a strong conviction that if there is anything to be left to the jury, any legal, or in other

words, any sufficient evidence, on which they have to pass, and if they have been properly instructed, and have found a verdict of guilty, neither the principles of the Constitution, nor the sound construction of the Act, will justify this Court in annulling or defeating that verdict.

Were it otherwise, the want of an appeal against the errors of juries would no longer be complained of in England: in the words of a recent writer of large experience, "pardons would be no longer the only redress of innocence against the wrongs done by ignorance," for the law would have already given the appeal which it is supposed to have withheld. And if such is the law we would do better in this Province to adopt the Canadian Act of 1857, enabling any person convicted of a crime to apply for a new trial upon any point of law, or question of fact, in as ample a manner as any person may apply there to the Superior Courts for a new trial in a civil action. I have some doubts, I must acknowledge, of the wisdom of this enactment, but would greatly prefer it to the supervision that is now claimed over the verdict of a criminal jury.

It is urged, however, that there was no evidence of guilt in this case—that there was nothing, in fact, which the jury upon legal principles had a right to consider,—and that the defendant is entitled to an unconditional and immediate discharge. Succinctly reviewing this branch of the argument, I must guard myself, first of all, from the charge of misconstruction. It is not my province, at this stage of the case, any more than at the trial, to advocate or press the conviction of this man, and still less the consequences that may flow from it. Should his life be spared after the sentence which, as I think, the law demands, the responsibility will rest in the proper quarter, and not upon this Court. If, indeed, the evidence had amounted, as in *Regina* v. *Smith*, to nothing more than a *scintilla*—a mere shadow, without form or substance—a mere suspicion, as in *Rex* v. *Isaacs*, Wills on Circumstantial Evidence, 76—sustained by no chain of circumstances, and opposed to all the probabilities of the case, I would not have hesitated a moment to interfere and to have declared my disapproval of the verdict. But unhappily for the defendant I am unable to take that view of it, and think it right, temperately but firmly, to vindicate the action of the jury, and in a

few short sentences to review the leading features of the transaction, and the legal principles which apply to the testimony.

Much was said at the argument on the nature of circumstantial evidence, and copious extracts were read to us from *Starkie* and *Wills*. But I know not that they can be better put than in the two extracts which I impressed at the trial upon the jury, and shall here repeat. In *Rex* v. *Hodges*, Lewin's Crown Cases, 227, where an indictment for murder was supported entirely by circumstantial evidence, and there was no fact, which, taken alone, amounted to a presumption of guilt, but the result of which I have been unable to ascertain, Mr. Baron Alderson said, that, to enable the jury to bring in the verdict of guilty, it was necessary, not only that it should be a rational conviction, but that it should be the only rational conviction, which the circumstances would enable them to draw. So in *Humphrey's* case, Lord Meadowbank said to the jury: "Your duty is to consider what is the reasonable inference from the whole circumstances; in short, whether it is possible to explain the circumstances upon grounds consistent with the innocence of the accused, or whether, on the contrary, they do not necessarily lead to a result directly the reverse." I will content myself with adding two passages from *Sharswood's Starkie on Evidence*, 724, 768, and one from *Phillips on Evidence*, 441: "Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute, mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable." Again: "It is universally admitted that circumstantial evidence is, in its own nature, sufficient to warrant conviction even in criminal cases, and the test of sufficiency is the understanding and conscience of the jury." "In the history of the law several presumptions, which were at one time deemed conclusive by the Courts, have, by the opinions of later Judges, acting upon more enlarged principles, become conclusive only in the absence of proof to the contrary, or have been treated as wholly within the discretion of juries."

In the light of these principles let us inquire into the leading facts of this remarkable case as they were in proof. First

of all, there was no evidence that the defendant, Douglas, committed the murder, or threw over the body. When I say there was no evidence, I mean no legal evidence, the declarations of the cook and of Bill being inadmissible. Next, there was no evidence, that is, no direct and positive evidence that the defendant counselled or advised the cook to commit the murder. In the absence, then, of direct proof, his guilt could be inferred by the jury only from the circumstantial evidence surrounding the transaction before and after the murder. There were five persons on board besides the captain. There is no proof implicating the two Germans or the boy. The fatal blow was struck by the cook, the defendant, who was the mate of the vessel, being in his berth, at the distance of only a few feet. Up to this point, it is clear, there is no evidence to convict him. This horrible murder having been committed by the cook, without, as the assertors of the defendant's innocence must maintain, the complicity or knowledge of the defendant, or any concert with or promise of support from him, we next find the defendant in the forecastle, at five o'clock in the morning, a few minutes after the murder, lighting and smoking his pipe, and telling Bill, who had been in the cabin, and seen the colored cook upon the body of the captain, to go and assist Harry. I am not touching the contradictions, whatever they may be or may be thought to be, between the boy and Charles, but am only following the leading circumstances, omitting the minutæ. Bill does assist Harry, and the two bring up the captain, all bloody, and with his face stove in. They throw him over the rail. The boy saw the wounds on his face. His hands were moving in the water; he was lifting them up, and the boy heard loud groans. What was the defendant doing all this while? He had tears running down his face, and was paralyzed either by terror or by a consciousness of guilt. But he became active. One would have thought that the first evidence of his activity would have been to have called on the Germans to assist him, and to have knocked down and ironed the ruffian who had just murdered his master, and whose hands were stained and his sleeves soaked with blood. But no. The captain's bedclothes are next brought upon deck, and it is decided to throw them overboard, and obliterate every trace of the crime.

It is a suspicious, and a material circumstance, that about an hour before the murder, at four o'clock in the morning, the defendant went forward to call the cook; and, after the murder, the defendant told Charley to throw the bed-clothes overboard, with some pieces of old iron which the defendant picked up himself and told the boy to bring. Charley stuck the pieces of iron in the mattress, and fastened them so as it would sink. Bill and he threw it over. The defendant told them to put the iron in to make it sink. This was about twenty minutes after Bill had told Charley the captain was killed. The charts and papers are then brought up and examined, and several of the captain's letters are burned. The boy says, "the defendant looked at the papers and said, we cannot do what we intended to do. The vessel has too many papers, and, before they could get to the West Indies or to Mexico, she would be missed and they would be searching for her." The boy then asked the mate what he intended to do. He said "he intended to go to the West Indies and sell the cargo of coal, and then he intended to go to Mexico and sell the vessel, but they could not do what they had intended." On cross-examination the boy stated that the defendant said, "we cannot do as we intended to do." The boy added, "I don't think he said as *you* intended; he might have said so." Charley says, "the defendant brought up some letters out of the cabin and read them on the quarter deck. Then the chart was brought up. I brought up the captain's instruments to see what place they could go to; the defendant sent me down to the cook for the instruments; the cook was taking the captain's clothes out of his chest. The mate was looking at the chart and told Bill to steer S. W. After this the cook brought up a little box of papers, which the cook and mate looked at, and the mate said they were no good, and they could not go to the West Indies, and that the best thing they could do was to steer to the land and sink the ship. The mate said, don't be frightened; if anything comes of it, I will take the whole of the blame." Then the captain's clothes were divided, the mate receiving no part of them—the vessel is run into the land—attempts are made, under the direction of the mate and cook, to scuttle her, which are providentially defeated,—the crew land at LaHave,—in pursuance of an agreement made

among all hands, the captain is represented to have fallen overboard,—the mate goes before the authorities at Lunenburg, and unites with the cook and boy in telling so plausible a tale that they are cleared. He is afterwards arrested, and makes confession, and the two Germans, the cook and boy, being secured, the whole of the tragedy, or such part of it as we have been permitted to know, is revealed.

This imperfect sketch omits many particulars, and is by no means to be taken as a substitute for the evidence, which must be carefully studied to obtain an accurate and complete view of it. I have assembled together these leading features to picture the transaction as it would naturally present itself to the minds of a jury. Some of the facts which bear hardest on the mate may be softened or explained away. It may be said that the design to run away with the vessel had not been formed before the murder; that his numerous actions, so much at variance with his duty as a mate, were the result of abject terror, and that the same terror led to his apparent complicity and silence when he reached the shore. I am content, for my part, that he should have the benefit of all these suggestions; for I am not arguing the case in order to demonstrate his guilt. I am only showing, as I think, conclusively, that there was evidence — I need not say how much or how little, that is not my province—but there was evidence of concert and complicity on the part of the mate, which was proper to be left to the jury, and which no Judge, as I think, that understood his duty, would have ventured to withdraw from them. I am of opinion that a jury drawn from the body of the people, and subject to challenge, is a better tribunal for the trial of criminal cases than any body of Judges could possibly be. The latter is the continental, the former is the British mode, and I give it a decided preference. Juries, in the language of C. B. Pollock, are inclined to take a broad, general and comprehensive view of the facts, and not relying on minute circumstances with respect to which there may be some source of error, their minds are generally conducted to sound conclusions, and all experience shows that in criminal cases they lean most commonly to the side of mercy. I am reluctant, therefore, to encroach on their proper functions, or to assume a responsibility which does not belong to a Judge.

That responsibility is entrusted to another power, and not to us.

For these reasons I am of opinion that the conviction of John C. Douglas is sustainable in point of law, and that this Court should give judgment accordingly.

JOHNSTON, E. J. A barbarous murder—apparently unprovoked, and with little object—has been perpetrated on the master of a vessel at sea, where it is particularly important that the authority of the law should be respected. The interests of society demand that none who have partaken in the guilt should escape conviction and punishment, and especially upon refined technicalities; for, to use the language of Mr. Starkie, "to acquit upon light, trivial and fanciful suppositions and remote conjectures, is a virtual violation of the juror's oath, and an offence of great magnitude against the interests of society." (*Starkie on Evidence* (Sharswood's edition), 761, m. p. 865.)

The rules of evidence, however, which have been sanctioned by the wisest and best Judges, and ratified by the experience of ages, as the safest guides in the investigation of criminal accusations in British courts of justice, are not subtle refinements, barren technicalities, or arbitrary enactments; they are deductions drawn from a deep insight into human nature, and being founded on a close observation of the ordinary current of human action under the influence of the motives, passions, interests and affections which sway men in the diversified incidents of life, their object is, and they are calculated, to protect the innocent from unjust condemnation, and to prevent the escape of the guilty from merited punishment.

It is no reason for slighting these wholesome rules that they sometimes fail to effect their destined objects. Their maintenance, in all their integrity, is essential to the common well-being and security; and exceptional failures must be submitted to as incident to the imperfection that attaches to human institutions. To the Judges of this Court is committed the very important duty of preserving inviolate the established rules of evidence, unswayed—on the one hand, by emotions of

compassion, seeking to relax them in favor of the guilty, and, on the other hand, indifferent to the demand, however universal and just, for the condemnation of an object of general execration and suspicion, in whose case conviction would not, under those rules, be warranted.

In cases of circumstantial evidence, such as that we are about to investigate, close examination and careful discrimination are peculiarly demanded.

To the validity of such testimony the circumstances from which the conclusion is drawn must be fully established. There should be a just relation between the circumstances and the conclusion, and the deduction from the circumstances proved must be conclusive and not indefinite. To use Mr. Starkie's language, "such evidence is always insufficient when, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true: for it is the actual exclusion of every hypothesis which invests mere circumstances with the force of proof. Whenever, therefore, the evidence leaves it indifferent which of the several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be." (*Starkie on Evidence* (Sharswood's edition), 757, m. p. 859.)

This rule, which is of fundamental importance, is obviously reasonable; for if, in the absence of direct proof, the circumstances that are known are consistent with two suppositions—one of guilt, the other of innocence,—to condemn on such evidence would be merely matter of chance and uncertainty, violating the maxim of Lord Hale, that it is always better to err in acquitting than in punishing,—a maxim which, by its justice and humanity, has so commended itself to universal acceptance, as to have grown into the proverb that it is better that many guilty should escape than that one innocent man should suffer.

With these rules before me, I will examine the evidence as it bears on the following questions:

1st—Was Douglas personally engaged in the act of murder?

2nd—Or was he constructively present—that is, was he cognizant of the fact, and in near proximity, prepared to assist if required?

3rd—Had there been a previous guilty concert between Dowsey and him for the murder of the captain?

(His lordship here elaborately reviewed the evidence and then proceeded as follows.)

I see nothing in all this testimony that is not consistent with the supposition that the murder was committed by the cook, who looked not to the mate for support, although within call, but, on the contrary, studiously avoided awaking him; that the mate was asleep, ignorant and innocent of the crime, and was only aroused to hear of the murder; that, from what he saw and heard, he believed the captain to be killed and the mischief beyond remedy; that, nervous and affrighted, and perhaps suspecting concert between the Germans and the cook, and trembling lest the fate of the captain might be his own, he yielded to his terror and the excitement of the moment, and concurred in the removal of the body and the bloody bedding, and in the concealment of the murder; that he never intended going to the West Indies, and was impatient to get away from the ship to escape the cook, and made such pretences as amused those on board and effected his object; that, on shore, he was influenced by the desire to escape suspicion and danger, and was pursued by the apprehension of the cook turning upon him if he revealed the facts, —an apprehension which the result showed to be not without reason. And, if any credit be due for tardy confession, the prisoner is entitled to it, as there is no reason to believe that but for his revelation the crime would not have remained unknown.

On the best consideration I can give the subject, the evidence in this case appears to fulfil the conditions of an hypothesis of innocence, naturally and without either violence or straining, or contradiction as regards the component facts. On the other hand, the supposition of guilt is opposed to the circumstances attending the murder, and is improbable from the absence of motive or object.

I think, from the evidence, that the supposition of innocence is stronger than the supposition of guilt. But it is not necessary that it should be so, for it will be recollected that if the hypothesis of innocence be a reasonable deduction from the facts, it is not necessary that it should exceed

in pro ability the hypothesis of guilt. It necessarily follows that, in my opinion, the jury, in finding Douglas guilty, did not arrive at the conclusion which a judicious application of the rules of evidence to the testimony in this case called for. I have taken the testimony as having been credited by the jury, except where it appears obvious that they rejected it. It is proper, I think, to notice the serious discrepancies and unaccountable want of corroboration between the two witnesses for the Crown. Some of these I have already mentioned; I will barely refer to two others.

(His lordship here referred to the fact that Marlberry made no mention, in his evidence, of the conversation alleged by Stockwell to have taken place between Douglas and Dowsey with regard to the blood on the hands, sleeves, &c., of the latter, when, according to Stockwell's evidence, Douglas said to Dowsey, "You had better wash the blood off." The learned Judge also remarked on the fact that Marlberry testified that the vessel's name was painted out by Douglas' order, while Stockwell stated that it was done by Dowsey's order, and that "the mate (Douglas) said nothing — he hadn't much to say." His lordship also referred to some statements made by Douglas and Lambruert, which were given in evidence against them respectively, but which he thought, notwithstanding the caution of the Chief Justice, probably affected the minds of the jury against Douglas, perhaps without their own consciousness of the fact. The learned Judge then concluded as follows.)

It remains to consider the very important enquiry which involves the construction of the Statute under which the question of the Chief Justice has been reserved, and the extent of this Court's authority in answering that question. The decision of facts is the province of the jury, and strictly it is their only province; but as it is their duty to apply the law as given by the Court to the facts as they find them from the evidence, in this sense they may be said to pass upon mixed questions of fact and law. In civil suits the errors of juries, acting within the scope of their authority, may be corrected on revision by the Courts, and when it is proper, justice may be done by setting aside their verdicts and granting new trials. In criminal cases the pratice has been different,

and the remedy has been limited, and the mode of reaching it circuitous. Limited generally to cases where there had been a failure of evidence to support the verdict, or some purely legal question had arisen, and where redress was deemed needed, it was obtained through the Executive on the representation of the Judge, and commonly, after argument, before Judges who sat to advise. By the English Act of Parliament, from which our Act is copied, a Court of Criminal Appeal is constituted, the Judges in which sit with authority to determine. This Act gave a judicial sanction to their deliberations and a judicial authority to their decisions, not before enjoyed. We are called upon to say to what extent the jurisdiction of this tribunal has been carried by English decisions, and whether the case before us belongs to a class excluded from that jurisdiction or not: in other words, whether the jurisdiction is confined to questions purely legal, or extends to cases embracing considerations of fact properly within the cognizance of the jury, but in which it is supposed they have come to an erroneous decision.

It seems a strange anomaly that a suitor, whose pecuniary interest is involved to an inconsiderable amount in a civil suit, may have the verdict of a jury reversed, and that no such privilege should exist when the issue is life or death—the most transcendently solemn that man can be called to deal with. Knowing, as I do know, the difficulty that Judges, counsel, and juries must labor under in protracted and intricate cases—in the hurry of trials to grasp the whole outline of a case—to combine and to separate, to group and to contrast the evidence—to give to each part its appropriate value, and no more, and to bring the whole within the operation of sound principles: knowing, too, that when prejudices have been strongly excited in a community, a jury may, unconsciously to themselves, forget the golden rule that forbids condemnation when a reasonable probability of innocence exists, I entertain a strong opinion in favor of the existence of a jurisdiction (under appropriate limitations and guards) in the Supreme Courts to review hasty or rash conclusions at which juries may have arrived. This sentiment is gaining ground in England, and, in that country where caution and deliberation hold the rein upon innovation, is now passing

through the preparatory stages of discussion ere it be finally tried by the crucible of public opinion as concentred in Parliament, and I doubt not that it will not be long before we shall have the opinions of wise and experienced men, and probably parliamentary enactments to guide us.

Our present business is with the law as it is, and its application to the case under consideration. The jury unquestionably had evidence which it was their province to consider after being instructed by the Court as to the law; it was their duty to determine what the result of the evidence was: by their verdict they say that the evidence has led them to the conclusion of the prisoner's guilt. They do not say that they also are of opinion that the evidence naturally warranted a supposition of innocence, but they have preferred the supposition of guilt. Had they said this they would have infringed the rules of evidence. But they simply say they find the prisoner guilty, and, assuming them to have been instructed in the law, the meaning of their verdict is that the evidence has led them to the conviction of guilt, and has excluded every reasonable supposition of innocence from their belief.

I think that in this they have very seriously erred, but it being a question of fact which the Constitution placed in their hands, I fear this Court has not the power under the Act to interpose to rectify their mistake, if mistake, as I think, they have made. I think this power ought to rest somewhere, and that, for obvious reasons, if the verdict of a jury is to be controlled, it had better be revised, and, if necessary, reversed, by a Court of Justice, after public argument, than by an Executive Government.

Believing that the evidence naturally led to a different and more favorable judgment than the jury arrived at, I should have been most happy to have found myself justified in the opinion that the Court has the power, under the Statute, to stay the effect of the verdict. I cannot come to the conviction that the decisions and practice in England warrant the Court in exercising such a power in this case.

I am bound to administer the law, however hardly, even fatally, I may think it operates in any individual case; and although I believe the conclusion at which the jury arrived, in finding John C. Douglas guilty of the murder of Colin C.

Benson, was a mistaken judgment, I am painfully compelled to say that I think the law has not authorized this Court to interfere to stay the sentence that follows the verdict. The responsibility of the verdict, and the responsibility of dealing with the sentence, must rest where the law has placed these responsibilities,—it is not with this Court.

DODD, J. I have given to this case the best consideration in my power, and have come to the conclusion that there was sufficient evidence to send the case to the jury, as respects the prisoner Douglas. The facts of the case were for the jury, and if there was any legal evidence upon which they could assume the guilt of the prisoner, it was within their province to do so; and I have no disposition, if I had the power, which I think I have not, to interfere with their prerogative. If there is any legal evidence against a party charged with a criminal offence, the case cannot be withdrawn from the jury. The Judge, in my opinion, is to decide upon the sufficiency of the evidence to send the case to the jury, but the jury are to decide upon the sufficiency of the evidence to justify a conviction; and, even where they convict against the views of the Judge who tried the cause, this Court can give no redress in such a case, but the resort must be to the Crown.

With respect to the trial by jury, Lord Hardwicke has observed that all reflecting men will agree in the observation that "it is of the greatest importance to the laws of England, and to the subject, that the powers of the Judge and jury be kept distinct." The general principle that the Judge must determine the law, and the jury the fact, is not, and cannot be disputed. 1 *Taylor on Evidence*, 30. The same author says, although it is the exclusive province of the jury to fix the due weight which ought to be given to presumptions of fact, juries are usually aided in their labors by the advice and instruction of the Judge, more or less strongly urged at his discretion. *Ibid*, p. 186. And Lord Mansfield, in *Rex* v. *The Dean of St. Asaph*, 21 How. St. Trials, 1039, 1040, said, it is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power

to do wrong, which is a matter entirely between God and their own consciences. With such authorities as these. it would be vain to say that the jury have not the exclusive power to decide upon all questions of fact, and, unless that power has been taken from them by legislative enactment, they possess it in as high a degree as they ever did.

At the argument of this cause, the learned counsel for the prisoner contended that, under the Act (Rev. Statutes, chap. 171) which enabled the Chief Justice to reserve the case for the opinion of the Court, we had authority to go beyond the question submitted to us, and decide upon the sufficiency of the evidence to convict the prisoner, and several cases were referred to to support his position, which I will hereafter examine. The language of chap. 171 is confined to questions of law that arose at the trial. (His lordship here read sections 99, 100, & 101 of this chapter.) In the case under consideration, the Chief Justice has followed the directions of the Statute, and has submitted the question I have already referred to. If there is not any legal evidence under which the conviction of the prisoner is sustainable in point of law, then it is our duty to say so. But how far our duty calls upon us to scrutinize the evidence and decide upon its weight for or against the prisoner, (as it has heretofore been the exclusive duty of the jury,) is an important question, and, if answered in the affirmative, will largely increase the duties and responsibilities of the Court, while it will, at the same time, diminish those of the jury, and change the whole character of the criminal jurisprudence of the country.

Mr. Johnston, for the prisoner, said that unless his guilt was mathematically established by the evidence, the jury were bound to acquit him. But let us see what Chief Justice Abbott says on that subject. He says that in drawing inferences or conclusions, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction; but, in matters that concern the conduct of men, the certainty of mathematical evidence cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men conversant with the affairs and business of life,

and who know that when a reasonable doubt is entertained, it is their duty to acquit. 4 *B. & Ald.* 161; *Wills on Circumstantial Evidence*, 160.

I will now refer to some of the leading cases cited in favor of the prisoner, founded upon the Imperial Statute, 11 & 12 Vict., from which the Act of our Province is taken. They are all Crown cases reserved under the Statute.

(His lordship here referred to *Regina* v. *Langmead*, 10 Law Times Rep. 350, (being one of the cases cited by the learned Chief Justice,), and observed that the case was very far from sustaining the argument of Mr. Johnston, that the Court is to decide upon the sufficiency of the evidence to convict. His lordship remarked that the fair and reasonable conclusion from the case was, that the Court will interfere where there is no evidence, but not where there is evidence to justify the Judge in sending it to the jury. The learned Judge then proceeded as follows.)

The next case referred to by Mr. Johnston was *Reg.* v. *Collins*, 10 Law Times Rep. 581. In this case it was held that, in order to convict of an attempt to commit larceny, it must appear that there was property in the place, where the attempt was made, that could be stolen. Therefore, where a person puts his hand into the pocket of another, with an attempt to steal, he cannot be convicted of the attempt, unless it appears that there was property in the pocket which might be stolen. In that case the conviction was quashed because the question of property in the pocket had not been submitted to the jury. But if it had been submitted, Cockburn, C. J., said they were very far from saying there was not evidence on which the jury might have said there was, and in that case the conviction would have been affirmed. The only evidence in the case was that one of the prisoners had put his hand into the gown pocket of a lady, and upon the cross-examination of the witness who proved the case for the prosecution (the lady herself not being a witness,) said, he had asked her if she had lost anything, and she said no; and yet, upon this extremely slight evidence, if the question of property in the pocket had been submitted to the jury, the conviction would have been confirmed. This case was reserved upon the objections which were taken at the trial. The defence was, that, to put a hand

into an empty pocket was not an attempt to commit a felony, and that, as it was not proved affirmatively that there was any property in the pocket at the time, it must be taken that there was not; and, as larceny was the stealing of some chattel, if there was not any chattel to be stolen, putting the hand in the pocket could not be considered as a step towards the completion of the offence. The law, as the counsel for the prisoner in the case contended for, was upheld by the Court, but when the question, that it was not proved affirmatively that there was property in the pocket, was considered as a fact for the jury, and not having been submitted to them, slight as the evidence was upon the subject, the defence prevailed. This case, instead of supporting the position of Mr. Johnston, is, in my opinion, directly against him, and shows that, where there is any evidence for the jury, they have the right to pass upon it, and that the Court of Appeal will not interfere with that right.

There were two other cases cited at the argument, *Regina* v. *Giles*, 11 Law Times Rep. 643, and *Regina* v. *Smith*, 12 Law Times Rep. 608, but as they have been fully referred to by the Chief Justice in his judgment in the cause, I will make but a slight reference to them, particularly as I do not think they avail Mr. Johnston in his argument for the prisoner.

(His lordship here referred briefly to these two cases, and then continued as follows.)

In the case before this Court, if I could bring my mind to the conviction that there was but a mere *scintilla* of evidence to justify the conviction of the prisoner, I would cheerfully assent to its being quashed. Where there is not any evidence,—or a mere *scintilla* of evidence, which amounts nearly to the same thing as there not being any evidence in a criminal case,—I would then say it came within the scope and meaning of the Act which authorizes questions of law to be reserved, and decide in that case there was not any legal evidence to convict; but that is a very different case from the one we are now called upon to decide, where, in my opinion, there is a large mass of criminating evidence, and which was exclusively for the jury to pass upon.

The evidence having been returned to this Court, with the case reserved for our opinion, it is unnecessary for me to

enter upon a minute investigation of the facts established at the trial. It is sufficient for my purpose to say, that, after much care and deep anxiety in examining the evidence, I have come to the conclusion that it established such a case against the prisoner as prevented the Chief Justice from withdrawing it from the jury, and that it was of that character, under the direction they received from his lordship, which made it peculiarly their province to decide upon.

Among the objections urged for the prisoner was that the witnesses for the Crown varied in many of their statements respecting what occurred on board the vessel upon the morning of the murder, and I admit they differed in the narrative they gave of some of the events of that unfortunate morning; still their statements did not amount to a contradiction except in one or two instances, but simply a want of uniformity in them; and in the main and important features of the case they substantially agreed. We must not forget that one of the witnesses was a foreigner, and from the manner he gave his evidence spoke the English language imperfectly, and also taking into consideration the excitement produced upon him when informed of the death of his captain, using his own words, he says, "I was frightened and shook; I could not get out of the berth." Under these circumstances, it is not very astonishing if he forgot many things that were said and done upon the occasion; but after all the credit of the witnesses was with the jury, and their attention was drawn to that fact, and they were told by the Chief Justice that their evidence should be received with caution. And the jury had the power of rejecting the evidence altogether and acquitting the prisoner, but this they did not do, but exercised their legitimate functions, and gave weight and efficacy to their testimony. *Wills on Circumstantial Evidence*, page 222, in speaking of variations in the relations by different persons of the same transaction or event, in respect of unimportant circumstances, says: "They are not necessarily to be regarded as indicative of fraud or falsehood, provided there be substantial agreement in other respects. True strength of mind consists in not allowing the judgment, when founded upon convincing evidence, to be disturbed because there are immaterial discrepancies which cannot be reconciled. When the

vast inherent differences in individuals, with respect to natural faculties and acquired habits of accurate observation, faithful recollection and precise narration, and the important influence of intellectual and moral culture, are duly considered, it will not be thought surprising that entire agreement is seldom found amongst a number of witnesses as to all the collateral incidents of the same principal event." And Lord Ellenborough, in *Rex* v. *Lord Cochrane*, Gurney's Rep. 456, said that the general accordance of all material circumstances rather confirmed, by minute diversity, than weakened the general credit of the whole, and gave it the advantage which belongs to an artless and unartificial tale.

It will be seen, by the writers I have referred to, that variations in the relations, by different persons, of the same transaction or event, are not always to be regarded as indications of fraud or falsehood, provided there be substantial agreement in other respects, and the jury have so considered the discrepancies in the case against the prisoner, otherwise they would not have convicted him.

Besides the variations I have referred to, *Wills*, page 224, says:—"Still less are mere omissions to be considered as necessarily casting discredit upon testimony which stands in other respects unimpeached. Omissions are generally capable of explanation by the consideration that the mind may be so deeply impressed with, and the attention so rivetted to, a particular fact, as to withdraw attention from concomitant circumstances, or prevent it from taking note of what is passing." Now, if anything was likely to take the mind from minor events, and deeply impress it with a particular fact, it would be so in the present case. The murder of the captain of the vessel, under the circumstances detailed by the witnesses, would naturally leave the mind incapable of receiving any other impression than that fixed upon it by the horror of the event.

It has been urged upon us that there was no evidence for the jury. But were they not to decide upon the acts of the prisoner throughout the bloody tragedy of the Sunday morning when the deceased was murdered in his cabin, within a few feet of where, it is said, the prisoner was in his berth, and might have been conversant with what was then going on, his state-room being partially open at the time.

(His lordship here referred at considerable length to the evidence, and then concluded as follows.)

I have referred to such parts of the evidence as appear most strongly against the prisoner to show that it was a case for the jury, and that the Chief Justice would not have been justified in withdrawing it from them. *Roscoe*, in his *Digest on Criminal Evidence*, says (p. 18): "In almost every criminal case, a portion of the evidence laid before the jury consists of the conduct of the party, either before or after being charged with the offence, presented not as part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind. * * In weighing the effect of such evidence, nothing more than ordinary caution is required. The best rule is for the jury to apply honestly their experience, and to draw such inferences as experience indicates in matters of the gravest importance. This will, in general, be found a safer guide than a consideration of some of the extreme cases which are related in many of the books on evidence. These must be considered as somewhat exceptional, and it may be fairly said that this is a very useful kind of evidence, and one which no Judge need seek to withdraw from the consideration of a jury."

Whatever discrepancies there were in the evidence in this case, and I cannot avoid saying they were numerous, may have been reconciled by the jury, but the contradictions between the evidence of the boy (Stockwell) and Marlberry was a question of deep importance, and if it left on the minds of the jury a doubt of the truthfulness of the statements given by either of the witnesses, they should have hesitated long before they convicted the prisoner.

There is abundant authority to show what the duty of the jury is in criminal cases. Mr. B. Park, in *Tawell's* case, in addressing the jury, said: "The point for you to consider is, whether, attendnig to the evidence, you can reconcile the circumstances adduced in evidence with any other supposition than that the prisoner has been guilty of the offence? If you cannot, it is your bounden duty to find him guilty; if you can, then you will give him the benefit of such a supposition. All that can be required is not absolute, positive proof,—but such proof as convinces you that the crime has been made

out. If there is any reasonable doubt of the guilt of the accused, he is entitled, as of right, to be acquitted." This rule is so universal in its application that I do not believe it is ever omitted by a Judge in his charge to the jury. *Wills* (*Wills on Circumstantial Evidence*, 154,) says, "The doubt, however, must not be a trivial one, such as speculative ingenuity may raise, but a conscientious one, which may operate upon the mind of a rational man, acquainted with the affairs of life." Those rules cannot be disputed. They are intended for the guidance of the Judge in his directions to the jury, and it would be wise in all cases if the jury were to adopt and act upon them. In the present case they have not been omitted by the Chief Justice in his charge, and it is not for me to say that the jury did not allow them to have the proper weight and influence before finding the prisoner guilty. My authority, as I believe it to be, is not to question the right of the jury to decide the guilt of the accused when there is sufficient evidence to give the case to them; and, as I think, there was legal evidence in this case involving the guilt of the prisoner, it was exclusively for them to pass upon it, and the verdict, in my opinion, cannot now be changed by this Court. In the language of Lord Mansfield, already referred to, "it is the duty of the Judge to tell the jury how to do right," (and it cannot be denied but that, in this case, he did so,) "though they have it in their power to do wrong, which is a matter entirely between God and their own consciences, but there it must rest." The Crown alone, and not this Court, can give any redress in such a case. But I wish it to bedistinctly understood, that, in this case, I give no opinion upon the question of the jury having done right or wrong, because I think, under the law, I am not called upon to do so.

DesBarres, J. There is no direct evidence to show that the prisoner was actually present at, or that he took any active part with the cook (Dowsey) in the murder of Captain Benson, and, therefore, it remains for us to inquire whether the circumstantial evidence produced on the part of the Crown, upon which the conviction entirely rests, is such as to warrant the jury in drawing the inference that there was a concerted

design between the prisoner and Dowsey to perpetrate the murder, and that, although he may not have been actually present, he was, in construction of law, present, aiding and abetting at, or ready to take part and assist in, the perpetration of the act, if that assistance had been required. His lordship the Chief Justice instructed the jury, that, if they believed the mate knew what the cook was doing in the cabin —that they two had actually formed the design of running away with the ship, and that, to accomplish this object, the murder of the master was the first preliminary,—then, the fact that the mate did not see the crime committed amounted to nothing; and that, if they believed there was a common design, having the murder as part of it, that was enough to inculpate the prisoner. The jury, acting upon these instructions, and believing, as we must presume they did from the facts before them, that there was a common criminal design to take the life of the master in order to obtain possession of the ship, pronounced the prisoner guilty of the crime charged against him, and the question to be considered is, whether there is any evidence upon which they could arrive at such a conclusion.

In 1 *Phillips on Evidence*, 166 (7th ed.), it is said: "When direct evidence of facts cannot be supplied, as must continually happen in some of the worst species of crimes, reasonable minds will necessarily form their judgment on circumstances, and act on the probabilities of a case. The whole system of human action proceeds on probability; 'and as mathematical or absolute certainty is seldom to be attained in human affairs, reason and public utility require that Judges and all mankind, in forming their opinion of the truth of facts, should be regulated by the superior number of probabilities on the one side or the other.'"

The substance of the leading facts of this case, upon which I shall make no comment, may thus be stated.

(His lordship here referred briefly to the evidence affecting Douglas, and then proceeded as follows.)

From all these circumstances put together, I think the jury might, if they believed them to be true, draw the inference of complicity between the prisoner and the cook.

It was argued by the learned counsel for the prisoner, that

what the mate said, and what he did, were under the influence of fear, and that his conduct, strange as it may appear, was therefore not inconsistent with the hypothesis of his innocence. It is possible that he may have acted under that influence; but the answer is, that this was a matter for the consideration of the jury, and not for the Court.

Assuming that there was evidence proper to be left to the jury,—and I confess I do not see how the circumstances to which I have referred could have been withdrawn from their consideration,—I do not see any ground upon which the Court can interfere with the verdict. My own impression is, that this is not a case in which the Court can step in and nullify the act of the jury, nor do I see how such a power can here be exercised without taking from the jury the constitutional right which they possess of passing upon the facts. I admit that, in a case entirely unsupported by evidence, such a power does exist, and that it ought to be exercised; but where there is evidence, though it may not be of a conclusive character, and a conviction follows, then it appears to me that this is not the tribunal to appeal to. There is another to which an appeal may more properly be made, possessing a power which is not possessed here, and where, I feel assured, all the evidence and circumstances of this case will be thoroughly weighed and considered. I do not, therefore, feel myself called upon to say whether I approve or disapprove of the verdict rendered by the jury. It is enough for me to say that I think there was sufficient evidence for their consideration, and that, although they might, if they had thought fit, have drawn from it a different inference, they were at liberty to draw that which they did. They were the sole judges of the evidence, and knowing that it was their imperative duty to acquit the prisoner, if they had any reasonable doubt as to his guilt, they have, in the exercise of their own judgment, and, in accordance with their own convictions, felt themselves constrained to pronounce him guilty. With them, then, the responsibility attaching to the verdict must rest.

In 1 *Greenleaf on Evidence*, sec. 49, it is said: "In trials by jury, it is the province of the presiding Judge to determine all questions as to the admissibility of evidence for the jury, as well as to instruct them in the rules of law by which it is

to be weighed. Whether there be any evidence or not, is a question for the Judge; whether it is sufficient or not, is a question fo' the jury." The principle here enunciated is that by which we are and must be governed, so long as the functions of the Court and of the jury remain as they are.

The cases to which our attention was directed at the argument by the learned counsel for the prisoner do not, as I read them, establish the position that the Court have the right to control the verdict of the jury upon the ground of the existence of doubts as to the guilt of the accused. They appear to be cases brought up before the Court of Criminal Appeal, on questions arising as to the admissibility and legality of evidence submitted. The first case that was cited was that of *Regina* v. *Smith*, 12 Law Times Rep., 608. (His lordship here referred at some length to this case, and said that he thought it showed two things: first, that it was for the Court to decide the question of law in the case; and secondly, that in a case where there is an entire absence of evidence to support the indictment, or only a *scintilla* of evidence, it ought not be left to the jury. His lordship then referred to *Regina* v. *Giles*, 11 Law Times Rep., 643, *Regina* v. *Langmead*, 10 do., 351, and *Regina* v. *Collins*, Ibid, 581, and remarked that there was nothing in them or the preceding case to satisfy his mind that this Court has the power, under the law as it exists, to set aside the verdict which the jury had rendered against Douglas. The learned Judge then concluded as follows:)

Being of opinion that there was sufficient legal evidence in this case to warrant the jury in drawing the inference and arriving at the conclusion that the prisoner was a participator in the crime for which he stands convicted, I concur with his lordship the Chief Justice, and my learned brethren Johnston and Dodd, that the verdict of the jury cannot be set aside.

WILKINS, J. The learned Solicitor General contended that upon a question of law submitted such as that before us, unless the evidence were so entirely insufficient as that it would be the clear duty of the presiding Judge at the trial

to keep the case from the jury, the Court of Appeal would have no jurisdiction; but *Regina* v. *Smith*, 12 Law Times Rep., 608, negatives such a view of the effect of the Statute. In that case the question submitted was whether there was evidence to support the indictment, which ought properly to have been left by the Judge to the jury? Mellor, J., said, "I think there was *some* evidence to support the direction of the learned Judge, but, on full consideration, I think that it was not sufficient to be left to the jury." He adds, however, these immediately following words: "Having regard to the circumstances of the case and its importance, I think the learned Judge was right in not stopping it." Smith, J., the learned Judge who tried the cause, said:—"I reserved the case for this Court because I felt great doubt whether the evidence was sufficient to sustain the conviction. I thought there was very little on the only ground on which the conviction can be supported. I thought then, and think now, that I could not have withdrawn the case from the jury." The conviction was quashed because the evidence did not support it, although it was conceded by the Court of Appeal that the Judge had exercised a sound discretion *in not stopping the case.* It was for manslaughter, in neglecting to provide proper food and lodging for a servant. It is important and very suggestive as regards that before us in this respect: In it, it became an important question "whether the deceased was so helpless in mind and body as to be unable to take care of herself, and *to withdraw herself from the prisoner's dominion.*" On that vital point of the case there was professedly *some* evidence, but the Court quashed the conviction *because there was not sufficient evidence.*

In *Regina* v. *Giles*, 11 Law Times Rep., 643, the learned Judge who tried it reserved for the Court of Appeal a question of law, in terms as follows:—"I request the opinion of the Court whether there was any evidence to go to the jury in support of the indictment." The Judge put the case to the jury, who found the prisoner guilty of extorting money from the prosecutrix, by means of a false pretence of an existing fact. Although the question submitted was whether there was any evidence, Erle, C. J., carefully examined all the evidence, and then said, "Upon this evidence I think there was enough for the jury, from which they had a right to infer

that the prisoner intended to induce the prosecutrix to believe that she had power (the existing fact charged), at the time when the money was parted with, to bring her husband back." Keating, J., says, "The opinion of the Court was founded on an examination of the whole of the evidence."

The parallel, in point of principle, between that case and this is therefore complete. In it the Court of Appeal examined the whole of the evidence in order to ascertain whether it established the guilt of the prisoner as "a fraudulent impostor." In this case the Nova Scotia Court of Appeal, having a question submitted in identical terms, is required to examine the whole of the evidence to see whether it sustains the conviction of Douglas *as a murderer.*

Our Legislature, therefore, has imposed on this Court a duty, which it must perform, of revising the case that was before a jury in order to determine whether that evidence, viewed in all its parts, and as a whole, was legally sufficient to sustain their verdict which found Douglas guilty of murder. In exercising that function so delegated, and made obligatory, the assumption of an undue interference on our part with the province of a jury is entirely gratuitous. Our practice before this Statute passed constituting a Court of Appeal was conformable to the old practice in England before the English Statute. Under that practice where the Judge at a criminal trial doubted about a question of law, he reserved it, and obtained the opinion of all the Judges. If in case of a conviction they doubted of the legal sufficiency of the evidence to establish it, a pardon was recommended. The prisoner was, in such case, discharged, and so, until the Legislature thinks proper to make him subject to a new trial, he ought to be; for every man is, in the eye of the law, innocent, until he is proved to be guilty by sufficient legal evidence.

It is not for Judges to speculate about the policy of a law but I may say that I view the law under which we are now revising this criminal trial as a wise and salutary one; and I do not think it at all likely to be abused. Its exercise is made to depend on the discretion of one of those functionaries in whom the Constitution reposes sacred trusts and unbounded confidence. Juries, in view of the solemn respon-

sibilities which attach to them in criminal cases, especially in capital ones, will, I am persuaded, be only too happy to be thus in a measure relieved of them. No one can appreciate or respect more highly than I do the peculiar province of a jury in criminal trials. Where the subject of its exercise is the credibility of a witness, or the truth or falsehood of a fact respecting which witnesses have spoken in conflict with each other, I accept as final the decision of a jury. But, although in the exercise of their functions they must necessarily, under such directions in point of law as they may receive from the presiding Judge, decide *in the first instance* on the mixed question of law and fact—in other words, on the legal sufficiency or insufficiency of the evidence to sustain the charge against the prisoner—there never was, since the Revolution, a time in the history of criminal jurisprudence in England, that their decision on that point was conclusive; there never was a time in the intervening period that a Judge conducting a criminal trial could not, in his discretion, obtain a judicial review of the finding of a jury convicting a prisoner, if he doubted of the legal sufficiency of the evidence to sustain the conviction. The means by which that object was attained was, as has been shown, different from that which may be adopted since the constitution of a Court of Appeal. It was the anomalous character of the old system which led to the introduction of the new one.

That which before the enactment of the Imperial Act, 11 & 12 Vic., chap. 78, was done somewhat *extra-judicially*, by taking the advice of all the Judges to satisfy the conscience of the presiding Judge, (*Roscoe's Digest of Criminal Evidence*, 216,) is now done by the *compulsory* and regular judgment of the "Justices and Barons" on a case reserved. The Statute furnishes not the slightest ground for the inference that the Legislature intended to institute any change in the *nature or character* of the questions to be reserved. Let us see, then, what the previous English practice in that respect was. *Russell* (2 *Russell on Crimes*, 725) states it thus:—"If the Judge who presides at the trial shall be of opinion that there is a doubt whether he may not have admitted some evidence or witness improperly, or *whether the facts proved constitute the crime charged*," (words which include this very

case,) "he may, in his discretion, forbear to pass sentence, or he may respite the judgment until the opinion of the fifteen Judges be obtained upon a case reserved." The language of the preamble to the English Statute shows that the only change intended referred to the *mode* of doing a thing that was done before. It is: "Whereas it is expedient to provide *a better mode than that now in use*," &c. The remedy given by the Statute is made to extend to the Court of Quarter Sessions, the practice is made more convenient, and provisions for final judgment are carefully made; but there is not a word in the Statute which will warrant the conclusion that the Legislature intended to make the phrase "*any difficult question of law*" less comprehensive than the previous practice shows it to have been.

Revised Statutes, chap. 171, sec. 99, *et seq.*, empower the Judge before whom a person may be convicted of treason, felony, &c., in his discretion, to reserve any questions of law that may have arisen on the trial for the consideration of the Justices of the Supreme Court. These last are required to "hear and finally determine such questions, and reserve, affirm, or amend any judgment given, &c., or avoid such judgment, or order an entry to be made on the record that, in the judgment of the said Justices, the party convicted ought not to have been convicted," &c. According to my construction of this law, I am bound in this case, as there is a conviction, to adopt the facts as found for the Crown; and, without questioning them, to inquire whether they are sufficient in law to sustain the conviction. If I find them legally insufficient, I am bound to quash the conviction. In 2 *Russell on Crimes*, 729, note, I find the notice of a case which the learned editor speaks of as "an example of a case of circumstantial evidence too weak for conviction." I avail myself of it, not only as applicable to the particular case, to show by analogy, as I think it does, the weakness of the evidence in this last; but as proving our jurisdiction to inquire into the legal sufficiency of the testimony, on which the jury have found their verdict against the mate. "Two women were indicted for coloring a shilling and a sixpence, and a man (Isaacs) as counselling, procuring, aiding, and abetting the coining. The evidence against him was, that he visited

them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room, just after the apprehension, he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three shilling piece, five bad shillings, and five bad sixpences." Upon a case reserved the Judges thought the evidence too slight to convict him. *Rex* v. *Isaacs*, M. S. Bayley, J., Hil. T., 1813.

Now, assuming that what we are required to do by the Statute is precisely what we *might have done* at common law on a case reserved,—I ask how on the point of jurisdiction the effect of this last mentioned authority can be avoided? In it the fifteen Judges of England inquired "whether the facts proved constituted the crime charged—which was counselling the coining." In this, what I feel myself bound to investigate is, "whether the facts proved constitute the crime of counselling, aiding, and abetting the murder."

The Courts at Westminster administering criminal justice recognize certain rules or maxims as necessary guides to juries, where the charge before them is sought to be sustained by circumstantial evidence. I will not take upon myself to pronounce that they have the absolute force of law; but I will undertake to say that without a strict observance of them criminal justice cannot be safely or legally administered. *Wills*, in his admirable treatise on Circumstantial Evidence, thus introduces five rules of induction which he fully explains (p. 136):—"Inasmuch" he says, "as the rules, which philosophic wisdom and judicial experience and sagacity have recognized as safeguards of truth and justice in general, apply with peculiar pertinency and force to circumstantial evidence, it is necessary briefly to advert to some of the more important of them;" and he thus concludes his consideration of them, (p. 155)—"It is from the practical disregard of those rules, rather than from the nature of the subject, that have proceeded those lamentable failures and violations of justice, which have occasionally disgraced the pages of judicial history."

I am prepared to maintain (and that is the point of *jurisdiction* which I am now considering) that where it shall be

made to appear to the Appellate Criminal Court, in any reserved case depending on circumstantial testimony and therefore on the doctrine of hypotheses, that those maxims have been plainly disregarded by the jury who convicted the prisoner, that Court is bound to decide that the evidence is not legally sufficient, and that the conviction should be quashed. It is, indeed, so very important that sound principles of construction of circumstantial evidence in criminal cases should govern jurors in the discharge of their duties, and forensic annals record so many instances of innocent victims of that species of evidence, when not rightly interpreted, that I gladly avail myself of an opportunity thus afforded of explaining, in connection with the facts before us, certain maxims *necessary to be observed* in criminal trials, where the evidence against a prisoner is purely circumstantial. In doing this, I disclaim all intention to reflect on the manner in which the twelve good men, who constituted the jury in this cause, discharged the painful duty that the law imposed on them. Had I been one of them, I believe that I should have concurred in their verdict convicting Douglas. I think that the testimony, viewed as a whole, would, after the comparatively short period for deliberation that was at their command, and without that searching analysis of testimony which they did not, perhaps, feel it necessary to institute, have made the same impression on my mind that it made on theirs. Now, however, after argument at the bar, and after weighing and discriminating the evidence, I cannot infer the prisoner's guilt from the facts relied on as inculpating him. Whilst I am, of course, aware that he *may* be guilty, I can entertain, in perfect consistency with all the facts, that which I believe to be a reasonable hypothesis of his innocence. In such a case the prisoner is, in my opinion, by the law of the land entitled to an acquittal; and should he in that case be convicted, a question whether the conviction can be sustained must be, from its nature, *a question of law.*

One of the greatest Judges that ever adorned the English bench has recorded, expressly as a warning to Judges and jurors, a case showing the danger of convicting, in a capital case, on circumstantial evidence, "without first considering with the utmost carefulness every possibility of an unproved state

of circumstances existing which, if proved, would reasonably account for all the facts, and yet establish the prisoner's innocence." A child was placed under the guardianship of an uncle. He was proved to have slightly chastised her; she had been heard to exclaim, "Oh! dear uncle, don't kill me!" The child was missing; suspicion attached to the uncle; he was arrested and bailed, with an admonition that at the next assizes he must produce the child. He, then, produced a supposititious one, which was proved to be such. On these facts he was convicted and executed. He was innocent, however, for the real child, many years after the execution, re-appeared, having run away from the prisoner's house. Now, that jury improperly convicted that innocent man, because they did not put to their minds and answer these two hypothetical questions: First—"May not the missing child have withdrawn herself from her uncle's house, and be still living?" Second—"May not the prisoner, from fear arising from consciousness of the suspicious circumstances of his position, have resorted to untruth and subterfuge?" Possibly, they were suggested, but derided and discarded as "light, trivial, or fanciful." But they were founded in reason and fact, and had they been acted on an innocent man would not have suffered.

There is in the case before us no direct evidence that Douglas, before, or at the time of the homicide, concurred in it, or assented to it. His conviction, therefore, rests on evidence purely circumstantial. Mr. Baron Alderson's rule in such cases has been commended by high authority as one of complete exactness. He said in *Rex* v. *Hodges*, 2 Lewin's Criminal Cases, 227, (cited in *Wills on Circumstantial Evidence*, 150, 151,) "to enable the jury to bring in a verdict of guilty on circumstantial evidence, it is necessary, not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw." If guilty at all, Douglas is guilty as principal, present (actually or constructively), aiding or abetting another who committed homicide. To establish his guilt as such, there must be sufficient evidence, not only that he was present at the slaying, but that his mind concurred in the intention that it should be committed. He was not, necessarily, even constructively

present, for he could only have been so on the condition, entirely unproved, of having been awake, and conscious of the violence of the cook. He had gone below an hour before his re-appearance on deck. He may have been in a profound sleep, and unconscious of the homicide. He was certainly in the cabin when the fatal violence was done. His precise position therein, at the time of the homicide, relatively to the deceased, is unknown. When Stockwell saw the cook in the captain's berth, he says, "the mate was in his stateroom, of which the door was closed within three or four inches." (His lordship here referred at great length to the evidence, commented largely thereon, and then concluded as follows:)—Douglas's acts and language must be considered in view of the following suggestive sentiments of great jurists.

Wills, in his learned essay on the *Principles of Circumstantial Evidence*, after remarking that acts of concealment, disguise, flight, and other indications of mental emotion, are usually found in connection with guilt, adds, "these are in all their modifications, indications of *fear*; but it would be harsh and unreasonable invariably to interpret them as indications of guilty consciousness." "Doubtless," he continues, "the manly carriage of integrity always commands the respect of mankind, and all tribunals do homage to the great principle from which consistency springs; but it does not follow, because the moral courage and consistency, which generally accompany the consciousness of uprightness, raise a presumption of innocence, that the converse is always true. Men are differently constituted as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt; and every man is, therefore, entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty." The same learned author subjoins this forcible observation:—"The consciousness that appearances have been suspicious, even where suspicion has been unwarrantable, has sometimes led to acts of conduct apparently incompatible with innocence, and drawn down the unmerited infliction of the highest legal penalty." The following sentiment, expressed by him, is also true, and applicable strikingly to the case under review. He says:—"Every consideration of

truth, justice, and prudence requires that, where the guilt of the accused is not incontrovertibly established, however suspicious his conduct may have been, he shall be acquitted of legal accountability." Again, in a warning voice, he reminds us that Romilly condemned the execrable maxim of Paley, "that he who falls by a mistaken sentence may be considered as falling for his country, while he suffers under the operation of those rules by the general effect and tendency of which the welfare of the community is maintained and upheld."—*Wills on Circumstantial Evidence*, 70, 71, 154.

I entirely assent to the principle that in criminal cases the conduct of the prisoner taken altogether is to be considered by the jury, but with this indispensable qualification, namely, "that, independently of his acts before, at, and after, the time when the crime was committed, proved facts warrant an inference of his guilt." In this particular case, all the acts and words of Douglas on board the Zero at and after the commission of the homicide, and all his acts and words after he reached the shore, should have been placed and weighed in the inculpating scale, only in case evidence existed, *apart from them*, to establish *per se* a reasonable hypothesis of his complicity in the murder, whilst it excluded every reasonable hypothesis of his innocence. That such a condition of circumstances, however, is not presented by the evidence, is what I believe, and have been endeavoring to show. The late learned Chief Justice Shaw of the Supreme Court of Massachusetts well understood the rule and the qualification to which I have adverted. He most sensibly remarked, in the celebrated case of Professor Webster, that, where the guilt of a prisoner was established by proper and legal evidence, his conduct and demeanor, at the time of arrest and subsequently to the time when the crime must have been committed, can add no material weight to the testimony, and that a case must be very weak against a prisoner which requires such evidence to support it.

It is quite true that Mr. Baron Parke, in *Regina* v. *Tawell*, who was indicted for the murder of a young woman who had been his mistress, told the jury that "it was for them to decide whether the falsehoods the prisoner had told did not show that he was conscious of his guilt of some act that re-

quired concealment," and also "that they were to judge of the truth of a case against a person by his conduct taken altogether"; but it is also true that he thus qualified and guarded those instructions. He said: "The untruths were material matters for their inquiry, bearing in mind that upon the evidence there was a very ample case for grave consideration to show that the deceased died of prussic acid, and that the prisoner was in the house at the moment of that death." The case was not only marked by that fact, but by the fact that the prisoner, on the day of the deceased's death, had bought prussic acid, the use of which he attempted to explain by stating that he had been in the habit of using it for varicose veins, though no proof was given that he had such occasion for its use. There was the additional circumstance of his having stated to the officer that arrested him that the deceased had, in his presence, poured something from a phial into her porter, and that he had left her under an impression that her subsequent illness was feigned. Under such circumstances, *the facts proved coming so close home to the fact to be proved*, one sees the importance of considering the prisoner's conduct subsequent to the point of time when he must have committed the crime if he was the author of it. The application of *that* case to this, as regards inferences from *subsequent conduct*, fails entirely, simply because in *this* there is a proved agent of the homicide distinct from the mate, and because, as has been shown, the circumstances relied on by the Crown do not warrant an inference of the particular prisoner's complicity in the murder. Such an inference would be a violation of the well known rule "that the facts alleged as the basis of any legal inference must be strictly and indubitably connected with the *factum probandum*." That wise rule was intended, as we are told by *Mill* in his "*Logic*," to "guard against fallacies of appearances and generalization."

It is the very existence of these "*fallacies of appearances and generalization*," which, in my opinion, strikingly characterizes the verdict against the mate. Taking all the circumstances proved to have occurred on board the Zero into review as a whole, or regarding any one of them singly,

there is not one that can be shown to be "strictly and indubitably connected with an assumed act of homicide on the part of Douglas." Viewed in connection with the *fact to be proved*, there is not one of them that possesses more weight in the legal scale of evidence than that of a mere conjecture, or of a probability.

This unhappy man has unquestionably committed, on board the vessel in which he held command, acts in the highest degree criminal, acts for the commission of which, his fears, however well founded, constitute no legal excuse; acts, too, for the perpetration of which it is most desirable that he should be punished. But he has been convicted not of these, but of the crime of murder. In respect of that crime, substantiated, if at all, by circumstantial evidence, there existed, in my opinion, when the jury retired to deliberate on the case, an hypothesis of his innocence, not a light, trivial, or fanciful supposition, or a remote conjecture, but one which the jury should have regarded as a reasonable hypothesis, presenting all the inculpatory facts in proof, as not incompatible with the innocence of the prisoner, and not incapable of explanation on that hypothesis.

I am deeply impressed with these learned and philosophic words of Mr. *Starkie*, (*Starkie on Evidence*, Sharswood's edition, p. 760): "The force of circumstantial evidence," he says, "being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being in the abstract insufficient, *unless they exclude every other supposition*, it is essential to inquire, with the most scrupulous attention, what other hypothesis there may be, which may agree, wholly or partially, with the facts in evidence."

This very inquiry I have to the best of my ability conducted, and the result under the duty imposed on me, as I conceive, of revising the verdict of the jury convicting Douglas, is the opinion that that conviction must be quashed, as there is no legal evidence to sustain it.

Conviction sustained.

TOBIN *v.* SYMONDS AND ANOTHER.

January 3, 1866.

Where a vessel is detained by the charterers beyond the agreed time for loading and is lost in a storm during such detention, the loss of the vessel is too remote a consequence of the detention to form the subject of an action against the charterers.

Where part only of a declaration is bad, the demurrer should be to that part, and not to the whole declaration; and if, in such a case, the defendant demur to the whole declaration, the Court will give judgment on the demurrer for the plaintiff.

Action for damages against the charterers of a vessel, for detention of the vessel after the agreed time for loading, whereby she was lost in a storm.

Declaration. First count. That in consideration that the plaintiff had promised and agreed, to and with the defendants, to proceed with his vessel, the "Deux Augustes," from Halifax aforesaid, to the Acadia mines, in the county of Cape Breton, and there receive a cargo of coals from and for the defendants, and convey the same to Halifax aforesaid, the defendants promised and agreed to load the said coals on board the said vessel, so soon as the said vessel should arrive at the Acadia mines aforesaid, and pay the plaintiff two dollars per chaldron for the freight and carriage of thesaid coals, on delivery thereof by the plaintiff at Halifax aforesaid. And the plaintiff further says that, confiding in the said promise and agreement of the defendants, he proceeded with the said vessel to the Acadia mines aforesaid, and arrived there on the 24th day of July last, and was ready and willing to receive the said cargo of coals on board the said vessel as aforesaid, of which the defendants had due notice; but the said defendants, not regarding their said promise and undertaking, neglected and refused to load the said coals on board the said vessel for a long space of time, to wit, for the space of seven days, and then loaded on board the said vessel only a portion of the said cargo of coals, and totally neglected and refused to complete the said cargo, and detained the said vessel for the further period of four days, waiting for the remainder of the said cargo, and that during the said four last mentioned days, and by the default and negligence of said defendants,

the said vessel was driven on shore by a violent gale, and became a total wreck, and was wholly lost to the plaintiff.

Second count. That in consideration that the plaintiff had promised and agreed, to and with the defendants, to proceed with his vessel, the "Deux Augustes," from Halifax aforesaid to the Acadia mines aforesaid, and there receive a cargo of coals of and for the defendants, and convey the same to Halifax aforesaid, the defendants promised and agreed to load the said vessel with coals in her turn, and to pay the plaintiff two dollars per chaldron for the freight of the said coals on delivery thereof at Halifax aforesaid, and the plaintiff further says that he proceeded with the said vessel to the Acadia Mines aforesaid, and arrived there on the 24th day of July last, and was ready to receive the said coals on board of the said vessel, of which the defendants had due notice. And the plaintiff further says that the defendants took charge of the said vessel by their agents and servants, and discharged the ballast therefrom, and loaded on board thereof a portion of the said cargo of coals, but neglected and wholly refused to complete the loading of the said vessel for the space of four days, and thereby kept and detained the said vessel at the Acadia mines aforesaid. And the plaintiff further says that while the said vessel was so detained by the defendants she was driven on shore by a violent gale, and became a total wreck, and was wholly lost to the plaintiff. And he claims one thousand dollars damages.

Demurrer. Because the action is brought to recover damages for the loss of a vessel by the perils of the seas, and though this loss is alleged to have arisen from the negligence and default of the defendants in not supplying her with a cargo, as soon as they were bound to do, the damages so sought to be recovered are too remote, and are not the natural or legal consequences of the conduct of the defendants, as set forth in the plaintiff's writ, and are not such as can reasonably or fairly be considered as having been in the contemplation of the parties to the contract set forth, at the time the said contract was entered into, as a result of the breach thereof.

Joinder in demurrer.

Solicitor General, for defendants. The loss of the vessel is too remote a consequence of the alleged neglect to be actionable. *Mayne on Damages*. 5, 8, 15; 9 *Exch. Rep.*, 341, 54; 17 *C. B.*, 21; *Broome's Commentaries*, 446; 1 *Exch.* 410; 10 *ditto*, 45; *Lindsay on Jurisprudence*, 262. The loss of the vessel is the gist of the action. The statements as to the detention of the vessel are mere introductory averments. (Cites on point of remoteness of damages, 8 *C. B.*, 148; 7 *Q.B.*, 918; cites also 4 *Exch.*, 637; 5 *ditto*, 203.) [YOUNG, C. J. You admit that by your neglect and default the vessel was detained four days. The question is, has the plaintiff a right to recover anything for that detention? If so, there cannot be judgment in your favor.]

Blanchard, Q. C., contrà. The loss of the vessel may be struck out of both counts, and a substantial cause of action still remains. What then remains will be in accordance with the form of a count for demurrage, as given in the Practice Act (Rev. Statutes, ch. 134, p. 564). It is no ground of demurrer to the whole breach of a covenant that the plaintiff is not entitled to recover the special damage alleged. 5 *B. & Ald.*, 712. If the declaration is good in part and bad in part, and the defendant demur to the whole declaration, the plaintiff shall have judgment for that part which is good. 2 *Saunders*, 379; 5 *Dowl.*, 317. The detention of a vessel beyond the agreed time for loading is a substantial cause of action. *McLachlan on Shipping*, 445.

E. H. Harrington, on the same side. The defendant should only demur to the defective assignment of the breach, or the insufficient count; if he were to demur to the whole declaration, the Court would give judgment against him. *Chitty on Pleading*, 696.

Solicitor General, in reply. The form given in the Practice Act of a count for demurrage states so many days, at so much a day, etc.; in fact sets out a regular contract. That is not done here. [YOUNG, C. J. The forms in the Practice Act are merely examples. See section 54.]

Cur. adv. vult.

YOUNG, C. J., now delivered the judgment of the Court.

There is little doubt that the real purpose for which this action was brought was to recover the value of the vessel. Mr. Blanchard, however, admitted at the argument that the loss of the vessel, whether it occurred as stated in the declaration or not, was too remote a damage to form the subject of the action. The case now then turns solely on the question of pleading, whether the declaration is sustainable where part of it is bad, and the whole demurred to. The rule is, that where part of a count is sufficient and the residue is not, if the defendants demur generally to the whole count, the plaintiff will have judgment, provided the matters alleged are divisible in their nature, as in *Pinkney* v. *Inhabitants of East Hundred*, 2 Saunders, 379, where the plaintiff declared in one count on the statute of hue and cry for taking his money, and also "certain goods in the custody of the plaintiff," without averring the goods to be his, and the defendants demurred to the whole count; but the plaintiff had judgment as to the money, and entered a *remittit damna* for the goods. The form of such a demurrer is given in 1 *Saunders*, 108-9, where it was put in to the defective part of a breach, and issue in fact as to the other part. Here the demurrer in fact is to the claim for the loss of the ship, which is in the nature of special damage, and, though it was no doubt intended as the most material part, cannot technically be called the gist or foundation of the action. See on this point *Amory* v. *Brodrick*, 5 B. & Ald., 712; *Robinson* v. *Marchant*, 7 Q. B., 918. The rule is different with a plea or replication which is entire, and if bad in part is bad for the whole. There the demurrer should be to the whole plea or replication. *Chitty on Pleading*, 697. We think, therefore, that as there is a substantial cause of action alleged in part of the declaration, that the demurrer to the whole declaration cannot be sustained.

Judgment for plaintiff.

Attorney for plaintiff, *E. H. Harrington.*
Attorney for defendants, *Solicitor General.*

TANCRED v. O'MULLIN AND ANOTHER.

January 3, 1866.

A wife in the presence, and with the apparent assent, of her husband, gave a gold chain (which he had previously presented to her) to a third party, in trust for their child, an infant six years old.

Held,—A valid gift *inter vivos* binding the husband, and that he could not after the wife's death recover possession of it in an action against the third party, either in his own right or as the guardian of the child.

REPLEVIN for a gold chain. Pleas. 1. Not the plaintiff's goods. 2. Did not unjustly detain, etc. 3. The goods were the goods of the defendants, or of one of them. The remaining plea was a plea of lien, which was not adverted to at the argument, and on which no question was raised.

At the trial before Wilkins, J., at Halifax, in October, 1865, a verdict passed for the plaintiff, with nominal damages, subject to the opinion of the Court, with power to the Court to enter a verdict for the defendants, or order a non-suit.

The material facts are sufficiently set out in the judgment of the Court.

Blanchard, Q. C., for defendants. The plaintiff had no property in the chain after the gift to the wife in December, 1862. Even if he had, his assent to the delivery of it to defendant's wife divested him of all right to the control or possession of it. 2 *Swanston*, 92; 9 *Vesey*, 369; *Mews* v. *Mews*, 15 Beav., 529, S. C., 21 English Law and Equity Reports, 556; 17 *Beavan*, 566; 3 *Atkins*, 394; *Grant* v. *Grant*, 12 Law Times Reports, N. S., 721.

Ouseley, contrà. There is no equitable plea on the record. Revised Statutes, chap 124, sec. 43, requires a defendant who has an equitable defence, to plead it by saying "for defence on equitable grounds." That has not been done in this case. Plaintiff had clearly a legal right. The plaintiff gave the

chain to the wife, merely that she might wear it, not that she could alien it. The evidence does not show an absolute gift of the chain to the wife,—it was in the husband's possession when she was on her death-bed.

W. A. Johnston follows on the same side. The action has been brought as a common law action, and defended as such, and the defendant has now no right to an equitable defence. I call on your lordships to decide on section 43, just referred to. (Cites 1 *Williams on Executors*, 681, 685). There is an important distinction between gifts by a husband to a wife of paraphernalia, and of other things; for she may dispose absolutely of the former, but not of the latter. The chain in this case is part of her paraphernalia. *Williams on Personal Property*, 294: 1 *Roper on Husband and Wife*, 169. Paraphernalia, at the death of the wife, descend to the husband. 2 *Roper*, 141; 2 *Black. Com.*, 436; 2 *Atkins*, 104. A wife cannot dispose of paraphernalia. *Roberts on Equity*, 160, 240. Gifts by a husband are paraphernalia; by a stranger, are separate property of the wife. To constitute a gift by a husband to a wife there must be a clear, irrevocable gift to a trustee for her benefit. The fact of the husband having taken possession of the chain, after he had given it to her in 1862, shows that the gift was not irrevocable. In *Mews* v. *Mews* the words in this case were used, but they were held not sufficient. (Cites 12 *English Law and Equity Rep.*, 144; 2 *Spence*, 501, 502, 507, 510; 2 *Ram on Assets*, 112, 165; *Smith's Manual of Equity*, 423; 8 *Eng. Law and Eq. Rep.*, 141.) In *Grant* v. *Grant* the gift was perfected by the death of the husband. Actual delivery is essential to every gift,* and there must be the assent of both parties. 2 *Kent's Com.*, 601. In all the cases the contest was between the wife and the representatives of the husband. (Cites 2 *Williams on Executors*, 1062; *Bacon's Abridgment*, B. 6.) It is clear that the plaintiff is entitled to the chain, either in his own right or as the guardian of his child. There is a distinction between our Act (Revised Statutes, chap. 112, sec. 3) which gives the power to a married woman to make a will, and the English Act.

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* This is no longer the law. See *Winter* v. *Winter*, 1 Best & Smith, 997.—Rep.

Blanchard, Q. C., in reply. The strong point in this case is the husband's acquiescence in the gift to Mrs. O'Mullin for the benefit of the child. Mrs. Smith was called by the plaintiff, and this is material in showing the plaintiff's assent. The evidence shows that the wife gave the property to Mrs. O'Mullin. and not to the husband, as trustee for her child. Under all the circumstances, the gift is as valid as if the husband had with his own hands given it to Mrs. O'Mullin. The defendants have no desire to get the chain, or the value of it. (Cites Revised Statutes, chapter 127, sec. 21). Paraphernalia must be suitable to the rank of the husband. *2 Blackstone's Com.*, 435; *Williams on Personal Property*, 293.

W. A. Johnston cites 5 *Exch.*, 388; 2 *M. & K.* 184; 2 *Hare*, 49.

Cur. adv. vult.

YOUNG, C. J., now delivered the judgment of the Court.

This was an action of replevin for a gold chain given by a soldier to his wife. The chain seems to have been in the hands of the wife for some time before her death, but it appears that the husband had afterwards and during her lifetime taken possession of it, and used it for purposes which she did not approve. On her death-bed she asked her husband for the chain, and on his producing it she gave it to Mrs. O'Mullin, the wife of one of the defendants. Mrs. O'Mullin's testimony on this point is as follows: "Mrs. Tancred on her death bed asked her husband, 'where was her chain.' He produced it. She said, 'give it to Mrs. O'Mullin.' Addressing me, she said, 'you keep the chain, Mrs. O'Mullin, for he'll take it away again.' I retained it. It was never demanded of me. I gave it to Patrick (one of the defendants) when I came home that night. She lived about a fortnight after this." Then we have the evidence of Mrs. Smith, who says:—"I nursed Mrs. Tancred; I was present when the chain was handed over by Mrs. Tancred. She asked for it, and her husband produced it by her desire. She, addressing Mrs. O'Mullin, said, 'Take this chain, and then if I get better, well and good; if not, my little Polly is to have it.' Mrs.

O'Mullin received it, and took it away. Sergt. Westcott has the child, who is about six years old. Mrs. Tancred died on Saturday week after the Thursday when the chain was delivered. Plaintiff, when he produced the chain, said, 'Here, Polly, is your chain.'"

The learned Judge who tried the cause called the attention of the counsel at the trial to a recent case (*Grant* v. *Grant*, 12 Law Times Rep., N. S., 721), which seems to decide that a wife has a more extensive power over articles transferred to her by her husband than has been hitherto supposed.

We are pleased to find that we are not obliged to review that question, as it does not arise in this case, nor the point about paraphernalia which was taken at the argument. Here it appears clearly that the wife on her death bed, in the presence and with the assent of her husband, delivered the chain to a trustee for the benefit of their child. We hold that under these circumstances, even supposing the title to the chain at that time to be in him, the delivery above mentioned bound him as a gift *inter vivos*. It appears from 1 *Parsons on Contracts*, 201, that a gift by a competent party made perfect by delivery and acceptance is irrevocable by the donor, though if it be prejudicial to existing creditors it is as a transfer without consideration void as to them. If, therefore, the husband had himself given the chain to the trustee, the gift would have been irrevocable. The same doctrine will be found in 2 *M. & G.*, 691, note *a.*, and in *Williams on Personal Property*, 33, and 2 *Blackstone's Com.*, 441. We, therefore, hold the gift in this case a gift *inter vivos*. As it appears, however, that the defendants have really no interest in the chain, we direct that it be brought into Court and held for the benefit of the child.

Judgment for defendants.

Attorney for plaintiff, *J. H. Weeks.*

Attorney for defendants, *Blanchard*, Q. C.

AUSTIN v. BOONE.

January 3, 1866.

Where a party enters into a written agreement under seal for the sale for a certain amount of all his right, title, share, and interest in a certain business, evidence is inadmissible to prove a prior verbal agreement for the sale of the "good will" of the business for a sum in addition to the amount so specified in the written agreement.

Lindley v. *Lacey*, 11 Law Times Rep., N. S., 273, distinguished.

Assumpsit. Declaration. First count. That the defendant is indebted to plaintiff in the sum of $200 for the good-will of a business of the plaintiff, sold and given up by the plaintiff to the defendant. Second count. After stating a former partnership between the parties in the business of livery-stable keepers, that "in consideration that the plaintiff would yield up his share and interest therein, and would retire from the said business and permit the defendant to carry on the said business in the plaintiff's stead, the defendant promised the plaintiff to pay him the sum of $200, and all the conditions necessary to entitle the plaintiff to be paid the said sum of $200 have been fulfilled, yet the said defendant has not paid the same." The other counts were the common money counts.

Pleas. 1. Never indebted. 2. After reciting the partnership and an agreement between the parties to dissolve the same, that by certain articles under the seals of the parties, the plaintiff, in consideration of $2400, assigned to defendant "all the right, title, share, and interest of the plaintiff in the business of livery and hack-stable keepers theretofore carried on between the parties under the name and style of 'Boone and Austin,'" and defendant thereby agreed to pay plaintiff the said sum of $2400 (setting out the mode and times of payment), and plaintiff thereby agreed not to enter into the said business in opposition to the defendant, so long as he (defendant) should continue in business therein, and defendant avers that he has paid plaintiff the said sum according to the said articles, and has in all respects fulfilled his said agreement. 3. Did not promise as alleged.

At the trial before Wilkins, J., at Halifax, in October, 1865, the plaintiff, who was the only witness examined, proved that the defendant, independently of the sealed articles, verbally agreed to pay him $200 "as a bonus for the good-will of the establishment that he had assigned to him." He further proved that the agreement was private, and made before the execution of the articles, and that after the execution of them, and when defendant was about leaving the Province for New Brunswick, he asked him (plaintiff) to give him time for the payment of the $200, to which plaintiff agreed. Plaintiff also proved that it was not until after defendant's return from New Brunswick that he for the first time repudiated the above-mentioned verbal agreement. Plaintiff concluded his testimony by saying, "I have performed all my conditions, but he has not paid me the $200."

The sealed articles were put in evidence, and proved a transfer by plaintiff to defendant, for the sum of $2400, of "all his right, title, share, and interest in the business of livery and hack-stable keeper, &c.," as set out in the second plea.

The learned Judge, on motion of the Solicitor General for the defendant, directed a non-suit. His lordship observed that he thought it was impossible to consider that the subject-matter of the alleged verbal contract was not in the minds of the parties, at the times of preparing and executing the *written* contract, since the latter, instead of being collateral to, or distinct from the former, was of the very substance of it, namely, the amount of compensation that the plaintiff was to receive and the defendant to give for the transfer of the plaintiff's interest in the common concern of livery and hack-stable keepers. His lordship further remarked that it appeared to him, therefore, that the articles must be considered to contain and express the whole convention of the parties.

His lordship subsequently, as the plaintiff's counsel, Mr. Cochran, had submitted to the non-suit from deference to his opinion, granted a rule *nisi* to set aside the judgment of non-suit and for a new trial.

This rule now (Dec. 23, 1865) came on for argument.

Cochran, in support of rule. The point is whether there

may not be a cotemporaneous collateral verbal agreement in addition to a written agreement. I am aware of the general principle which excludes parol evidence to affect a written agreement, but this case is an exception. The defendant's agreement is in addition and collateral to the agreement under seal. *Taylor on Evidence*, sec. 1049. The question should have been left to the jury. *Lindley* v. *Lacey*, 11 Law Times Rep., N. S., 273; 4 *H. & N.*, 1; 4 *Bing.*, 459; 5 *Law Times Reports, N. S.*, 489, *S. C.*, 11 *C. B., N. S.*, 369; 6 *El. & Bl.*, 370; 7 *ditto*, 503; 17 *C. B.*, 625.

Solicitor General, contrà. The rule is clear that parol evidence will not be admitted to vary or add to a written contract. If this case is not within that rule, I do not know what cases are within it. *Taylor on Evidence*, sections 1046, 1035; 2 *Blackstone's Rep.*, 1250; 1 *Greenleaf on Evidence*, 359; *Levi on Mercantile Law*, 92; *Browne on Frauds*, 428; *Broom's Commentaries*, 286; *Addison on Contracts* (1st ed.) 159.

Cochran, in reply. (Cites 12 *East*, 578). The good-will of a business is a distinct thing from a share or interest in it. *Wharton's Law Dictionary*, 331.

Cur. adv. vult.

Wilkins, J., now (Jan. 3, 1866) delivered the judgment of the Court.

The plaintiff gave no evidence of his having done any act with a view to, or of which the effect would be, to assure to the defendant any advantage to which he would not be entitled from the legal operation of the sealed articles. It is true, he proved, generally, "that he performed all his conditions," but as he made an averment to that effect in the second part of his writ, and in particular relation, not to the mere transfer of a "good-will" in a strict sense, but in terms, to his engagement "to yield up his share and interest in the particular business, and to his retiring from that business, and permitting the defendant to carry it on," the general evidence produced must be held to have been given to *maintain that averment.*

Thus, then, the plaintiff not having either alleged in his writ, or made it appear in evidence, that he, in consideration of the alleged verbal promise, did anything for defendant, beside what he was bound to do by *the articles*, the verbal engagement would be void, as having no consideration to support it. And, of course, if it were void, the circumstance of plaintiff's having, at defendant's request, given defendant time for the performance of it, could not set the void contract up. The *general* rule of evidence applicable to this case is incontrovertible, to the effect, that where the contracting parties have committed the terms of the contract to writing, especially a writing under seal, an averment by either of the parties as to what was said or understood previously to, or contemporaneous with, the written contract, is excluded. Putting out of the question fraud which avoids everything, it may be doubted whether any authority can be produced of a real exception to this long established rule. Seeming exceptions there undoubtedly are; but, before considering these, I must observe that if "good-will" in a strict sense is in its nature a distinct thing from the subject matter of plaintiff's stipulations expressed in the articles—a proposition not very easy perhaps to be maintained—it is impossible, looking at the writ, to suppose that the plaintiff himself so regarded it. If he had so viewed it, all that he has set out in the second branch of his case—the special contract relied on—was unnecessary, because it was all expressed and provided for in the articles, and because it is, undeniably, a mere abstract of the contract embodied in them; and what makes this the more striking is, that in the second part of the writ the plaintiff, after stating the substance of the general contract as it is expounded in the articles, and after averring his general performance, concludes by stating that in consideration of the benefit that defendant would derive from *that performance*, the defendant promised to pay, not the $2400, but the $200 claimed in this action.

It was argued that the case should have been left to the jury; but there is no controverted fact in the case, and therefore nothing on which the jury could pass. *Lindley* v. *Lacey*, 11 Law Times Rep., N. S., 273, was relied on, on this point; but it has nothing in common with this case. In that

case the fourth count, which was the material one, stated that it was agreed, by and between the plaintiff and the defendant, that in consideration that the plaintiff would enter into the written agreement (previously set out) *the defendant would settle the action of Chase against Lindley.* Verbal negociations had taken place between the parties before the written agreement was entered into, and plaintiff proved that in the course of those he addressed defendant, and said. "Am I to understand that Chase's bill is settled? *That is the ground work of the whole.*" Defendant said it should be settled. This, which took place on the 4th July, was corroborated by one Taylor, but the fact of such a question and such an answer as that just stated was controverted, and, therefore, it was put by the learned Judge to the jury. Observe, the written agreement was not executed until the 6th of July. It contained no reference to Chase's bill, and, as soon as it was executed, the defendant said that he should not take up Chase's bill. Erle, C. J., left it to the jury to say whether the agreement was entirely reduced to writing, or whether there was a parol agreement (*that* respecting Chase's action) *besides the written agreement.* The opinions of Erle, C. J., and of Byles, J., show the following points distinguishing that case from this: 1st—There was in proof a complete consideration for the defendant's verbal promise to settle Chase's action. 2nd—There was an agreement distinct from, and collateral to, the written contract, on the part of defendant, viz., *to settle that action.* 3rd—The *Court* decided that it was the intention of the parties to have a distinct agreement, collateral to the written agreement. Nothing can more clearly shew the exceptional character of *Lindley* v. *Lacey* than these observations of Byles, J. He says, "The prior collateral agreement was not interfered with by the subsequent written agreement;" again, "It is clear that the later contract was not intended to refer to the bill;" and again, "Independently of this, the taking up of the bill was to be the foundation of the agreement, and evidence of it is admissible as *being the parol condition on which the written agreement depended.*" A reference to the written contract in *Lindley* v. *Lacey*, in contrast with the defendant's verbal stipulation respecting Chase's bill, will show that the subject

matter of the former, was perfectly distinct from the subject matter of the latter. In the particular case, on the contrary, the verbal contract and the written contract have a common relation to the transfer by plaintiff to defendant of *all his interest* in a particular branch of business, and *to the amount of compensation that the plaintiff was to receive from the defendant for that transfer.*

Harris v. *Rickett*, 4 H. & N., 1, was also cited by Mr. Cochran, but it is sufficient to remark respecting it, that in that case the Court decided that the verbal contract could not have been in the contemplation of the parties at the execution of the written agreement. In contrast with that case, I apprehend it is impossible for this Court, adverting to the verbal contract and to the written one, to believe that when the latter was executed, the former, if real and genuine, could have been absent from the thoughts of the contracting parties. The very recital of the provisions in the articles adjusting the amount of the plaintiff's compensation for his transfer therein stated, could not, in the nature of things, but force on the minds and memories of the parties to the articles *the co-existing verbal agreement.*

"Why then," it may be asked, "was it not incorporated?" *Rogers* v. *Hadley et al.*, 9 Law Times Rep., N. S., 292, was not referred to at the argument. It is an interesting case, because it shows that, though parties executed a formal written agreement, it was competent to show that it was not intended to operate *as an agreement evidencing a subsisting contract.* We refer to it because it recognizes the general principle of merger of all previous negociations and stipulations in a subsequent written agreement. Bramwell, B., said (p. 294), "Where parties have put down in writing the agreement between them—or rather I ought to say where they have *professed* to put down in writing the agreement between them—they cannot add to it, or subtract from it, or vary it in any way, as otherwise they would defeat that which was their primary intention in putting it down in writing." Channel, B., said (p. 295), "I quite agree that where parties sign or otherwise adopt a written instrument, which they mean and understand to be the terms of the agreement between them, they cannot by parol evidence alter the terms

of that instrument." Pollock, C. B., said, suggestively to this case (p. 294), "My brother Wilde, in the course of the argument, has very properly observed that this is not a case where it is proposed to alter, by parol, a real contract entered into between the parties; it is not a case where *they have agreed to something, and then they propose to prove by parol that they agreed to something more, or something less.*" Now, it is undeniable, we think, that, truly and substantially, what this plaintiff contends for is, that what the defendant contracted to pay him for a transfer of his subsisting interest in the joint concern of hack and livery stable keeping was $200 *in excess of the sum stipulated to be paid therefor by the articles under seal.* We cannot give effect to *that* without an unauthorized departure from a wise and established rule of law. This rule must, therefore, be discharged.

Rule discharged.

Attorney for plaintiff, *Cochran.*
Attorney for defendant, *Solicitor General.*

TEMPLE AND OTHERS *v.* McDONALD.

January 3, 1866.

Where a vendor lets a vendee into possession of lands on a contract which afterwards goes off, he cannot recover for use and occupation.

ASSUMPSIT for the use and occupation of lands of the plaintiff, the particulars being as follows:

Two years' use and occupation of one half of our farm at the Gore, at $24 per year............ $48 00.

Plea (among others) that the "plaintiffs put defendant in possession of the farm in their writ mentioned under an agreement between them to purchase, which plaintiffs refused and neglected to fulfil on their part," &c.

At the trial before Wilkins, J., at Halifax, in October, 1865, the following facts appeared in evidence. The farm in question had been deeded originally to the plaintiff, Alexander

Temple, and his deceased brother, who was drowned shortly after they purchased, and of whom the other plaintiffs were the heirs. Alexander Temple had agreed with the defendant and his brother James, to sell them the farm for £160. The contract of sale was merely verbal. The defendant and his brother James purchased together, but they went into possession of distinct portions by a division made between themselves at the time, and continued to occupy for two years. They promised to complete the arrangement for the purchase, but did not do so. James McDonald died, and then the place was given up, the defendant refusing to take it after his brother's death. It appeared that during their occupation the defendant and his brother James had cut down timber on the place, and cut the hay. From the cross examination of one of the plaintiffs' witnesses, it seemed that defendant had said he was ready and willing to carry out his part of the contract, and would take half the premises, but, on account of his brother's death, could not complete the purchase of the whole. Before the trial Alexander Temple sold the farm to other parties for £160.

The defendant was not examined at the trial, and called no witnesses, but he put in a letter to himself from Mr. James, the partner of the plaintiffs' attorney, in which Mr. James says that Mr. Temple is willing to allow him (defendant) to abandon the purchase, if he pays rent.

The learned Judge non-suited the plaintiffs, on the ground that there was no tenancy such as would support the action for use and occupation.

A rule *nisi* having been taken out, under the Statute, to set aside the judgment of non-suit, and for a new trial, it now (Dec. 22, 1865) came on for argument.

James, in support of the rule. There was no valid and subsisting contract of sale. The defendant repudiates the same as invalid, and yet he sets it up in this case. He was tenant at will to the plaintiff, and the plaintiff must be considered as his landlord. Wherever a party occupies lands under another, and there is no valid contract of sale, the law implies a contract to pay rent. The defendant is the tenant of the plaintiff, not of a third party, and he did not take

possession under deception, nor under a title found to be bad. 1 *C. & P.*, 589; 8 *ditto*, 389. Implied contracts rest on equity. The contract here rests on permissive occupation. 1 *M. & W.*, 700; *Cole on Ejectment*, 59; 4 *B. & Ad.*, 596; 6 *Price*, 157; *Tudor's Leading Cases*, p. 10; 1 *Q. B.*, 854; 9 *A. & E.*, 853; 8 *M. & W.*, 118; 2 *Taunt.*, 145; *Peakes' Nisi Prius Cases*, 253.

Blanchard, Q. C., contrà. The equities are not all on one side. The defendant was willing to carry out the contract, but could not, on account of the death of his brother. The contract was a joint one. The plaintiff sues defendant for the rent of only one half of the farm. In 6 *Price*, 157, the plaintiff was cheated by the defendant, and it was on that ground that it was held that the plaintiff could recover for the use and occupation. (Cites 2 *Starkie*, 419; *Roscoe*, 245-6; *Selwyn's Nisi Prius*, 1393, 1388; 6 *T. R.*, 452; 7 *Q. B.*, 614, 619; 12 *M. & W.*, 426; *Holt's Nisi Prius*, 47.) [WILKINS, J. I suppose that the difficulty is as stated in *Howard* v. *Shaw*, 8 M. & W., 118, that you cannot convert a contract for sale into a contract for rent, and that does not depend on whether it was a valid contract or not, if the parties believed it to be such.] Yes, the Courts will not imply a contract of one kind when the parties themselves have made a contract of a different kind.

James, in reply. (Cites *Chitty's Equity Digest*, Title, Interest.)

Cur. adv. vult.

YOUNG, C. J., now delivered the judgment of the Court. After stating the facts, his lordship said: In this case the merits are with the plaintiffs, but the difficulty is the question of law. It appears that the defendant and his brother entered into possession of the land under a contract to purchase. There was no contract to pay rent, and without such contract, express or implied, it is impossible to compel them to pay it. We have looked into all the cases with a view to sustain the action, if possible, but we do not think we can do so consistently with the law. From *Hall* v. *Vaughan*, 1 C.

& P. 591, note c, it appears that the Court of Exchequer held in Michaelmas Term, 59 George 3, that the vendor might, in cases where the contract went off without fault on his part, and the occupation had been beneficial to the vendee, recover compensation for such occupation. That is a decision expressly in favor of the plaintiffs, but it is not sustained by the later cases. In *Howard* v. *Shaw*, 8 M. & W., 118, Lord Abinger said (page 122): "While the defendant occupied under a valid contract for the sale of the property to him, he could not be considered as a tenant. The parties could not convert the contract for purchase into a contract of tenancy, nor, while the former was pending, infer another of a different nature." In *Winterbottom* v. *Ingham*, 7 Q. B., 611, 619, it was held that where the vendee of an estate sold by auction has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has been afterwards determined for want of title, the vendor cannot on these grounds only recover for use and occupation, although a jury find that the occupation has been beneficial. Lord Denman, C. J., in that case, said: "The defendant certainly was considered both by himself and the plaintiff as purchaser, not as tenant; and the plaintiff cannot convert him into an occupier, liable to pay for his occupation, by his own wrongful act in not completing the contract of sale." Under the authority of these last two cases, and the doubt expressed in *Smith's Leading Cases*, 76 *a*, and *Roscoe's Nisi Prius*, 245-6, we feel ourselves obliged, though reluctantly, to decide that the plaintiffs cannot recover in this case.

*Rule discharged.**

Attorney for plaintiff, *J. G. Foster.*

Attorney for defendant, *Blanchard, Q. C.*

* ***Temple and others* v. *Scott and another***, being another action by the same plaintiffs against the executors of James McDonald for his use and occupation of the other half of the farm, was determined by the decision in the above reported case.—Rep.

BATTLEMAN AND OTHERS *v.* McKENZIE AND OTHERS.

January 3, 1866.

A special verdict in ejectment had been taken for plaintiffs by consent, subject to the opinion of the Court. It appeared at the argument that the action had been brought in the name of some only of the individual members of a corporation, and not in the name of the corporation itself.

Held (Young C. J., dissenting), that the verdict must be set aside, with costs of trial and of argument, and that an amendment without a new trial, as granted in *Boutilier* v. *Knock* (*ante* p. 77), would not be allowed, the amendment in that case without a new trial being granted solely on account of its peculiar circumstances.

A new trial was granted, with leave to the plaintiffs to amend by adding the names of other plaintiffs.

EJECTMENT for lands in Victoria county. Plea, denying the right to the possession, &c.

At the trial before Dodd, J., at Baddeck, in October, 1865, it appeared that the plaintiffs claimed under a grant from the Crown (which was put in evidence), dated 10th Sept, 1862, to themselves as trustees of the Presbyterian Church at Boularderie. The dispute appeared really to be between this Church and the Church of Scotland. The defendants alleged that trustees of the Church of Scotland had taken possession of the lands in 1829, by authority of Mr. Crawley, then Surveyor General for Cape Breton, and that they (defendants) had held under these trustees for 19 years before action brought. It seemed, however, that two of these trustees afterwards became connected with the Free Church, and subsequently with the Presbyterian Church of the Lower Provinces, and were plaintiffs in this action. Rev. James Fraser, a witness for the plaintiffs, testified that, though a minister of the Church of Scotland when he arrived in Boularderie, he was in 1843, '44 and '45 a minister of the Free Church, and that the husband (since deceased) of one of the defendants, and father of the other defendants, went into possession for the first time in 1845, by his permission and that of his congregation.* The defendants' counsel moved for a non-suit, on the

* Considerable evidence was given with regard to the possession of the defendants, and its character, but as the case was decided on another point, it is unnecessary to report this evidence.—REP.

ground that the Crown was out of possession for forty years before the grant passed to plaintiffs, and that, therefore, the grant passed for nothing; and that there were no such persons as those named in the grant.

The learned Judge declined to non-suit, but reserved the points, and, on his recommendation, a verdict passed for the plaintiffs, subject to the opinion of the Court upon the whole case, with power to direct a non-suit or a verdict for the defendants, or that the present verdict should stand,—the Court also to have the power to draw conclusions of fact from the evidence in the same manner that a jury might.

W. A. Johnston, for defendants. (Cites Prov. Act of 1857, chap. 52. This Act incorporates "the trustees appointed by the congregation of the Great Bras d'Or and of Man-of-War Point, Boularderie, in connection with the Free Church of Nova Scotia on the 8th and 9th July, 1851, namely Donald McDonald, &c., [ten persons are named, among whom are Murdoch Battleman and the other five plaintiffs] and their successors in office, by the name of the 'Trustees of the Free Church Congregation of Boularderie;' and vests in them all real and personal estate then belonging to those congregations. The second section of this Act declares that the persons who at any time subscribed, or caused their names to be subscribed, or may from time to time subscribe, are the congregations of the Free Church of Boularderie, according to the congregational book under the ministerial charge of the Rev. James Fraser, and his successors in office, to be elected according to the rules of the Free Church of Nova Scotia for the time being. The plaintiffs here have not sued in their corporate name, but in the name of some of the individual members of the corporation. The trustees forming the corporation are named in the Act of 1857, and only six of them are made plaintiffs in this action. The Crown had no power to grant in 1862, because it had been out of possession. (Cites Prov. Act of 1862, chap. 68. This Act recites that the two bodies of Christians known as the Presbyterian Church of Nova Scotia and the Free Church of Nova Scotia, were in the year 1860 united into one, by the name of the Presbyterian Church of the Lower Provinces of British North

America. It then proceeds to vest in the congregations of the latter body all property, real or personal, hitherto belonging to the congregations of the two first named bodies. The Act also provides that conveyances of any lands or real estate heretofore made to trustees, or to trustees and their successors, for the use of any congregation, "now or hereafter to be in connection with the united body," shall be deemed valid conveyances in fee simple, notwithstanding that the heirs of the trustees are not named, and notwithstanding that the manner of appointing successors is not provided in such conveyance.)

Blanchard, Q. C., contrà. The trustees were in possession before they became a corporate body. They represent the Free Church, and the defendants took possession under the representatives of that Church. (Cites *Grant on Corporations* 63.) Chapter 50 of the Revised Statutes gives a congregation power to incorporate themselves. (Cites 4 *Leonard*, 190.) If the action is not brought in the names of the proper parties I would ask the Court to allow an amendment, as was done in the case of *Boutilier* v. *Knock*.

W. A. Johnston, in reply.

Cur. adv. vult.

The Court now delivered judgment.

YOUNG, C. J. In this case I have the misfortune to differ from my Brethren. It appears that some thirty years ago, Mr. Crawley put the then Presbyterian congregation at Boularderie in possession of lands there. In 1857 they accepted an Act of incorporation, which vested these lands in the then trustees of the congregation by name. My Brethren hold that the fee simple thus vested in these trustees by an Act of the Province, without any grant, prevented the Crown from granting the lands again. In April, 1862, a general Act of incorporation was passed. The title of the trustees of the congregation to these lands was thus confirmed by two successive Acts of the legislature. A grant was then taken out in the names of six of the trustees. The parties appear to have been ignorant of their own Act of incorporation. I am

inclined, seeing that the title is clearly in the congregation, to apply the principle which we adopted the other day in *Boutilier* v. *Knock*, and to amend the writ by inserting the corporate name of the trustees and giving judgment in their favor. My Brethren, however, think that the amendment made in *Boutilier* v. *Knock*, should be confined to the special circumstances of the case. Then comes the question of costs. As a question of law, there is no pretence of title in the plaintiffs as individuals, and, therefore, I have no difficulty in granting the defendants the costs of the argument. I have a good deal of difficulty, however, in assenting to grant them the costs of the trial. My Brethren think that, as the plaintiffs have mistaken the mode of bringing their action, they must pay both the costs of the trial, and of the argument.

JOHNSTON, E. J. To avoid misapprehension I wish to state the grounds upon which I give my judgment. This was a special verdict for plaintiffs by consent, subject to the opinion of the Court. The Court, having considered the case, think that the plaintiffs have failed to make out their title, having mistaken the name in which the action should be brought. The consequence of that is that the defendants are entitled to a judgment, either of non-suit or for a new trial. If they are entitled to judgment they are entitled to all the consequences which follow, viz., the costs of the trial and of the argument—of the whole action in fact.

DODD, J. If I had charged the jury in this case, I should have directed them to find a verdict for the defendants, because they proved title out of the plaintiffs, and that is always sufficient in an action of ejectment. I do not think that this case comes within the principle of the amendment made in the case of *Boutilier* v. *Knock*.

DESBARRES, J., and WILKINS, J., concurred with the majority of the Court.

A rule was granted setting aside the verdict and directing that the plaintiffs should pay the defendants the costs of the

argument and of the trial, and that the plaintiffs should have leave to amend by adding the names of the other plaintiffs.

Rule accordingly.

Attorney for plaintiffs, *Campbell, Q. C.*
Attorney for defendants, *N. L. MacKay.*

ANNIS AND ANOTHER *v.* COOK AND ANOTHER.

January 3, 1866.

Where an arbitrator makes a mistake in the heading of an award in the christian name of one of the parties, the award will be referred back to him for amendment, although the time for his making the award has expired, and the reference was by consent of parties, and although no power of amendment was reserved in the rule of reference.

J. W. JOHNSTON, JR., had obtained a rule *nisi* on a former day to enable the plaintiffs to enter up judgment, on the award in this suit, against Joseph H. Cook, or to refer the award back to the arbitrators to amend an error in the christian name of Joseph H. Cook, by substituting Joseph for John in the heading of the cause in the award. The rule had been granted on the affidavit of George W. Barss, the arbitrator who wrote the award, in which he stated that by mistake he had written Cook's name John H. Cook, instead of Joseph H. Cook.

The rule now (Dec. 30, 1865) came on for argument.

J. W. Johnston, Jr., in support of rule. This is a mere clerical error which the Court will either amend on motion, or refer back to the arbitrators to be amended by them. 8 *Scott's N. R.*, 851; 1 *C. B.*, 128; 16 *do.*, 586; 17 *do.*, 182; 16 *do.*, 162; 11 *Eng. Law & Eq. R.*, 596.

Blanchard, Q. C., contrà. The time for making the award has now expired, and the arbitrators are *functi officio*. In all the cases cited on the other side there was a compulsory

reference by order of the Court, but this is a reference by consent of parties and the same rule does not apply. Rev. Statutes, chap. 146, sec. 11, gives power to the Court to send the award back to the arbitrator for amendment, but that refers solely to compulsory references under the Act. (Cites 3 *B. & Ad.*, 234; 2 *Ch. Ar. Q. B. Prac.* 1609, 10th ed.) At all events the power of amendment must be reserved in the rule of reference, where the reference is made by consent, to enable the arbitrator to make an amendment such as that required.

Cur. adv. vult.

YOUNG, C. J., now (January 3, 1866) delivered the judgment of the Court. After referring to the facts, his lordship said: Mr. Blanchard contended that the power of the Court to order an award to be amended was limited to compulsory references, or that it only applied to cases where power to amend was reserved in the rule of reference itself. Now, I find in *Archbold on Awards*, p. 85, that the clause of the English Act, which is similar to section 11 of chapter 146 of our Revised Statutes, has been held to extend not only to compulsory references, but to all references by consent of parties. In *Bird* v. *Penrice*, 6 M. & W., 754, a case was sent back to an arbitrator to determine the issue on an account stated, and to correct the award in that particular. The award was re-drawn and upheld by the Court. In *Ferguson* v. *Norman*, 4 Bing., N. C., 52, an award was remitted to an arbitrator to state facts with more particularity. The arbitrator amended it, and it was referred back to him a second time. In *Bradley* v. *Phelps*, 11 Eng. Law & Eq. R., 596, it was held that if an award is invalid the Court may, upon application of the party objecting to it, either refer it back to the arbitrator or set it aside. In 1 *C. B.*, 128, the arbitrator mistook the name of the plaintiff, calling him James instead of Joseph, and the Court granted a rule to enable the arbitrator to amend the mistake, which he did by a certificate on the back of the award. This case is recognized in 17 *C. B.*, 185. On these authorities we allow the award in the principal case to be amended by the arbitrators making an en-

dorsement thereon of the proper name, the plaintiffs thereupon to have judgment with costs, but neither party to have the costs of the argument.

Rule accordingly.

Attorney for plaintiffs, *C. Morse.*
Attorney for defendants, *H. W. Smith.*

McDONALD *v.* MILLS.

January 3, 1866.

A magistrate's summons, not endorsed with the notice required by the Provincial Act of 1865, chap. 1, sec. 6, is absolutely void.

Blanchard, Q. C., had obtained a rule *nisi* to set aside a judgment of DesBarres, J., for plaintiff, on appeal, confirming a judgment of a Justice of the Peace "for balance due on note after deducting payments made by defendant and set-off as proved." It appeared that the defendant had taken the objection at both trials that the summons was not endorsed with the notice required by the Act of 1865, chapter 1, section 6. He gave no evidence at the trial, either by himself or by calling witnesses.

The rule now (Dec. 30, 1865) came on for argument.

Blanchard, Q. C., in support of the rule, stated the facts and read the section above referred to. [DesBarres, J. What operated on my mind was that defendant was told four days before the trial that he must file his set-off.]

Miller, contrà. I contend that the only effect of the notice not being given on the summons is that the defendant can give evidence of a set-off at the trial without having filed it. Evidence of set-off was actually given in this case at the trial, as the cross-examination by the defendant's counsel brought out the evidence. I think, therefore, that the de-

fendant is not in a position to ask the Court to set the judgment aside.

Blanchard, Q. C., in reply. [YOUNG, C. J. You must contend that the writ is absolutely void for want of this notice.] Yes, just as much so as if the magistrate's name had not been signed to the writ.

Cur. adv. vult.

YOUNG, C. J., now (Jan. 3, 1866) delivered the judgment of the Court.

Mr. Miller's argument was that the only effect of omitting this notice was to enable the defendant to give evidence of set-off at the trial without filing a plea of set-off. We do not think that this is the true construction of the section. We consider that the real intention of the legislature was that there should be no summons without this notice, and, therefore, we consider this writ absolutely void, and give judgment for defendant.

Judgment for defendant.

BELLONI v. MURPHY.

January 3, 1866.

The objection to the want of the notice on a magistrate's summons required by the Provincial Act of 1865, chap. 1, sec. 6, is waived by the defendant when he goes into his evidence at the trial before the magistrate.

DODD, J. This was a case that came before me on appeal from a magistrate's judgment, and in which I reserved a point awaiting the decision in *McDonald* v. *Mills*. The defendant in this case actively defended the suit before the magistrate, and went into his evidence, and, by so doing, we think that he waived the objection to the want of the notice on the summons required by the Provincial Act of 1865, chap. 1, sec. 6.

BOND AND ANOTHER *v.* IVES, ADMINISTRATOR, &c.

December 20, 1865.*

A plea, though in the present tense, refers to the time at which the writ issued, and not to the time at which the plea is pleaded.

Where an action is brought on a foreign judgment, and the declaration claims the equivalent in Nova Scotia currency of the amount of the judgment, it is a departure to claim in an equitable replication an increased amount, on account of the depreciation of the currency of the foreign country, equivalent to the change in the value of the currency since the cause of action arose.

ASSUMPSIT on a judgment obtained in the Supreme Court of Massachusetts on the 26th Feb'y, 1864, by the plaintiffs against one Hugh McKinnon, of whom defendant is the administrator, for $326.84.

The first count alleged, among other things, that the "said sum of $326.84 is equivalent to $500 in currency of Nova Scotia."

Fifth plea to said first count, stating, *inter alia*, that defendant "denies that the sum of $326.84 of United States currency is equivalent to $500 in currency of Nova Scotia."

Eighth plea to said first count, among other things, denying, &c., as in the fifth plea, and averring that "the sum of $326.84 currency of the United States is much less in value than $326.84 of the currency of Nova Scotia."

Demurrer to those parts of fifth and eighth pleas which deny, &c., as above, for the following reasons:

1. Because said denial refers to what happened to be the equivalent between the sums named, in United States currency and currency of Nova Scotia respectively, at the time when said pleas were by said defendant pleaded, and not to the time when the plaintiffs' writ was issued and when proceedings were commenced in this action, and is, therefore, immaterial and irrelevant.

2. Because the same objection applies to that part of defendant's eighth plea, which avers that the sum of $326.84 currency of the United States is much less in value than $326.84 of the currency of Nova Scotia.

Joinder in demurrer.

* This case has been accidentally misplaced in point of time.

Replication upon equitable grounds, stating, among other things, that in equity and good conscience defendant ought to pay said judgment according to the relative equivalent between the currencies of the United States and of Nova Scotia when the original promises were made, and when the original cause of action arose, and not according to any depreciated or diminished value of said United States currency which may, by any means, have since happened.

Demurrer thereto. Because the plaintiff brought his action to obtain the amount of a judgment recovered by him in the United States against the late Hugh McKinnon for $326.84, and he can only be entitled to recover that sum or its value in the currency of Nova Scotia, and as he is not legally or equitably entitled to more, and he has not in his writ claimed to recover any special damage, he cannot claim more in his replication than the said sum of $326.84 United States currency, or its equivalent in Nova Scotia currency.

Joinder in demurrer.

Both demurrers now came up for argument together.

B. G. Gray, for plaintiffs. The substantial question as I take it is the measure of the two currencies. My objection to the pleas is that they are in the present tense. Revised Statutes, chap. 134, sec. 97, and forms annexed. *Bullen & Leake*, 575; 2 *Exch.* 471. If a plea of set-off were pleaded, it would be necessary that it should allege that the plaintiffs *were* and still are indebted, &c. 4 *Exch.* 159; 3 *Q. B.* 239; 3 *D. & L.* 407; *Mass. Law Reporter*, April, 1865; 6 *M. & W.* 559. [YOUNG, C. J. Surely "is equivalent" in a writ means at the time of the issue of the writ. As regards the pleas, if they had said "was at the commencement of this suit," you admit they would have been good.] Yes. [YOUNG, C. J. Then I call the objection matter of special demurrer only, and such demurrers are not allowed by our practice. Revised Statutes, chap. 134, sec. 61. WILKINS, J. You say that the plea is immaterial, because it does not answer to the time of the declaration, that the defendant uses the word "is" referring it to the time at which he pleads.] Yes. [WILKINS, J. I think the objection must be taken to be matter of special demurrer. Suppose the defendant had said, I deny $500 to be

the value in Nova Scotia currency, of the $326.84 in the judgment. Is not that substantially what he has said?] I would take that not to be an immaterial allegation. [YOUNG, C. J. Your objection would apply equally to "that the alleged deed is not his deed." Surely that means—not his deed at the time of action brought.] (Cites 4 *East*, 502; 3 *M. & W.* 442; 1 *ditto*, 209.)

Solicitor General contrà. This action is brought on a judgment, and the declaration sets out the judgment and nothing more. The replication on equitable grounds sets up a new case altogether, and is a departure. Can a party claim damages against a man who appeals from a judgment?

B. G. Gray, in reply. The departure, if any, of the replication from the declaration is matter of special demurrer only. Rev. Statutes, chap. 134, sec. 61; 5 *Comyn's Digest*, 101, Title Pleader F. 10; 5 *B. & Ald.* 71. (*Solicitor General.* A departure in pleading is matter of substance.) I claim that there is no departure here. The special damage claimed is not a departure. The declaration claims a larger amount than the amount of the judgment. [YOUNG, C. J. You have taken a judgment, then your previous claim is merged in that.] I contend that that is not the case on a foreign judgment. [YOUNG, C. J. You have sued on a judgment.] But not for the amount of a judgment. [YOUNG, C. J. But still on a judgment.] (Cites 33 *Eng. Law and Eq., Rep.* 513; 5 *T. R.* 381; 99 *Eng. Com. Law Rep.* 179.) I contend also that the claim is not merged in the judgment, that we can still go on on the original promise. [YOUNG, C. J. You surely can not go into that without having it alleged in your declaration.] I have pleaded it,—it is pleaded in the replication. This is not an action on a domestic judgment. We are asking for the equivalent in this currency of a sum of money in another currency, and when we claim that equivalent we have a right to point out how we do so in the replication. [WILKINS, J. The difficulty is that you are putting on the record in your replication allegations distinct from those you have made in your declaration. YOUNG, C. J. In the replication you are claiming on a ground of action not set out in your declaration. In

the declaration you claim an amount due on a judgment, and in the replication you have gone a step beyond this and have claimed a sum referring to the original contract. That cannot be done under this writ.] My view is that I am not claiming more than is equivalent to the original sum. If I am not asking more than so many dollars and cents as are equivalent to the amount of the judgment, and there are two equivalents, can I not point out by the replication which of the two I am claiming? [WILKINS, J. The answer to all that is that it should be set out in the declaration.]

The COURT. There must be judgment for the defendant on both demurrers.

Judgment for defendant.

Attorney for plaintiffs, *B. G. Gray.*
Attorney for defendant, *Solicitor General.*

ELLIOTT AND OTHERS v. LADDS.

January 3, 1866.

Where a cause, which stood number 65 on the docket of jury causes marked for trial on the first day of the sittings, was tried on the first day of the jury trials in the absence of the defendant (who swore to surprise) and her witnesses, though her counsel was present throughout the trial, and addressed the jury, and her attorney was present at the close thereof, a new trial was granted, the costs of the first trial and of the argument to abide the event.

The Court will not on a summary application hold an attorney liable for costs for negligence, unless such negligence is clearly and unequivocally proved.

Where affidavits were read and filed at the time a rule *nisi* was moved for, though the rule did not refer to them, the Court, no surprise being alleged by the other side, allowed the rule to be amended at the argument by reference to the affidavits, Wilkins, J. dissenting.

B. G. GRAY had obtained a rule *nisi*, which he now (Dec. 23, 1865) moved to make absolute, to set aside the verdict for plaintiffs, and for a new trial.

The rule referred to no affidavits or papers, but the affidavits of the defendant, James Stanford, and Elizabeth Ladds, and the examinations of W. A. D. Morse and William Walsh,

taken before a commissioner, were read in moving for the rule.

The following were the grounds stated in the rule:—1. For culpable negligence of the defendant's attorney, S. H. Gray, Esq., in not attending said trial until the close thereof, and in not procuring the attendance of defendant and her witnesses thereat, by reason whereof said cause was undefended at said trial. 2. That the verdict was rendered upon incompetent and insufficient evidence. 3. That the verdict was for rent of the whole house, whereas the defendant rented and occupied only half thereof, &c. 4. That defendant has a good and substantial defence on the merits, which, from the cause assigned in the first ground herein, she was precluded from establishing by evidence at the trial. 5. That defendant was entirely taken by surprise on first hearing that this cause was reached in its order for trial, and was not able to ascertain the probable time of trial, although using every diligence for that purpose.

The rule further provided that the defendant's attorney should pay to the defendant the plaintiffs' costs of the late trial of the cause, and also the costs of this application as between attorney and client, unless cause to the contrary were shown at the time named for the return of this rule. The rule also provided that the plaintiffs should take no prejudice as to the costs of the late trial by reason of this rule, and that in the meantime all further proceedings should be stayed.

At the trial before Wilkins, J., at Halifax, in October, 1865, John B. Elliott, one of the plaintiffs, testified that the defendant had been tenant for the year ending the 1st May preceding of a house in Dartmouth, belonging to an estate of which he was an executor, £20 a year being the rent originally payable. On cross examination this plaintiff (who was the only witness examined at the trial) said that he had no personal communication with the defendant (one Fuller being the agent employed), but that she had once offered him (witness) £10.

A verdict without further opposition was taken for the plaintiffs for £20.

The affidavits of Joseph H. Weeks, John W. Ouseley (plain-

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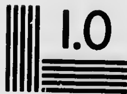
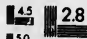

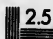

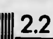

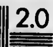

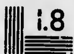

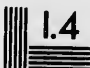

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tiffs' attorney), S. H. Gray (defendant's attorney), William O. Schwartz, N. Russell, B. H. Eaton, George Shiels, and J. W. Nutting, were read at the argument.

The various affidavits were very voluminous, but the following appeared to be the only material points. It seems that the cause stood number 93 on the docket for the October sittings, and number 65 on the list of the causes marked for trial on the first day of said sittings, that it was somewhat unexpectedly reached about 3¼ p.m. on the first day of the jury trials at said sittings, that S. H. Gray then sent for the defendant and her witnesses (all of whom resided in Dartmouth), having an hour previously thereto directed his clerk to prepare subpœnas for the witnesses. The defendant and her witnesses left Dartmouth for Halifax by the steam ferry shortly after being so notified, but before their arrival the cause had been tried, and judgment given for the plaintiffs. Morse, defendant's counsel, informed S. H. Gray, about half-past twelve o'clock, that the cause would probably be reached soon, but Gray seemed to think there was no danger of it. Morse opened the defence, but neither his client nor her witnesses being present, he was unable to oppose by evidence the plaintiffs' claim, and a verdict therefore passed for the plaintiffs as already stated. It also appeared that the defendant had several times, both on the first and second day of said sittings, made enquiries of her attorney, through her daughter, as to the time when the said cause would probably be tried, and had been unable to obtain any exact information. The affidavits on the part of the plaintiff, and those on behalf of the defendant, were conflicting with regard to the merits of the case. The defendant testified that she had rented only one half of the house from Fuller, the agent for the Elliott estate, at $50 per annum, which she had tendered and offered to pay. Joseph H. Weeks swore that Fuller denied the letting of half the house to the defendant.

B. G. Gray, in support of rule. (Reads the Judge's minutes of the trial, and the affidavits read in moving for the rule *nisi.*)

Ouseley then read the affidavits on behalf of plaintiffs, and *S. H. Gray* read his own affidavit.

Solicitor General, for plaintiffs, shows cause. In 1 *Moore & Scott*, 229, a cause was called in the absence of the defendant's attorney, and no one appeared for the defendant, and yet the Court refused a new trial. As the affidavits on behalf of the defendant are not referred to in the rule, they cannot be used now. To allow them to be used now will be a violation of a long established rule of practice. [WILKINS, J. The only security the Court have is that a rule should state on what it is granted. JOHNSTON, E. J. The affidavits, it appears, were in point of fact read when the rule was moved for. It is not as if they had not really been read. YOUNG, C. J. I see no difficulty in the matter at all. The question is have we the power to amend the rule or not. I think we have and there is authority for it. (His lordship here consulted with the other Judges, and then said: We are of opinion that the rule may be amended by reference to the affidavits read in moving for it, as they were filed on the 22d November last, and no surprise is alleged.) WILKINS, J. I do not wish to be understood as assenting to this.]

S. H. Gray. The defence intended to be set up was not that the defendant was tenant at $50 per annum. I could have shown that she was not tenant to the plaintiffs at all. Though the defendant has treated me very badly, I should be sorry that she should lose a new trial. I consider that I have not been guilty of negligence. If I stated that there were 63 causes before this marked for trial on the docket, on that ground alone I would have obtained a new trial. 2 *Dowling*, 246; 2 *Chitty's Rep.* 269; 3 *B. & Ald.* 328. In this last case the cause had been several days on the list of causes for trial, and had at last been taken out of its order as an undefended cause, and a new trial was granted on payment of costs. The cause we are now considering was taken out of its order, because several of the cases preceding it had been set down for particular days.

B. G. Gray, in reply. I admit that an attorney can be

made liable only for gross negligence, but this case shows such negligence on the part of the defendant's attorney. None of the cases go so far as this, where the attorney was hunted into Court by the client and his associate counsel two or three hours before the case was called, and he himself saw the state of the docket. If the attorney was notified nearly three hours before the case was called, and took no action for an hour or two afterwards, surely there was gross negligence. [YOUNG, C. J. Even admitting all that you say, the modern cases do not go the length of punishing the Attorney by the act of the Court. The case in 3 *Taunt.* 484, has been over-ruled. Do you not think that, in common justice to the Bar, the Court should not impose costs on the attorney, unless there is a clear, unequivocal case against him? DODD, J. The Courts will not decide a case where the affidavits are conflicting, but will leave the parties to a jury]. In 3 *Dowl.* 798, the plaintiff's attorney was compelled to pay costs on account of the plaintiff being non-suited through the neglect of his clerk. (Cites 8 *Bing.* 144, 5 *Bing. N. C.*, 112; 29 *Eng. Law & Eq. Rep.* 306; 11 *ditto*, 420.) I rely on the point that had defendant's witnesses been in Court a verdict could not have been rendered against her. In 3 *Taunt.* 484, a cause was tried as an undefended cause from the neglect of the defendant's attorney, and a new trial was granted, he paying the costs out of his own pocket as between attorney and client. (*Solicitor General.* A case in which the defendant's counsel has addressed the jury is not an undefended case.) Cites 7 *M. & W.* 143.

Solicitor General cites as to affidavits not referred to in a rule not being allowed to be read at the argument, 2 *Ch. Arch. Q. B. Practice*, 10th ed. 1510-1522, and 1 *Q. B.* 315.

Cur. adv. vult.

YOUNG, C. J. now (Jan. 3rd 1866) delivered the judgment of the Court.

After stating the facts of the case, his lordship said:— Though this case was not actually undefended, the merits were not heard, and, referring to the case in 2 *Dowl.* 246, and the peculiar facts of this case, we are of opinion that a

new trial should be granted, the costs of the first trial and of the argument to abide the event. As regards Mr. S. H. Gray, we do not award costs against him, nor do we allow him costs.

Rule accordingly.

Attorney for plaintiff, *Ouseley*.
Attorney for defendant, by substitution, *B. G. Gray*.

ZINK AND OTHERS v. ZINK.

January 3, 1866.

Where an action is brought to test the validity of a will in which all the heirs of an estate are interested, the costs of such action should not be borne solely by the losing party in the suit, but those of both parties should be a charge on the estate, in analogy to the practice on feigned issues.

EJECTMENT, tried twice at Lunenburg, and in which the question of costs stated in the judgment came before the Court during this Term.

No formal argument was had on the point, but it was very briefly referred to by *James*, for the plaintiffs, and *J. W. Johnston, Jr.*, for the defendant.

YOUNG, C. J., now delivered the judgment of the Court.

This cause was tried before me for the second time at the last October Term in Lunenburg, on the amended writ and plea thereto; and a verdict was again found for the plaintiffs for the lands in the first count, being the same lands that were devised by George P. Zink, deceased, to his son, George Zink, the father of the plaintiffs, by his will, dated in March, 1859.

The jury, in rendering their verdict, declared that they found against the will of 9th July, 1861, on both the grounds on which it had been attacked, because in their view the testator at that date had not the capacity to make a will, and the will was not duly executed under the Statute. In this

finding the defendant has determined to acquiesce, and the plaintiffs' counsel has moved for judgment.

The finding as between the parties to this suit has in effect set up the will of March, 1859, but that will and the parties interested in it are not before us, nor can we anticipate the proceedings that may be had for the final settlement of the estate in the Court of Probate.

The knowledge, however, that we have acquired from the two trials and arguments before us, of the position of the defendant, and the two letters of Mr. Solomon, the Judge of Probate, dated 26th March and 2nd April, 1862, conclusively show that the costs of this suit ought not to fall on the defendant alone, as it was brought in fact to test the validity of the will, and the general principle applies as in the case of a feigned issue. In view of this, the Judge of Probate at Lunenburg will probably allow the costs of both parties to be taxed in this Court as a charge on the estate, and we suspend execution against the defendant therefor for ninety days, within which period the estate may be settled up if the defendant is diligent in pressing it on.

Rule accordingly.

Attorney for plaintiffs, *Desbrisay.*
Attorney for defendant, *Creighton, Q. C.*

POPE v. THE PICTOU STEAMBOAT COMPANY.

January 3, 1866.

An order of Her Majesty in Council allowed an appeal from the judgment of the Supreme Court of this Province to herself in Her Privy Council, "in case such judgment, decree, order, or sentence shall involve directly or indirectly any claim, demand, or question to or respecting property in any civil right amounting to or of the value of £300 sterling, (£375 currency.)"

The sum to recover which the action was brought was £340 currency, but adding interest on this amount from the date of the writ until judgment, together with the costs of the successful party, increased the sum to over £300 sterling.

Leave to appeal was granted, the respondent being at liberty to raise any question with regard to the appealable amount before the Privy Council.

WILKINS, Q. C., on a former day in this Term had moved for

an appeal to the Judicial Committee of the Privy Council from the judgment given in this case on the first day of the Term. The motion was founded on an affidavit of his own, in which he stated that the steamboat, to recover the price of which the action was brought, was sold to the defendants for £340 currency, that the interest on that amount from the date of the writ was £27, that the costs of the plaintiff, and the sheriff, counsel, and witness fees, amounted to £60, and the costs of the defendant to £50,—in all £477.

He contended that the wording of the order in Council relating to appeals from Nova Scotia was different from that relating to the other colonies, except Antigua and New Brunswick. The words in the order applying to this Province were, "where any such judgment, order, decree or sentence shall involve directly or indirectly any claim, demand or question to or respecting property in any civil right amounting to or of the value of £300 sterling." In 12 *Moore's Privy Council Cases*, 467, interest was allowed to be added to make up this amount. (Cites also 9 *Moore*, 100, and 7 *ditto*, 195.)

Young, C. J., now (January 3rd, 1866) delivered the judgment of the Court. We are not disposed to refuse the leave to appeal, but we would recommend the plaintiff to have the defendant's costs taxed in order to meet any difficulty. We suspend judgment, therefore, during the appeal, but the defendant will be at liberty to raise any question as to the appealable amount before the Privy Council.

*Rule accordingly.**

Attorney for plaintiff, *Wilkins, Q. C.*
Attorney for defendants, *A. C. McDonald.*

* On the 15th January, 1866, two bonds were filed, one at Pictou, from the plaintiff and Henry R. Narraway, and the other at Halifax, from the plaintiff and Thomas Bolton, each conditioned in £500 sterling for prosecuting the appeal, the one signed by the plaintiff by his attorney, M. I. Wilkins, and the other by his attorney, Thomas Bolton. Exceptions were taken to both by W. A. Johnston for want of authority to the two attorneys, and to Narraway's for insufficiency. Affidavits were filed which sustained these objections which were not controverted, and W. A. Johnston moved thereon before DesBarres, J., at Chambers, on the 23rd January, to quash the appeal. DesBarres, J , (Jan. 30th), declined to interfere, stating that he considered that the objections were rather for the appellate Court. W. A. Johnston subsequently (February 21st) renewed his motion before Young, C. J., who also declined to interfere, stating that he thought the appellate Court should decide its own practice. The appeal was not prosecuted.—Rep.

Note.—The following cases were also argued and decided during the present Term, but, for the reasons which will appear below, it has been considered unnecessary to publish anything more than the ensuing brief notice of them.

McKenzie v. *McKenzie* was an equitable suit tried before DesBarres, J. and an ordinary jury at Pictou, in October, 1864, when all the issues were found for the defendant. *Wilkins, Q. C.*, for the plaintiff, argued in favor of setting aside the verdict, but was stopped by the Court on the ground that the point for which he was contending, namely, that estates tail were *not* abolished by the Provincial Act (Rev. Statutes, 2d series, chap. 112), where a valid remainder was limited thereon, was settled otherwise by the decision *in re Estate of Simpson* (*ante*, vol. 1, p. 317). Judgment was therefore given for the defendant, without calling on the *Solicitor General*, who appeared for him.

Angus v. *Ibbetson* was an action of dower, tried before Wilkins, J., at Amherst, in October, 1865, when a verdict passed for the plaintiff. A rule *nisi* had been taken out under the Statute, to set the verdict aside. *Smith, Q. C.*, moved to make the rule absolute, his main, if not sole ground, at the argument, being that the notice of demand of dower should have specified by metes and bounds the land out of which the dower was sought. The Court considered that it was impossible to sustain this position, and accordingly stopped *Smith, Q. C.*, and without calling on *Blanchard, Q. C.*. contrà, discharged the rule. *Smith, Q. C.*, immediately afterwards, before the whole Court, acquiesced in the propriety of the decision, and himself cited several modern cases supporting it.

In re Pineo et al. was argued by *Blanchard, Q.C.*, for the appellants, and the *Solicitor General* and *Oldright*, for the respondents, the Trustees of Schools for School District No. 19 in the County of Cumberland. Young, C. J., on the last day of term, delivered the judgment of the Court in favor of the

trustees, but the decision turned almost wholly on the construction of a mere temporary Act (Act of 1865, chapter 28), which was virtually repealed by chapter 29 of the Acts of 1865, which came into effect in October of the same year. The Court held that "all *future* assessments," in the eighth section of the first mentioned Act, referred to assessments made *after* the assessments contemplated in the seventh section should have been completed.

Bliss, J., was absent during the whole of this Term from illness.

END OF MICHAELMAS TERM.

IN THE

SUPREME COURT OF NOVA SCOTIA,

MICHAELMAS VACATION, XXIX VICTORIA.

CHAMBERS DECISION.

Coram DESBARRES, J.

LYONS *v.* DONOVAN.

January 23, 1866.

Error of judgment in an arbitrator is not sufficient ground for setting aside his award.

To set aside an award on the ground of mistake on the part of an arbitrator, the mistake must be apparent on the face of the award, or admitted by the arbitrator; and in the latter case it must also be shown that the judgment of the arbitrator was influenced by it, and that, if it had not happened, he would have made a different award.

LENOIR had obtained a rule *nisi* to set aside the award in this case, "for mistake and misconduct of the arbitrators which appears by evidence, the balance of accounts being clearly in favor of plaintiff, also for that the facts are not sufficient to warrant a finding for the defendant, also for that the arbitrators have omitted crediting the plaintiff with his account distinctly acknowledged and proved."

It appeared that the plaintiff, by his particulars, claimed $262.28, while the defendant, by his particulars of set-off, claimed that the plaintiff was indebted to him in the sum of $246.07. The cause had been referred to Blanchard, Q. C., and H. C. D. Twining, who made an award in favor of the defendant for $8.

The rule was granted on reading the affidavits of the plaintiff, and of Cornelius Phelan and Michael Keefe. The plaintiff swore to admissions by the defendant, at the reference, which

he contended conclusively showed a balance due him (plaintiff) of over $60. Plaintiff's affidavit was corroborated to a certain extent by those of Phelan and Keefe.

Counter affidavits were made by the defendant and his attorney. The defendant swore that the plaintiff was largely indebted to him, and denied that he admitted the plaintiff's account at the reference as stated by him, but, on the contrary, stated that he positively denied thereat his liability for $123 of such account. Defendant also contradicted the statements of Phelan and Keefe, and his affidavit was largely corroborated by that of his attorney.

There was also a short affidavit from Blanchard, Q. C., the substance of which is stated in the judgment.

The rule now (Jan. 16th, 1866) came on for argument.

LeNoir, in support of the rule, read the affidavits of the plaintiff, Phelan, and Keefe above referred to, and contended that they showed such mistake on the part of the arbitrators, as to require the Court to set their award aside.

Ouseley, contrà, contended that the award could not be set aside unless it were shown that the arbitrators acted dishonestly or corruptly. 2 *Ch. Arch Q. B. Prac.* (10th ed.) 1612.

LeNoir, in reply, cited 1 *Vesey Jr.* 369; 9 *Exch.* 662; 13 *Q.B.* 955; 5 *Bing. N. C.* 187. The arbitrators could not show by figures how they made up the $8.

Cur. adv. vult.

DesBarres, J. now (Jany. 23, 1866) delivered judgment. The ground upon which the order *nisi* was moved for and granted to set aside the award in this case was that the arbitrators, to whom the subject matters in difference between the parties had been referred, had made so gross a mistake in the calculations of the amounts, proved before them on the part of the plaintiff, as to amount, though not in a moral point of view, yet in the judicial sense of that term, to misconduct on their part.

I had strong doubts whether the facts stated in the affida-

vits made to obtain that order were sufficient to warrant me in granting it, but I consented to grant it, on the statement made to me by the plaintiff's counsel that he would be prepared with authorities to show that this was a case, in which I had the power to interpose to prevent great and manifest injustice being done to the plaintiff, either by the carelessness or misconduct of the arbitrators in making an award against him, when it clearly appeared from the evidence that the defendant was largely indebted to him.

Having attentively read and considered the affidavits produced on both sides, I feel it but due to the arbitrators to say that I have failed to discover any ground for the imputation of carelessness, much less of misconduct, on their part in the investigation of the accounts and dealings between the parties, in which there were disputed items, and in respect of which there was contradictory evidence alone for them to pass upon.

This then is not a case, in which, as I view it, either the Court or a Judge has any power to interfere, or can or ought to interfere with the decision of the arbitrators, who, in the absence of any proof to the contrary, I am bound to presume have decided the matters in difference submitted to them according to the best of their judgment, and with the view of doing impartial justice to both parties. To give the Court or a Judge such a power the mistake or carelessness of the arbitrator must be of so gross a character as to amount to misconduct. In *Knox* v. *Symmonds*, 1 Vesey Jr. 369, the Lord Chancellor says: "A party to an award cannot come to have it set aside upon the simple ground of erroneous judgment in the arbitrator, for to his judgment they refer their disputes, and that would be a ground for setting aside every award. In order to induce the Court to interfere there must be something more; as corruption in the arbitrator or *gross mistake, either apparent upon the face of the award, or to be made out by evidence*, but in case of mistake *it must be made out to the satisfaction of the arbitrator;* and the party must convince him that his judgment was influenced by that mistake, and that, if it had not happened, he should have made a different award." See also *In re Hall and Hinds*, 2 M. & G. 847, to same effect.

There being, as I have already said, no foundation for a charge of misconduct in the arbitrators apparent on the face of the award, the only question is whether the affidavits on the part of the plaintiff disclose any facts showing that any mistake has been made, and if made, whether the arbitrators, if they had discovered it, would have made a different award. They probably did not allow the disputed items in the plaintiff's account, amounting to $23, which the defendant positively swears were incorrect; and they may not have allowed the sum of $100 charged by the plaintiff to the defendant for the rent of the premises in 1865, which he occupied in 1864 at $60, as to which there was contradictory evidence, and, if they believed the defendant's statement that he refused to take the premises from the plaintiff at the increased rent, and that he removed his effects from and actually left the premises before the expiration of his tenancy in 1864, it surely will not be pretended that, as judges and jurors appointed by the plaintiff himself, the arbitrators had not a right to strike that item out of his account if they thought fit, and, if in the exercise of their judgment they did strike it out, the plaintiff under the circumstances must be bound by their decision. There is no evidence of any miscalculation or mistake made in the adjustment of the accounts between the parties; on the contrary, the fact of there being such is negatived by one of the arbitrators, who states under oath that he gave the best attention to the investigation of the respective accounts of the parties, heard evidence under oath, and made such award as he verily believed was just and right. With such evidence as this before me I cannot believe that any injustice has been done to the plaintiff by the award which the arbitrators have made against him; if there has been I am bound to suppose from the statement of the arbitrator that it was through error of judgment alone, which is not a sufficient ground for setting aside the award.

In *Morgan* v. *Mather*, 2 Vesey Jr. 18, Lord Commissioner Wilson says: "It would be a melancholy thing, if, because we differed from the arbitrators in points of fact, we should set aside awards. The only grounds for that are, first, that the arbitrators have awarded what was out of their

power; secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there be no corruption, as if without reason they will not hear a witness; thirdly, that they have proceeded upon mere mistake, which they themselves admit."

It is quite clear, from the facts disclosed in the affidavits, there is no ground for setting aside the award in the present case, and therefore the order *nisi* must be discharged with costs.

Rule discharged.

Attorney for plaintiff, *LeNoir.*
Attorney for defendant, *Ouseley.*

CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

IN EQUITY,

IN

MICHAELMAS VACATION, XXIX VICTORIA.

IN RE ESTATE OF AMOS SEAMAN.

May 7, 1866.

A testator, in the fourteenth clause of his last will, executed 8th March, 1862, said: "Inasmuch as several of my children and grandchildren have received and may receive from me advances in personal or real estate, or in both, which it is my desire should be charged against their respective shares, portions, or interest in and out of my estate or some part thereof, *I do direct* and order, and my will is, that *all advances* of real or personal property, and all sums and charges of what nature or kind soever, *which have been or shall be by me entered* or set down as *advancement to, or charged to* or against any of my children or grandchildren, *in a book used or to be used by me for that purpose*, shall, in the distribution of my estate, *stand as advancement* made to such children and grandchildren respectively, and be taken by each of such children or grandchildren towards his or her share of my estate."

In the fifteenth clause the testator said: "To prevent dispute and dissatisfaction in the division of my property after my death, *I may make some apportionment* of my Minudie estate, or parts thereof, *to take effect* as respects my children and grandchildren or some of them *after my death*, it is my will and *I do order* that *all, any, and every portion* of my Minudie estate, whether marsh land or upland, *which by deeds executed or to be executed by me, I have conveyed or shall convey*, or have expressed or shall express to convey to any of my children or grandchildren, *or which I have allotted or shall allot* and apportion to any of my children or grandchildren, and shall *particularly describe* and designate *in any writing by me signed, shall in the division* of my estate *be included* in the shares of such children and grandchildren, and every of my children and grandchildren, to whom or in whose name I have made or shall make any such deed or allotment, shall accept the same towards their shares respectively in my estate," &c.

Two codicils were made by the testator, one on the 22nd October, 1862, and the other on the 13th September, 1864, being the day before his death.

It appeared that at the time of the execution of the will there was a *red* book in existence, in which the testator had made certain entries.

Subsequent to the execution of the will, but before the execution of the last

codicil, it appeared that he kept another book, called the *black* book, in which he wrote the following preface: "This book is kept by me, and the charges, entries, and memorandums herein made, are in conformity with the clauses inserted in my will executed on the 8th March, 1862; and I desire and direct that the amounts herein charged against, and the several allotments and divisions of my Minudie estate and other lands and personal property made to my children and their heirs, shall be adhered to, and bind all parties on the distribution of my estate, both real and personal. AMOS SEAMAN."

The red book contained the following entry, proved also to be in the handwriting of the testator:—"Sept. 27, 1844. This book is intended by me to make charges to each member of my family, as occasion may require, from time to time, as I may think just and equal and right, it being my desire to make all equal as regards my real and personal property which may be left behind when I leave for a better world." This book also contained the following entry, which, however, is scored across by diagonal pencil lines: "This book is kept by me, and the entries and charges therein given made in accordance with the clause inserted in my will executed on the 23rd September, 1861, referring to the same. AMOS SEAMAN."

It appeared by the testimony of R. S., one of the executors, that the testator, about a month before his death, sent the red book to him, and that he shortly after said to him, referring to this book, "Keep it, take care of it; you will see by that how I want my property divided." The testator also directed V., who took the book to R. S., to show it to his (testator's) sons, and to say to them, "It is to be the final division of my estate as the book will show them."

It also appeared that the testator kept the black book in his own possession, and that he told A. McF., the other executor, that he had made the red book null and void. At the time of the execution of the last codicil, he told A. McF. that the book was in his red box, where he kept his money, that this book contained his directions respecting the disposition of his property, and that he relied on him to see that his directions as therein given were carefully fulfilled. The testator also told A. McF. that he would get the keys of this box from Mrs. McF. A. McF. took the keys, and found that one of them was the key of this red box. He opened the red box, and found the black book in it. A. McF. testified that this was the same book which the testator had before repeatedly shown him as the book kept in connection with his will. He further testified that the entries and writing in the book were entirely those of the testator.

Neither of the codicils contained any reference to either the red or black book, or to any deeds, writings, or documents of any kinds, except the will itself.

A paper (marked No. 13) was found, signed by the testator, and containing allotments of land to his several heirs, all, except one, at the like valuations contained in the black book. A. McF. prepared this paper, *after the execution of the will*, at the testator's request, who returned it to him signed, with the valuations filled in, and told him to keep it with his will.

Nine deeds were found signed by the testator, three dated 25th March, 1854, and six dated 14th January, 1864. A. McF. stated that the deeds of 1854 were handed to him by the testator in 1862 or 1863, who told him to retain them as escrows, and deliver them to the parties or those who might represent them after his death, should he (testator) not deliver them before. These deeds were never actually delivered to or accepted by the grantees, but they were registered by A. McF. after the testator's death. The deeds of 1864 were signed in the presence of C., a subscribing witness, to whom testator said, at the time of subscription, "Perhaps you may be called on some day to prove these deeds, and perhaps not." Testator retained these deeds in his possession until his death, but told A. McF.,

shortly before his death, where to get them, and that he wished him to take them for delivery to the parties when he (testator) was gone.

Held, as regards the books and papers, by DesBarres and Wilkins, JJ.—Johnston, E. J., dissenting—that the red book, and the entries existing therein at the time of the execution of the will, were alone incorporated in it, and that the black book must be entirely rejected, as also all entries made in the red book subsequent to the execution of the will.

By Johnston, E. J., that the black book alone, with the entries which it contained on the 13th Sept., 1864, the writing No. 13, and all the deeds, were so incorporated in the will.

By Wilkins, J., that the deeds of 1854, [illegible] not those of 1864, were so incorporated.

By another clause of the will, the testator, after reciting that the immediate division of that portion of his Minudie estate called the Joggins would be injurious to the profitable working of the quarries and ledges of freestone thereon, devised to A. McF. for a term of years all that portion of the shore frontage of his Minudie estate lying *between* Dog Fish Cove and Lower Cove, with the lands adjoining, &c. In referring to the reversion of this property, in subsequent clauses, the testator described it as "the said property, called the Joggins, as hereinbefore described"—"my Joggins estate, before mentioned"—"the said Joggins estate."

It appeared that the principal and more valuable quarries were *in* Lower Cove.

Held, by DesBarres and Wilkins, JJ.—Johnston, E. J., expressing no positive opinion—that as the word "between" was unambiguous, and was sensible with reference to extrinsic circumstances, that it must be considered in its strict and primary sense, and could not be controlled by the most conclusive evidence of an intention to use the word in another sense, and, therefore, that the quarries both in Dogfish Cove and Lower Cove were excluded from this devise.

By the tenth clause of his will, the testator devised to A. McF. (the sole executor named in the will), certain lands in trust for the use and toward the support and maintenance of a public school. By the codicil, executed just before his death, the testator appointed R. S. executor, "in connection with A. McF., with the same power and authority as if his name had been originally inserted in the will."

Held, That R. S. was not a trustee with A. McF. of the said lands.

By the seventeenth clause the testator directed that the residue of his estate (except as controlled by previous clauses) should be divided into eight equal shares. He then devised several of these shares in trust to R. S. for certain named persons.

Held, by Johnston, E. J., that the trusts were not necessarily inseparable.

By the twenty-third clause of the will the testator provided that from the respective shares in his estate of the children of his deceased sons, Amos T. and James, there should be abated such advances as he had made to the said sons respectively in their lifetimes, in like manner and evidenced in the same way as in the case of the advances made to his surviving children.

Held, by Johnston, E. J., that the advances to be charged against the children of Amos T. and James could only be ascertained in the same way as in the case of the other heirs, and directed in the fourteenth and fifteenth clauses.

The codicil of 22nd October, 1862, provided that in case certain devisees and legatees therein named should make any charges or claims against testator's estate, such charges should be deducted from the shares they might be entitled to receive, "either from his personal estate, or from the rents arising from his quarries or Joggins lands."

Held, by DesBarres and Wilkins, JJ., that the codicil could operate according to its expressed intent, without a contravention of any rule of law or equity, as it simply imposed a condition on a mere voluntary act of bounty on the part of the testator.

By Johnston, E. J., that the enquiry was premature, until the claims against which this codicil professed to be directed were asserted in distinct form ; and that any objection to its execution could only come before this Court in its appellate jurisdiction, and must be first raised in the Probate Court.

THIS was an application under the Act of 1865, chap. 7, section 7, by the executors of the estate of the late Amos Seaman, of Minudie, to the Judge in Equity (Johnston, E. J.) for directions as to the management of the estate. The executors filed separate petitions, and, by consent, the examination of the executors and their witnesses was taken before A. S. Blenkhorn, Esq., the Prothonotary at Amherst, under an order from the Judge in Equity, and the depositions with various exhibits returned. The devisees and all the parties interested were notified of the proceedings. The Judge in Equity directed that the questions submitted should be argued before himself and two associate Judges of the Supreme Court, and they were accordingly fully and elaborately argued on the 20th and 21st February last, before the Judge in Equity, Des Barres and Wilkins, JJ., by *McCully, Q. C.* and *J. W. Johnston, Jr.*, on behalf of Rufus Seaman, one of the executors, and of certain of the devisees; and by the *Solicitor General* on behalf of Hon. Alexander McFarlane, the other executor.

The following is the substance of Rufus Seaman's petition, which is dated Oct. 19, 1865.

"That the said Amos Seaman, the father of your petitioner, departed this life in the month of September, A. D. 1864, having first made his last will and testament with a codicil of a subsequent date, as by copies thereof hereunto annexed numbered 1 and 2 will appear.

That the will No. 1 and codicil No. 2, being in the possession or under the control of the hon. Alexander McFarlane, a co-executor and also a trustee, were produced by him, and having been proved probate thereof was duly granted to him and your petitioner as executors.

That an inventory of the real and personal estate of the testator has been duly filed in the office of the Registrar of Probate in said county.

That in the month of May last your petitioner applied in the usual way by petition to the Judge of Probate for the

county of Cumberland, for an order to appoint appraisers to divide the real estate and lay off the shares of the several devisees, and an order was made accordingly, and three respectable freeholders were appointed accordingly.

That shortly after and on the twenty-ninth day of May, the hon. Alexander McFarlane, co executor and trustee and a devisee under said will, filed a caveat in the office of the Registrar of Probate for said county, and no further proceedings have, therefore, been had in reference to such division, and the real estate valued at £31,757 10s., still remains undivided, and as it was at the testator's death.

Your petitioner is informed and believes that the testator kept one or more books or written papers made subsequently to the date of his will, but none of which have been produced for probate, nor are they capable of being proved as testamentary documents, as your petitioner is informed and believes. One such book or document was deposited by testator with your petitioner, and he hath the same ready to be produced if required, or ordered so to do; another such book or document your petitioner believes is in the possession of the hon. Alexander McFarlane, co-executor, and a copy hath been furnished by him to your petitioner.

Your petitioner having submitted the copy of the testator's will and codicil, and copies of these several documents to counsel, hath been advised to submit the facts by way of petition to your lordship, and ask the opinion, advice, and directions of your lordship respecting the management and administration of the trust property, and the assets of the testator, as to the proper course of procedure, and especially as to whether the books or documents so referred to are legal and valid instruments, and to what extent, and whether the verbal declarations of testator about or shortly before the time of his decease are admissible to explain the contents of said books, and if anything written or spoken by testator in reference to his will, and the devises therein contained, should control or affect the dispositions contained therein, whether the freeholders already named should proceed to divide and lay off to the respective devisees according to the form of the Statute in such cases provided, their respective shares, or whether they should not or how otherwise.

Your petitioner also respectfully submits that upon a recent inspection of the public records in the office of registrar of deeds at Amherst, he finds that nine deeds purporting to be made by testator, and to convey parts and portions of the testator's real estate (inventoried as such by the executors, in the month of May previous) to certain of his children, some for natural love and affection, and others for small and inconsiderable considerations, were, on the 7th and 9th July, 1865, proved and recorded, but whether these deeds were ever delivered or executed to convey real estate, your petitioner is unable to pronounce, but believes some of them were not, and as the clauses in the books, and the considerations in the deeds are not in consistency with each other, he prays advice and direction on the subject in connection therewith. If permitted so to do, your petitioner is prepared to show that neither the deeds recorded, nor the books referred to, carry out the intentions of the testator as regards the division of his estate among his children, and as shortly before his decease testator had frequently and repeatedly declared what his intentions in that respect were, your petitioner has reasons to believe that other books or papers yet exist in reference to such division which embody the testator's views, and, if reference should be had to deeds and books, then he prays that testimony be taken on that point.

Your petitioner further desires the opinion, advice and direction of your lordship as to whether he as co-executor, is, by the tenth clause of the said will, a co-trustee with the hon. Alexander McFarlane, of the twenty acres of land devised for school purposes.

And also whether under the eleventh clause of such will, and the expression "all that portion of the shore frontage of my Minudie estate lying between Dog Fish Cove and Lower Cove, with the lands adjoining, extending for one quarter of a mile inward from the shore, and running that breadth along the whole of the said shore frontage with the reefs and quarries of stone thereon and therein, and all the houses, stores, buildings and appurtenances, and all privileges of every kind thereon or thereto belonging, or enjoyed therewith"—the coves themselves, and the lands, houses, &c., within such coves are included or excluded.

And if it should be held that the deeds above referred to, or any of them, were well executed by the testator in his life-time to convey real estate, whether the sums, &c., therein named as the consideration money shall be conclusive as to the value, and be a compliance with the provisions set forth in the tenth clause, or any other clause of the said will, so that it shall be binding. And whether in cases where natural love and affection is the consideration, the property conveyed shall be held to be a clear gift, and the grantee and his representatives be entitled to one-eighth of the residue.

And also, in case a grantee is unwilling to accept the portion thus conveyed, or to accept it at the rate conveyed whether he has the option, under the terms of the said will so to do, and claim an eighth of the entire estate.

And also whether the trusts set forth and described in the seventeenth clause are one and indivisible, or whether petitioner can take upon himself the burden of trust as regards one or more of the devisees or the representatives of the deceased children of testator, and yet decline as to others.

And also, how and in what manner the alleged advancements referred to in clause twenty-third, to the children of Amos T. and of James Seaman, deceased, are to be ascertained; and also as to any and all other portions of said will and codicils where doubts and differences of opinion exist."

The following is the substance of Hon. A. McFarlane's petition, which is dated Nov., 1865:

"That the said Amos Seaman departed this life on the 14th September, 1864, having made his last will and testament on the 8th March, 1862, with two codicils, one dated on the 22nd October, 1862, and the other on the 13th September, 1864, copies of which will and codicils are annexed hereto.

That the will and codicil first executed had been deposited by the testator with petitioner, long previous to his death, and petitioner being sole executor of the said will, and being desirous of having Rufus Seaman, one of the testator's sons, connected with him therein, induced the testator during his last illness to consent to the appointment of the said Rufus Seaman, and he was so appointed by the last mentioned codicil, executed by the testator the day before his death.

That testator having informed petitioner that it was his

wish that the codicil executed by him in the month of October, 1862, should only be made use of in the event of any accounts or claims against his estate as therein mentioned, being made; petitioner, previous to taking probate of the testator's will, consulted the said Rufus Seaman as to whether or no the said codicil should then be proved, and understanding from him that there was no intention of making any accounts against the estate, as in such codicil referred to, it was not then proved or included in the said probate. But subsequently the said Rufus Seaman having informed petitioner that such claims would be made against his father's estate, and petitioner being aware that these demands were disputed by the testator in his lifetime, then informed the said Rufus Seaman that in such case the said codicil should be proved, and filed in the office of the Registrar of Probate at Amherst, which has accordingly been done.

That an inventory of the real and personal estate of the testator has been filed in the office of the said Registrar of Probate, and although petitioner was desirous of having such real estate divided among the several children and heirs of the testator with the least possible delay, he found that in consequence of the peculiar nature of the trusts and bequests in the testator's will, and from the fact that parts of such real estate were mentioned by him as having been allotted to certain of his children and grandchildren, and value put thereon, in a book kept by the testator in connection with his will, and also that other portions of his lands had been conveyed by deeds to his several children; in some of which deeds the consideration was nominal; that such division could not be safely or properly made without having the disputed and doubtful matters in reference to the distribution of the assets of the estate first settled, to guide and direct the parties in making such division.

That testator on several occasions previous to his death showed petitioner a book kept by him, with entries therein of charges made against his several children and grandchildren, and also describing the allotments of certain portions of his real estate to such children and heirs; and during his last illness conversed with petitioner respecting this book as expressing his intentions respecting the distribu-

tion of his estate, informed him where the same was kept, and it was found by the petitioner after the testator's death in a small locked box in which he kept his money, that the entries in such book are wholly in the handwriting of the testator, and it is the same book so shown to petitioner, and described to him by the testator as the book kept by him in connection with his will, that such book is in petitioner's possession, ready to be produced as directed, and a copy thereof is hereto annexed.

That testator had also, previously to the time of his last illness, deposited with petitioner a written paper signed by him, showing an allotment of portions of his real estate among his children and heirs, which is similar to the entries and allotments made in the book referred to, but does not include all the parcels of land therein described, nor the other charges made therein.

That this book and paper writing (and the deeds hereinafter mentioned) contain all the allotments or dispositions of his estate made by the testator in connection with his will, which have come to the possession of petitioner, or of which he has any knowledge; with the exception of a book alleged by petitioner's co-executor as having been given to him by the testator, which petitioner has not seen, nor was it even spoken of by the testator to him.

That three deeds signed by the testator, dated in March, 1854, and made in favor of his sons Gilbert, Rufus, (and James, now deceased), conveying certain portions of his real estate to them, were, sometime previous to the death of the testator, deposited by him with petitioner, with instructions that they were to be delivered to the said parties after his death, and, although the consideration mentioned in such deeds is natural love and affection, testator informed petitioner that the amount they were to be charged therefor was mentioned in the book so kept by him, which book does contain entries placing a value on the lands described in the said deeds.

That some months previous to the time of his death, the testator directed petitioner to prepare further deeds for conveying certain other portions of his marsh lands to his children and grandchildren, and these deeds, so written, were afterwards shown to petitioner by the testator, signed by him,

and petitioner was informed by testator that they were executed by him as escrows, to be delivered and take effect after his death. Such deeds, six in number, bear date the 14th January, 1864; one a joint deed to his two sons Gilbert and Rufus, and his daughter Jane; one to the children of his deceased son James; one to the children of his deceased son Amos Thomas: and one to each of his three daughters, Ann, Mary, and Sarah; which deeds, during his last illness, the testator informed petitioner were then in the keeping of his niece, Emma Seaman, from whom petitioner was directed by him to receive them for the benefit of the parties to whom they professed to be executed. That such deeds were so received, and with the first mentioned deeds to testator's sons have been placed on record by petitioner.

Your petitioner is desirous to submit these facts in connection with such will, as affecting the administration and distribution of the assets of the testator's estate, by way of petition to your lordship, and asks your lordship's opinion, advice, and direction as to the proper course of procedure thereunder, and especially on the following points:—

1st. As to the validity and operation of the codicil to the testator's will, executed on the 22nd October, 1862, witnessed by G. W. Cutter and Chas. C. Seaman.

2nd. Whether the book referred to is legal and valid; and to what extent, and in what manner, the charges and entries therein made will operate in the distribution and settlement of the testator's estate.

3rd. Whether or no the deeds above mentioned, or either of them, are so executed as to convey the real estate therein described, and, if so executed, whether the consideration moneys therein mentioned are the values to be placed thereupon; or, where such consideration is nominal, if the value put thereon in the said book is the sum to be charged therefor.

4th. If the allotments made in the book kept by testator, and the properties described as conveyed by the said deeds, are held to entitle the several parties to whom the same are so given to retain them at the value put thereon by the testator; how the residue of the real estate is to be divided, and in what manner the value of the same is to be ascertained.

And also as to any and all other parts of the said will and codicils wherein doubts and differences of opinion may exist."

The following are the clauses of the will on which the questions arose, the more important words being italicized:

10. It being my desire to contribute toward the support and maintenance of a public school at Minudie, I give and devise for this purpose to my son-in-law, Alexander McFarlane, of Wallace, Esquire, member of the Provincial Parliament, my executor hereinafter named, and to his heirs and assigns, ten acres of land from my Minudie estate, and ten acres of land in the Big Marsh, which lands it is my intention myself to select, designate, and allot, but which, if I should fail to do, I desire my said trustee to select, designate, and allot, in such place and manner, and of such value as he shall deem calculated to promote my wish, to hold the said twenty acres of land to him, his heirs and assigns, in trust for the use and toward the support and maintenance of a public school at Minudie in such manner as in his judgment shall be most advisable. And on further trust that so soon as with his approval trustees, whether individual or incorporated, shall have been provided, and the purposes and objects of the trust have been settled and expressed, he, the said Alexander MacFarlane, his heirs or assigns, shall convey the said lands absolutely to the said trustees so to be provided to and for such trusts, uses and purposes, and objects as aforesaid.

11. And whereas the immediate division of that portion of my Minudie estate, called the Joggins, would be injurious to the profitable working of the quarries and ledges of free-stone thereon, *I do therefore give and devise to the said Alexander McFarlane, his executors and administrators, all that portion of the shore frontage of my Minudie estate lying between Dogfish Cove and Lower Cove, with the lands adjoining, extending for one quarter of a mile inward from the shore and running that breadth along the whole of the said shore frontage with the reefs and quarries of stone thereon and therein, and all the houses, stores, buildings, and appurtenances, and all privileges of every kind thereon or thereto belonging or enjoyed therewith,* to hold to the said Alexander McFarlane, his executors or administrators, from the day of my death for and during and

until the full end and term of fifty years, from thence to be completed and ended without any manner of impeachment of waste,—upon trust, nevertheless, and for the uses, ends, and purposes following—that is to say: upon trust that the said Alexander McFarlane, his executors or administrators, shall enter into and upon and possess the said described premises and any part thereof, and shall during the said term in and by such ways, manner, and means as to him or them shall seem most advantageous or advisable, occupy, use, and work, or cause to be occupied, used and worked, the said premises, and the quarries, ledges, and reefs of free-stone, and other materials and minerals therein or thereon, or portions of them, and the produce thence coming and arising sell or dispose of to the best advantage, and also from time to time during the said term, and as often as he or they shall deem it to be advantageous and advisable so to do, demise, lease, and let the said premises or portions thereof, and the said quarries, reefs, and ledges, or portions thereof, for such terms and periods of occupation, and on such rents, reservations, conditions, and agreements as he or they shall think suitable and beneficial, and such demises, leases, occupations, and terms, renew or alter or terminate and discontinue, and also other demises, leases, occupations, and terms, make and create from time to time as occasion may require.

13. And the remainder or reversion of and in the said property called the Joggins as hereinbefore described subject to the said term of fifty years hereby created, I give and devise to the same persons to whom and in the same manner and subject to the same restrictions as I have herein given the residue of my estate.

14. And inasmuch as several of my children and grandchildren have received and may receive from me advances in personal or real estate or in both, which it is my desire should be charged against their respective shares, portions, or interest, in and out of my estate or some part thereof, *I do direct* and order and my will is that all advances of real or personal property, and all sums and charges of what nature and kind soever, *which have been (or shall be) by me entered or set down as advancement to* or charged to or against any of my children or grandchildren *in a book used (or to be used) by me for the*

purpose, shall in the distribution of my estate stand as advancement made to such children and grandchildren respectively at the value by me declared and set down therein; or otherwise, if the value be not set down and declared, then at a just value and be deducted from their several shares, portions, and interest in my estate, and be taken by each of such children or grandchildren towards his or her share of my estate.

15. And further to prevent dispute and dissatisfaction in the division of my property after my death, *I may make some apportionment of my Minudie estate or parts thereof, to take effect* as respects my children and grandchildren or some of them *after my death, it is my will* and I do order *that all, any, and every portion* of my Minudie estate, whether marsh land or upland, *which by deeds executed or to be executed by me, I have conveyed or shall convey,* or have expressed or shall express to convey to any of my children or grandchildren, *or which I have allotted or shall allot* and apportion to any of my children or grandchildren, *and shall particularly describe and designate in any writing by me signed, shall in the division* of my estate *be included* in the shares of such children or grandchildren respectively, and be estimated in making up and allotting such shares at the value which I shall declare and set down in writing to be the value I attach thereto in such apportionment, or otherwise in the absence of such declaration of value then at a just value, and such and every of my children and grandchildren, to whom, or in whose name I have made or shall make any such deed or allotment, shall accept the same towards their shares respectively in my estate, at a value ascertained or to be ascertained as before mentioned and in manner as aforesaid.

17. I direct that the residue of my estate, except as aforesaid, shall be divided into eight equal shares, in which divisions respect shall be paid as well to my apportionment, as to any advancement made or to be made by me as hereinbefore provided for, and one of which equal shares I give and devise to each of my two sons, Gilbert and Rufus, one to each of my four daughters, Ann, Mary, Jane, and Sarah, his and her heirs, executors, and administrators, to his, her, and their use forever, and in case of the death of either or any of them in my lifetime, I give and devise one such share

to the legal representatives of each of them so dying, their heirs, executors, and administrators, and one such share I give and devise to the children of my deceased son Amos Thomas, their heirs, executors, and administrators, and one such share I give and devise to the children of my deceased son James, their heirs, executors, and administrators, subject as regards the shares of my said daughters Mary and Jane, and of the children of my said sons Amos T. and James respectively to the trusts, limitations, and restrictions hereinafter declared concerning the same or some part thereof, and provided that each of the said eight shares shall comprise therein every piece of land which at my death shall have been conveyed or expressed to have been conveyed by me, or apportioned or expressed to have been apportioned by me as hereinbefore mentioned to and for the party to whom such share shall be allotted, and shall have abated therefrom every such advancement and charge which shall have been made by me for or to the same party as aforesaid, and as regards all, any, and every my real estate which shall fall to the share of my said daughter Jane, the wife of George Hibbard, and which shall fall to the share of my daughter Mary, the wife of Edward G. Vernon, and which shall fall to the share of the children of my deceased son Amos Thomas, and which shall fall to the share of the children of my deceased son James, it is my will to place the same in trust, and subject to the restrictions following, and I do give and devise all and singular the real estate which in the division of my estate shall fall to and form part of the said four shares—that is to say: the share of my daughters Jane and Mary and the children of my deceased sons Amos T. and James, to my son Rufus Seaman, his heirs and assigns, to hold upon the trusts and for the uses and purposes following—that is to say: to enter upon the said several premises, and work, cultivate, devise, let and manage the same to the best advantage, without impeachment of waste, and the rents, issues and products, and the profits and emoluments therein arising to collect and receive, and thereon and therefrom first to deduct and reimburse himself for all charges, expenses, costs, and outlays by him incurred, and arising in or by means of the execution of the said trust or anything pertaining thereto, and also a just and adequate allowance and re-

ward for his own time and oversight, and the remainder of such rents, issues and profits, and products and emoluments, after such deductions to pay and apply as follows—that is to say: as regards such the remainder of the rents, issues and products, and profits and emoluments of, and arising from the real estate of, and belonging to the share of my daughter Jane, to pay the same to the said George Hibbard and the said Jane for the use of the said Jane during their joint lives, and to the survivor for his or their life, and after the death of the survivor of them to and for the support and education of the children of the said Jane, until they shall respectively attain the age of twenty-two years, or be married, whichever shall first happen, and the said real estate of and belonging to the share of the said Jane after the death of the said George Hibbard and Jane, and as and when the children of the said Jane shall respectively attain the age of twenty-two years, or be married, to hold to and for the use of the children of the said Jane and their heirs and assigns in equal proportions, as they severally shall attain the age of twenty-two years, or be married, whichever shall first happen.

23. To preclude mistake and misapprehension I hereby declare and it is my will that from the respective shares in my estate of the children of my deceased sons Amos T. and James, there shall be abated and deducted such advances as I have made to my said sons respectively in their lifetimes, in like manner and evidenced in the same way, as in the case of advances made to my surviving children, such having been my intention in these passages in this my will which relate to such advances."

The whole purport of the codicil of October 22, 1862, is that in case Gilbert Seaman, Rufus Seaman, or George Hibbard should make any charges against testator's estate, such charges shall be deducted from their shares under his will. It also contains the following clause:—"hereby ratifying and confirming my last will and testament, I declare the foregoing to be a codicil thereto."

The codicil of 13th Sept., 1864, contains only two short operative clauses. The first of these conveys to Rufus Seaman and James McIntosh, in trust for Ephraim Seaman, the property conveyed by the will directly to the latter, and pro

vides that, if the latter shall settle down into sober and steady habits, Seaman and McIntosh may relinquish the trust and place the property at his disposal. The second of these clauses appoints Rufus Seaman executor, "in connection with Alexander McFarlane with the same power and authority as if his name had originally been inserted in the will." This clause also contains the words "hereby ratifying and confirming my said last will and testament, I declare this to be a codicil thereto."

Neither of the codicils contains any reference to either the red or black book, or to any writings or documents whatever except the will itself.

The testimony and the documents referred to, and the various points taken at the argument, are sufficiently set out in the judgments.

The Court, being divided in opinion, now delivered judgment *seriatim.*

JOHNSTON, E. J. The first question I will consider is one that arises under the fourteenth clause of the testator's will. (The learned judge here read this clause.)

Mr. McFarlane has propounded under this clause a book numbered by the examiner 12, and distinguished as the *black book* from the color of its cover, and Mr. Rufus Seaman has propounded a book numbered 5, and distinguished for like reason as the *red book.*

The question is, whether either of these books is incorporated into the will under the 14th clause, and, if either, which of them?

An objection was taken by the counsel of Mr. R. Seaman and the devisees represented by counsel, which, if well founded, would be fatal to the black book, and to a portion of the red book, viz:—that they were made after the will, and, therefore, inoperative, under the rule that a testator cannot by any declaration in his will give himself power to affect the disposition of his estate by unattested papers made after the will.

The principle was not controverted, but it was answered that the will was re-published by the execution of a duly attested codicil made on the 13th September, 1864, and, therefore, that the will, though dated on the 8th March, 1862, speaks

from the later date, which was only a day before the testator's death, and subsequent to both books.

The codicil refers to the will by its date, and in express terms ratifies and confirms it.

It is unnecessary to go through the cases which establish the latter proposition.

The case of *Attorney General* v. *Hartwell*, Ambler 451, shows the practical operation of the rule,—a will made before the Statute of Mortmain being brought within its operation by a codicil made after. In *Barnes* v. *Crowe*, 1 Ves. Jr. 486, lands purchased after the will passed under it by virtue of republication by means of a codicil. In *Rogers* v. *Pittis*, 1 Addams, 30, the rule is laid down in some detail, and Sir John Nichols sums it up by saying, (p. 38), "In short, the will so republished is to all intents and purposes a new will," and in the later case of *Allen* v. *Maddock*, 11 Moore's P. C. C. 445 (1858) the principle is recognized.

The objection, therefore, though sound in principle is inapplicable, and it is unnecessary to notice the numerous cases cited in its support,—the will speaking from the 13th September, 1864, after both books had been completed.

In the belief that the law on this subject was clearly settled I thought it needless to say more than this. Had I known when I wrote what I have just read, as I since have learned, that one, if not both, of my learned Brothers differs, I should have felt it respectful to treat the question more at large.

The view taken I understand is that, though the codicil republishes the will, that republication does not affect the book referred to in the 14th, nor the paper and deeds referred to in the 15th clause, because they are not specially referred to in the codicil. I am unable, with every deference, to adopt that view. It seems to me to lead to this incongruity—that the republication would be partial, and mutilate the will, and it would make the testator speak as regards one part of his will from one date, and as regards another part from another date.

I take the distinction to be this: Where the unattested paper takes its testamentary efficiency from the codicil direct, then there must be reference to it in the codicil, but

when the testamentary efficiency comes through the will, then the reference to it in the will is all that is required, and the codicil has fulfilled its function in giving the will a new date by its republication.

The cases are, I think, equally opposed to that view.

What else is meant by the Judges when they say the will speaks from the day of publication—that it is as a new will? If this be law, then the testator on the 13th September, 1864, spoke in the past tense in relation to that day, when in the 14th clause he referred to a "book used" by him for a particular purpose. It surely cannot be that on that day he spoke of a "book used by him" before the 8th March, 1862.

Sir John Nichols, in *Rogers* v. *Pittis*, says:—"The republication is tantamount to the making the will *de novo*, it brings down the will to its own date, and makes it speak, as it were, *at that time*. In short, the will so republished is to all intents and purposes a new will."

This is surely very clear. So in *Allen* v. *Maddock*. 11 Moore, 452, the Court said: "A republication of a will would amount to a republication of whatever antecedent papers might answer the description of codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either will or codicil." And again, p. 445:—"In the numerous cases to be found on the subject of republication of a will by a codicil duly executed, and which, in effect, is equivalent to a re-execution of the former instrument, it has never been held necessary that the codicil should refer to the particular papers containing the will, so as to distinguish it from all other wills." Again, p. 453:—"It is sufficient that the description should be such as to enable the Court, when the evidence is produced, to say what is the instrument intended."

The cases cited from 1 *Williams on Executors*, 194, and *Roper on Legacies* are directly in point. It appears from *In the goods of Hunt*, 2 Robertson, 622, that a codicil duly executed will give effect and operation to a will after the passing of the Act, although the alteration was not duly attested, and although the will itself was executed before 1838, or to unexecuted papers which have been written between the periods of the execution of the will and codicil, although the

latter does not refer to the former, as where a testator by his will bequeathed articles of plate, "specified in schedules A and B, *to be* annexed to this document" (his will), and after his death two such schedules marked A and B were found, which it was sworn were not written when the will was executed, but were in existence prior to the execution of a subsequent codicil in which no mention was made of the schedule; Sir John Dodson admitted the two schedules to probate, together with the will and codicil. See also *In the goods of Baldwin*, 5 Notes of Cases, 293.

In *Gordon* v. *Lord Reay*, 5 Sim. 274, an attested codicil confirmed a will, but took no notice of a previous unattested codicil; it was held that, a codicil being in law a part of a will, the second codicil by confirming the will established the first codicil.

It seems that this is directly applicable, for an existing unattested paper suitably referred to in a will is a part of the will as well as a codicil is, and it is only on that ground that probate is granted of such paper.

Another objection, if I rightly apprehend the argument, was that evidence beyond the will could not be used for identifying the document referred to in it.

It is impossible to read the cases cited on both sides, without seeing that no such rule is acknowledged in practice. Indeed, from the nature of the case, some evidence must always be required, with whatever clearness of reference the foreign instrument may be indicated in the will.

In the case of *Rogers* v. *Pittis* the question was considered on the face of the several instruments, and then on the extrinsic evidence. In *Hodges* v. *Horsfall*, 1 Russ. & Mylne, 125, a plan was referred to in the argument. There were two in existence and parol evidence was admitted to show which of them had been intended. In *Rogers* v. *Pittis* what the testator said was compared with the contents of one of two wills, to prove that his codicil was intended to establish that one, and not the other will. In *Allen* v. *Maddock*, 11 Moore's P. C. C. 440, the admissibility of parol testimony to identify the paper referred to in a will is repeatedly affirmed, and the distinction remarked on between evidence

to prove a testamentary paper and evidence to explain its meaning.

The real question, as I consider, on this branch is whether there is sufficient evidence of either book to satisfy the requirements of the decided cases—or, I think the point will more accurately perhaps be, whether between the two such uncertainty is not raised as to preclude both.

The rule is well established that before an unattested instrument can be admitted to incorporation with a will, it must have been referred to with clearness, and its identity proved with a degree of certainty that precludes mistake.

The testator has referred to a book used or to be used by him for a particular purpose. Reading as I do the will as if it had been made on the 13th Sept., 1864, when it was republished by the execution of the codicil, I have to enquire whether on that day there existed a book that had previously to that day been used by him for the particular purpose expressed, and whether there is any evidence to identify any particular book as being that book. For this purpose the internal evidences, extrinsic evidence, and declarations of the testator, are admissible and legitimate.

The testator in this case had, as testators in multitudes of other cases have had, that disposition which is congenial with our weak and infirm nature, which aims to control and regulate the appropriation and management of property in the hands of their heirs, after their power to exercise that control in their own behalf should have passed away. The evidence is abounding to show that while Mr. Seaman designed to make an equal division of his property among his children, he designed to do so in his own way and according to his own notions of their convenience, and of the relative value of different portions of his estate; and also that it was his purpose to charge against them respectively the lands which in his lifetime he apportioned to, and the moneys he advanced for them.

To make a clear apprehension of the subject, I have found it necessary to institute a close analysis of the contents of each of the books, and to submit the two to a careful comparison between themselves—the 14th clause of the will

being kept constantly in view, as the light by which to read and to determine their respective claims.

Proceeding then with the internal evidence, I begin with the red book as the older. This book commences at an early period, with this entry on the inside of the cover: "Sept. 27, 1844,—this book is intended by me to make charges to each member of my family, as occasion may require, from time to time, as I may think just and equal and right, it being my desire to make all equal as regards my real and personal property which may be left behind when I leave for a better world."

The first four pages are in pencil, commencing thus: "In the distribution of lands in the village among my family, I propose as follows"—then follow specific allotments of land to his nine children—William being then alive.—the rate of improved upland being stated at £10, and of marsh at £15; a lesser rate is in some cases mentioned on account of inferior quality—in some instances the whole quantity of the lot is given and the aggregate sum set down as its value. These pages conclude as follows: "Big marsh to be equally divided in quality and quantity, £10 per acre all round—Job to be provided for equal with the rest; all other lands to be equally divided. January 24th, 1846."

I have been thus particular, because it is a striking fact that the testator preserved not only the general principles here laid down, but to a great extent the same specification and details throughout the long interval that elapsed till his death. For example—Rufus is to have the homestead; Ann (Mrs. McFarlane) a portion of the manor farm; Sarah (Mrs. Mitchell) the other portion of it.

Another page of pencil writing follows, in which the testator has entered: "March 25th, 1854, this day deeded lands on Joggin road to—

Rufus, lot 620 acres, at 20s £620
Gilbert, lot 558 " " 558
James, lot 514 " " .... 514."

which entry corresponds in every particular with the three deeds in evidence written by William, except that they express the consideration to be love and affection.

The page contains some further proposed allotments of land. These first five pages I will distinguish as the first part of the red book.

The second portion is in ink, with a few entries in pencil, and is kept in form of a debtor account against each child. Two of his sons and three of his daughters have charges against them of personal property, viz.: Amos Thomas, £500, which is relinquished by a note written at the foot of his account, in consequence, it is said of his continued illness; Gilbert, £250; Ann, £125; Mary, £100 on her own account, and £50 apparently in some business, respecting a vessel, with her husband; and Jane £50 for herself, and £12 10s., money received by her husband. Against each of the sons are entered marsh lots "divided" to them, viz.: Amos, £310; James, £350; Gilbert, £197 10s.; Rufus, £205; and against Mary, a marsh lot "divided on day of her marriage," £320; and against James, Gilbert, and Rufus are entered in pencil the lots on the Joggin road before mentioned, at the same valuations, except that James' is increased from 514 acres and £514 to 515 acres and £515.

These charges make up the second part of the red book, omitting William's account, and two accounts with other parties that have no bearing. The entries in this part of the book have various dates, extending from 1845 to 1860.

All the entries in the first and second parts of the red book have light pencil lines scored across them in the usual manner of obliteration.

On the next page is an entry having reference to a previous will, viz.: "This book is kept by me, and the entries and charges therein given made in accordance with the clause inserted in my will executed on the 23rd day of September, 1861, referring to the same.—AMOS SEAMAN." This is scored across by diagonal pencil lines. Below and on the same page is written and subscribed by the testator another entry or title in the same words, except referring to a will executed on the 8th March, 1862, being that under consideration.

Immediately following are eight pages of writing in ink, dated on different days successively from 17th March, 1862, to 25th March, 1862, each entitled "Memorandum to be kept

and performed," and expressing what the heir designated in it was to have of the testator's real estate.

This is the third and last portion of the red book, and is that which has been printed and propounded on the part of Mr. Rufus Seaman.

It gives to James, Gilbert, and Rufus respectively the three Joggin lots before mentioned, at the same valuations as before, except an increase of £30 on Rufus's; but none other of the charges in the second part of the book are made in this.

It gives two new allotments to the heirs of Amos, one to the heirs of James, two to Mrs. McFarlane, one to Gilbert, none to Rupert, two to Mrs. Vernon, two to Mrs. Holland, and one to Mrs. Mitchell; and then follow the proportions in which they are to have the residue of the testator's real estate expressed as one-eighth part of the big marsh, viz.: 350 acres value £10 per acre (£3500); and also one-eighth part of all undivided lands, together with one-eighth of all rents and profits that may arise from the Joggin lands and quarries, value *in time* estimated at £2750.

There are intimations given in these two entries that allotments had been made out of the big marsh which were to form part of the one-eighth, but they are not specified; and also instructions that other allotments might still be made, both of the marsh and other undivided lands.

It will be seen that none of the charges of personal property, and none of the lots of marsh charged in the second part of the book, are mentioned in the third part, which is that which, as I have said, has been printed and propounded.

It is hardly possible to believe the testator intended to abandon these charges, seeing the short interval between the making of the will and the writing-up the book—not three weeks; and the book itself gives intimation (as I have mentioned) of the testator's intention that the previously allotted portions of the big marsh should form part of the shares of the parties who had received these portions.

This propounded part of the red book thus fails in two important particulars. It does not bring forward the charges contained in the previous part of the book, while it refers to one portion of these charges in a manner so vague and undefined, as must have led to confusion and uncertainty, and

the probable frustration of the testator's intention as regards these charges; and, what is more to the point, it falls short of meeting the desire and fulfilling the object distinctly expressed in the 14th and the residuary clauses of his will—that his heirs should be charged with the advances in personal and real estate they had received or might receive.

Turning to the examination of the other book—the black book—the first thing presented is its preface, which is more distinctly directed to the objects of the 14th clause than the preface of the former book.

"This book is kept by me, and the charges, entries, and memorandums herein made are in conformity with the clauses inserted in my will, executed on the eighth day of March, one thousand eight hundred and sixty-two; and I desire and direct that the amounts herein charged against, and the several allotments and divisions of my Minudie estate and other lands and personal property made to my children and their heirs, shall be adhered to and bind all parties on the distribution of my estate, both real and personal.

AMOS SEAMAN."

Next it contains what the other wants to meet the purpose of the 14th clause. For it charges advances of personal property, and these correspond with the similar charges in the second part of the red book, except in adding the charge to Mrs. Mitchell of her marriage outfit, conformably with what had been done to her three sisters. And, also, it charges the marsh lots previously allotted and charged in the second part of the red book, with the exception of the marsh entered as deeded Mrs. Vernon on the day of her marriage. Further, it takes no notice of the undivided residue of the real estate, or the proportions in which the heirs were to inherit it or its supposed value; nor does it notice the rents of the quarries.

Whatever other object this information on these points might answer, it is obvious it was wholly foreign from the purpose the book mentioned in the 14th clause was designed to answer, viz.: of being an account of what the heirs had received in severalty, that, the value being deducted from their proportions on a final division, the intention "to make all equal," expressed as early as 1844, might be carried out.

The black book also contains all the specific appropriations

contained in the propounded part of the red book except two, a wood lot to Mrs. McFarlane, and I think a lot to Mrs. Hibbard, as far as I can make out the description. Besides all these it contains further allotments to most of the heirs, chiefly in the Big Marsh, and it will be recollected that the propounded part of the red book intimates the probability of additional allotments being made, and this is not an unimportant feature in the internal evidence in corroboration of the black book.

In considering the internal evidence, the wording of the residuary clause ought not to be omitted. After directing the residue to be divided into eight equal shares, the testator says: "In which division respect shall be had as well to any apportionment as to any advances made or to be made by me, as hereinbefore provided for," and that each party's share should comprise the land that should have been allotted to him, and should have deducted every advancement and charge which should be made by him for or to the same party as aforesaid.

Having before us the will and the two books, the enquiry necessarily arises, why the testator should have made up the later book? He tells us himself in his preface; but independently of any declaration of his, and drawing our answer to the enquiry solely from the books themselves, read in the light reflected from the will, there seems to be but one rational conclusion, and this is that he designed it to be the final record of his intention as expressed in the 14th clause, by collecting together the elements for the division of his estate, scattered through the other book, with such alterations, omissions, and additions as he saw fit to make after a full and careful revision of his estate and the circumstances of his heirs. His right to make alterations, omissions, and additions is unquestionable—that he might see occasion to do so was far from improbable. And it must be recollected that appropriations of land were not necessarily benefits—they diminished the share of the undivided lands, and their relative value depended on the valuation.

While, however, I see in the internal evidence an immeasurable preponderance in favor of the black book, evidence extrinsic may yet be necessary to give it application, and to lay the foundation of judicial conviction.

From the evidence we learn that the red book had long been known to the family, and had, at some time, been generally accessible, being kept in an open trunk in the testator's house—that little more than a month before his death the testator gave it to Mr. Vernon, his son-in-law, saying, "I want you to take this down to the boys (meaning his sons); tell them this is to be the final division of my estate, as the book will show them"—and that at a still later time the testator asked his son Rufus if he got the book from Vernon, telling him "to keep it, take care of it, you will see by that how I want my property divided."

On this evidence it is that the red book is set up, either as the book referred to in the 14th clause, or as inducing so much uncertainty as to neutralize both.

The history of the black book we receive from Mr. McFarlane. He says he bought and gave it to the testator, and explained to him the difficulties that might arise from the discrepancies and entries in the red book, and desired him to make what entries he intended to make in connection with his will in the black book; and he says (line 1260) that the first time he saw it after he had given it to the testator, he (the testator) said that it was the book kept by him in connection with his will, and that he had made the red book null and void.

Mr. McFarlane further testifies that on the occasion of the execution of the codicil the testator conversed with him respecting his estate and its distribution. Among other things, he says the testator "stated to me that the book—the important book kept by him in connection with his will—was in his red box, where he kept his money; that this book contained his directions respecting the disposition of his property, and that he relied on me to see that his directions as therein given were carefully fulfilled. He said that I would get the keys of this box from Mrs. McFarlane, to whom he had given them, and to take the box into my charge. I then took two keys given me by her and put them into my pocket, one of them being the key of the red box." Mr. McFarlane proceeds to say: "This conversation was the last I ever had with him in reference to his estate. He died the following morning. In the course of the forenoon I took posses-

sion of the red trunk, which I had previously seen, from under the head of his bed on which he slept and died. On opening it I found the black book which I now produce. This is the same book which he had before repeatedly shown me as the book kept by him in connection with his will. The entries and writing therein are entirely those of the deceased; and the book is in the same condition, and the entries therein contained the same, as when received by me."

This evidence of identification is very strong—stronger than any I have met with in any of the cases; for I know of no case in which a testator personally identifies the document to be incorporated, at a time and in a manner, and under circumstances which exclude any conflicting document being subsequently established; for it was his dying act, and that act pointed with the utmost certainty to but one object.

It must be borne in mind that the will, as I understand the law, speaks at the moment of the execution of the codicil; and that contemporaneously therewith the testator indicates where the book was deposited. This, to me, is equivalent to the testator, after repeating the 14th clause, adding: "And the book used by me for the purpose—thus stated in this clause of my will—is there in that money box, and here is the key;" or, as if he had caused the book to be taken from the box, and with his own hand put it into the hand of his executor, using like words.

To overbear or to neutralize such testimony—testimony in which the internal and the extrinsic evidence unite, and both reach the highest degree—there must be opposed something of constraining force, contradictory, and incapable of explanation. Such, I think, is not the character of the opposing evidence.

All that is in the second and third parts of the red book is in the black, with the exceptions I have named, and alterations in a few instances in valuations. The distinction lies in the black book containing more than the other; but it contains nothing more than what is coincident with the will, or is explained in the evidence, or is indicated in the red book itself. The origin of the black book is explained in a satisfactory manner; for it is impossible to examine the red book, with its rough unfinished pencillings and obliterations, not to

see the expediency of a record more regular, clear, and certain.

The black book is itself the evidence that the testator did in fact make one more regular, complete, and certain; and in the very nature of things I do not see how we can give the testator credit for the most ordinary measure of common sense, and yet imagine him to have had any other purpose than that purpose which the book itself evinces. And when the evidence shows that he carefully preserved it in his own possession until death approached, and then directed his executor where to find it—and where he did find it—to say nothing of the testator's dying injunction to see his directions carefully fulfilled, and all this *after* the conversations testified to by Vernon and Rufus, I find it impossible to believe that these conversations establish an intention as regards the books contrary to the conclusion that the evidence otherwise irresistibly establishes, or raise a doubt adequate to neutralize that conclusion.

Mr. Vernon's testimony is that the testator said: "This is to be the final division of my estate as the book will show;" and Mr. Rufus Seaman says that his father's language was, "Keep it; take care of it; you will see by that how I want my property divided"—referring to the red book.

What the book informed his sons principally was that each child and the children of those deceased would have an equal share of his real estate. They knew that to some extent he had anticipated the division by specific appropriations, and the book itself showed that when he wrote it he contemplated further appropriations; but all these, they would understand from the book, were to be subordinate to his leading purpose of equality in the division.

The testator could not have said this of the black book; it was confined to the object to which the 14th clause of the will was directed, and gave no intimation of the proportions in which the heirs were to inherit, and would have given his sons no assurance of the equality he designed; the last part of the red book was rather an abstract of the will, and seems to have been made with a different intent.

With the facts in proof—with the objects expressed in the 14th clause,—for a Court of Justice to interpret what the

testator said to Vernon and Rufus as intimating a strict division according to that book in all respects—as an intimation that he had abandoned all charges for advances, and had, since that book was written, made no further allotments,—would, I think, be to give the evidence a meaning far beyond its reasonable import, and bring it into conflict with a mass of evidence, internal and extrinsic, direct and inferential, of the very strongest character; leading to a conclusion consistent, clear, and incapable of two constructions.

The object for which the red book was sent to the sons may also be gathered from the statement of Mr. Rufus Seaman, that when his father came to his store, "he said he had made a will, in which he considered he had divided his property equally among all his children, all to share alike." And there is evidence bearing more directly on this point in another part of Mr. Rufus Seaman's testimony. Alluding to his conversation with his father in his store, he says he "spoke of the homestead; said he intended it for me; at the same time he referred to the book sent me by Vernon; said, you will see in the adding-up that your share is not equal to the rest, but when this place is added to it it will make it more than equal." He "spoke of the top of the hill as being a desirable place for his son-in-law, Dr. Mitchell, and said he ought to have a building lot there; he then told me that that property was to come to me through Mrs. McFarlane; he said, you have blamed Mrs. McFarlane for interfering with our business, but to show you that you are mistaken, this property will come to you through her." Now before it could come *through* her, she must receive it: and so Rufus understood, for he adds, "I said, perhaps Mr. and Mrs. McFarlane will not be willing to do what they have told you they will." He said, "I have every confidence in Mac and his wife that they will do what they have agreed to do."

Rufus knew that the homestead was not given to Mrs. McFarlane by the red book, and, therefore, that it must be given by some other document—whether will, deed, paper, or book; and he must have learned when his father told him, referring to the red book, that he would see by that how he wanted his property divided, that he had not intended to exclude other allotments besides those comprised in the red

book; because here was a property, which some of the witnesses value at £4000, not comprised in the propounded red book, and yet separated by individual appropriation from the residue of the estate, as his father's conversation clearly intimated to him.

This leads me to recur to the contents of the black book for the purpose of considering the two last pages, which I have hitherto abstained from doing. They are important from the value of the subjects treated, and from the influence they probably exercise in the controversy. By the first of these the testator says:—

"In addition to the lands I have set apart to my daughters Ann and Sarah, I further allot to them, jointly, and to be equally divided between them, all that part of my Minudie estate at present occupied by myself, etc., (describing it), with the wharves and buildings thereon, at a value of £1200. —Done at Minudie this twelfth day of August, one thousand eight hundred and sixty-two.—AMOS SEAMAN"

Knowing, as we do, from the evidence, that from an early period the testator intended the homestead for his son Rufus, this appropriation would seem most unaccountable, except for the explanation given to him by the testator. It is to be regretted that no elucidation is afforded by the evidence of the reason of this arrangement, and of the time and mode in which it was to be ultimately concluded; nor any explanation of the cause of introducing Mrs. Mitchell into the bequest, which seems in some degree incongruous with the object stated by the testator. Yet I cannot but perceive that the correspondence, as far as it goes, between the statement of the testator on this point and this appropriation, affords fresh and strong corroboration of the authority of the black book as being that by which the testator intended the division of his estate to be controlled under the 14th clause of his will.

I cannot pass from this point without saying that it is to be hoped that if this appropriation was made by the testator, under any agreement that the homestead should be transferred to Rufus, as appears to have been the case from the testator's language, and from Mr. McFarlane having since his death said the homestead was to belong to Rufus, no un-

necessary delay may occur in executing the trust which such an arrangement raises, and which this Court has power to enforce, and thereby remove an occasion of dissatisfaction that may tend to retard the settlement of the estate.

The last entry in the black book recites that the testator considered himself to have been deceived in the value of stock in a gas company, in some bargain in which Mr. Hibbard was concerned, and in consequence he directs $4000 to be charged to his daughter Jane (Mrs. Hibbard), and deducted from her share. This entry is dated Dec. 1st, 1862. There is evidence that the testator made this complaint in his lifetime, and stated his intention to make the charge against Mrs. Hibbard's share. This entry in the black book furnishes, therefore, no evidence against its authority, but rather tends to confirm it. Indeed, when the testator, in August, 1862, and again in Dec., 1862, made in this black book these two charges, which from the testimony of Rufus as to one, and the testimony of many witnesses as to the other, we know he designed should operate on the settlement of his estate, the inference is very strong; nay, it is more than inference—it is a fact, that he, after the red book had been finished, used the black book for purposes expressed in the 14th clause, and so used it after he had entered in it the other entries it contained, thus giving a character to the whole.

Mr. McCully urged the superior claim of the red book, because it was the earlier, and ingeniously argued that being the first it became first incorporated with the will, and could not be revoked by an unattested instrument; but he failed to perceive that his argument on another branch of his case defeated this: he had said, and truly, that an unattested instrument made *after* the will had no testamentary force. When the black book was written, both books were alike inoperative; it was the republication in September, 1864, that gave vitality to the "book used by the testator for the purpose" of the 14th clause, and that was the black book, if the testator had before that time substituted it for the red book. The giving the red book to persons, none of whom were at the time executors, and retaining the black book in his own possession until given at the latest moment to his executor, are facts of

significance; and, finally, the fact that the recognition and identification by the testator of the black book were *after* his conversations with Vernon and Rufus, would determine the question, though the bearing and effect of these conversations were more weighty than I have taken them to be.

On the subject of the incorporation of unattested papers many cases were cited on both sides, into which, as indeed into every case cited for any purpose, I have carefully looked; but the question having been fully considered in later cases in which those previous have been fully examined, I deem it unnecessary to refer, except in the briefest manner, to the earlier decisions.

Smart v. *Prujean*, 6 Ves. 560, is a leading case, and one of the earliest. There the Chancellor laid down that an instrument properly attested, in order to incorporate an instrument not attested, must describe it so as to be a manifestation of what the paper is that is meant to be incorporated, in such a way that the Court can be under no mistake. It was, however, unnecessary to resort to the rule there, because there was another decisive point. The will stated that the unattested paper would be left with a certain person, which it had not been, and the Chancellor was not satisfied the testator meant it to have effect unless so left. What was meant by impossibility of mistake succeeding cases show, and, as we might expect, the expression is taken in a reasonable, not an unlimited sense.

In *Wilkinson* v. *Adam*, 1 Ves. & Beames, 422, the will desired that the observations and directions the testator should leave for the better improvement of his estate, etc., in a book, should be observed; and the Court held that the book which contained those directions could not be used for a different purpose, viz.: to prove his recognition of illegitimate children.

In *Croker* v. *Hertford*, 4 Moore's P. C. C. 364, by a codicil the testator ratified his "said will and codicils," held not to bring in an unattested paper, in which he gave legacies: first, because in strict language it was not a codicil; and, secondly, because there was no identification of that particular paper.

DeZichy Ferraris v. *Croker et al*, 3 Curteis, 499, was nearly the same case, having the same result.

Dillon v. *Harris*, 4 Bligh's P. C. C. N. S. 322, is very like

Smart v. *Prujean*, and decided on the same points. First, the will said the testator had put the unattested paper into the hands of his executors, and they swore they had never received it; secondly, no explanation was given of the custody out of which the paper offered for proof came, and nothing to connect it with the paper mentioned in the will. The Court say (p. 364): "There was a want of identification, there was no evidence to show that the engagement produced was the engagement referred to in the will, and rather there was evidence the other way, because the executors to whom the testator said he had given it denied having ever received it."

Utterton v. *Robbins*, 1 A. & E. 423. Here the testator, by several unattested memoranda, left a certain house to his daughter which had been purchased since his will. He afterwards made a codicil, duly attested, giving all his lands purchased since his will to trustees for the uses expressed in his will concerning the residue. Held, that the house passed to the trustees.

In the argument, Lord Denman put this case (p. 431):—Suppose a man having made a devise of real property, not attested, went into a distant country, and there signed a paper duly attested stating that his will was in a particular place (mentioning it), would not the will in that case pass the property?

Dickinson v. *Stidolph*, 11 C. B. N. S. 341, was another case cited. The testator, by an attested instrument, revoked all former wills, except two memoranda, dated 10th May, 1819, which were to remain in force with her will. Only one was found and that was upheld. The Court said (p. 356): "She refers to two memoranda. The context shows that she refers to a testamentary paper, for they are to remain in force with her will; and, as no other testamentary paper of that date has been found, we consider this to be sufficiently identified as one of those to which she refers. It is signed by her, it has the specified date, and it constitutes the disposition of her residuary estate which is wanting in the will." In giving judgment in this case, the Court recognized the rule in *Smart* v. *Prujean*, and said the unattested paper must be referred to in the will in such a manner as shall, with the assistance of

parol evidence, when necessary and properly admissible, leave no doubt of its identity.

Now in that case there was no reference beyond the date, and there was but one instead of two papers, as referred to; but a paper answering that date was upheld.

Here the reference is to a book used for a special purpose, as in *Wilkinson* v. *Adam*, and the book produced most perfectly corresponds; while the proof of identity in the present case is more direct and certain than in that.

The case of the *Goods of Graves*, 1 Swabey & Tristran, 250, has a strong bearing on the nature of the requisite evidence. There the testator made his will, dated April 22, 185C, and gave to Sarah Florence "some household furniture, to be delivered to her in one week after my decease, which she has got a list of, if she lives with me at the time of my death."

When the will was executed, the list referred to was not produced. Sarah Florence deposed that the testator, about the year 1852, upon making a former will, stated to her, she being his housekeeper, that it was his intention to leave her some portion of his furniture, and that thereupon he handed her a list of such furniture which he desired her to keep, (the list was in his handwriting, and began: "List of goods that I give to my godson Edward Florence," and ended thus, "My violin and clarionets,") that when he executed his said will in April, 1856, he again requested her to keep the said list, which she had then in her possession, and that she did so until his death, and that the deceased never gave her any other list; and she believed the same to be the one referred to in the will, and intended to be a bequest to her. The John Edward Florence mentioned in the list was an illegitimate son of the deceased by Sarah Florence.

Sir C. Cresswell.—"The list purports to be a list of certain property intended by the testator for another person, and it does not correspond with the one mentioned in the will. If I granted the motion, I should be extending the principle laid down in *Allen* v. *Maddock*, which I am not inclined to do, although I entirely concur in that decision."

From this case we see the nature of the testimony received in such cases. The person to be benefitted was the witness

to declarations of the testator in her own favor, and on this evidence the paper undoubtedly would have been received to proof had it corresponded with the object of the bequest; and we may infer from the significant reference to the fact that the list was not produced when the will was executed, that had that been the case, it would have been received, although discrepant in its terms. It is on the individual identification I rely in the case before us.

In *Van Straubenzee* v. *Monck*, Law Digest, part 2nd, vol. 4, N. S., 1862-3, the attested paper made no mention of, or reference to any paper as existing; by inference only could it be judged a paper existed; and the proof of identity was defective, because the envelope had been opened and there was no proof that the papers found were the same as those first enclosed. The circumstances were:—M. duly executed the following document: "It is my wish for my dear husband to administer to the moneys; the smaller bequests L. will be so kind as to attend to." She then, in the presence of the attesting witnesses, enclosed in it two papers with writing thereon, folded it up and sealed it. After her death the envelope was found to contain two sheets of paper, containing bequests of money and other bequests, in the handwriting of deceased, but unexecuted. When found, it appeared that the envelope had been opened and resealed, and there was no evidence that the papers found in it were those originally enclosed or that they were in existence when the envelope was executed. No other testamentary papers were found. Held, that the duly executed paper did not refer to any written document as then existing; and, if it did so, that the document was not pointed out in such manner as to enable the Court to ascertain its identity, and, therefore, that the three papers were not entitled to probate. (32 L. J., 21 Prob. & Matr., 8 J. N. S., 1159; 7 L. T. R. N. S. 723.)

Digest to Weekly Reporter, from Mich. 1863 to Trin. 1864, Probate Digest. 3, *Goods of Alnutt*, viz.: A codicil referred to and confirmed a first codicil. No evidence that a previous codicil had been executed; but a draft codicil was found among the testator's papers, which the solicitor proved he prepared and supposed had been executed when he wrote the codicil that was executed. Probate refused of the draft

codicil, as it was not sufficiently identified as the paper referred to by the testator.

There was no evidence to connect the draft codicil with the testator, or to show that when he spoke in his will of a first codicil he meant the draft, except being found with the papers—a circumstance which has been held not sufficient.

The Goods of the Countess of Durham, 3 Curteis 57. The will referred to a revoked will of her late husband. Probate was granted of the two.

The Goods of T. Dickins, 3 Curteis, 60. The will referred to a deed of settlement, and probate was granted of both.

Allen v. *Maddock*, 11 Moore's P. C. C. 427. The decision in this case is very elaborate, and exhausts the subject. It is referred to in a later case, with approval. *The Goods of Graves*, 1 Swabey & Trist. 250. The will was not attested according to law. By a paper sufficiently attested, and expressed as follows, "This is a codicil to my last will and testament," the testatrix gave several legacies, but made no other reference to her having made a will. Held that parol evidence was admissible, and a will found in a trunk was on the evidence admitted to probate.

By the will, dated 1st Dec., 1851, the testatrix had appointed the Rev. —— Wood and Sir Thos. H. Maddock her executors. There was only one witness. The codicil was dated 13th Sept., 1856, and by it she gave several legacies, and among others to her servant, Eliza Baker, who was a prominent witness, and proved that the testatrix had expressed her intention to make a will, and appoint Sir Thomas her executor: that she saw her writing it, and that afterwards the deceased told her she had made her will and appointed him executor, and had deposited the will in a chest in her room; that the chest alluded to was kept in the room of deceased until shortly before her death, when it was moved to witness's room; and she further deposed to the finding the will in that chest, and the codicil in the drawers in deceased's room, and that she knew of no other will except one destroyed long before. Proof was given of search, and no other will or codicil was found. The surgeon who took her instructions for the codicil, and who was an attesting witness, deposed that the deceased, in answer to his question who was her executor, answered

Sir Thomas H. Maddock, and that he deposited the codicil in the drawer where it was found. Another witness testified that after the codicil was signed, the testatrix was asked where the will was, and that she replied, "that is in safe keeping." Sir J. Dodson, by his judgment, held that though the will was not executed according to the Statute, he was satisfied from the evidence, and the place where the will and codicil were found, that the instrument of 1851 was the will which the testatrix referred to in the codicil, and he decreed probate of the two papers, as together containing the will of the testatrix. This decision was appealed from and affirmed.

It is to be noticed that here there was no reference in the codicil to a will further than the words "this is a codicil to my last will" imported the existence of a will.

In the present case there is distinct reference to a book used for the purpose expressed in the clause.

There the statement of testatrix that the will was deposited in a chest was long before the making of the codicil; at the latter time she was no more precise than to say "it is in safe keeping."

Here the information where the book was deposited and the means of procuring it were furnished just before the testator's death, and when no alteration could take place in any of the circumstances.

In both cases there is the evidence of declarations of the testator and testatrix. This case, which was decided evidently on great consideration and has been approved of in a later case, seems to me strongly in point.

In this case, as in some others, stress is laid upon the fact that no other document of like nature could on search be found.

I think that this fact only bears on cases when the evidence of identification is not perfect and complete—when it leaves room for the existence of some other paper. If the testatrix in that case, when asked where her will was, had said, at a time when so near her death as to leave no space for alteration in the circumstances, "My will is in that trunk," it appears to me there could have existed no necessity for search for other papers, and there would be less reason in the case of a book or paper referred to than of a

will. The Court on this point, in that case, said that "it must always be proved or assumed that there is no later will revoking the one set up. This fact is one which is in truth a necessary foundation of the establishment of every testamentary paper." And again: "If we are to read the codicil with the knowledge of what the testatrix knew, namely, that she had this testamentary paper and no other, can it be doubted that this is the paper referred to?"

In the case before the Court, the direction of the testator leaves no room to doubt that the book in his cash box was the book that the 14th clause referred to.

I have reviewed all the cases cited, and, in view of the facts and evidence in this case, I possess no power over my own mind adequate to prevent these facts and that evidence from producing the conviction that the black book was that which the testator intended to be the book that was to give effect to his desire, expressed in the 14th clause of his will: and this opinion which I thus am constrained to entertain as an individual, the legal authorities, I think, require me to maintain judicially. I have gone through the several cases in which the unattested paper has been disallowed, and have asked myself what the decisions would have been had the testators in these cases identified the papers in the manner the testator did in this case; and I cannot but believe, from the tenor of all the cases, especially the later ones, that such evidence would have been held sufficient to establish the papers.

My opinion, therefore, is that the book No. 12, distinguished as the *black* book, is the book referred to in the 14th clause of the testator's will, as it spoke on the 13th Sept., 1864, when republished by the codicil.

The next question arises under the 15th clause. (His lordship here read this clause.)

Under this clause is propounded a paper marked No 13, signed by the testator, and containing allotments of land to his several heirs, all of which at the like valuations are contained in the black book, except one lot to Mrs. Sarah Mitchell, which, from the description, I presume to be part of the homestead given by the black book to Mrs. McFarlane and her jointly.

In this paper the testator says that he allots to his several children and their heirs, in accordance with the clause in his will, for the purpose of defining certain portions of his Minudie estate, which it is his desire shall form part of the portion or share they shall inherit under his will, with the estimated value thereof.

Mr. McFarlane deposes that this paper was prepared by him at the testator's request, who returned it to him signed, and with the valuations filled in, and told him to keep it with his will, which he did until produced with the will after testator's death.

This was a paper existing when the testator republished his will. It answers the objects and terms of the 15th clause; and I think that, although the evidence of identification is not so direct as in the case of the book, it is sufficient; and I am, therefore, of opinion that this paper is the paper referred to in the 15th clause of the will when it was republished.

Under this clause there are also propounded three deeds, made by the testator in 1854, of lots on the Joggin road, which have been already noticed. These lots and their valuations are enumerated in No. 13. Also six deeds made by the testator in January, 1864, expressed to be for valuable consideration.

As deeds, I think there is not sufficient evidence to support them as executed deeds or as escrows: I think they would fall under the case of deeds imperfectly executed, which Chancery will not establish.

But I am of opinion that there is evidence to identify them as deeds referred to in the 15th clause, and therefore sufficient to give them the character of testamentary papers.

The next question relates to the codicil of 1862.

It is necessary to bear in mind that the powers conferred by the Act alluded to are limited, and that many questions affecting parties having interests under the testator's will may require the ordinary modes of procedure for their adjudication; and that any judgment we give may reach no further than to protect the executors in acting under it. Of this nature are some of the matters that have been brought before us. Respecting some others there may be much room for doubt.

The recent Act of our legislature under which these proceedings are conducted, copied from a very modern English Act of Parliament, is calculated to be very useful in facilitating the settlement of properties in trust, and in relieving from undue responsibility the trustees. To carry its operation beyond the intention of the legislature, and to make its proceedings in all cases of questions of trust-interests the substitute for a suit, would be injurious to the systematic administration of the law, and dangerous to the rights of parties, by removing the protection afforded by the forms that attend the prosecution of a suit between parties.

The codicil asserted by one of the executors and contested by the other, dated 22nd October, 1862, is a subject which I think is not within our present inquiries. Supposing it to be within the intention of the Act, which I greatly question, the inquiry, as regards its operation and effect, is, I think, premature, until the claims against which this instrument professes to be directed shall be asserted in distinct form: and the same reason applies to the objection urged against the validity of its execution.

There is, besides, a more fundamental objection against this latter inquiry. I conceive that inquiry belongs to the Probate Court alone (as I suggested to the counsel at the argument), and can only come before the Supreme Court in its appellate jurisdiction. That this is so, appears clearly from the case of *Barnes* v. *Vincent*, 5 Moore's P. C. C. 201 (1846), which was an appeal from a decree of the Prerogative Court of Canterbury rejecting the allegation and refusing probate of a will of a married woman made under a power, because the requisitions of the power regarding the execution had not been complied with. This was reversed by the Privy Council, on the ground that it belonged to the Court of Equity to determine whether the power had been properly followed, and rejection of probate precluded the party from having the opinion of that Court, "because, if probate be refused, the Courts of Equity can never know anything of the will at all." And again, the learned judge (Lord Brougham) says: "On both sides of Westminster Hall, when a power is to be executed by a last will, probate of the instrument must be obtained before any Court can look at it or

know of its existence:" and he cited *Ross* v. *Ewer*, 3 Atk. 160; *Jenkin* v. *Whitehouse*, 1 Burr. 431.

The cause was sent back, with directions to admit the allegation and take evidence to prove the will, taking into no consideration whatever the execution of the power.

In *Ross* v. *Ewer*, Lord Hardwicke said: "Where a *femme covert* has a separate power over her estate and may dispose of it by will, whatever sort of writing she leaves, it ought to be first propounded as a will in the spiritual Court," and in *Jenkin* v. *Whitehouse*, Lord Mansfield fully recognized the rule.

Sir Herbert Jenner, in *Griffin* v. *Ferard*, 1 Curt. 109 (1835), felt his responsibility in refusing probate (because he thought the paper to be not dispositive) to be enhanced from the same cause, as "thereby, so far as this Court is concerned, precluding the parties from resorting to another Court, for the purpose of obtaining its opinion on the construction of the paper."

I have, however, investigated the cases cited, and, if it can serve any useful purpose, I am ready to give my opinion on the two points raised, viz: Whether it is testamentary in character; whether the penalty it imposes is absolute or *in terrorem.*

On the question raised on the 11th clause of the will respecting the shore quarry frontage, I do not propose to give an opinion. It is unnecessary to do so, as my learned Brethren are agreed on the point, and the contention arises on the frame of the will, on which I would rather avoid giving an opinion, unless absolutely required to do so. The question, however, is of so much practical interest that I desire to hold my opinion free in cases of similar character that may hereafter arise; and I may, therefore, be excused if I offer a few suggestions on the subject as it has presented itself to my mind.

The leading cases for a restricted construction depend on the locality of the devise or grant.

A devise of land in the county of Limerick was held not to convey land in the county of Clare.

My estate of Tedworth, in Hants, did not mean that part

of the estate also which lay out of that county. *Webber* v. *Stanley*, 12 Weekly Reporter, 831.

My estate at Ashton—for so the Court read my estate of Ashton—on which there are probably many compelled to bow to the authority of the decision who may be unable to appreciate its reason; yet, so read, the case turned on the locality of the devise. *Doe d. Oxenden* v. *Chichester*, 4 Dow's Reports (House of Lords), 65.

Here the question turns on the word "between." Is its ordinary sense capable in any case of extension to meet an obvious intention? A very different question from one arising on a restricted locality.

My doubts in this case are principally raised by the case of *Pugh* v. *The Duke of Leeds*, Cowp. 714. The opinion of Lord Mansfield in that case is a worthy study. We see a great mind, fretted by the entanglements of technicalities, breaking and casting aside the meshes that would control his reason, with an expression of scornful indignation not often found in the sober language of Judges, and a force of eloquence and argument not easy to resist. He there decided that the obvious intention must prevail, and held that "from the day of the date" was to be construed inclusive or exclusive, according to the intention.

This reasoning was approved in *The King* v. *Gamlingay*, 3 T. R. 513, where, in an indictment, the words "towards and unto" were held exclusive; but there Ashhurst J. says: "The case of *Pugh* v. *The Duke of Leeds* was properly decided: but that turned on the construction of a contract between two persons where their intention was to be considered. But greater certainty is required in indictments."

This will apply to wills. Buller J., in *Doe* v. *Collins*, 2 T. R. 503, says: "In construing wills we do not look at technical words so much as the testator's intention, which can only be collected from the whole will."

American text writers have given the word "between" an always limited meaning, while they have allowed "to, from, and by" to be subject to the control of necessary implication. They do not explain the reason of the difference.

Lord Mansfield having emancipated the law from the tyranny of one preposition, I hesitate to assist in rivetting

the fetters in any similar case, for I cannot see why the whole tribe should not be subjected to the wholesome discipline that that very able Judge administered to one of them.

I have carefully examined and made notes of all the numerous cases cited on this branch, and several not cited, and there are many that support this view. But I do not profess to go through them, nor to express an absolute opinion whether or not the word "between" may be extended to meet an obvious intent, because it is not necessary that I should do so.

If, however, it can be so extended, then the rule to be applied is acknowledged. It is found in *Wigram*, whose learned work is the subject of high eulogium by the Judge who delivered the opinion of the Court in *Allen* v. *Maddock*; and that learned Judge declared the rule in these terms (p. 440): "In construing his will, the Court is entitled and is bound to place itself in the situation of the testator with respect to his property, the objects of his bounty, and every other circumstance material to the construction of his will, and for this purpose to receive, if occasion requires it, parol evidence of those circumstances, and to expound his meaning with reference to them."

On the subject of the *intention*, as ascertained from the words of the will as read in the light of the surrounding circumstances, there seems little room for difference of opinion. The preamble of the clause explains the intention to be directed to the valuable quarries, and the various regulations touching management and distribution that follow clearly indicate the same thing. The evidence shows that the valuable quarries are in the coves, and that all that lie between, in the restricted sense, are of insignificance. On this point the language of the testator in the red book has a strong bearing. After giving one-eighth of the big marsh to each heir, he says: "Also to have one-eighth part of all undivided land that may not by me be set off during my lifetime, together with full shares of all rents that may be collected from these lands and Joggin quarries, etc., which, in time, under good management, may be good value to each for £2,750."

By the will no lands were to be the subject of rent for the benefit of the heirs except the Joggin quarries, and the sum

the testator has set down for each eighth is too large, unless he had contemplated the valuable quarries to be included.

He could not have embraced, in the description in the eleventh clause, the whole frontage in general terms; for in the arrangement of his property he seems, according to the papers in evidence, to have designed Downie's Cove for present distribution.

The question whether Rufus Seaman is trustee as respects the school lands jointly with Mr. McFarlane, I think, must be answered in the negative. I do not think that his appointment as executor in the codicil confers on him a special trust of that nature.

I do not think the several and different trusts under the 17th clause are necessarily inseparable.

Under the 23rd clause, I think the advances to be charged against the shares of the children of Amos and James can only be ascertained in the same way as in the case of the other heirs, and directed in the 14th and 15th clauses.

Thus, I believe I have answered, either directly or by necessary inference, all the questions propounded in the petitions.

I have given to this case the best consideration of which I am capable, and which the interesting nature of the question and the value of the property demanded. If I have erred in the conclusions I have arrived at—and I ought to think it probable that I have done so—I am relieved from the anxiety that must always weigh on the mind of a Judge, who appreciates the infirmities of his own judgment and the deficiencies of his own knowledge, when his opinion is to bind large interests. In this case, if my conclusions are erroneous, I have the satisfaction to know they are innoxious, as I believe they have not met the concurrence of my learned colleagues, and will not, therefore, enter into the instructions to be given to the executors on their petitions.

DESBARRES, J. This very important case, in which the learned Judge in Equity has just delivered an elaborate opinion, I have not failed carefully to consider, and I have examined the authorities which were cited at the argument, and others which a research conducted together with my Brother

Wilkins has discovered. With him I have more constantly conferred than the many engagements of the learned Judge in Equity have enabled me to do with him, as I could have desired. With that learned Judge my Brother Wilkins and I, unfortunately, are unable to concur in some of the conclusions at which he has arrived; and there are some points, indeed, in which my views are not entirely coincident with those of my Brother Wilkins. But, in his conclusions as to the necessity of rejecting all entries in the red book made subsequent to the execution of the will, the black book, and paper marked No. 13: as to the construction of section 11 of the will in relation to the quarries: as to the effect of the first codicil of October, 1862: and, as to the question submitted relative to the trusteeship of Rufus Seaman, I concur; and, without having written an opinion, I content myself with referring to the elaborate one prepared by my Brother Wilkins, which I have read, and of which I generally approve.

WILKINS, J. As to the first point of inquiry, "*Whether any and what consideration is to be given to certain books, documents, and verbal declarations of testator?*" (The learned Judge here read the 14th and 15th clauses of the will.)

I did not, at the argument, understand the writing No. 13, to be much, if at all, insisted on; but I shall, nevertheless, consider its claim to be regarded as incorporated in the will.

All of the documents propounded (the red book, the black book, and writing No. 13) being unattested according to the requirements of the Wills Act, neither can be regarded as a part of the will, unless its incorporation can be established by evidence that will bring it within the rule enunciated by Lord Eldon, in *Smart* v. *Prujean*, 6 Ves. 565, which has often been recognized as the only safe rule. It is as follows: "An instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated, in such a way, that the Court can be under no mistake."

This Court is, when adjudicating in the matter of this en-

quiry, in a certain sense a Court of construction and must, looking at the circumstances which surrounded the testator at the execution of his will, if necessary to do so, compare with his language in these sections every document offered in evidence claiming to be the extrinsic "book" or "writing under the hand of the testator" referred to therein; and, in order to this, the intrinsic evidence of such document must be carefully considered so far, *and so far only*, as may be necessary to decide "*whether it is identical with the document to which the will refers.*" I will not enquire particularly whether, where as here, more than one document is presented in evidence which may possibly be the extrinsic document referred to, the Court can decide between them. The language of Lord Kingsdown in *Allen* v. *Maddock*, 11 Moore's P. C. C. 454, referring, as it does, to a decision of Lord Lyndhurst in *Hodges* v. *Horsfall*, 1 Russ. & Mylne, 116, where one of such documents was received, and which decision Lord Kingsdown says has been criticised for that reason, and because opposed to the expressed opinions of Parke, J., and Littledale J., in *Shortrede* v. *Cheek*, 1 Ad. & Ell. 60, who thought such evidence inadmissible—cannot but occasion very grave doubts as to the propriety of admitting it. A Judge called on to decide the point referred to might well say, in such a case as that before us, "I stand on delicate ground—the question is *res integra*. I am unwilling to go beyond the authority of decided cases." Assume, however, that such an admission of testimony is not open to objection—also, that the *prospective* powers reserved by this testator in sections 14 and 15, were legally reserved, and further, that the *comparative* force of the rival claims of these documents may be determined by evidence of *declarations of the testator respecting them made since the execution of the will.* These are the words of the Right Hon. T. Pemberton Leigh in *Allen* v. *Maddock*, (the character of which case, by the way, he thus described), p. 454:—"The thing referred to (a codicil) is a writing (a written will); it is in its nature a single instrument; *and only one document* is found to answer the description." "It is necessary also to remember the distinction beween the admissibility of evidence to prove a testa-

mentary paper, and of evidence to explain its meaning, that direct evidence of intention, *declarations of the testator by word or in writing*, and other testimony of a similar character are admissible, when the will is disputed, but that no such evidence can be received in order to explain the expressions which he has used." (p. 440.).

Still, conceding for the present all that is thus assumed, I find, referring to the evidence, that it would be utterly impossible to pronounce on the identity of either document as manifestly that by which the testator, at the moment of his death, designed to give *effect* to section 15, except to a very limited extent that I shall explain hereafter. To adopt the language of Lord Eldon, in *Smart* v. *Prujean*, "I may conjecture, but the fact is not so manifest that there can be no doubt or difficulty." Neither could be recognized without nicely balancing evidence, even supposing that evidence legal in its character. On that point, however, grave doubt arises. The testimony of either McFarlane, Rufus Seaman, or Vernon is open to the objection "that it violates the spirit of the Wills Act." Can the black book, or No. 13, be set up by McFarlane, or the red book by Seaman or Vernon, without such a result? The first is supporting a devise to his own wife. The two last are endeavoring, Seaman to maintain a devise to himself; Vernon, a devise to his wife. Thus each practically makes himself a subscribing witness, for *himself*, as well as for others, and *without incurring the forfeiture which the legislature requires in order to making him competent.*

But, I overlook, for the present, this objection also, and proceed to enquire whether this testimony, in connection with the documents to which it refers, substantiates "beyond doubt or difficulty" the identity of book or writing with the extraneous document that is mentioned in the 15th section.

It will be perceived, presently, that I consider the question, as to the effect of the evidence, to be presented under very different circumstances, relatively to *section* 14. The books and the writing No. 13 alike profess to describe the allotments mentioned in section 15, and every one of these is "a writing signed by the testator." A *book* is not mentioned in section 15, in which the comprehensive term

"*any writing*" is used. Both the books indicate advances as referred to in section 14.

On the point of mere intention we may, perhaps, notice that the testator did, in fact, under the reserved prospective power, at different times after the execution of his will, adopt a different writing. McFarlane, who says, "After the execution of the last will the deceased again showed me this red book with the entries made therein in connection with that will," and who afterwards heard testator say, referring to the *black* book, that, adopting it, he had made void the *red* book—says further, (and note this was after the execution of the codicil) the testator said to me "that the black book —the important book—kept by him in connection with his will was in his red box, where it was found." McFarlane says further, "This (the black book) is the same book which testator had before repeatedly shown me as the book kept by him in connection with his will." *When* last previously the testator had so stated we are not informed, though it were desirable to know, since within a very few weeks before testator's death he is proved to have spoken of the red book as *the* book connected with his will. Rufus Seaman tells us (and the time, according to him and Vernon, could not have been more than a month before the testator's death) that at his last conversation with his father, the testator, expressly referring to the red book, said "You will see by that how I want my property divided." Rufus adds, "My father referred to that book sent me by Vernon, and said, 'You will see in the adding up that your share is not equal to the rest: but when this place (the homestead) is added to it it will make it more than equal.'" Vernon, when he carried the red book to Rufus, was told by the testator to take it down to the boys and tell them "*It is to be the final division of my estate as the book will show them.*" The red book is identified by Vernon. Thus, though it seems the testator told McFarlane long before this that he had made the red book void, yet the testator, so far from destroying the red book, sent it thus formally a few weeks before his death to his son, (who is now one of his executors), as and for the book that was to show how the testator's property was to be disposed of. As such, that son and executor, who retained it, produced it

after his father's death. In the interval between the declaration made by testator to Vernon and Rufus respecting the adoption of the red book, and that last made to McFarlane regarding his recognition of the black book, we have no evidence respecting either book. If the circumstance of the black book being found in the trunk can have any weight in raising a presumption in its favor, that presumption would have to encounter the declarations in favor of the red book, and the fact of its co-existence (uncancelled) with the black book.

At the moment of testator's death, when one of the executors possessed and relied on the black book, the other executor possessed and was relying on the red book. The existence of the red book in testator's possession in 1861, and anterior to the existence of the black book, and of the writing No. 13, is clearly proved. Such is the difficulty as regards the books; but No. 13 claims to be incorporated in section 15. It furnishes no internal evidence of being connected with the 14th section, as it has no reference to charges or advances. It is, however, "a writing signed by the testator," and it is headed in accordance with the 15th section of the will. It is without date, but it is proved *that the red book long pre-existed it.* McFarlane says that he prepared it in the year 1862, and that, *after the execution of the will,* it was sent or delivered to him, signed by the testator, to be laid away, as it was, with the will. Red book and black book are each also "a writing signed by the testator." No. 13 allots and fixes valuations; so does also each of the books. Being signed after the execution of the will, No. 13, like the black book, is, of course, founded on the reserved *prospective* power. It would seem to follow that if used according to law originally it could be abandoned, and a subsequent writing adopted by the testator. That he did adopt another is incontestable. We cannot, therefore, believe that he relied on No. 13, at the time of his death. That document is silent on the subject of advances; but the testator has made an indication by him of *advances* an essential and indispensable part of his plan embodied in the two sections. The provisions of section 15 must necessarily fail if those of 14 cannot be effectuated. The converse does not follow, for 14 can stand without 15.

A construction of these sections involves a necessity for considering the effect of the deeds in evidence. That question presents a double aspect; first, as regards the deeds in the abstract; secondly, as regards them in connection with the intended disposition of the estates as referred to in the sections. Under the first the question simply is, "Were the deeds completely executed?" There are three in one class, six in the other. The latter have all *monied* considerations expressed, the former are stated to be for *love and affection.* They bear date, the six on the 14th January, 1864, the three on the 25th March, 1854. The only evidence respecting the execution of the latter is given by McFarlane, who says, "These were handed me by the deceased some three or four years ago. He said I was to retain the deeds as escrows, and deliver them to the parties or those who might represent them after his death, should he not deliver them before." He adds, "They are in the handwriting of William, deceased, who is a witness thereto. They have never been actually delivered to or accepted by the grantees, but I have registered them since testator's death." The deeds in the second class, being dated subsequently to the execution of the will, and being to children and grandchildren of the testator, were prepared by McFarlane in the year 1863 or 1864 from a paper written by the testator. After they had been executed in the presence of one Charman—a subscribing witness thereto—under circumstances to be stated—they were retained by the testator. After his death they were received by McFarlane, at the hands of Emma Seaman, the testator having, a short time before his death, addressed to McFarlane these words "Those deeds you wrote of the new diked marsh you will get from Emma Seaman; those I wish you to take for delivery to the parties when I am gone." Charman says, "I was called on by the testator to witness some deeds between December, 1863, and January, 1864. Mr. Seaman, at his house, said he had some deeds to witness. He, the testator, signed them one after another, and desired me to set down my name as a witness, which I did. He said, '*Perhaps you may be called on some time to prove these deeds, and perhaps not.*' He retained the deeds, and I came away." McFarlane gives this further testimony concerning them. "Some short

time after I prepared the deeds, the testator, at Minudie, showed them to me executed, and subscribed by Charman. Testator said he had executed them, and that they were as escrows to take effect after his death, unless he himself delivered them before to the parties." This was, as has been shown, anterior to the last declaration made by the testator respecting these deeds.

The deeds of 1864 are materially distinguished as to their operation from those of 1854, in this respect, that the former, for reasons which will be explained, are unconnected with the will, whilst the latter are essentially a part of it. The following appear to be the legal principles which govern the question as respects the former. The authorities show that a deed may be, in the absence or without the knowledge or consent of the grantee, absolutely executed, so as to convey the estate to him; and the grantor may, without affecting the validity of the execution, retain the document. The grantee thus invested with a title without his concurrence can, of course, however, disclaim it, if he pleases, by deed under seal. But the authorities also show that to make the deed operate, either absolutely or as an escrow, on the performance of a condition imposed, there must be a complete execution by the grantor. The grantor may completely execute a deed, and deliver it to a third person, with directions not to hand it to the grantee until after the grantor's death. In one of the cases stated below, it will be seen, however, that Coleridge J. expressed himself doubtful if the deed had been delivered *on condition that the grantee should not have it till the grantor's death*, whether it could operate as an escrow. *Doe d. Garnons* v. *Knight*, 5 B. & C. 671; *Doe d. Lloyd* v. *Bennett*, 8 C. & P. 124; *Graham* v. *Graham*, 1 Ves. 275; *Cecil* v. *Butcher*, 2 Jac. & W. 565. The power of a Court of Equity to relieve, in cases of execution of deeds, according to good conscience and the real intentions of the parties, sufficiently appears from the cases noticed by the Master of the Rolls in the above case of *Cecil* v. *Butcher*.

Now, applying these principles, I consider the words of the grantor addressed to Charman, at the time of his subscription, namely, "*perhaps you may be called on to prove these deeds and perhaps not*," decisive in connection with grantor's

retention of the deeds, to show that the execution by the grantor was not *then* complete, and that he had not absolutely divested himself of his title to the estate mentioned in the deeds. These were retained by the grantor, and continued in his possession until his death. The directions respecting them, which the testator gave to McFarlane on the evening before the day of his death, appear to me clearly of a testamentary nature in reference to the intended operation of these deeds; but they cannot, in my opinion, have a testamentary effect, because they are unconnected with the will, either by direct reference, or through the medium of any extraneous document in effect incorporated with the will. My reasons for this opinion, and my view of the operation of the deeds of 1854, will appear from the result of my reasonings respecting a principle which, in my opinion, prevents either of the extrinsic documents in evidence being received as incorporated in the will *as respects any act done, or writing signed by the testator, subsequently to the execution of his will.* It will be seen that I regard section 14 as made to speak effectually *in regard to advances or charges in personal or real estate*, by means of the red book, so far as such advances or charges are expressed therein. My mind has reached a clear conviction that neither the operation of the execution of the will, nor of the execution of the codicil of the 13th September, 1864, incorporated with the 15th section the red book or any other document in evidence, as regards any "apportionment," "conveyance," or "designation of estate," expressed, executed, or described by the testator after the actual execution of his will; and this on the broad ground that a will cannot incorporate an extrinsic paper *not in existence at the execution of the will.* If, at the time of the execution of the codicil, the will had not effectually incorporated an extrinsic document, the execution of the former could not have that effect *from its mere operation.* It would set up the will, of which it professed to be a codicil, and also previous codicils executed, or, perhaps, since the Statute, *unexecuted*, from the force of the term "codicil," and by virtue of express decisions. But it could not incorporate any paper which the will had not incorporated, *without express reference thereto in the codicil.*

I have found a notice of but one case which could, at all,

even seem to sanction such a violation of principle. It is the case cited at the argument of *In the goods of Hunt*, reported in 2 Robert. 622, and mentioned by Williams, *Williams on Executors*, (p. 195.) I can attach no importance to it as stated in the text-writer, without inspection of the report, to which we have not access. It is inconsistent with not only *Croker* v. *Hertford*, of which hereafter, but with another passage in *Williams* (p. 85), in these terms: "The *reference* must be distinct, so as to exclude the possibility of mistake, and *the paper* (not incorporated, *but*) REFERRED *to, must be* ALREADY WRITTEN." For this Williams cites *Wilkinson* v. *Adam*, 1 Ves. & B. 445 (to which I shall presently refer), and *Utterton et al.* v. *Robins et al.*, 1 Ad. & El. 423.

These are the words of Sir William Grant on the effect of the execution of a codicil. He says, in *Pigott* v. *Waller*, 7 Ves. 118: "A reference to the will proves only that the devisor recognizes the existence of the will, which the act of making a codicil necessarily implies; not that he means to give *it any new operation, or to do more by speaking of it than he had already done by executing it.*"

Dr. Lushington, in *Sheldon* v. *Sheldon*, 1 Robert. 88, says: "Under the late Wills Act it is still possible to incorporate into a duly executed will or codicil any written document *then in existence.*" Thus the learned Judge qualifies the rule. And again he says, in the same case: "If the testator, in a will or codicil duly executed, *refers to an existing unattested will, or other paper*, the instrument so *referred to* becomes part of the will. But the *reference* must be distinct, so as to exclude the possibility of mistake, and the paper *referred to must be already written.*"

This principle is recognized by Mr. Pemberton Leigh (Lord Kingsdown) in *Allen* v. *Maddock*. The learned Judge in that case refers to *Wilkinson* v. *Adam*, in which we find the following clear and decisive language used by a great Judge, who never spoke unadvisedly. Lord Eldon says: "The cases, as far as they have gone, have raised doubts, even as to a paper antecedently existing, but clearly and undeniably referred to in a will." (These, it appears from *Allen* v. *Maddock*, have been since removed. His lordship continues): "But I take it to be decided, and there is no doubt, that a

paper *made afterwards* could *never* be part of the will; for the three witnesses required by the Statute are witnesses to the sanity of the testator, and to all that is necessary to constitute a good will. The consequence is that the subsequent paper has not the ceremonies necessary to constitute a devise of land."

The reasons, conclusive in the particular case, would not, of course, apply to the case of a defectively executed will, referring to an extraneous document as designed to be incorporated, being followed by a codicil *referring to that document*, and itself legally executed. Such reference would incorporate the document in the codicil.

In my view of the law and of the evidence the execution of the codicil in September, 1864, has no practical operation in this case. It must be borne in mind that the reference in section 14 is, not to a book, but to "*entries* made, or to be made in a book."

It will be perceived, already, as a consequence of the opinion I entertain of the law governing the facts, that the *black* book must be rejected *in toto*, and the *red* book held to be incorporated, but not as regards any entries made therein after the execution of the will. The red book, proved to have existed at the execution of the will, contains entries shown, *per se*, to be made, some before, others since, 8th March, 1862. All the entries in the black book are proved to have been made *after* that time. Both classes accord with the description of entries referred to in the will. Those that at the execution of the will existed were, and are, a part of the will; and, as such, needed, and could derive, no aid from the execution of the codicil. The entries made (and they include all those in the black book) *after* the execution of the will were, at the moment of the execution of the codicil, *void*. That act republished the will, and made it repeat the voice that it uttered at the day of its execution. It could do no more. What it had then uttered was the language of section 14 (it is sufficient now to refer to that alone), as made completely intelligible by the entries in the book referred to *as then made*, and which were then—8th March, 1862—in the book, as proved by the book itself. The execution of the codicil (that codicil containing no express

reference to any entries) could not *by implication* make the will then—in September, 1864—speak the voice of entries that did not exist at the time when the will first spoke. The language of section 14 shows that the testator reserved to himself a power to make the section speak by entries *to be made after the execution of the will, and not duly attested*, but that the law did not permit. The moment an attempt is made by implication from the mere effect of the execution of a codicil, not expressly referring to it, to set up as part of the will these republished entries in a book, then existing, but not in existence at the execution of the will, there arises an indispensable necessity to have recourse to *parol testimony* to ascertain *what* entries the testator, at the time of the execution of the codicil, *intended* to be incorporated in his thus republished will. This cannot be done consistently with the Statute of Wills. These are the words of Dr. Lushington, in *Sheldon* v. *Sheldon*, 1 Robert. 88: "The validity of the incorporation does not depend on parol evidence (which is no longer permitted), but the paper to be incorporated is protected by exactly the same evidence as renders valid the instrument by which the incorporation is effected, namely, the signature of the testator, and the subscriptions of two witnesses." Thus were protected, in this case, the entries in the red book existing at the time of the execution of the will. The testator and the witnesses both, in legal contemplation, subscribed these entries, because they subscribed the will, of which they were as much a part in the eye of the law as if written in the will. So the testator and witnesses who subscribe a codicil, in legal contemplation, then subscribe all previous codicils and the will; the whole, in the view of the law, constituting one then subscribed instrument.

But try the application of this to the execution of this codicil in relation to the entries in the *black* book, and its failure is glaring. The testator and the two witnesses who subscribed this codicil in September, 1864, in legal contemplation could be held to have subscribed nothing but the codicil, and the will with the entries co-existing with the will at its original execution, and *then* a part of it. On what *incorporating* evidence, let me ask, did the entries in the black book rest one minute *before* the execution of the codi-

cil? Not on the execution of the previous will, for the reasons stated. Not on the subscriptions of testator and two witnesses to the entries, for those had no such subscription in fact. On what *incorporating* evidence did they rest one minute *after* the execution of the codicil? Exclude McFarlane's evidence of the declarations—parol testimony—and there is no pretence for implied incorporation. Suppose the testator had himself declared to the two witnesses, whilst producing the black book and putting his finger on the entries, that he had made them *after the execution of his will*, and intended them to speak as and for the entries referred to in section 14, and thereupon he and the witnesses had subscribed a codicil *silent about those entries?* This is plainly substituting parol testimony to prove a will for the requirements of the Statute. When we refer, however, to the evidence of McFarlane respecting the black book, to the book itself, and to the codicil as executed, the testimony does not differ in kind or in degree from that which I have supposed. The two books were, on unobjectionable evidence, proved to have existed at the time of the execution of the codicil. Referring to their entries, made subsequently to the execution of the will, the mere internal evidence for the one is as strong as for the other. By what means is the scale attempted to be turned? By the testimony of witnesses orally delivered, in connection with one of two rival books *unincorporated*, and by means of that alone! My opinion is that a man's estate cannot thus be disposed of after his death! To talk about *republication* by the codicil of the black book which *ex concesso had never been published* would be a contradiction in terms. The question can only be, "Was the black book *incorporated* in the codicil of 1864?"

After writing what I have just read, I found, with great satisfaction, the following express confirmation, by the highest authority, of the opinion entertained by me, that "*since the Wills Act an attested paper, even a codicil, cannot incorporate an unattested paper without expressly referring to it.*"

Dr. Lushington, in *Croker* v. *The Marquis of Hertford*, 4 Moore's P. C. C. 365, says: "Before the passing of the recent Statute, it was common to republish a will or a codicil for the purpose of rendering them operative from the date

of publication, because, otherwise, lands acquired subsequently would not pass. Ordinarily, there had been a previous legal execution of the codicil sought to be republished; as, indeed, the term itself imports: but there was another mode admitted to be legal, namely, in a regularly executed codicil, *to refer expressly to a paper not previously duly executed;* this was not, properly speaking, a republication, but an incorporation, *by reference*, of an unexecuted paper." "We will next consider," he continues, "upon what principle it is, that incorporation by reference has stood, and may be justified. By the Statute of Frauds, devises of lands were to be in writing, signed and attested; this was the security which that law provided for the authenticity of such instruments. Any attempt to devise lands with less security would be, *pro tanto*, a defeasance of the Statute; therefore, it was held that a man could not, by his will, reserve to himself the power of devising land by an unattested codicil—for such codicil would carry with it less proof of authenticity; but it was permitted to a testator to render operative, as part of his will duly attested, a written paper *already in existence;* and for this reason—because the paper being clearly identified, and the will duly attested, the security intended by the Statute would not be diminished. It is, however, evident that certainty and identification is the very essence of such incorporation. If any doubt can exist as to the instrument to be incorporated, then the principle of incorporation by relation would fail; consequently, so far as we can discover in all the cases of incorporation under the Statute of Frauds, there has been an *express reference* to a paper in writing described with certainty."

Then, after reviewing authorities, the learned Judge thus continues: "Having then examined the doctrine applied to incorporation, in cases having reference to the Statute of Frauds, the next step is to determine whether it does not equally apply to the present Statute of Wills; there is not any ground for distinction, for the only difference, as relates to this case, is attestation by two instead of three witnesses; a bequest of personal estate being now governed by the same rules as apply to devises of real property. This brings

us at once to the question, whether the Milan script, being a separate paper, distinct from the codicil of the 26th April, 1839, and not executed according to the Statute, is incorporated as part of the codicil of April, 1839, for 'republished,' in the proper sense of the term, the Milan codicil (that is the separate paper) cannot be, for it never was legally published or duly executed. Bearing in mind that certainty, and prevention of mistake are requisite, let us examine the words of the codicil of April, 1839. There is no express reference to the Milan script, by date, by contents, or by any specific description which could identify. The words to be relied on are, 'I affirm my said will and codicils.' If such words are sufficient for incorporation, then general description will incorporate without express reference or identification;" and then the learned Judge asks, 'Is general description certainty, without chance of mistake?' The want of specific identification would of necessity repeal, to a certain extent, the Statute, for if general reference would do, why should not a testator write as many codicils as he pleases, after the incorporating codicil, and by omitting to date them, or by antedating, defeat the provisions of the Statute? * * The Statute says property shall not be thus bequeathed, unless the paper to be incorporated is as clearly identified as if it was actually a part of the executed will or codicil."

Dr. Lushington concludes, warningly to us, thus: "If we defeat the possible intentions we may lament it; but we sit here, not to try what the testator may have intended, but to ascertain, on legal principles, what testamentary instruments he has made; and we must not be induced, by any consideration of intention or hardship, to relax the provisions of a Statute (perhaps the most important of modern times) for the disposition of property."

In the case of *In the Goods of Smith, deceased,* 2 Curt. 796, where the words relied on to incorporate were, "I make and publish this a *second* codicil to my last will and testament," it was held that a previous codicil, signed by deceased, not attested, was incorporated. Sir H. Jenner says: "The latter codicil being duly executed, and *referring to the former,* is an execution of the former codicil also."

Under the present Statute of Wills it is a fixed law, regulating incorporation, "That an attested testamentary paper cannot incorporate an unattested paper without express reference to it." I shall, therefore, regard the point as settled, and conclude, in the language of the Vice-Chancellor, in *Johnson* v. *Ball*, 5 DeG. & Smale, 91, "That a testator cannot, by his will, prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil." My argument as to the inefficiency of the execution of a codicil, to set up an extraneous paper *not referred to in it*, of course demands this principle for its support. It may not be amiss to remark that if it were found that, at the execution of this will, there did exist an extraneous instrument that was *legally* incorporated, and the effect of which, in connection with the will, was to dispose of the testator's estate, another instrument, not duly executed, could not be substituted, that *changed* the disposition, consistently with the provisions of the Wills Act (see sec. 15 and 16), because it would amount, to the extent of the alteration, to an unauthorized *revocation* of the will. If the principles above stated are sound, then No. 13, the black book, and all entries made in the red book subsequently to the 8th March, 1862, when the testator executed his will, must be dismissed from our consideration.

I am of opinion that certain entries in the red book, at the time of the execution of the will, were incorporated with section 14, as being, in the language of that section, entries then made by the testator, of "advances of real or personal property, and sums and charges as advancement to, or charged against, certain of his children or grand-children therein named." I am also of opinion that these were then incorporated in section 15, so far as that section speaks of deeds then executed by the testator, which are plainly referred to in that book. I am of opinion that the three deeds of 1854 are so referred to, and must take effect precisely as if the testator had devised the estates in the body of the will, and had declared in the will, as he has declared in the book, read with the will in connection with these deeds, that the devisees, who are the grantees, should be subject to a deduction from their several shares of the estate of the sums charged

in the book in respect of the estates professed to be conveyed by the deeds. The testator in the book, under date of the very date of these deeds, has expressly declared "*that he then deeded the lands*," and the deeds are found at his death.

I have spoken of these papers as *deeds*, but, of course, I have not supposed that they could operate as common law conveyances. They could not do so in point of law, and it would be inconsistent, as my view of their operation supposes, with the intention of the grantor (viewed as *this testator*) so to regard them. I view them as written papers, signed by the testator, referred to in his will as "deeds executed," which in form they are, and in entries existing at the execution of the will, referring to them, and found in a book—*the book*— to which the will refers. I consider that these written papers, and the language of the sections and the entries—all proved to have co-existed with the execution of the will, which in legal effect incorporated them—constitute a devise to the *quasi* grantees of the different estates respectively named in the papers; whilst the testator has, in legal effect, said: "Each and every of the parties named in these papers shall be subject to a deduction from his share of the whole estate, corresponding in amount to that sum which in the entries I have written opposite to my reference to the particular deed, as my declared valuation of the estate named therein." All *that* he has as plainly said as if he had expressed himself in the words which I have used to show the effect supposed by me. Had he said in the will: "I devise to my son Rufus a portion of my estate, as described, and on the terms stated in a written paper being in form a deed between me and him 'for love and affection,' but on the conditions expressed herein, and in a certain book respecting the same as to what he is to allow for it out of his portion of my estate,"—the effect would have been *a devise*, but no more a devise than is the actual incorporation in this will of the extraneous papers and entries that I have referred to.

The entries in the book beginning, "*Amos Thos. Seaman*, Dr. 1845, &c.," and, ending with the testator's signatures subscribed to the two consecutive entries which referred first, to a will of 23rd September, 1861, (and secondly to that of March, 1862, although I deem any such reference immaterial) show

distinctly, in my opinion, the charges as advancement which the executors of the last will must regard as regulating the disposition and settlement of the estate. Section 14 of the will refers to "entries which the testator *had* made," and clearly those are they. The date, in pencil, *January* 31, 1863, which is immediately preceded to the testator's notice of Eph. (or Ephraim), evidently refers to that notice alone. The entries are some *in pencil*, others in ink; but this, in no respect, detracts from their genuineness or authenticity. There they are, and were, at the execution of the will, uneffaced, unobliterated, uncancelled. Section 14 does not require the entries of advances and charges to be *signed by the testator*—all that it requires is that they shall appear in a book kept by the testator for that purpose. Of the fact that this *at the testator's execution of the will* was "*the book so kept*" there is the clearest evidence within, and without the covers of the book—indeed it is not denied!

I have already expressed my opinion that the red book cannot be regarded as incorporated in section 15, for the purpose of describing and designating in "a writing signed by the testator" an apportionment of the Minudie estate, or parts thereof, except as regards the deeds shown by that book to have been *previously* executed in furtherance of that purpose. That section, therefore, being, as shown, without support from any other "writing" is, in my view, *as regards apportionment*, as inoperative as if struck out of the will.

My reasons for forming that opinion are these:—The book, among other entries, contains one in these terms:—"This book is kept by me, and the entries and charges therein by me made *are* in accordance with the clause inserted in my will, *executed on the eighth day of March*, 1862.

AMOS SEAMAN."

The testator thus declares that on that particular day he executed his will; but all the entries that follow purporting to apportion his estate among his descendants, and to declare the values of the portions thereof, are expressly stated to be made *subsequently to the execution of the will.*—They must all, therefore, share the fate of the black book, and be rejected, as, in legal effect, unattested, and not incorporated in the will.

I turn back, then, to the preceding pages of the red book to see whether they contain entries of an apportionment made by the testator, at, or previous to, the execution of the will. If such be found they must be regarded as incorporated therein. I find entries, indeed, evidently made *in order to apportionment.* They are inserted between the dates of Septr. 27th, 1844, and January 24, 1846:—but they, in my opinion, are not incorporated, because they are manifestly incomplete and defective. Whilst they profess to apportion, and do apportion to *some* of the descendants named, in an unqualified manner; they are so uncertainly and vaguely expressed as regards *others*, that it cannot be said, in reference to these, what the testator intended to give them. For instance, whilst Ann's portion is thus described, "Ann to have that part of the Manor-farm where the Doncasters now live to the Lake Road, at same value, for the marsh, 30 acres £15, and improved upland at £10—woodland, say at £2 per acre,"—the apportionment to Rufus and William is as follows: "Rufus and William to have the upland rise from the old Chapel to Clarke's Point, with the pasture marsh to the north of the road opposite, at same rate—upland £10 and marsh £15 per acre, to be equally divided as they may agree; *but if Rufus sticks by me, and behaves well, it is my desire for him to have that part with the buildings I now occupy, and William to take from Blenkhorn's line to the point, value both £945. If Rufus takes the homestead, he ought to allow William* SOMETHING *for building extra.*" Again, in the apportionment for Mary and Jane, he writes: "They should have *some part* of the little marsh in front, to accommodate each," &c. Now, adverting to this vagueness, and incompleteness in some of the apportionments, I consider it quite impossible to consider the general entries last referred to incorporated in the 15th section. Another objection to so regarding them arises from the fact that, at an interval of eight years from the date at the end of the last mentioned entries, the testator disturbed the previous arrangement by entries made showing the subsequent conveyances to Rufus, Gilbert, and James, and by certain entries under the date which accords with that of those conveyances, showing a variance from the previous apportionment, for instance, "*the Blenkhorn lot may go to Jane and*

Sarah." I forbear remarking on the inference of changed intention as to mode of apportionment, arising from that which appears in the book to be entered *after the execution of the will*, feeling sure that I am bound to shut my eyes to this last, as much as I am to the whole contents of the black book. My views of this case preclude the possibility of my contrasting the books, inasmuch as I consider the black book absolutely void.

The Court is also required to construe the eleventh section of the will, and decide "*what portion of the shore frontage, as it is called, passed to Mr. McFarlane under that section.* (The learned Judge here read this section.)

The testator, in section 13, speaking of the reversion of this, uses the phrase, "*the said property, called the Joggins, as hereinbefore described*,"—in sec. 16, the language is, first, "*in my Joggins estate before mentioned*," secondly, "*excepting the said Joggins estate*, and the reversion, &c." These are all the words in the will that can possibly aid the construction in question. They throw no light on the point of inquiry, because there is a reference in them to the preceding description, and the mind of the enquirer is brought back to the consideration of *that*.

It is contended that an intent is manifested by the context and the surrounding circumstances that the whole extent of that which was known, and indifferently designated in the testator's lifetime as the "Joggins," or "Joggin Quarries," or "Joggin shore," of which, indisputably, by far the more valuable portion, in general repute, and according to the witnesses, is not included in, but lies far out of, the prescribed limits, should be considered as included within those last; and, further, that such intent can, consistently with acknowledged rules of construction, override the particular language used.

Supposing such intent, if manifest, could be legally effectuated under this devise, let us enquire whether the words, the context, and the evidence of the situation and circumstances of the testator when he made his will establish it. My impression is that all these considerations rather point to an intention in accordance with the primary meaning of the words. The testator would seem to have intended to *circum-*

scribe, and not to permit the *whole* of the Joggin shore to be the subject of the particular disposition to which undoubtedly the recital points. Had he intended not to do this, he would not have stated any limits at all, but would have used the general description which would have effectuated his intention without the risk of controversy. He must have had a definite purpose in his mind when he prescribed limits, and, if so, he could not have intended the whole to pass. He must, necessarily, have designed to effect a purpose essentially different from that which would have been effectuated, had he used *the general description*.

Our difficulty of departing from the primary meaning is, I think, immensely increased by consideration of the fact as stated by Rufus, namely, that Lower Cove contains the principal, and the most valuable, and the hitherto most profitably worked quarries. It is scarcely possible to conceive that the testator, aware of all this, excluded Lower Cove without design—mistake is out of the question. The will shows on its face evidence of great deliberation and carefulness in preparing its provisions. We are precluded by the general character of the will, and the surrounding circumstances, from supposing it possible that this testator could, from oversight or mistake, have designated boundaries of a far more limited effect than he intended. Every foot of the land and water in the locality was familiar to him as an household thing.

We can gather nothing conclusive in favor of the larger limits supposed to be intended from the *recital*, since it is not necessarily inconsistent with the testator's opinion "that the immediate division of 'the Joggins' would be injurious to the profitable workings of the quarries (regarded *as a whole*)," that he should, for reasons which, though unexpressed, may have influenced him, have determined to make the subject of a lease that portion of them *alone* which he has defined. We must bear in mind that he had differed with his sons in the management of these quarries, and had expressed an opinion (not apparently in accordance with that of others) that it would not be advantageous to open and work the "Bank Quarries," a portion of the Joggins, and which Cutter says was, in his opinion, *the most valuable part of the whole*. Those

the plan shows to lie outside the limits. This is a noticeable fact. When it is urged that it was more probable, as it would be more for the interest of the estate, that he designed thus to devise *the whole*, the obvious answer is, "*that* is a mere conjecture, and his views, on the point of the interest of the estate, might not be in accordance with those of his children, or of the neighborhood.

It is the more difficult for a Court of construction to assume the responsibility of amplifying the limits, because that cannot be done without violence to very precise language used, in a case where the circumstances show that there must have been reflection and deliberation before the words were adopted. The testator, before using them, had to consider, not merely the frontage, but the precise depth or breadth of contiguous land to be devised along that frontage. The terminus *a quo* and the terminus *ad quem* are stated with careful precision. The word "*between*," when used, as here, (not figuratively,) in relation to space is free from ambiguity. Worcester defines it, "*in the intermediate space*." "Dog fish Cove" on the one side, and "Lower Cove" on the other, are *ex vi terminorum* excluded from that intermediate space.

In considering the rules of law which govern this enquiry, I intend to confine myself, shortly, to the concise but comprehensive canons of Sir James Wigram. That most learned author, in his treatise on the admissibility of extrinsic evidence to explain wills, thoroughly considered all the cases, and elicited deductions in the form of propositions which may be safely regarded as maxims. His proposition II. is as follows: "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted *are sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and *although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered*."

Now, the words in question, descriptive of the limits devised in section 11, considered with reference to the extrinsic circumstances, viz., the situation of the testator relatively to the "Joggins," or "Joggin quarries," viewed as a whole, are undeniably *sensible*, and create, *per se*, no difficulty of interpretation. The words are not capable of any different sense from that which they primarily convey; and there is absolutely no evidence (nothing but a mere conjecture) of an intention to convey another and a different meaning, which would require the substitution of other words.

Sir James Wigram thus expresses, at the end of his treatise, his conclusions from his preceding review of the authorities. He says: "The conclusions, then, which the preceding pages appear to authorize, are these: 1. That evidence of material facts is in all cases admissible in aid of the exposition of a will. 2. That the legitimate purposes to which—*in succession*—such evidence is applicable are two, namely, *first*, to determine whether the words of the will, with reference to the facts, admit of being construed in their primary sense; and *secondly*, if the facts of the case *exclude* the primary meaning of the words, to determine whether the intention of the testator is certain in any other sense of which the words, with reference to the facts, are capable. And, 3. That intention cannot be averred in support of a will, except in the special cases which are stated under the Seventh Proposition."

Referring to that proposition, we find those cases thus defined: "Where the object of a testator's bounty, or the subject of disposition, is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

Sir James concludes his deductions in these words: "The writer of this Examination, then, whilst he admits and insists upon the rule 'that the judgment of a Court in expounding a will should be simply *declaratory* of what is *in* the instrument,' hopes that he may, in this place, without fear of correction, add that, *consistently with that rule*, 'Every claimant under a will has a right to require that a Court of construc-

tion in the execution of its office shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare.'"

The expression of the result of the authorities seems to me to go the length of showing that the clearest possible intention, proved by extrinsic facts, on the part of this testator to devise the whole extent of the quarries, could not prevail against the plain and sensible language used. It clearly, I think, sanctions the view I have expressed, of a necessity for construction of the section in question according to the primary meaning of the words of the testator.

As regards the codicil of 22nd October, 1862, and its legal operation, assuming its due execution proved, I am of opinion that it can operate according to the expressed intent of it, without a contravention of any rule of law or of equity. It imposes a condition on a mere voluntary act of bounty on the part of the testator; and the object of that bounty cannot insist on taking any benefit under this will to which the testator has attached a condition, without acceding to the obligation of that condition. The condition is, in effect, the non-prosecution by those who are named in the codicil of their respective claims against the estate of the deceased. Whether those have, or have not, a support in law or equity, seems to me to be beside the question. The attempt to assert them compulsorily, by either of the parties named, is made by the testator to involve a forfeiture of the intended devise or bequest in favor of that party.

The Court is asked to declare "whether Rufus Seaman is trustee as respects the land devised for school purposes?"

By the codicil of 13th September, 1864, the testator appointed his said son in terms "to be *executor* of his will in connection with his son-in-law, Mr. McFarlane, with the same power and authority as if his name had originally been inserted therein." These words are satisfied by holding them to constitute Rufus Seaman co-executor in the strict sense of the word "executor:" as contradistinguished from the office of "trustee." Adverting to the 10th section of the will which refers to the school purposes, we find McFarlane thereby appointed a *trustee* in terms; and for the purposes of the trust twenty acres of land are devised to him.

The devise is, indeed, to him, his heirs and assigns, but it is made nevertheless, under special circumstances of personal confidence as respects McFarlane. I think, for these reasons, Rufus Seaman has no authority to act under the section in question.

Order accordingly.

COLLINS v. REID AND OTHERS.

May 11, 1866.

In order to make an assignee under the Insolvent Debtors' Acts liable for not collecting the assigned debts, there must be distinct proof of neglect; or of positive forbearance on his part towards the debtors, without the concurrence of the assignor, and of consequent loss; and also that the debts assigned were of real value.

The claim of an assignee of the equity of redemption in mortgaged premises, for surplus proceeds remaining after the sale of premises on foreclosure of the mortgage, is not barred by a twenty years' possession of the premises by the assignor, who claimed under the mortgagor, the mortgagee having by the foreclosure suit asserted a paramount claim to the possession, and the premises being sold under that claim.

Semble, The possession of the assignor of an equity of redemption is not adverse to the assignee, unless shown to be in opposition to his will.

THIS was an application on behalf of the defendant, Archibald Greenshields (a judgment creditor of the defendant, Adam Reid, and assignee of the equity of redemption in the premises mortgaged to the plaintiff), for surplus proceeds remaining from the sale of Reid's property, after payment in full of the amount due on the plaintiff's mortgage and the costs of the foreclosure suit. Payment was resisted on the ground that Reid had assigned to Greenshields debts to a very large amount, out of which he might have paid himself the full amount of the judgment, and on the ground of adverse possession of the lands and premises on the part of Reid.

The cause was twice argued; first, by *Primrose* for the defendant Greenshields, and *S. H. Gray* for the defendant Reid:

and again by the *Solicitor General* for Greenshields, and *S. H. Gray* for Reid.

S. H. Gray cited the following authorities:—2 *Chitty's Equity Digest*, 1221; *Ex parte Mure*, 2 Cox's Cases, 63; 8 *Beavan*, 243; *Williams* v. *Price*, 1 Simons & Stuart, 581; 3 *Johns. Chan. Rep.* 129; 10 *Vesey*, 453; Rev. Statutes, ch. 154, sec. 11.

Primrose cited *Collins* v. *Bulger*, M. S. in this Court.

Solicitor General cited the following:—3 *Cruise's Digest*, 196; *Adams on Ejectment* (Tillinghast), 77; *Washburn on Real Property*, 49; 2 *Hilliard on Mortgages*, 13; 5 *B. & Ald.* 690; 2 *D. & R.* 38.

The facts set out in the various affidavits, and the points taken at the argument, are sufficiently set out in the judgment.

Johnston, E. J., now delivered judgment as follows.

This is a suit for foreclosure of a mortgage made by Samuel Cupples in 1838, to the plaintiff. Cupples' equity of redemption was subsequently acquired by the defendant, Adam Reid, and he, on the 20th September, 1842, assigned it to the defendant, Archibald Greenshields, under the Insolvent Debtors' Acts.

The property, being a house and land in the city of Halifax, having been sold under the order of foreclosure and sale in this cause for more than sufficient to pay the plaintiff; the defendant, Archibald Greenshields, has applied for the surplus, $838.05, under his judgment and assignment. This application is resisted by the defendant Reid, and the disposition of this surplus is the matter now to be determined.

Two objections to Greenshields' claim are urged by Reid. 1st. That debts to a very large amount were assigned by him to Greenshields, together with the equity of redemption of this house and land, and that with due diligence Greenshields might and ought to have paid himself by moneys collected from the assigned debts. 2nd. Adverse possession.

On the first objection it is to be borne in mind that Greenshields under the assignment has all Reid's interest, and is, therefore, the person entitled to claim the surplus. This

objection must be considered in the nature of a bill charging negligence, the money being retained to wait the decision.

Without considering the objections that might arise against proceeding in such a case in the summary manner adopted here. I will enquire into the grounds laid.

Mr. Reid in his affidavit says that the assigned debts amounted to about £2315, and that at the time of the assignment he believed, and now believes, that with due diligence Greenshields might have collected sufficient to satisfy his judgment (£710 10s. 3d). He does not point to any particular debt or debts as being of value—he had the list under his hand and could have done so—nor does he negative having himself received any part of these debts, nor does he allege having stimulated the creditor—then in the character of trustee—to diligence, offered him information and assistance, informed any of his debtors of the transfer of their debts, or taken any measure whatever. His case rests exclusively on the largeness of the amount, and his own general and unexplained assertion of belief. The amount might give just occasion of enquiry, but is no evidence of value. Small experience is required to teach the great disparity between the nominal amount and real value of the debts standing on the books of an insolvent trader. Nor is Mr. Reid's assertion of belief proof on which the Court can act.

In reply, Mr. Primrose denies that any money was ever received under the assignment, and says, "In fact the agents of the said Archibald Greenshields, as well as myself, considered the debts (assigned) to be wholly valueless." Both the agents, Messrs. Daniel and John E. Starr, also in their affidavits negative the receipt of any money under the assignment, and Mr. Daniel Starr states "that they never took any legal steps to recover said debts from any of the parties, for the reason that there was not the slightest probability that they would be able to pay even the costs that would be incurred by so doing, many of them being of long standing, and which Mr. Reid, after having used his utmost efforts, had altogether failed in collecting himself."

These facts forbid any charge against Mr. Greenshields as for money actually received. His large judgment remains

undiminished in amount. Any charge against him must be for neglect, and neglect alone is not enough, there must be loss consequent upon the neglect, and in this case the amount of loss must be shown to be large—equal to the amount of his judgment—to defeat his claim for the surplus or some portion of it.

In the two cases relied on by Mr. Reid's counsel the assignee was made chargeable only to this extent. In *Ex parte Mure* the amount charged was that which it was shown would have been recovered by due diligence. In *Williams* v. *Price*, 1 S. & S. 581, the reference to the Master was to ascertain what might and ought to have been recovered on the assigned judgment.

These cases are in other respects also essentially different from the present. A single security was assigned—a bond in one case and a judgment in the other, one of less, another of equal amount with the debt to be secured—the assignment being voluntary in itself testified that each party thought the security assigned to be of some value, and that means should be taken to render it available. In each case the assignee took measures for enforcing payment, and was guilty of laches in giving time, and in not pursuing those measures to the end; and all these circumstances were alluded to and had influence with the learned Judges. The Lord Chancellor, who in *Ex parte Mure* carries the general principle of liability much farther than the Master of the Rolls in *Williams* v. *Price*, yet attaches the liability to cases where there has been forbearance to the debtor without the concurrence of the assignor, and the Master of the Rolls intimates that this forbearance must be positive, not merely negative.

Here the assignment was under the Insolvent Debtors' Acts and coercive—it was of all the insolvent's effects, however worthless. There was nothing to indicate that either party attached value to the debts assigned, and the assignee gave no time to any of the debtors, nor took any steps showing that he considered the debts available. In the state of the proof it is unnecessary to investigate the degree of diligence necessary in the case of an assignee under the Insolvent Debtors' Acts, or to enquire whether the circumstances might

not have assumed a character to require from the attorney and agents of Mr. Greenshields a fuller account of their reasons for esteeming the debts worthless, and of the measures they adopted for obtaining information on the subject.

There is no proof of value, of forbearance, or of loss, upon which the Court can act.

There has been no suggestion for a reference, there is no reason to suppose that an enquiry at this distant period would result in anything but delay and expense, and there are not wanting considerations to make such a reference improper under the circumstances of the case.

I am of opinion that this objection cannot prevail. The next objection offered to the application of Mr. Greenshields is that the right has been lost by laches, and that the Statute of Limitations applies.

This induces the consideration of the relations of Reid and Greenshields to each other, and to the property.

The latter, since the assignment in 1842 to the commencement of this suit in 1865, has taken no step to enforce his rights, whatever they were, not even by recording the assignment. And as regards the former the only passage in Mr. Reid's affidavit concerning the possession of the land is this: "That from the time of said assignment till the summer of this present year (1865), I have exercised ownership over said property, and paid the interest that from time to time become due to the complainant, Enos Collins, by virtue of the said mortgage."

How this ownership was exercised, whether by actual occupancy or the receipt of rents only, and whether those rents were more or less than the interest, are facts of which we have no more information than may be gathered from the above passage.

It was argued that under 3 & 4 George 3, chap. 5, (Provincial Laws, vol. 1, p. 90), the assignee of an insolvent debtor took a perfect title in the property assigned, and could by the terms of the Act sue in his own name in like manner as the assignee of a bankrupt. There is, however, a marked distinction, for by the seventh section the creditor may, notwithstanding the assignment, take the debtor's lands and goods in execution, and, I think, the assignee must be held

to take the property subject to a trust for the debtor, should it realize more than enough to satisfy the debt. and the assignment must be regarded as in legal effect a mortgage, creating but a specific lien on the property. See *Burrill on Assignments*, 139.

As Reid through Cupples, the original mortgagor, was only entitled to the equity of redemption, subject to Mr. Collins' mortgage, the assignment to Greenshields was in the nature of an imperfect mortgage with the legal estate outstanding in the prior incumbrancer, and it is laid down that the second mortgagee, being disabled from obtaining possession at law, is entitled to have a receiver appointed in equity, by whom the rents may be received and applied in satisfaction of his mortgage, without prejudice to the right of the first incumbrancer to apply for possession, and a receiver will not be appointed when the prior legal incumbrancer is in possession, unless the applicant will pay off the demand, for the legal mortgagee cannot be a receiver but must take possession. See *Adams on Equity*, 312.

Mr. S. Gray, the counsel for Mr. Reid, pressed on me the case of *Cholmondeley* v. *Clinton*, 2 Jac. & W. 1. and, if Reid may be considered as a stranger, the doctrines laid down in that case would have a strong, perhaps an irresistible bearing in his favor on the case under consideration. In that case the estate was under mortgage, and there was a question arising on the construction of a will as to the party entitled to the estate,—that is, to the equity of redemption. Mrs. Davison and Lord Clinton severally claimed; the latter had gone into possession under his claim and had paid the interest on the mortgage for many years. The former who was the plaintiff, and seeking to redeem, had not asserted her claim until after that possession had existed for more than 20 years. There was no privity or relation between them. It was there decided "that the laches and non-claim of the rightful owner of an equitable estate for a period of 20 years (supposing it the case of one, who must within that period have made his claim in a Court of Law, had it been a legal estate) under no disability, and where there is no fraud, will constitute a bar to equitable relief by analogy to the Statute of Limitations, if during all that period the possession has been held under a claim unequivocally adverse."

If Greenshields is to be considered as trustee, and Reid as *cestui que trust*, neither at law nor in equity would his possession be adverse. *Hill on Trustees*, 393, m. p. 266; *Melling* v. *Leak*, 16 C. B. 663; *Garrard* v. *Tuck*, 8 C. B. 231.

The Master of the Rolls in *Cholmondeley* v. *Clinton*, after distinguishing the relation of mortgagor and mortgagee from that of ordinary trust relations says (p. 179): "The possession of the mortgagor, or the person claiming that character, is not adverse to the mortgagee, because it is consistent with his title. The mortgagee is, therefore, not barred by any length of that possession, but the possession of the mortgagor is adverse to every other claimant of the equity of redemption, because it is inconsistent with his claim of title."

The cases at law are strong on that point.. *Hall* v. *Doe d. Surtees* in Error, 5 B. & Ald. 687; *Doe* v. *Hull*, 2 D. & R. 38. In these two cases it is declared that there can be no disseisin at law without a wrongful entry,—a wrongful continuance is not sufficient, and, again, that the Statute of Limitations cannot attach, unless it is shown that the mortgagor held in opposition to the will of the mortgagee. So it is laid down that the mortgagee may treat the mortgagor as being rightly in possession, and 10 *Ves.* 453, is in point to show that an equitable interest will not be barred when the Statute of Limitations does not apply to the corresponding legal interest.

Again, in *Lister* v. *Pickford*, 6 New Rep. 244, where trustees having mistaken their proper *cestui que trust* had paid the rents to wrong parties, the Court held that notwithstanding the misapprehension under which they acted their possession enured to the benefit of the right parties—saying "as soon as they entered, their possession was attributable to their real rights, and to no others."

Now, to what conclusion would these principles lead, had there been no equitable interest in the case—had Reid been in actual occupation under a legal title, when he assigned under the insolvent proceedings?

It would seem that unless there were evidence in such case of a possession in opposition to the will of the assignee, the Statute would not run.

It is to be considered that Greenshields had no right to possession,—all he could do to promote his interest would have

been either to redeem or obtain a receiver. He might not be able to do the first, and if the rents were small—and of their amount we have no evidence—so long as they were applied to keeping down the interest on the first incumbrance he had no object to answer by requiring the second.

As soon as the foreclosure suit is instituted he asserts his lien and claims the surplus.

If he is not entitled to the surplus, what title has Reid to claim it? Only on the ground of a purely adverse possession, for he had conveyed away his title; the laches of Greenshields might stand in the way of his recovery, but what would give the money to Reid? Not his equity of redemption, because that he had conveyed; not his possession, supposing that possession to have enured to his own benefit, because the first mortgagee had asserted a paramount claim to that possession under which the land has been sold.

Whether, therefore, I have looked at this case purely in its equitable relations, or as these relations are affected by the analogy of legal principles, I cannot reach the conclusion that the claim of the second incumbrancer Greenshields has been barred, or that Reid is entitled, although I confess that I have felt the case to be one by no means free from difficulty and doubt.

I ought to have mentioned that the letter of Reid to Greenshields precludes the presumption that the debt had been paid.

My judgment is that the surplus proceeds be paid to Archibald Greenshields under the assignment by Adam Reid to him of the mortgaged estate.

But as this contention has arisen from great laches on the part of Greenshields, I do not give him costs.

Order accordingly.

Attorney for plaintiff, *Collins.*
Attorney for defendant Reid, *S. H. Gray.*
Attorney for defendant Greenshieids, *Primrose.*

HAMILTON AND ANOTHER v. BROWN AND OTHERS.

May 21, 1866.

Where Plaintiffs had brought an action against defendants for an alleged trespass on their mine, and it appeared that the mine was within the limits of a lot assigned to the party under whom plaintiffs claimed, on a survey attended by all the parties then interested; that the lot had been occupied from that time by the plaintiffs and those under whom they claimed, by consent of the proprietor of the adjoining lot under whom the defendants claimed; and that no interruption of that occupation had been attempted for a period of nine years, or until defendants interposed,

The Courtr efused to dissolve an injunction which had been granted on *ex parte* affidavits on behalf of the plaintiffs to restrain the defendants from working or interfering with the mine.

The fact of the title being in dispute or of the opposite party acting under a claim of right will not prevent the granting of an injunction, where the value of the inheritance is in jeopardy, or irreparable mischief is threatened.

On an application for an injunction *ex parte* all the facts should be fully disclosed, but the injunction will not be dissolved on the ground of the suppression of facts, if the facts suppressed would not have altered the decision of the Judge.

Principles on which injunctions are granted, and practice as to affidavits on applications therefor.

THIS was an application to set aside an order for a Writ of Injunction, and to dissolve the writ on the grounds that the title to the property on which the defendants were restrained by the writ from mining, &c., was in dispute, and that the plaintiffs in the affidavits on which they had applied for the order had suppressed material facts.

The facts alleged to be suppressed were that the defendants claimed the disputed property, and had forbidden the plaintiffs from trespassing on it, and had brought an action against them for so trespassing after such notice.

The case was argued on the 30th April, before the Judge in Equity, by *McCully, Q. C.*, and *W. A. Johnston*, for the plaintiffs, and the *Solicitor General* and *W. Twining* for the defendants.

McCully, Q. C., cited the following authorities: 2 *Chitty's Arch., Q. B. Prac.* (10th ed.) 1071; 2 *Daniell's Chancery Practice*; *Willard's Equity Jurisprudence*, 342; 16 *Vesey*, 51.

Solicitor General and *W. Twining* cited the following: 2 *Chitty's Arch., Q. B. Prac.*, (10th. ed.) 1065, 1069, 1070;

Willard's Equity Jurisprudence, 382; *Eden on Injunctions*, 108, 110, 191, 195; 2 *Phillips*, 154; 8 *Vesey*, 89; 6 *do.* 147; 17 *do.* 110; 19 *do.* 146; 6 *do.* 51; 4 *New Rep.* 459; 3 *do.* 669; 7 *Ves.* 305; 2 *McN. & G.* 231; 1 *My. & C.* 210; 4 *Beavan*, 130; 1 *McN. & G.* 47.

The material facts stated in the various affidavits, and the points taken at the argument, are sufficiently set out in the judgment.

JOHNSTON, E. J., now (May 21, 1866) delivered judgment as follows:

The plaintiffs having brought an action of trespass against the defendants for breaking their close, and extracting manganese, obtained an injunction *ex parte* on affidavits stating their possession under Stephen Parker of land, in which they had sunk a shaft to a deposit or pocket of manganese, and that the defendants from a shaft in their adjoining lot had run a gallery to and beneath the deposit on plaintiffs' land, and were by that means carrying off, or were about to carry off, the ore which the plaintiffs were engaged in working.

The defendants have moved to dissolve the injunction on affidavits on two grounds:—1st. That the title is in question. 2nd. That the plaintiffs suppressed material facts.

It appeared that Mr. Nutting, being the owner of a rectangular tract of land, sold specified quantities to three several persons, and to Stephen Parker whatever should remain. On a survey attended by the parties interested, a line between Parker and Edward Church, the adjoining purchaser, was run about 9 years ago,—was marked throughout and was held to on each side, the parties fencing on it as far as their cultivation extended, and being regulated by it towards the rear in cutting wood and timber, and the blazes were subsequently renewed, where they had been obscure, by Parker and the son of the then proprietor, Edward Church. The plaintiffs' manganese mine is on the Parker lot if this line be correct, but the defendants allege that there was a mistake in running the line, and that by the true line it is on the lot of the said Edward Church which they have acquired.

The plaintiffs offered affidavits to strengthen their title, an

in one particular to contradict. The defendants' counsel objected, and the affidavits were received subject to the objection.

I will first dispose of this point.

There is much contradiction in the authorities cited. The cases referred to by the defendants' counsel decidedly negative the admissibility of affidavits on showing cause to support the right to the injunction. On the other hand *Daniel* in his *Practice* lays down the right in unqualified terms, and many cases support that view. A strict examination would probably show that there is a distinction between different causes of complaint and different stages of proceedings, and, perhaps, something in the large discretion exercised in cases of injunction.

In *Norway* v. *Rowe*, 19 Ves. 154; the Lord Chancellor in waste held the plaintiff entitled to assert his title by affidavits contradicting the answer which denied his title to stay waste.

In *Peacock* v. *Peacock*, 16 Ves. 50, affidavits were received to contradict the answer, "by analogy to waste." There the Lord Chancellor said: "The Court with the view in each case to have sufficient, and no more than sufficient information, does exercise a discretion in hearing affidavits."

In *Packington* v. *Packington*, 1 Dickens, 101, Lord Hardwicke asked this question: "On showing cause to continue an injunction to stay waste, is the plaintiff confined, as in an injunction to stay proceedings at law, to make out his case from the answer only, or may he strengthen his case by affidavits?" He answered the question by saying: "The plaintiff might read the answer to show his right, and might also read affidavits to make out the waste."

As far as I might be required to exercise my own discretion I should deem it unreasonable that a party, who seeks so summary a remedy as an *ex parte* injunction, should be allowed to strengthen his position in matters relating to his right, and within his power when he applied,—and only reasonable that he should be permitted to contradict or explain matters newly put forward in his opponent's affidavits. The greater portion of the affidavits in question would fall under the former head. The assertion of Arlington Church, the son of Edward Church, that he removed the line without his father's

authority would very properly, I think, be met by the father's statement that the removal was made with his knowledge for the purpose of regulating the cutting of logs.

The view of the case which I take does not make it necessary to decide this question, and I hope soon to be enabled by general rules to define the practice on this point, and on others which the argument has presented.

On the objections taken by the defendants' counsel to the continuance of the injunction, it is true that in general injunctions will not be allowed when the title is in dispute, nor be continued where there has been the suppression of material facts. But I do not find that these principles have been acted upon with the inflexibility, or to the extent assumed by the defendants' counsel.

In several cases I have had occasion to act upon the first named principle. But in one of these cases the defendant had been in possession for fourteen or fifteen years; in the other a mill, which it was alleged caused the overflow of plaintiff's land, had been in use for many years, and being burnt down I thought I was not justified in restraining the re-erection before a suit then pending was decided, and in which already a jury had disagreed.

In the decided cases there have been generally, if not always, circumstances which gave application to that principle. In *Spottiswoode* v. *Clarke*, 2 Phillips, 158, the Court held the right to be uncertain, but did not, therefore, necessarily dissolve the injunction; they considered the great and irreparable injury to the defendant from restraining the sale of his almanac at that season of the year, and dissolved the injunction, directing the defendant to keep an account, and the plaintiff to be at liberty to bring an action.

In *The Attorney General* v. *The Mayor of Liverpool*, 1 Mylne & Craig, 171, there was a doubtful contention, but there, too, the Court acted on the circumstances according to that large discretion exercised in cases of injunction. The Master of the Rolls said, (p. 208) "Balancing the inconveniences which would arise from continuing the injunction, and from dissolving it, I should unquestionably run much greater risk of doing mischief by continuing the injunction than I can do harm by dissolving it. I think, therefore, exercising the discretion

which is vested in the Court in cases of this kind, that my proper course is to dissolve this injunction."

The Vice Chancellor used similar language in *Macey* v. *Metropolitan Board of Works*, 3 New Rep. 669.

In *Willard*, cited by Mr. W. Twining, it is said, "Injunctions will be granted when the value of the inheritance is in jeopardy, or irreparable mischief is threatened even against a person acting under a claim of right." And, again, the same author says, "To prevent a mere trespass the party must have been in the previous undisturbed enjoyment under claim of right."

I am influenced, in deciding this application, by the fact that the plaintiffs' mine is within the limits of the lot assigned on the survey to the party under whom they claim, and occupied from that time by consent of the proprietor of the lot under whom the defendants claim, and that no interruption was attempted of that occupation for a period of nine years, or until the defendants interposed. I by no means intend by this, in the slightest degree to determine or prejudge the question of title,—that will be decided after trial and full evidence. All I mean is that the plaintiffs should be protected in the possession which was undisturbed in their lessor, and only disturbed since the recent acquisition by the defendants of their title to the adjoining lot.

Any other course would be liable to serious objection. To determine the title in favor of the defendants would be to do what it is admitted on both sides I ought not to do, adjudicate on a question not ripe for decision and not before me. To dissolve the injunction because of the title being in dispute would be of no use to the defendants, unless this can overbear the prior possession of the plaintiffs and their lessor by superior force. I see no reason why I should encourage a course that would put in jeopardy the public peace and violate the right which possession confers. So long as the contention of title is undetermined the plaintiffs' possession avails them, and it is not contended that if ultimately unsuccessful they are not able to meet the consequences.

On the question of suppression I have had a good deal of hesitation, from the strong feeling I entertain of the propriety of a full disclosure of facts on applying for an injunction *ex*

parte. But on examining the cases the Judges seem to put it on the effect the facts would have had if stated.

In *Dalglish* v. *Jarvie*, 2 MacNaghten & Gordon, 231, relied on by the Solicitor General, the Lord Commissioner Langdale put the question on the facts being material, and he decided on another ground; and Lord Commissioner Rolfe, who used the strong expression referred to at the argument, uses this language: "If the party applying for a special injunction abstains from stating facts which the Court thinks are most material to enable it to form its judgment he disentitles himself to that relief which he asks."

In the case already referred to of the *Attorney General* v. *the Mayor of Liverpool*, 1 My. & C. 171, the Master of the Rolls puts it in this way, (p. 210): "A very wholesome rule has been established in this Court that if a party comes for an *ex parte* injunction, and misrepresents the facts of the case, he shall not then be permitted to support the injunction by showing another state of circumstances in which he would be entitled to it."

The case where the rule seems to have been applied with greatest rigor under the circumstances is *Hilton* v. *Lord Granville*, 4 Beavan, 130, and on appeal in *Craig & Phillips*, 283, but there it is expressly said that the plaintiffs' erroneous statement induced the Master of the Rolls to grant the injunction, when otherwise he would have appointed an early day to hear the case in the presence of both parties.

By the Lord Chancellor in *Prince Albert* v. *Strange*, 1 McNaghten & Gordon, 48, "If an injunction is obtained by misrepresentation, and it can be shown it would not have been granted but for the misrepresentation, the Court will not uphold the injunction, although the plaintiff may show himself entitled to it."

Although I feel strongly that the plaintiffs should have informed me upon applying for the injunction of the notice they had received from the defendants, and of the action commenced against them, yet I cannot say that the information would have altered my decision.

The single fact I act upon, as I have already explained, is the long possession with the concurrence of the adjoining proprietor. It is in this view that the affidavits offered in

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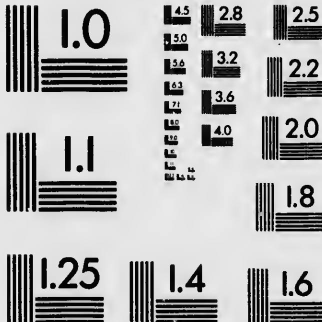

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reply by the plaintiffs are, as I conceive, unimportant, as that fact is sufficiently established by the previous affidavits. So the notices and suit by the defendants were but an assertion of a right claimed by them to interrupt the plaintiffs in working the mine in their possession, and the affidavits of the plaintiffs state that the defendants had interrupted them. After hearing the affidavits produced by the defendants, and seeing their claim of title expanded, I still think the plaintiffs should be protected in their possession until the title is decided, and, therefore, entertaining that opinion I ought not to have refused the injunction because of the notices and action.

I, therefore, discharge the rule *nisi*, but in view of the withholding of the information of the notices and action I do not give costs to the plaintiffs, and I direct that the injunction be continued, and the defendants restrained from mining, &c., in the disputed land until the title shall be tried at law, or further order on terms, viz., to keep accounts, &c., and pay amount and to give security, &c.

*Order accordingly.**

Attorney for plaintiffs, *Blanchard, Q. C.*
Attorney for defendants, *W. Twining.*

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* The following is a copy of the order granted :—

Halifax SS. Before the Judge in Equity, Monday, 21st May, 1866.

Cause { PETER S. HAMILTON, and another, Plaintiffs.
against
JOHN BROWN, and others, Defendants. }

The plaintiff having obtained an injunction to restrain the defendants from certain alleged acts of trespass and spoliation set out in the plaintiffs' writ, and the defendants having obtained a rule *nisi* for dissolving the said injunction which having been fully argued by counsel and affidavits read on both sides, I do order that the said rule be discharged without costs, and that the injunction be continued and the defendants restrained from mining or working into, or in the lot of land claimed by the plaintiffs' and from extracting manganese or ore therefrom until the title shall be determined at law, or until further orders on the terms following, that is to say, that the plaintiffs file with the Prothonotary within one month a verified account of all the ore raised by them on the land and premises in dispute since the issuing of the defendants' writ against them, to this date, and of any sales made thereof, and also a verified account of their expenses in the getting and sale of the same, during the same period—and that the plaintiffs keep a perfect account from this date of all the ore which shall be got by them from the same premises, and of any sales which may be made thereof, and of the expenses of getting and selling, the same to be verified and submitted to the Court when ordered.

And in the event of the title being established in favor of the defendants, that the plaintiffs pay the defendants for the nett value or price after deducting nett expenses and charges of the manganese or ore gotten or sold by them since the commencement of the defendants' suit out of the disputed land to which the defendants may establish title, the amount to be ascertained under the order of the Court, and to be added to the damages assessed by the jury or otherwise paid as the Court may direct—and that the plaintiffs give security to be approved by the Prothonotary at Halifax for the fulfilment of these terms in eight hundred dollars.

By order of the Judge in Equity.

(Signed.) J. W. NUTTING,
Prothonotary.

CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

IN

TRINITY TERM, XXX VICTORIA.

McINTOSH AND ANOTHER *v.* CULLEN.

July 17, 1866.

Where there is a *substantial* performance of work under a special contract, though not in strict accordance with it, and there is no fraudulent or wilful deviation from its terms, the contractor is entitled to recover for the work done, the measure of damages in such a case being the agreed price less such a sum as it would take to complete the work according to the contract.

Where a plaintiff has done a large portion of his work under a special contract under the supervision of the defendant's inspector, who, though he complained of portions of the work and forbade the plaintiff to proceed, stated that he did not suppose that the work would be stopped, and the defendant has himself continued to superintend and direct the work after such expression of disapproval, he cannot afterwards refuse payment for the work done.

ASSUMPSIT. Declaration, after reciting a certain contract in writing between the plaintiffs and defendant, whereby they undertook for £460, payable by instalments, the last of which was payable within three months after completion of the work, to make certain specified alterations, and additions in and to a building of defendant in the city of Halifax, (the plaintiffs providing the materials, the work to be subject to inspections as it proceeded, and to be completed to the satisfaction of the defendant, or such person as he should appoint), alleged that they expended large sums in the prosecution of the work, according to their contract, provided a large amount of materials, (averring their readiness to complete); but that defendant during the time limited for performance, wrongfully prevented their proceeding, and refused them access to the premises, whereby they lost the profits to which

they were entitled, and were put to great expense in providing materials for the completion of their engagement, and were obliged to discharge certain sub-contractors and to pay them compensation. The declaration also contained the common counts for work and labor, &c. Pleas, admitting the contract, but alleging that plaintiffs in violation of their agreement proceeded to do their work with other and inferior materials than provided in their agreement, and on other plans and in other manners and workmanship than stipulated for, against which he from time to time remonstrated; that they persisted in proceeding nevertheless in the erection of a kind of building which he had not agreed for, and of inferior materials and workmanship; and thereupon he, not being able by any other means to prevent plaintiffs from so doing, forbade them further to proceed, and requested them to remove the materials from his premises. There was also a plea to the common counts of not indebted otherwise than under the special agreement.

At the trial before Wilkins, J., at Halifax in October, 1865, although the evidence was somewhat contradictory, it appeared that the plaintiffs in several particulars had not performed the work contracted for in exact accordance with their written agreement, the principal deviation being in the size of certain studding which they had made 5 x 3 inches, instead of 6 x 4 inches as required by the specification, and which was also not mortised both at the top and bottom as required by the agreement. It appeared, however, that all the work had been done under the inspection of an architect (Marshall) appointed by the defendant, and that after Marshall had by letter forbidden the plaintiffs to proceed, defendant had himself given them instructions with regard to the work. Marshall also stated on the trial that he had not supposed that the plaintiffs would abandon the work on the receipt of his letter, but that they would go on and make all right. Bush, an architect, who was also one of defendant's witnesses, testified that it would not cost a great deal to make all right.

The learned Judge, after contrasting the conflicting testimony, which he left to the jury to decide, instructed them that the main question for their consideration was the *quantum* of damages which the plaintiffs were entitled to receive.

He also told them that it was clear that when the work was stopped by the defendant, no rational man placed in his situation would treat the amount of work done and then in a material form on his premises as useless, and a nuisance and incumbrance. He further said that on the contrary many of defendant's own witnesses proved that when plaintiffs' operations were stopped by defendant's act, the *substantial* contract as understood by the contracting parties might have been completed at a certain cost, and that, in the judgment of some of them, not a very heavy one. His lordship also commented on the position in which Marshall stood to the parties, being defendant's inspector, &c. The learned Judge concluded by instructing the jury to find for the plaintiffs the original sum stipulated to be paid by the defendant, after subducting from it such an amount as would have been necessary to complete the contract when the work was stopped.

The jury found a verdict for the plaintiffs for £290, and a rule *nisi* having been taken out under the Statute to set it aside for misdirection, as contrary to law and evidence, and for excessive damages, it was fully and elaborately argued during last Michaelmas Term by *McCully, Q.C.*, and *Blanchard, Q. C.*, for the defendant, and the *Solicitor General* for the plaintiffs.

The defendant's counsel contended that entire performance of the contract was a condition precedent without which the plaintiffs could recover nothing, and that the main question was not the *quantum* of damages, but whether plaintiffs had performed their contract, and that, therefore, the learned Judge had misdirected the jury on a point of vital importance.

The *Solicitor General* contrà argued that the modern cases had altered the law, that the failure to perform the contract must now be in something essential to prevent the plaintiff from recovering.

WILKINS, J., now delivered the judgment of the Court.

After referring at some length to the pleadings, and his instructions to the jury, his lordship said:

It appears to us then that there can be but two questions for our consideration,—first, "Was the Judge authorized to instruct the jury to assume that when the work was stopped,

plaintiffs had substantially performed their contract up to that time?" second, (that question being answered, if it may be, in the affirmative,) were the jury instructed rightly as to the principle on which the amount of damages was to be adjusted?"

Before considering these questions, it will not be without its advantage to reflect on what we have *not* got to consider.

We have not got to deal with the case of a fraudulent, or wilful deviation by a contracting mechanic from the stipulations into which he had entered,—the case of the owner of land on which a contracting party persists contrary to his agreement with that owner, to insert into a fabric in progress of construction some material which, if suffered to remain, will be irremediably injurious to the structure, and respecting which the other part as soon as he is aware of the fact, takes his stand, and *at once* forbids the defaulting contractor to proceed, and so repudiates all his subsequent acts. To come home to the present case, we are not called on to say what the legal consequence would have been, if, when this defendant knew of his own personal knowledge, or of that of his inspector, that plaintiffs had inserted and, when required, refused to remove the particular studding proved not to have been of the stipulated size, he had then absolutely forbidden the plaintiffs to proceed, and had not thenceforth expressly or impliedly recognized their subsequent proceedings.

Of the two questions referred to it will, perhaps, be more convenient first to consider the *second*. "Assuming that there was in some particulars a deviation by plaintiffs from the conditions of their contract—was the principle on which the jury were instructed to fix the damages, one that is sanctioned by law."

The authorities show that on this point there can be no question. The whole doctrine involved in the inquiry will be found elaborated in a note to *Cutter* v. *Powell*, 2 Smith's Leading Cases, 17–18. Some of the cases turn on a point unnecessary for us to consider, viz., whether the remedy must be on the special contract, or by the count for *quantum valebat*. It is unnecessary to be considered, because the writ of the plaintiffs, who have a verdict, contains both forms of action. The history of the remedy is curious. For a long time it

was held that under the circumstances of this case, no matter to what extent defendant had deviated from his contract, the plaintiff, suing for the contract price of his work, was entitled to recover the full amount of it, whilst defendant's only remedy was by a cross action.

Then, again, it was held, as in the case of *Ellis* v. *Hamlen*, 3 Taunt. 52, that the slightest deviation from the contract prevented the contracting builder from recovering anything. Finally, there was adopted *that* which is unquestionably the rule at the present day, not only in England, but in some, if not all, of the more enlightened Courts of the United States.

Before referring to the cases, we may notice the following passage from 2 *Smith's Leading Cases*, 11–12, in note. "It is submitted," he says, "that it is an invariably true proposition that wherever one of the parties to a special contract, not under seal, has in an unqualified manner refused to perform his side of the contract" (and note this defendant has in effect done so, when he forbade to plaintiffs access to his premises) "or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit* for anything which he had done under it previously to the recission." "This," he adds, "is apprehended to be established by *Withers* v. *Reynolds*, 2 B. & Ad. 882," and certain other cases which he cites.

Again, he says, "The general rule being that while the special contract remains unperformed (meaning of course capable in reference to the acts of parties of being performed) no action of *indebitatus assumpsit* can be brought for anything done under it, we now come to the exceptions from that rule. The first of them consists of cases in which something has been done under a special contract, *but not in strict accordance with it*. In such a case the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labor, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred upon him

is reasonably worth. This is conceived to be a just expression," he concludes, "of the rule of law as it at present prevails."

To the same effect speaks *Addison*, (*Addison on Contracts*, p. 198.) Lord Ellenborough's rule, laid down after consulting the Judges, in *Farnsworth* v. *Garrard*, 1 Camp. 38, is "the claim shall be co-extensive with the benefit." Such also is the doctrine, except perhaps as to the form of action, in *Baillie* v. *Kell*, 4 Bing. N. C. 652. In *Thornton et al.* v. *Place*, 1 M. & Rob. 218, it was decided that where a tradesman finishes work (in the case it was *slating buildings*) differing from specification agreed on, he is not entitled to the actual value of the work, but only to the agreed price minus such a sum as it would take to complete the work according to the specification." Per Parke, J. The principle of this *Nisi Prius* decision is expressly recognized by the Court in *Mondel* v. *Steel*, 8 M. & W. 870; also in *Lucas* v. *Godwin*, 4 Scott, 502.

Hayward v. *Leonard*, 7 Pick. 181, is a very interesting case, directly in point as respects the principles involved in it, and one that shows the doctrine of the Supreme Court of Massachussets to be in accordance with that now held in Westminster Hall. The learned Chief Justice Parker who decided it referred to it as governing another case before him, also in point, viz., *Smith* v. *The Proprietors of the First Congregational Meeting House in Lowell*, 8 Pick. 178.

Since the decision of Parke J. in the case cited from *Moody & Robinson*, I have not found either in the cases cited at the argument, or in any other case, one single decision opposed to it. The remaining question is one that refers to the written contract and to the evidence, and it makes it our duty to inquire, "whether, in view of the facts, the jury were at liberty to assume that, when the plaintiffs were forbidden by the defendant to proceed with their work, they had, up to that time, substantially performed their contract?" And thus, it appears to us—there existing no ground for imputing to plaintiffs fraud, or a wilful, perverse design to conceal from defendant or his inspector bad materials, or to save their own pockets by imposing on him work of less value than that which they contracted to provide for him—resolves

itself into an inquiry, "whether that portion of the work done when the progress of it was arrested was useless to defendant, in a sense, that by expenditure of a certain sum he could not make the work done at that time, when completed, as good for the purposes contemplated by him when he entered into the contract, as it would have been if there had been a literal, and perfect performance by plaintiffs of their stipulations.

One's common sense revolts at the proposition, "that because a contractor has *honestly* deviated, in some slight particulars, from his specifications, he can recover nothing for work actually done, work of real value to the other contracting party, on whose land the fabric stands which embodies it—and yet that result is reached, if the contention of defendant's counsel at the argument must be received as law! To say nothing at present of the evidence of plaintiffs and of their witnesses, which we must assume the jury believed, and which, if believed, decisively shows that the defendant could by expending a certain sum have cured all defects, and had a building substantially according with plaintiffs' contract, we turn to the testimony of defendant's witness—Marshall—than whom none could be more competent to judge. It shows conclusively that the work done, when the work was stopped, was not useless, and might have been perfected. He says, "I did not suppose that plaintiffs would abandon the work, on my letter, but that they would go on and make all right." This is decisive to show that, in his opinion, if they had been allowed to go on, they *could* have made all right. Again, he says, "there would be no difficulty in making all right if what the architects and carpenters" (meaning those who had been produced by plaintiffs as witnesses) "said yesterday in their examinations be true." Now, it must be taken, after the verdict, that it was true, and, therefore, Marshall's testimony is destructive of the only ground of defence that could possibly avail the defendant. It must not be forgotten that Marshall, with a full knowledge of the defects and deviations—few and not very important they are—which he pointed out in his testimony, nevertheless, continued to superintend and direct the work up to the 8th August, when the letter was written of which the object was to prevent its further progress. On no rational principle

could defendant, in view of this fact, repudiate, and refuse to pay for the work of these plaintiffs then previously done. Common justice to them demands that they should have been stopped, at the moment of knowledge of any one of the breaches of contract, which it is now insisted that they committed. According to the defendant's evidence his condemnation of work and materials is so unexclusive that it induces a belief that he must have been laboring under delusion and misapprehension about the real nature and character of both. In contrast with the testimony of his inspector just adverted to, he said, "as a matter of prudence, I would not attempt to support this now defective building,"—again, "the roof is so bad that it cannot be set to rights."—He even condemned the wall, though Marshall admits that *he* passed it as unobjectionable. As regards the roof so absolutely condemned by defendant, Bush, one of his own witnesses, said, "I would not pull down, but I would not be satisfied with the roof—*it would not cost a great deal to make it all right.*"

On the point of waiver of objections by permitting plaintiffs to proceed after knowledge of defects, it is observable that whilst defendant said: "I cannot say whether *this* (plaintiffs' giving him a sketch for shop-front) was or was not after Marshall's letter," plaintiff, Innis, said, "it was long after letter received the section of front was given by defendant." We must, therefore, take such to have been the fact.

If, on the other hand, we confine our attention to the evidence for the plaintiffs, we find their case completely substantiated, and we find also a complete failure, on the part of the defendant, to substantiate this his defensive allegation, viz., "that he stopped the plaintiffs because they persisted, in despite of his remonstrances, in erecting a kind of building which he had not agreed for, and one marked by inferior materials and workmanship." The evidence last referred to shows that, had the plaintiffs been allowed to proceed to completion of their work, defendant would either have had such an erection as they stipulated for, or that there would have been only such deviations from the strict letter of their contract, that by means of the legal privilege incident to defendant to subduct from the contract price an indemnifying sum,

he could within the limits of that contract price have commanded, really and substantially, such a building as plaintiffs engaged to provide for him. The learned counsel for the defendant was understood at the argument to object "that the evidence afforded no sufficient data to enable the jury to ascertain the amount of damages." But that objection is obviously unfounded, for, to say nothing of the inferences as to the *quantum* which the jury might have drawn from the work proved to have been undone when plaintiffs were stopped, relatively to what they had engaged to do, and to the consideration therefor, there exists direct testimony given by the plaintiffs, which, if believed, presented abundant grounds for arriving at a legitimate conclusion on the point last noticed. For these reasons, we are of opinion that this rule must be discharged.

Rule discharged.

Attorney for plaintiffs, *J. N. Ritchie.*
Attorney for defendant, *Blanchard, Q. C.*

HARTSHORNE AND ANOTHER v. WILKINS AND OTHERS.

July 17, 1866.

Where two or more persons, and especially where relatives, perish in the same calamity, the law recognizes no presumption of survivorship; but in the total absence of all evidence respecting the particular circumstances of the calamity, the matter will be treated as if all of them had perished at the same moment, and consequently none of the parties will be held to have transmitted any rights to the other.

A testator, J. C., by his last will bequeathed a certain fund to trustees in trust, after payment of an annuity of £30 sterling to E. H., and a disposition of the remaining income during the life of his daughter, L. C., (who was illegitimate), then on further trust after the decease of his said daughter to transfer and dispose of the said fund to such of her children or grandchildren as should then be living, in such parts and proportions as she should appoint, or otherwise in equal shares.

By a subsequent clause he provided that should his daughter die "without leaving any lawful issue," that the fund should be paid to his nieces in equal proportions, or to their lawful issue then living.

He further provided that the above bequest to his nieces should be subject to any legacy or legacies, not to exceed in the whole £1000, sterling, which his daughter, in case she should have no lawful issue, might by her last will give and bequeath, notwithstanding her coverture.

L. C., shortly after the death of the testator, married H. S. B., by whom she

had three children, and made her will after her marriage (under the power reserved to her in the will of the testator) whereby she bequeathed out of the said fund to her husband, H. S. B., £600 sterling, and to her mother, E. H., £400 sterling. She appointed her husband executor, and he duly proved the will after her death as hereinafter stated.

L. C., then L. B., with all her children, three in number, embarked in February, 1862, in the steamer "Wiesbach," bound for Halifax, but neither the steamer nor L. B. nor any of her children ever arrived at Halifax, nor had any information been since received of the steamer, nor of L. B., nor of any of her children, nor what has become of them, nor how nor in what manner the said steamer was lost, nor how, or in what manner the said L. B. and her children died, and which of the said children died first or last, but it was assumed that some time during the year 1862, the said L. B, and all the children that she had by the said H. S. B., (who survived her) being the three mentioned above, perished on board the said steamer "Wiesbach" that foundered at sea under circumstances unknown.

Held, first, that the fund could not be assigned to H. S. B., as the heir at law of the children of himself and of L. B., because such children were entitled as should be living at the decease of L. B, and there was no proof that any of the children were so living, *i. e.* that any of the children survived her, and she having been illegitimate the title of her children depended entirely on the will of the testator.

Secondly, that the fund could not be assigned to the nieces, or their representatives, because their title depended entirely on the daughter, L. B., dying without leaving any lawful issue, and there was no proof whether she did or did not so die, *i. e.* whether her children did or did not survive her.

Thirdly, that the will of L. B. could not take effect, because she was only empowered to bequeath the £1000 sterling "in case she had no lawful issue," and she had issue born, and there was no proof of survivorship between her issue and her.

Lastly, (there being an intestacy in the events that happened), that the whole of the fund must be distributed among the next of kin of the testator, subject to the payment of the annuity to E. H.

The question as to whether the intestacy should be computed from the time of the death of the testator, or from the date of the events which produced the intestacy, was ordered to be argued, and the decision thereon reserved until after such argument.

THIS was a special case on the construction of the will of the late Joseph Creighton, stated for the consideration of the Court by the parties interested in the will, or in the estate of the testator independently of the will. The will is dated 22nd June, and was admitted to probate, 10th September, 1853. The testator left an illegitimate daughter, Louisa Creighton, a sister, the late Mrs. Wilkins, the children of a brother, and the children of another sister. The daughter married H. S. Bagnell, shortly after the death of the testator, and had three children, all of whom perished with her by an unknown disaster at sea, in February, 1862. The husband survived and claimed the whole of the estate as heir to his

children, or part of it as a legatee of his wife. Five nieces of the testator claimed the whole under a clause in the will. There were four children and eight grandchildren of Mrs. Wilkins, three children of the late John Creighton, four children and a grandchild of the late Lucy Binney, all of whom were claimants; and twelve of these, to the exclusion of the grandchildren of Mrs. Wilkins, claimed as the testator's next of kin. The case asks the Court to decide on the conflicting claims of the defendants, and to adjust and decree their rights so as to enable the plaintiffs, the trustees, to carry out the trusts of the will, and to make a proper distribution of the funds under their control.

The material portions of the will affecting the questions raised by the case are substantially as follows:—The testator bequeathed to the plaintiffs, Lawrence Hartshorne and the Rev. James Stewart, (both of whom are now deceased) the sum of £8133 2s. 11d., three per cent. consols, in trust after payment of an annuity of £80 sterling to Elizabeth Horn, and a disposition of the remaining income during the life of his said daughter, Louisa, that the plaintiffs or the survivor, his executors or administrators, should, and would, after the decease of his said daughter, transfer and dispose of the said sum unto all, and every, and such one or more of the children or grandchildren of the said Louisa Creighton as should then be living, in such parts and proportions, manner and form, as the said Louisa Creighton, notwithstanding coverture, or whether sole or unmarried, by her last will and testament in writing or any codicil in writing, or by any deed or writing disposing thereof to be by her signed, should direct, limit, give, or appoint, and in default thereof, then unto, and among the child or children of his said daughter Louisa living at the time of her decease, to be equally divided among them if more than one, and if only one then to such only child; and further, should his said daughter Louisa die without leaving any lawful issue, then it was his will that the said sum be paid over by his trustees to his nieces in equal proportions, or to their lawful issue then living, subject, however, to any legacy or legacies, not to exceed in the whole one thousand pounds sterling money, which his said daughter Louisa, in case she should have no lawful issue, might by her last will and

testament give and bequeath notwithstanding her coverture.

The first of these provisions, as will be seen, transfers the fund after the decease of the daughter to such of her children as should then be living, in such parts and proportions as she should appoint, or otherwise in equal shares.

The second transfers the fund, should the daughter die without leaving any lawful issue, to the neices of the testator in equal proportions,

The third empowers the daughter, in case she should have no lawful issue, to bequeath £1000 of the fund as she should think fit by her last will notwithstanding her coverture.

The case sets out that the daughter in the month of February, in the year 1862, then Louisa Bagnell, with all her children, three in number, embarked in a British steamer called the "Wiesbach," laden with warlike stores and bound for Halifax, to rejoin her husband, the said Henry Sedley Bagnell, but neither the said steamer nor the said Louisa Bagnell nor any nor either of her said children have ever arrived at the port of Halifax, nor have any tidings or information since been heard of the said steamer "Wiesbach" or of the said Louisa Bagnell, or any or either of her said children, or what has become of them, or how or in what manner and when the said steamer was lost, nor how or in what manner the said Louisa Bagnell and her said children died, and which of the said mother and children died first or last, but it is assumed that some time during the year of our Lord one thousand eight hundred and sixty-two the said Louisa Bagnell, and all the children that she had by the said Henry Sedley Bagnell, perished on board the said steamer "Wiesbach" that foundered at sea under circumstances unknown.

The case further sets out a will made by the daughter after her coverture, under the power reserved to her, bequeathing out of the fund £600 sterling to her husband, and £400 sterling to her mother, the said Elizabeth Horn, which will has been duly proved by the husband as executor.

The case finally sets forth the various aspects under which the several parties lay claim, which are stated as follows:

First—Sarah Maynard and her husband in her right—Mary Whittey and her husband in her right—Lucy Kearney, and Jane Hays as nieces of the testator, and Charles W.

Parker, in right of representation of his mother Lucy Parker, who is now dead but survived the said Louisa Bagnell and her children, the two defendants who are children of the said Lucy Sturge, deceased, and the several defendants who are children of the said Isabella Moorsom, deceased, claim to be entitled to the said trust property as nieces and representatives of nieces of the said testator respectively under the will.

Secondly—Lewis M. Wilkins, Charles T. Wilkins, Martin I. Wilkins, Stephen Binney, Richard Binney, Edward Binney, and John Creighton and (in case it should be decided that the nieces cannot take under the will) then also Sarah Maynard and her husband in her right—Mary Whittey and her husband in her right—Lucy Kearney and Jane Hays and the said Charles W. Parker as representing his deceased mother, together with the said Lewis M. Wilkins, Charles T. Wilkins, Martin I. Wilkins, Stephen Binney, Richard Binney, Edward Binney, and John Creighton claim to be entitled to the said property in equal shares, (the whole in twelve equal parts to be divided), as the next of kin to the said testator, they and they alone being as aforesaid in the nearest degree of relationship to him. They found their claim (the said contingent claimants last named claiming conditionally as aforesaid) on the ground that the event mentioned in the will, on the happening of which alone the nieces could claim as legatees, and the event on the happening of which alone the said Henry Sedley Bagnell could claim as heir to his children are alike unproved and incapable of proof, and that, therefore, under the only circumstances known of the deaths of the said Louisa Bagnell and her children, the said testator in contemplation of law at the time of their deaths died intestate (except as respects the legacy to Elizabeth Horn), as to all the property in the hands of his trustees under or by virtue of his will.

Thirdly—The defendants, who are children of Mrs. Sturge, and Mrs. Moorsom, deceased, respectively claim to be entitled (in case their claim as representatives of the nieces as legatees fails) to share among the next of kin.

Fourthly—The said Henry Sedley Bagnell claims to be entitled to the whole of the said sum of eight thousand one hundred and thirty-three pounds two shillings and eleven

pence, as the father of the said children by the said Louisa Bagnell, his wife, and that on failure of such right, then he and the said Elizabeth Horn claim under the said will of the said Louisa Bagnell made as aforesaid, to be entitled to the several sums of six hundred and four hundred pounds bequeathed to them respectively by the said Louisa Bagnell in and by her last will and testament hereinbefore in part set forth.

Fifthly—All the defendants, except the said Henry Sedley Bagnell and Elizabeth Horn, deny the respective claims of the said Henry Sedley Bagnell and Elizabeth Horn under the will of the said Louisa Bagnell deceased, insisting that as she had lawful issue she was not empowered by the testator to make a will disposing of any part of his property bequeathed by him to the plaintiffs, the trustees, and that, therefore, the probate of her said will granted to the said Henry Sedley Bagnell must be annulled and avoided in due course of law.

The suit was an equitable one brought by the executors and trustees of the testator against twenty-seven persons, being all the parties believed to be interested in his will or his estate. All these persons claimed as being in one or other of the classes set out above.

The case was argued during last Michaelmas Term, by counsel representing the various classes of defendants before Young C. J., Dodd J., and DesBarres J., Johnston E. J., being absent, and Wilkins, J. being one of the defendants.

Smith, Q. C. for the plaintiffs simply read the case without argument, stating that the plaintiffs had a right to ask the opinion of the Court.

B. G. Gray for the next of kin referred to *Underwood* v. *Wing*, 31 Eng. Law and Eq. Rep. 293, and to the language of Wightman, J. in that case (p. 297) where he states that the next of kin as to personalty stands in the same position as the heir at law as to realty, and that the person claiming against him must make out his entire title. He also read the following extract from the judgment of Lord Cranworth in the same case, (p. 301): "The real ground to proceed on is, that it cannot be proved which died first; they both probably died

within a few seconds of each other, but which died first it is impossible to say. That being so, what is the result? Why, here is a will made in which, in one state of circumstances, namely, if the wife died in the husband's life time, the property is given away. It is not proved that that state of circumstances existed, and in no other state of circumstances is it given away. Then it is not given away at all. Therefore it is to be taken as upon an intestacy, and must be distributed among the next of kin." He also referred to *Wing* v. *Angrave* (House of Lords) 30 Law Jour. Rep. N. S. 65, and several other cases, and contended that the whole fund, subject to the annuity to Elizabeth Horn, must go to the next of kin.

McCully, Q. C., for all the nieces (except Lucy Parker and Mary Whittey) contended that the title of the nieces to the whole fund did not depend on the survivorship of either Louisa Bagnell or of her children, that they (the nieces) were entitled under the will even if she and her children all died at the same moment. The words of the testator on which the right of the nieces under the will defended were, should his said daughter Louisa, "die without leaving any lawful issue," and she did so die if she and her children all perished at the same instant. The words were not "die without issue," but "die without *leaving* issue."

Shannon, Q. C., for Lucy Parker (since deceased) and Mary Whittey, referred to 1 *Taylor on Evidence*, 179; 2 *Kent's Com.* 583–585, and other authorities.

W. A. D. Morse, appeared on behalf of the children of Mrs. Sturgo and Mrs. Moorsom, deceased, being the grand-children of Mrs. Wilkins, and contended that they were not excluded by the last clause of the third section of Chapter 115 of the Revised Statutes, second series (p. 747, third series) from participation in the fund.

The *Solicitor General*, for H. S. Bagnell, contended that to adopt Mr. Gray's view would obviously entirely defeat the intention of the testator. He also argued that if Louisa Bagnell's children survived her, then H. S. Bagnell would

take the whole fund as their heir at law, but if they did not survive her, then he was entitled to the £600 under her will. The Courts said that time like matter was infinitely divisible. It could not be imagined that all had died at precisely the same instant. There must be a surviving of one at least, for a second or a minute part of a second. The birth of her children did not take away Mrs. Bagnell's powers of devising. The words "in case she have no lawful issue" should be read "in case she have no lawful issue *her surviving*." Even if she and all her children died at the same instant, then she had no lawful issue her surviving.

Wilkins, Q. C., on behalf of himself and the other next of kin of the testator, argued that the question was not what was the intention of the testator. His intention was quite obvious. The question was, whether the death of his daughter and all her children by the same catastrophe had not created an intestacy except as to the annuity to Mrs. Horn. There was no presumption whatever in such a case as to survivorship from the age, strength, sex, or other circumstances of the parties. The whole fund must go to the heirs at law.

Cur. adv. vult.

The Court now (July 17) delivered judgment.

YOUNG, C. J., after referring at some length to the case, and the material portions of the will, said:—

In the view we have taken of this case and the remarkable circumstances which distinguish it, we have been mainly guided by the recent decision of the House of Lords in *Wing* v. *Angrave*, 30 Law Journal Reports, 65, February, 1860, and the previous judgments in the same case under the name of *Underwood* v. *Wing*, 19 Beavan, 459, before Sir John Romilly, Master of the Rolls, and 31 *Eng. Law & Equity Reports*, 293, before Lord Chancellor Cranworth, assisted by Judges Wightman and Martin.

In that case Mr. and Mrs. Underwood and their two boys having embarked on a voyage for Australia were shipwrecked, and were proved by a survivor to have been washed into the sea by the same wave, their daughter Catherine having sur-

vived for about half an hour and then also perished. Mutual wills had been made by the husband and wife, whose efficacy depended on the survivorship of the one or the other, and the doctrine was upheld which is succinctly and clearly stated in 1 *Taylor on Evidence*, (3rd edition), 179: "When two persons (and of course when two or more persons) and especially when two relatives perish in the same calamity, the law of England, whether administered in the Courts of Common Law, the Courts of Equity, or the Courts of Probate, recognizes no presumption of survivorship; but in the total absence of all evidence respecting the particular circumstances of the calamity the matter will be treated as if both sufferers had perished at the same moment, and consequently neither of the parties will be held to have transmitted any rights to the other." *Taylor* adds in a note that by the Mahometan law of India when relations thus perish together it is to be presumed that they all died at the same moment.

This principle, however, is by no means universally received. The Code Civil of France and that of Louisiana, both of which are cited in the note to the American edition of 1 *Young & Collyer*, 126, take into account the circumstances of each case; and so late as the year 1842 in *Sillick* v. *Booth*, reported as above (but which Mr. Taylor says, can no longer be relied on as an authority) Vice Chancellor Bruce declared that by the law of England, evidence of health, strength, age, or other circumstances, may be given in cases of this nature, tending to the judicial presumption that one party survived the other.

According to 2 *Kent's Com*, 435, 9th edition, the English law has hitherto waived the question, and perhaps prudently abandoned as delusive all those ingenious and refined distinctions which have been raised on the vexed subject by the civilians. The latter draw their conclusions from a tremulous presumption resting on the dubious point which of the parties at the time, under the difference of age or sex, or of vigor and maturity of body, and quickness and presence of mind, was the most competent to baffle and retard the approaches of death.

It is remarkable that neither in the 9th nor 10th edition of *Kent*, both published after the decision of *Underwood* v. *Wing*,

is that case referred to, though it shows that this vexed question is no longer waived, as stated in the text, by the English law.

As matters of judicial curiosity I have looked at all the earlier cases, and will cite two or three of them as affording us instructive or curious illustrations.

Swinburne puts the case of a testator and legatee being drowned in the same ship, or both being struck to death by the fall of a house, in which case, he lays it down that as they both died at the same time, the legacy is not due, and consequently not transmissible to the executors or administrators of the legatee.

In cases of this description, says *Williams on Executors*, 1084, the question of survivorship is by the law of England a question of evidence merely, and, in the absence of evidence, there is no rule or conclusion of law on the subject; and as the *onus* of proof lies on the legatee's representatives, they cannot claim the legacy unless they can produce positive evidence that he was the survivor.

In *Broughton* v. *Randall*, Cro. Eliz. 502 which was error of a judgment in Wales, in dower, the title of the femme to recover dower was that the father and the son were joint tenants to them and the heirs of the son, and they were both hanged in one cart, but because the son, as was deposed by witnesses, survived, as appeared by some tokens, viz., his shaking his legs, his femme thereupon demanded dower, and upon the issue this matter was found for the demandant.

In re Robert Murray, 1 Curt. 596, decided in 1837, Murray, his wife and child, being below in the cabin of a vessel which struck the land and went to pieces, were drowned. Murray left a will in which he had bequeathed the whole of his property to his wife. The Court granted administration with the will annexed to the next of kin of the husband as dead, a widower; there being nothing to show that the wife survived and the next of kin of the wife consenting.

In *Satterthwaite* v. *Powell*, 1 Curt. 705, decided in 1838 and closely resembling the present case, Ann Armett sailed in 1819 with Major Armett, her husband, and four children on a voyage from Bristol to Cork in a packet which was lost in the channel, and every one on board perished. Counsel for

the administrator of the husband insisted that where husband and wife perished by the same accident, the ordinary presumption of law is that the husband survived, and relied on a dictum of Sir John Nicholl, 2 *Phil.* 261-279. But Sir Herbert Jenner said the point was settled "that the principle has been frequently acted on, that where a party dies possessed of property, the right to that property passes to his next of kin, unless it can be shown to have passed to another by survivorship. Here the next of kin of the husband claims the property which was vested in his wife; that claim must be made out, it must be shown that the husband survived. The property remains where it is found to be vested, unless there be evidence to show that it has been divested. The parties in this case must be presumed to have died at the same time, and there being nothing to show that the husband survived the wife, the administration must pass to her next of kin."

These conflicting views would have imposed on us a delicate task, but for the governing case of *Underwood* v. *Wing*. There it was held that neither the will of the husband nor wife could prevail, and that the next of kin of the surviving daughter was entitled. The evidence clearly established that the husband and wife and their two sons were immersed together in the water, that they sunk at once and never appeared again. In this state of things the Master of the Rolls held it impossible to found any decision on the assumption that either was the survivor, just as no such assumption can possibly be entertained in the case in hand.

When the case came up to the Court of Chancery, Mr. Justice Wightman observed, "the next of kin stands as to personalty, in the same position as the heir at law as to realty; and the person claiming against him must make out his entire title. In the absence of any effectual disposition of the beneficial interest in the personalty, the next of kin is entitled to it, and the person seeking to dispossess him of it is bound to prove a perfect title and to rebut the *primâ facie* title of the next of kin." "As to the point of survivorship it was argued with great ability, and the same cases and authorities were cited before us as before the Master of the Rolls. In the French code the rule of survivorship is made

a matter of positive regulation and enactment, varying according to the age and sex of persons dying in the same shipwreck; but in our law it is not so. The question of survivorship is the subject of evidence to be produced before the tribunal which is to decide upon it, and which is to determine it as it determines any other fact." "We may guess, or imagine, or fancy; but the law of England requires evidence, and we are of opinion that there is no evidence upon which we can give a judicial opinion that either of the four persons survived the other."

So also the Lord Chancellor. "Having turned the matter much over in my mind," (this is so late we must observe as the year 1855) "I am perfectly persuaded," he says, "that exactly the same principle is applicable to the case of personal as of real estate. If a person dies possessed of personal estate, *primâ facie* the next of kin will be entitled to it; and their right will only be displaced by some person coming forward and showing a valid and effectual disposition taking it away from them." "As to the survivorship, the real ground to proceed on is that it cannot be proved whether the husband or wife died first: they both probably died within a few seconds of each other, but which died first it is impossible to say. That being so, what is the result? Why here is a will made, in which in one state of circumstances, namely, that if the wife died in the husband's lifetime (and *vice versâ*) the property is given away. It is not proved that that state of circumstances existed; and in no other state of circumstances is it given away. Then it is not given away at all. Therefore it is to be taken as upon an intestacy, and must be distributed amongst the next of kin."

These opinions were affirmed by Lord Campbell in the House of Lords, though he differed from his brethren on another point, as well as by Lords Wensleydale and Chelmsford. The latter observed that "if Mrs. Underwood had foreseen the extraordinary contingency which actually occurred, no doubt she would have provided for it, but she had not. The House might speculate with great probability, if not with certainty, as to what the form of bequest would have been, if the possibility of such an event as had happened had been suggested to the minds of Mr. and Mrs. Underwood; but to act on such

a speculation would be to make the will speak a language which it did not speak." This last observation which is often heard in Courts of Justice has a peculiar bearing on the case in hand. There is enough on the face of the will to show the testator's preference of his nieces to his other next of kin, and a few words added would have made that preference effectual in any event. But the words are not there and it is not for us to supply them.

Reverting then to the three questions, which I have already succinctly stated, the fund, first of all, cannot be assigned to the father as the heir at law of the children, because such children were entitled as should be living at the decease of the daughter, and there is no proof that any of the children were so living, that is, that any of the children survived the daughter, and the daughter having been illegitimate, the title of her children depended entirely on the will. Neither can the fund, in the second place, be assigned to the nieces, or the representatives of the nieces, because their title depended on the daughter dying without leaving any lawful issue, and there is no proof whether she did or did not so die, that is, whether her children did or did not survive her.

These positions are doubtless very subtle; they seem to partake more of the inflexibility and precision of mathematical rules, than of a science which deals with the larger questions of ethics. But still as we have seen, they are fully supported by the later decisions of the English Courts, and with reference thereto I may add that so recently as in the month of December last, the most important of them was recognized and acted on by Vice Chancellor Wood, in *Re Green's Settlement Trusts*, 13 Law Times Reports, N. S. 541.

Lastly. The argument in support of the daughter's will appears to be quite untenable. She was at liberty to bequeath £1000 sterling in one event, that is, in the words of the testator, "in case she have no lawful issue."

It was contended that her having issue which might die in an hour could not take away her power of devising. Why not? The birth of a lawful child *ipso facto* created new rights and interests. The immediate death of that child, or the still more extraordinary event which happened, were not in the contemplation of the testator, and he gave the power of

devising to his daughter with a limitation which put an end to the power the moment she had issue. If again, as was contended, the words are to be read: "in case she have no lawful issue her surviving," words which we have no right to add, then there is no proof of survivorship as between her issue and her.

Hard as it seems then, I do not see how it is possible for us to sustain this will, or to award either the £400 to the mother, or the £600 to the husband of the deceased.

I think, therefore, that the fund must be distributed among the next of kin of the testator, subject to the payment of Mrs. Horn's annuity of £80 sterling. Eight of the defendants, viz., Stephen Binney, Edward Binney, Richard Binney, Charles W. Parker, in right of his mother, Mary Whittey, and her husband, Irvine Smith Whittey, in her right, John Creighton, Lucy Kearney, and Jane Hays, will thus be entitled to eight-twelfths or two-thirds of the fund in the proportions to be hereafter determined. As respects the other four-twelfths claimed by the four surviving children of Mrs. Wilkins, a question remains which was scarcely spoken of at the argument but which demands mature consideration. Eight of the defendants are children of two of the deceased daughters, that is, they were grand-children of Mrs. Wilkins, and had Mrs. Wilkins predeceased the testator they would have been excluded by the Statute as collaterals "after" or beyond the degree of "brothers' and sisters' children." This would seem to have been the only or at least the main view contemplated by the case; but the case sets out that Mrs. Wilkins did, though the brother and the other sister did not survive the testator, but died before Mrs. Bagnell and her children. Had Mrs. Wilkins then any interest at the time of her death? A vested interest in the usual sense of the term she had not. But had she a contingent interest to which the Statute of Distributions would apply? In other words is the intestacy of Colonel Creighton to be computed from the time of his own death, or from the time of the death of Mrs. Bagnell and her children?

In the former case one-third of the fund had vested in Mrs. Wilkins, subject to the contingency that has happened, and descends in equal sixth parts to her four surviving children and the representatives respectively of her two deceased

daughters. In the latter case the representatives of these two daughters are excluded.

Now on looking at the cases, none of which have been cited, and especially at a recent decision of the House of Lords, we think that we would not be justified in forming any opinion on, or in deciding the rights of these parties and especially of the absent defendants, until they shall have been heard by counsel; and, therefore, we direct that upon this point the case shall be re-argued, and, as both trustees are deceased and time is of consequence, my two learned brethren and myself will give every facility for a re-argument at an early day during the present Term.

DESBARRES, J.* In considering this case we must be governed by the principle laid down in *Underwood* v. *Wing*, 31 Eng. L. & E. R. 297, that there is not in the English law any presumption from age, sex, or other circumstances, as to the survivorship of one out of several persons who are destroyed by the same calamity; there must be proof of the fact, and the *onus probandi* lies on the party who asserts the affirmative.

Now the proof which the nieces of the testator and their representatives are required to produce, to entitle them to take the trust property under the will of Joseph Creighton is that Louisa Bagnell died without leaving issue, and that involves the necessity of showing that all the three children died before the mother, in other words that she, for some short period, however short, survived her children when the ship on board of which she and they had embarked foundered at sea. It is probable that they all perished within a short time of each other, and it may be that the mother lived a few moments longer than her children, but as that fact cannot be proved, no human being out of all the persons who were on board of that ill-fated ship being known to have survived, it is clear that according to the principle laid down in *Underwood* v. *Wing*, the claims set up by the nieces and the representatives of the nieces to the trust property under the will cannot for want of such proof be sustained. If then

*DODD, J., also delivered a written opinion, concurring with that of his lordship the Chief Justice, but it has unhappily been mislaid.

the nieces as a class of claimants cannot establish their right to the trust property under the will of Joseph Creighton, the next question is whether the claim of Henry S. Bagnell as heir to his children rests on any surer or better foundation. It lies on him to show that the children or some one of them survived their mother, and, as that fact is under the circumstances utterly incapable of proof, it follows that his claim as heir to his children like that of the nieces must for that reason also fail, nor can the devise to him by his wife of £600 sterling from and out of the trust property take effect, since there can be no doubt that having had children, she had no power or authority under the will of Joseph Creighton to make such a devise. That devise, then, as well as the devise to Elizabeth Horn of £400 sterling out of the trust money can have no legal operation, and both, as it appears to me, must on that ground be rejected. Seeing that neither the claims of the nieces to the trust property as devisees under the will of Joseph Creighton, nor the claim of Henry S. Bagnell thereto as heir to his children, nor his claim or that of Elizabeth Horn as to the sums bequeathed to them respectively therefrom by Louisa Bagnell can prevail, it remains to inquire to whom this trust property legally belongs and in what manner it is to be appropriated and applied. It was contended at the argument on the part of the next of kin that under the circumstances of this case, Joseph Creighton, as to the principal or trust money remaining in the hands of the plaintiffs up to the event of Louisa Bagnell's death must be presumed in law to have died intestate, and that dying intestate his next of kin became entitled thereto. That position is supported by the case of *Underwood* v. *Wing*, in which the Lord Chancellor said that "where a person dies seized in fee of real estate *primâ facie* his heir at law is to succeed, and he can only be deprived of his right to succeed to it by some devisee coming forward, showing that a valid will was made, valid in point of form and effectual in point of substance in displacing his rights. If that is not shown the heir at law is entitled." "The same principle (he added) is applicable to the case of personal estate. If a person dies possessed of personal estate, *primâ facie* the next of kin will be entitled to it; and their right will only be displaced by some

person coming forward and showing a valid and effectual disposition taking it away from them." In the present case although there is a will, valid it is true in point of form, yet as the devisee, Louisa Bagnell, and her children are all dead, and the nieces cannot take the trust property under it as devisees after her death, in consequence of their inability to prove that she survived her children, there is consequently no effectual disposition of the property displacing the rights of the next of kin; and, therefore, the testator, Joseph Creighton, must be considered as having died intestate as to all his undisposed of property; and I agree that the next of kin to the testator are the parties who are entitled to take that trust property subject to the annuity to Elizabeth Horn for her natural life, but whether those who were the next of kin at the time of the death of Louisa Bagnell, or those who were the next of kin at the time of the death of the testator, are the persons who are legally entitled to take the said trust funds is a question upon which I am not at present prepared to give any opinion. Our attention was not directed to that point at the argument, and as it is one that ought to be well considered, I concur with the learned Chief Justice and my brother Dodd, that there ought to be a re-argument upon that point.

*Order accordingly.**

Attorney for plaintiffs, *Smith, Q. C.*

Attorney for Hon. L. M. Wilkins, M. I. Wilkins, and C. T. Wilkins, *Wilkins, Q. C.*

Attorney for T. Maynard and wife, *McCully, Q. C.*

Attorney for S. Binney, R. Binney, C. W. Parker, I. S. Whittey and wife, *Shannon, Q. C.*

Attorney for E. Binney, *B. G. Gray.*

Attorney for Lucy Kearney, *James.*

Attorney for H. S. Bagnell, *Solicitor General.*

Attorney for grandchildren of Mrs. Wilkins and parties claiming through them, *W. A. D. Morse.*

John Creighton, *Q. C.*, appeared in person.

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*JOHNSTON, E. J. was absent from the Court at the time of the argument in consequence of having been originally retained in the cause.

FREEMAN AND OTHERS *v.* ALLEN.

July 17, 1866.

Mere prior possession is sufficient to maintain ejectment against a wrong doer.

Such possession, however, must be clear and unequivocal.

Such possession must be open, notorious, exclusive, and well defined, and interfered with by defendant, by force or fraud. Per Wilkins, J.

There not being evidence of such possession on the part of the plaintiffs, or him under whom they claimed, (the mere running of two side lines, the removal of a fence around the land which was wild and uncultivated, the use of a way over it for a cow-path by a third party with the permission of the plaintiffs' devisor, and a continuous claim of title being held not to be sufficient), and they having failed to prove a documentary title, the Court, the case having been twice tried with the same result, refused to set aside a second verdict for the defendant, though he showed no title whatever,—Dodd, J., dissenting.

***Smith* v. *McKenzie*, James' Rep. 228, affirmed.**

EJECTMENT for lands in Queen's County, tried before DesBarres, J., in Liverpool in May, 1865, and verdict for defendant.

A rule *nisi* having been obtained to set the verdict aside, it was argued in Michælmas Term last by the *Solicitor General* for the plaintiffs, and *Smith, Q. C.* for the defendant.

All the material facts are sufficiently set out in the judgments.

The Judges being divided in opinion now delivered judgment *seriatim.*

YOUNG, C. J. This ejectment was brought for a small piece of land about an acre in extent, occupied by the defendant since the year 1859, being a part of what is known as the Gore lot at Liverpool. The plaintiffs claim title, first of all, under a deed to the late Joseph Freeman, dated in 1815, of a five acre lot, described as laid out at the end of the Gore and bounded Easterly by the common, and my brother DesBarres who tried the cause in May, 1865, left it to the jury to say, whether the land in dispute formed a part of that lot. If it did the plaintiffs of course were entitled to a verdict, but the jury found for the defendant, as the jury had found on a former trial, and on this head I think there is abundant evidence to justify the finding. The stone wall which was recog-

nised as the Eastern boundary of the five acre lot, and from which the old fence ran across the Gore to Waterloo street, independently of Colonel Freeman's admissions, clearly defines the extent of that lot as originally conveyed and understood. This reduces the plaintiff's claim to a question of prior possession which was also left to the jury, and on which the argument indeed mainly turned.

It was questioned how far a mere prior possession unsustained by title, and if any, what kind of possession would enable a party to recover in ejectment, and I have accordingly looked into the cases upon these points.

The right to maintain ejectment upon prior possession,—though it made its way slowly and was accepted with some reluctance in the Courts, may be now regarded as settled. In 1 *Chitty on Pleading*, 218, *Roscoe on Real Actions*, 488, *Adams on Ejectment*, 31, and the note to 2 *Saunders*, 111, it is spoken of as doubtful. "It has been thought," says Roscoe, "that mere priority of possession is a sufficient title in ejectment" and he cites the case of *Doe e. d. Crisp* v. *Barber*, 2 T. R. 749, in which the doctrine seems directly overruled. Of the two old cases which are usually cited in support of it, *Allen* v. *Rivington* in 2 *Saunders*, and *Bateman* v. *Allan*, Cro. Eliz. 437, counsel remarked *arguendo* in 10 Johns. 346, that in both cases the defendant entered on the prior possessors and ousted them. But the doctrine now-a-days does not depend on a forcible or actual ouster. A simple taking possession—a peaceful entry on a prior possessor who claimed and held the land as his own, will enable him to maintain ejectment. As against a defendant who has no title and is therefore a wrong doer by the very fact of entry, such prior possession is *primâ facie* evidence of title, and no other interest appearing in proof, Mr. Justice Patteson in 13 Q. B. 953, regards it as evidence of seisin in fee. Many of the cases are founded on this presumption, but the principle extends to cases where the plaintiff has merely a possessory right as tenant of the locus, the fee residing in another. In *Doe e. d. Hughes* v. *Dyeball*, Moo. & Mal. 346, the plaintiff proved a lease to him of the house and a year's possession, and, the defendant having forcibly taken possession, the plaintiff had a verdict. In this case there was no fee in the plaintiff but only possession for a year,

as there was also in a very recent case which I shall presently cite. There was also a forcible taking possession, but where can the difference be though the prior possession were only for a month, if it be the sort of possession that gives the right; and where also the difference, whether the defendant enters peacefully or forcibly, if he enters on a possession which he has no right to disturb. The cases, as it appears to me, are not so clear on these points as one would have expected, and turn upon distinctions which do not at all affect the main principle.

In *Jackson* v. *Hazen*, 2 Johns. 22, the plaintiff had a peaceable possession of three years which was held enough as against a wrong doer. The Court said: "Had the defendant come into possession of the premises peaceably, a question would then have been presented whether the plaintiff was not bound to show a possession for twenty years, but the case did not turn upon that point, for the defendant must be considered as a trespasser. Here the doctrine is stated somewhat obscurely as if it rested on the actual or presumptive ownership in fee, and the same remark may be applied to the case of *Doe e. d. Carter* v. *Barnard*, 13 Q. B. 945.

It is stated more vividly, and as I think more accurately, in *Smith* v. *Lorillard*, 10 Johns. 338 where it was held that a prior possession under a claim of right, and not voluntarily abandoned, would prevail over a subsequent possession of less than 20 years. But the rule was laid down with the qualification that no other evidence of title appeared on either side, that is, that the evidence did not show a right of possession or title, as in some of the cases, out of the plaintiff, and that the subsequent possession of the defendant was acquired by mere entry without any lawful right.

The recent case I have spoken of was an action of ejectment decided in the Queen's Bench, *Asher* v. *Whitlock*, 13 L. T. Rep. N. S. 254, (S. C. 1 Law Reports Q. B. 1) where Cockburn, C. J., said: "It is contended that possession once acquired as against the rightful owner (that is by a wrong doer) does not operate to keep out other wrong doers. That seems to me to be a very dangerous proposition. It certainly appears to me that possession is a good title against all the world, except against the rightful owner. The cases show that even

the possession of a year by a party is a good title as against one who expels him. Suppose the case of a person, who, finding the door of a house open, and the occupier temporarily absent, goes in and claims to retain possession, on the ground that the occupation of the possessor is wrongful with reference to some third party, could it be said that an action could not be maintained? The whole law of disseisin is founded on the right of every one, except the rightful owner, to retain possession."

This is the latest decision and lays down an intelligible and a sound principle, though, as I have already stated, a possession of shorter duration must have the same effect.

One of the squatters in our woods without pretence of title cuts down the trees on an acre of Crown land—he expends a month's labour in burning and planting it—he takes actual though unlawful possession—and a week after, another squatter, having as little title, enters on the land and disturbs the first possession. The first possessor under these circumstances could maintain trespass against the second, and why not also ejectment, which is only a possessory action in another form?

The possession, however, must be capable of clear and distinct proof, visible to the senses, so defined and marked that it cannot be mistaken. The possession being the very gist of the enquiry, a plaintiff relying on it must of course unequivocally show it. It must not be forgotten that he is seeking to change the possession, and asking the aid of a Court and jury to turn the defendant out. The *onus* therefore lies upon him.

On this point I have fallen in with no English case. It arose in the American case of *Jackson e. d. Ludlow* v. *Myers*, 3 Johns. 388. There the Ludlows had paid taxes on the *locus*, and included it in deeds of partition among themselves. One farmer who occupied the premises acknowledged their title, he then quitted the possession, and from that time till the entry of the defendant the premises were left vacant and uninclosed. But Kent, C. J., said that these facts, though they included payment of taxes and partitions, were not evidence of actual possession, though they may have been of a claim of title, and the claim was defeated. The sort of possession that is enough to satisfy the rule was also enquired into in our own Court in *Lessee of Smith* v. *McKenzie*, James'

Rep. 228, where the jury found in favor of a prior possession by the plaintiffs, and their father under whom they claimed. and the majority of the Court refused to disturb the verdict. Mr. Justice DesBarres, who tried the case, said, (p. 233), " It is enough that the father had such a possession as warranted the jury to presume a title in him as against the defendant who showed no title."

In the present case the jury have found a second verdict against the possession of the plaintiffs, though the charge was in their favor, and, on the whole evidence, I think the jury were in the right; at all events there is no such preponderance of evidence as could justify us in setting the verdict aside. Mere claim of title as we have seen is not enough, and I look in vain in this case for any actual possession. The running of lines by a surveyor will not do. Two side lines only were run on the first survey, and even admitting that these lines, with Waterloo street as the base, described the whole of the Gore, "the south line was not blazed," and the witness says, " We marked a stone at the road and that was all we did." The second survey was in 1860, after the defendant had gone upon the land as part of the common. Till then the *locus* had never been fenced except when McLeod went in and abandoned it at Mr. Freeman's request. It had never been cultivated but lay waste for 40 years up to the time the defendant took possession. The only act of ownership of any avail was the use of the cow path by permission of Freeman. But this and the other circumstances in proof fall far short in my opinion of what the law requires to found a possessory right in ejectment, and, therefore, I think that the rule for a new trial should be discharged.

Dodd, J. I regret that I differ from the majority of the Court. I agreed with them in the former judgments given in this same case, and I do not think that the facts proved on the second trial vary the position. I think that there was a sufficient prior possession in the plaintiffs to enable them to maintain ejectment against mere trespassers, and such the defendant was.

DesBarres, J. The present action of ejectment was

brought in the name of Snow P. Freeman, who died while it was pending, and it has since his death been prosecuted by the plaintiffs as his legal representatives. They claim title to the land in dispute first of all under the will of Snow P. Freeman, who derived his title from the will of his father, Joseph Freeman, to whom one Benajah Collins executed a deed as far back as 8th July, 1815, of a five acre lot, comprehending, as the plaintiffs allege, the land in dispute; and, secondly, the plaintiffs claim to have a possessory as well as a documentary title to the land. The action has been twice tried, and on both occasions there has been a verdict for the defendant.

Looking at the evidence produced on the last trial, to which alone our attention must be directed, I am of opinion that the plaintiffs have failed to establish a documentary title to the land in dispute, and that if they are entitled to recover at all, it must be on the ground of a prior possession either in Snow P. Freeman, or his father, Joseph Freeman, to that of the defendant. The deed from Benajah Collins to Joseph Freeman describes the land thereby conveyed as being part of a five acre lot formerly the property of Prince Snow, and laid out to him at the end of the Gore of land lying between the fish lots and the thirty acre lot No. 2, in Block B.

It is contended on the part of the plaintiffs that this lot of land extends to the shore of the harbor of Liverpool, and that it contains eight acres, that is three acres more than the deed represents it to contain, and for the defendant it is insisted that this lot of land contains no more than five acres, and extends no further to the Eastward or towards the shore than a line running North from the line of a stone wall erected at some distance from the shore on the North-East line of lot No. 2, to Waterloo street, and that the end of the Gore lot claimed by the plaintiffs under the deed made by Benajah Collins to Joseph Freeman is at that line.

Now, if that is indeed the true North East line of the lot, it necessarily follows that the land in possession of the defendant consisting of one acre, which is proved to be to the East of that line, and between it and the shore, forms no part of the five acre lot conveyed by Benajah Collins to Joseph Freeman. On this point the evidence of Jabez Snow, a witness on the part of the defendant, who was not examined on the

former trial, is very important, inasmuch as it shows, as I think conclusively, that the line running North from the stone wall to Waterloo street is in fact the true North East line of the five acre lot, and that the land in possession of the defendant is outside of that lot. He states that the land in dispute was wild and uncultivated when he first knew it, and that it remained waste for 40 years before the defendant took possession of it, that he always considered it to be part of the common, that he calls the end of the Gore lot at a line running from the line of stone wall to the East of No. 2 to Waterloo street, from the fact that Joseph Freeman, the then owner, wanted to hire to him the five acre lot, called the Gore, between thirty and thirty-seven years ago, and then pointed out to him the line running from the stone wall to Waterloo Street, as the boundary of his five acre lot, that there was at that time part of a fence running across the Gore lot to Waterloo street, the marks of which he has seen every year since that.

The testimony of this witness as to the existence of the fence, pointed out by Joseph Freeman as the boundary of his five acre lot, is corroborated by Whitman Freeman, a witness produced on the part of the plaintiffs, who states that, "the fence which Joseph Freeman erected on the North-East line of the Gore, was a continuation of the line of stone wall, made 40 years ago as the North-East line of No. 2." And it appears from the testimony of John Carey, a witness for the defendant who hired the five acre lot from Snow P. Freeman for four or five years, that he, as well as his father, recognized the remains of the old fence, some of the posts of which were then standing, running from the stone wall erected across No. 2 to Waterloo street, as the boundary of the five acre lot, and that he directed Carey to follow the posts as the boundary of the lot in making the fence.

With such evidence as this before them, it cannot be matter of astonishment that the plaintiffs failed to satisfy the minds of the jury that they had a documentary title to the land in dispute, and having so failed, the next question is whether they have produced sufficient evidence of a possessory title therein to entitle them to recover in the present action.

On this point the evidence, as it appears to me, is by no means satisfactory, for there is no evidence to show that either Joseph Freeman, or Snow P. Freeman, his son, ever had any actual possession of the land to the Eastward of the fence running from the stone wall to Waterloo street, unless indeed the user of that portion of it now in possession of the defendant by John Campbell, by the license of Snow P. Freeman, for a cow-path can be considered as being a possession in Snow P. Freeman, affording *primâ facie* evidence of title sufficient to sustain an action of ejectment. It is true Campbell proves that Joseph Freeman always claimed the Gore lot to the shore, but merely claiming a right to the land to which he had no legal title was not an act that can of itself be regarded as an actual possession of the land, and that is all that either Joseph Freeman, or his son Snow P. Freeman, appear ever to have done. It was therefore a mere assertion from time to time of a right to possess, but it was not an actual possession of the land, such as I think it was incumbent on the plaintiffs to show in order to maintain ejectment against a party entering into and holding possession against all persons not having a better title than himself.

In presenting this case to the jury, I told them that I thought the user by Campbell by permission of Snow P. Freeman of a right of way or cow-path through the land in dispute, before the defendant's entry upon it, was evidence of a prior possession in Freeman which entitled the plaintiffs to a verdict to the extent of the land so used; but, I think on reflection that so equivocal a possession as that can hardly be looked upon as evidence of title sufficient to warrant a recovery in ejectment.

In *Jackson e. d. Ludlow* v. *Myers*, 3 Johns. 388, it was held by Kent, C. J., that where the plaintiff in ejectment claims to recover on the ground of prior possession, that possession must *be clearly and unequivocally proved*, and that the payment of taxes and the execution of partition deeds were not evidence of an actual possession, though they might show a claim of right. The running by Moore, the surveyor, of the South line of the Gore lot, which is the line of division between it and No. 2, at the instance of Joseph Freeman between 1815 and 1818;—the running of the same line and

also the North line of the same lot at the instance of Snow P. Freeman in 1860, and the removal by the command of Snow P. Freeman of the fence erected by McLeod around the land in dispute, and the user of the cow-path by Campbell are the principal acts upon which the possessory title set up by the plaintiff is supported.

Now to hold that the running of the South line of the Gore lot in 1815 gave Joseph Freeman an actual possession of, or any right to possess the land to the North of that line now held by the defendant is a position to which I cannot give my assent; nor do I think the running of the same line and also the North line by Snow P. Freeman in 1860 at all strengthens the plaintiffs' case, for the defendant was at that time in possession of the land, and therefore that survey could give the plaintiffs no prior right to it. It is according to my view very doubtful whether the acts of ownership exercised either by Joseph Freeman or his son Snow P. Freeman were sufficient to establish a possessory title in the plaintiffs, and it is evident they were not considered by the jury sufficient to satisfy their minds in that respect. That both Joseph Freeman and Snow P. Freeman, his son, claimed the land in dispute as well as all the rest of the land extending from the stone wall line on the North-East boundary of the five acre lot to the shore cannot be denied, but it appears to have been a mere claim or assertion of right unsupported by any actual or visible possession, and that I think is not enough to entitle the plaintiffs to recover on the ground of prior possession. The land in dispute, so far as the knowledge of the witnesses extends, who speak of a period of forty years and upwards, has never been occupied in point of fact, either by Joseph Freeman or Snow P. Freeman; it does not belong either to the plaintiffs or the defendant, and as the evidence of prior possession adduced on the part of the plaintiffs is of a very uncertain and unsatisfactory character, and the cause has been twice tried with the same result, I think that under all these circumstances the verdict ought not to be disturbed.

WILKINS, J. The evidence for the defendant which we must assume the jury believed, is decisive, in connection with the description in the deed from Collins to Freeman, to show that

the real boundary by which *the five acre lot* has always been held to be bounded towards the North East, or towards the harbor, is the fence in continuation of the line of the stone wall separating No. 2 from the common land. The description speaks of the lot as bounded North Easterly by the common land, by which it would not be bounded, (but on the contrary, by the shore of the harbor), if that shore were the North Eastern boundary of the lot as conveyed, and as is contended by plaintiffs. Whitman Freeman, indeed, plaintiffs' own witness, says expressly, "The fence which Mr. Freeman erected, *as the North East line of the Gore lot*, was a continuation of the line of the stone wall made 40 years ago as the North East line of lot No. 2." The question, then, is not "whether the plaintiffs can sustain their ejectment for the land in the defendant's possession, which lies on the North and East of the stone line continuation fence, on the ground that the plaintiffs and their ancestor had prior possession of the land in contention *as connected with the title deed in evidence*, under which prior possession had been taken in good faith,"—but the question is, "can the plaintiffs sustain this action against the defendant (who has no title appearing from the evidence, but who, being in possession, must, in the absence of some evidence of title in the plaintiff, be presumed to own the land)—on the mere ground of prior possession in the plaintiffs *unconnected with any title shown by them*."

I apprehend that, on the clearest principles of law, the circumstances of this case are not such as to warrant the application to them of the doctrine "that prior possession is under certain circumstances sufficient to maintain ejectment." It is sufficient where the plaintiff has had *open, notorious, exclusive, and well defined possession of land*, and, being so possessed, the defendant has entered on him and deprived him of such possession by force or fraud. Now, here, this defendant entered on the *visible* possession of nobody, when he took possession of the *locus* in dispute. He does not appear to have practised force or fraud. The acts of plaintiffs or those under whom they claim, from which a prior possession in either of them could be inferred, if inferrible at all, may be summed up thus:—Plaintiffs' devisor,—old Mr. Freeman—upwards of forty years before the trial, caused one line, the

Southern line, to be run to the shore, and that was done to ascertain the division line between the lot, of which unquestionably he then owned a part, and the adjoining lot. In 1860, when defendant's occupation of the lot in dispute was enclosed by a fence, the late Snow P. Freeman ran the South line, and measured the North line, both from the shore. The same gentleman, about 13 or 14 years before the trial, caused a fence to be removed that a witness had placed on the land that enclosed the land in contention. The land so enclosed was uncultivated. About 15 years before the trial the late Snow P. Freeman gave another witness—Mr. Campbell—permission to pass and repass over the wild, uncultivated, and unfenced land in dispute. The only user proved of this privilege was driving cows, to and fro, across the land. I have never met with an authority that would support a position that such a prior possession as this is sufficient to enable a plaintiff in ejectment to call on the defendant to show his title.

Whilst reviewing the circumstances of this case, I have not been unmindful of the fact that Waterloo street has long subtended not only the land in dispute but the 5 acre lot also; but there is no evidence of any fence having existed along the line of that street in part enclosing the land. Had such been the fact, I should have been prepared to adopt a different conclusion from that to which I have arrived on the question before us; for, in that state of facts, it would have appeared that the defendant entered on a piece of land of which the plaintiffs were visibly in possession as shown by an actual enclosure.

Rule discharged.

Attorney for plaintiff, *C. Morse.*
Attorney for defendant, *H. W. Smith.*

SMITH AND ANOTHER *v.* SMITH AND ANOTHER.

July 17, 1866.

As a general principle, a sheriff (like an auctioneer or attorney or any other person holding a fiduciary character) is incapable of purchasing property sold under execution by himself, or under his authority or direction, and such purchase is absolutely void.

The transaction, however, in this case, being a fair one, (the sheriff, although he purchased the land of the execution debtor through a third party at his own sale under execution, having bought the judgment from the execution creditor, and having paid him in full therefor, and no offer being shown by the defendants to repay the sheriff the amount so paid) the Court upheld the sale, and set aside, in an action of ejectment by the sheriff to recover the land, a verdict in favor of the defendants who claimed under the execution debtor.

Where an objection to secondary evidence of a deed is either not taken or waived at the trial, it cannot be taken afterwards; and in such a case the regularity of notices to produce and matters of the like kind is always presumed.

A sale of lands under a second or later judgment is valid, although there is a prior outstanding recorded judgment, and passes the title of the defendant subject to prior registered incumbrances.

EJECTMENT for lands in Inverness. There was a plea of tenancy in common, but on the trial the defendants defended for the whole of the lot claimed.

At the trial before Young, C. J., at Port Hood, in June, 1864, it appeared that the principal question in the case was the fact alleged on behalf of the plaintiffs, and denied by the defendants, of a deed of the *locus* having been made in 1846, by Angus Smith to his son Peter, under whom the defendant Christy, as his wife or widow, and the other defendant Alexander his son, for himself and the other children, occupy and claim the land. The deed itself could not be found and it had not been recorded. The circumstances under which it was prepared were detailed with the utmost particularity by a witness, whose integrity it appeared was not impugned. He said, "I went to the house and saw the old man. He was sick, and told me he wanted to divide the property, being the homestead, between his sons. I took a memorandum of what he desired to be done, and took it home with his Crown lease. A day was then fixed that all the sons and daughters might be present. I prepared two deeds, one to Angus and one to Peter. I explained the papers fully to the old man in Gaelic, and he executed the two deeds and a bill of sale. All the papers were delivered to the several parties. I witnessed all the papers with another witness to each paper. All the sons and daughters that were living, and all the sons-in-law were present. The old man died two or three months after. I never saw him after." It also appeared that the deed to Angus was found upon record, and that the defendants live upon the half of the homestead so conveyed. None of the

sons or daughters, or of the sons in-law were called on the trial.

The real plaintiff in the suit was Mr. Lawrence, the sheriff of Inverness, David Smith, the other plaintiff, being his son-in-law, and having taken a conveyance merely for his benefit. This was admitted by the sheriff at the trial. The circumstances under which the sheriff became connected with the property were as follows. Peter Smith, the husband of the one defendant, and father of the other, having become embarrassed in his circumstances, three judgments were entered against him, the first by Ronald McLellan, the second by Alexander Campbell, and the third by Neil McLean. A sale was had in due course under executions on the second and third of these judgments, when Neil McLean, plaintiff in the third suit, bade in for himself, and the sheriff at his request conveyed the land to Alexander Rankine for the consideration money of £120. Up to this time the sheriff had no interest whatever in the land, but Rankine, having also become embarrassed, was taken in execution and escaped without any fault on the part of the sheriff, whereupon he was threatened with an action by the execution creditor and uncertain of his liabilities paid the amount, Rankine at the same time conveying to him the Smith farm for his indemnification. McLellan's first judgment, however, standing out, Lawrence to protect himself obtained an assignment of the judgment from McLellan for £25, 21st Jan. 1862. An execution was thereupon issued 31st January, and delivered to the sheriff 3rd February, 1862, on which a sale was had. Angus McDonald bade in the property for David Smith, at the sheriff's request, and the deed was made to Smith. The sheriff in his evidence said, "I had an understanding with David Smith about the lot. I had an interest in the land. I had a deed of it before, and asked David Smith to bid it in. He is only a nominal party, but he stands the owner on record. I was obliged to buy it in to protect myself."

The learned Chief Justice, in his charge to the Jury, stated that, although he was inclined, in any case where a sheriff had bought without the permission or against the interest of the execution creditor, to uphold the doctrine that a sheriff could not purchase and hold land directly or indirectly which he

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was selling as a public officer under execution, that the doctrine did not apply in this case, as the creditor, who had sued out the execution, had assigned his judgment to the sheriff accepting £25 in full. His lordship also stated in substance that as the sheriff was not a volunteer in the matter, and had acted in perfect good faith throughout, he did not consider there was any thing either morally or legally wrong in his proceedings. This view, if correct, his lordship added, reduced the defence to an inquiry into the fact of a deed having passed from Angus the father to his son Peter, and the alleged insufficiency of the secondary proof thereof. His lordship considered this deed sufficiently proved, and told the jury so.

The jury, however, after being out for two hours, found a verdict for the defendants.

A *rule nisi* having been granted to set the verdict aside, it was argued during last Michælmas Term.

Blanchard, Q. C., in support of the rule. The jury have undertaken to disbelieve uncontradicted testimony with regard to the deed from old Angus to his son Peter, and their verdict is therefore perverse. The secondary evidence of the deed was sufficient and was rightfully received. 7 *Q. B.* 642; *Starkie on Evidence*, 496; 3 *A. & E.* 46; 7 *Exch.* 639; 6 *C. & P.* 206; 3 *Scott's N. R.*, 577. Whether or not the objection should have been taken at the trial. 8 *Ad. & Ell.* 314; 7 *M. & G.* 481.

Attorney General contrà. The credibility of the witnesses was a question for the jury. They had a right to disbelieve McLeod. He was reckless and interested. A doubt was cast upon his testimony. He was a judgment creditor of Peter.

The sheriff being the seller cannot be the buyer. His title is under a subsequent judgment, and his levy, therefore, bad. Rev. Statutes, ch. 115, sec. 5. *Sugden on Estates*, 189. McLean could not transfer his right as purchaser to Rankine. Rankine could not convey to Lawrence because the defendants were in adverse possession.

Notice to produce the deed to Peter was not given to

Christy. She appeared and pleaded in person. The notice served was to the attorney of Alexander Smith. The notice to produce on the trial of October, 1862, did not extend to the second trial. Christy did not appear in person till 1863. She ought to have been served.

The deed to Smith, the son-in-law of Lawrence, is bad in equity. 4 *Kent's Com.* 516.

Solicitor General follows on the same side. No sheriff or deputy-sheriff can purchase directly or indirectly at a sale by himself of goods or land. 2 *Sugden on Purchasers,* (Am. ed. 1851) 362. This principle extends still more to the execution debtor than to the creditor. *Jacobs' Reports,* 421; *Hilliard on Sales,* 80, 79, 69; 8 *Ves.* 340, 350; 4 *DeGex & Smale,* 388; *Ex parte Lacey,* 6 *Ves.* 626; 10 *Ves.* 395, 398; *Sugden on Vendors and Purchasers,* 436, 688; 16 *Curtis' U. S. Rep.* 189.

McCully, Q. C., in reply. (Cites as to new trial, *Ch. Arch Q. B. Prac.* (10th ed.) 1454; 3 *Taunt,* 91, &c.) A judgment may finally bind the estate. The objection to the notice of October, 1862, must have been taken at the trial. The notice to produce the deed was sufficient. 1 *Taylor on Evidence,* 400; 17 *Q. B.* 509; 2 *Ch. Arch, Q. B. Prac.* 1244; 1 *Cr. & Jer.* 174; 3 *Camp.* 499; *Sharswood's Starkie,* 505. As regards the defendants the plaintiffs have all the rights of Peter Smith. The defendants had no adverse possession against him, nor against plaintiffs. The purchaser at a sheriff's sale may direct the deed to be made to a third party. Substantial compliance is enough under our Act. (Cites Rev. Statutes, Chap. 115.) Otherwise if a sheriff has a judgment he has no remedy, no one being entitled to act for him. Section 10 of the chapter referred to legalizes a sale by a second judgment creditor. The word "may" is in the 5th section. A sheriff does not come within the principle binding trustees. A sheriff or administrator does not sell the freehold in England. A purchase by a constable of goods he is selling under execution is absolutely void. Rev. Statutes, chap. 128, sec. 29. There is no such law with regard to purchases by a sheriff. A purchase by a sheriff may be voidable but not void. Here there is no fraud and the rule does not apply. 2 *Eden,* 134. This question cannot be raised here. There is no equitable plea. 3

Mer. 209; 8 *Ves.* 351. The Court of Equity merely debar the trustee from making a profit. The defendants must pay the amount of the purchase made by Rankine. 8 *Price*, 272.

Cur. adv. vult.

YOUNG, C. J., now delivered the judgment of the Court. After referring to the facts of the case, and particularly to the circumstances of the deed to Angus being found upon record, the defendant's living upon the half of the homestead so conveyed, and none of the sons or daughters or of the sons-in-law being called at the trial, from which he argued that it was impossible to resist the conviction that a deed was in fact executed to Peter, or to sustain the verdict if it proceeded on the ground that it was not, his lordship said:

The objections urged at the argument against the receptio of secondary evidence could not possibly prevail, because it appears by the minutes that they were either not taken or were waived at the trial. Where this is the case, the regularity of notices to produce and matters of the like kind must always be assumed. The rule is so laid down in *Williams* v. *Wilcox*, 8 A. & E. 314, and in *Doe e. d. Child* v. *Roe*, 1 El. & Bl. 279, and is obviously a sound one.

The plaintiffs' right of recovery, however, was assailed at the trial upon other grounds, which probably had a more direct influence on the verdict than any real or supposed defect in the secondary evidence. (His lordship here referred at length to the circumstances detailed above, showing the connection of sheriff Lawrence with the property). Now the question is, can these proceedings be supported? The argument for the defendants was that a sheriff can, in no instance, directly or indirectly, purchase property which he is selling under execution,—that he is to be looked upon as a trustee both for plaintiff and defendant, and as under all the disabilities of a trustee, and that the deeds from Rankine to Lawrence and from Lawrence to Smith are equally ineffectual to give title.

The deeds to and from Rankine are attacked, upon the ground that the sheriff's sale was under a second and third judgment, without notice to or the assent of the prior jud

ment creditor, and the notice under Revised Statutes, (3rd series) chap. 115, sec. 5, was said to be indispensable to make title. To this it was answered, and I think with reason, that the general scope of that chapter, and the language of section 10, are inconsistent with any such proposition, which is new, so far as I am aware, in this Court, and would shake numerous subsisting titles. The right of a second mortgagee to foreclose was recognized by us at an Equity Sittings in *Barss* v. *Chase*, March, 1862, although the right may be subject to qualification, and can in no wise affect the interests of a first mortgagee. So, also, I am of opinion that a second or subsequent judgment creditor may sell the lands of the defendant, whose interest will pass to the purchaser "subject to prior incumbrances."

The title, therefore, of Lawrence as derived from Rankine being good and a general verdict having passed for the defendants, he is entitled to a new trial, independently of any objection to his claim under the deed to David Smith. I trust, indeed, that as this case has already been twice tried a third trial will not be necessary, and that the fair and reasonable claims of Mr. Lawrence will be adjusted, and paid from, or secured on the land.

But as this may not be the issue, it seems advisable shortly to review the cases on the main point of the responsibilities and duty of a sheriff selling under execution. No English decision or text-boo kdirectly bearing upon a sheriff or other officer holding an execution was cited at the argument. On the general principle, as it is laid down by all the text writers, particularly in *Sugden on Vendors and Purchasers* (14th edit.) chap. 20, fol. 687, and in 4 *Kent's Commentaries* (9th edit.) 503, the authorities are numerous.

In *Stratford* v. *Twynam*, Jacob's Reports, 418, cited by Mr. Ritchie, the Master of the Rolls held, and this is now the received law, that the creditor may purchase the property seized and sold under his execution. "This is quite different," said he, "from the case of trustees; with respect to them the principle is that the same person shall not be buyer and seller. But here the sheriff is the seller. (The premises sold were leasehold.) In the case of the trustee there is a conflict of duty and interest, and the Court, therefore, says that he shall

not be trusted to purchase unless he has divested himself of his character of trustee. * * Here the party is proceeding adversely against his debtor, not by any private dealing but by the public process of the law; and he is not the person who is to sell: that is the duty of the sheriff; and what injury can arise from the creditor attending at the sale and bidding?" These expressions certainly imply a disability in the sheriff to purchase for his own benefit, just as an assignee, an agent, a solicitor, or an auctioneer, is disqualified. It is possible that other English authorities as to the position of a sheriff may exist, but I have been unable to find them, nor, as I have said, were any produced.

It makes no difference in the application of the general principle, that the sale is a judicial one, by public auction or at a fair price, or that the purchase is made through the medium of a third party. A sale *per interpositam personam* is equally discountenanced, and this with the other branches of the subject are elaborately discussed in *Davoue* v. *Fanning*, 2 Johns. Chanc. Rep. 252, and *Michoud* v. *Girod*, 4 Howard's U. S. Rep. 503, 560.

In a note to 4 *Kent*, already cited, the rule is applied by Judge Tucker, in opposition to some *dicta* in the Virginia Courts, among other persons, to sheriffs, auctioneers, attorneys, and all persons in fiduciary characters, as incapable of purchasing the trust property at sales made by themselves, or under their authority and direction. And *Hilliard* in his *Treatise on Sales*, 80, cites a case from New Hampshire, in which it was held that a sheriff cannot legally purchase goods sold by himself, and that such purchase is equivalent to a conversion. We have applied the same principle to inferior officers—the Revised Statutes, chap. 128, sec. 29, declaring that no constable shall, directly or indirectly, purchase any goods at any sale made by him under that chapter, and that every such purchase shall be absolutely void.

By the Revised Statutes of New York, part 3, chap. 6, sec. 41, it is enacted that the sheriff or other officer, to whom any execution shall be directed, and the deputy of such sheriff or officer holding any execution and conducting any sale of property in pursuance thereof, shall not, directly or indirectly, purchase any property whatever, at any sale by virtue of such

execution, and all purchases made by such sheriff, officer, or deputy, or to his use, shall be void.

To apply these rules in all their strictness to a sheriff in this Province, where the Legislature has been silent, and to debar all our sheriffs from protecting their own interests, however fairly or conscientiously they may have acted, would sometimes be productive of great injustice. I should be disposed, for my part, to require the party seeking to avoid the sale, at all events to return the money that had been paid, as seems to have been done in analogous cases in 8 *Vesey*, 351, and 8 *Price*, 172.

In a Massachusetts case, *Arnold* v. *Brown*, 24 Pick. 89, where the defendants in an attachment writ sold the goods to the attaching officer at a fair price, and an action on the case was brought therefor against the sheriff, this sale was upheld by the Court. "The property," said they, "when attached, bears very little resemblance to a trust fund. The sheriff cannot be considered as sustaining the relation of agent or trustee, in any sense, to the defendant in the attachment. He is the officer of the law, and as such holds the property attached. It may be considered as in the custody of the law." "There may be something in the situation of the debtor, and the power of the officer, which should induce a close scrutiny into their dealings, to see that there is no fraud or oppression in their contracts." "If the officer should obtain an unconscionable bargain from the necessities of the debtor, the law would set it aside."

Inquiries of this character in the present state of the law, where the transaction is perfectly fair and no advantage has been taken, this Court would probably be inclined to enter into. But, still, as the general principle is unquestionably sound, and sheriffs conducting sales should have no interest nor the suspicion of any interest inconsistent with that of either plaintiff or defendant, it is safer for them to act as if they were wholly restrained from becoming purchasers, directly or indirectly, at the sales which they conduct.

In the present case, for the reasons I have assigned, I think that the verdict for the defendants should be set aside and a new trial had.

Rule absolute.

Attorney for plaintiffs, *E. D. Tremain.*
Attorney for defendant, Alex. Smith, *McDonnell.*
The other defendant, Christie Smith, appeared in person.

HALIBURTON AND OTHERS v. HALIBURTON.

July 19, 1866.

A testator (J. P.) devised certain real and personal estate to trustees for the benefit of his two children, (a daughter and a son), in trust to pay one moiety of the rents, issues, and profits of the real estate, and of the interest of the personalty to and for the benefit of his daughter during her life, and "upon the decease of his said daughter, he gave and bequeathed the said moiety of his real and personal estate in Nova Scotia unto the heirs of her body lawfully begotten forever, share and share alike."

He also devised the other moiety of his real and personal estate in like manner to and for the benefit of his son during his life, and "upon the decease of his said son, he gave and bequeathed the said remaining moiety of his real and personal estate in Nova Scotia unto the heirs of his body lawfully to be begotten forever, share and share alike."

He further provided that "in the event of the death of either of his said children *without lawful heirs as aforesaid* then the survivor to have the whole of the rents, issues, and profits, during her or his life, and at her or his decease to descend to the lawful heirs of her or his body lawfully to be begotten as aforesaid."

There was also a devise over, in the event of the death of both his children "without lawful heirs," of "all his estate both real and personal in the Province of Nova Scotia" to his brother, and of his money in the funds in England to S. R. and M. R., share and share alike, upon their marriage or attaining the age of twenty-one years.

The testator's son died many years ago without leaving any issue. The daughter died in February, 1865, having had five children (sons) four of whom survived her. The son J. G. P. H., who pre-deceased his mother, and died without leaving any children, was living at the time of the death of the testator, and by a will made in May, 1856, devised and bequeathed all his "estate real and personal whether in possession, remainder, reversion, or expectancy, inclusive of the distributive share he had of the estate of his late grand-father J. P., (the testator) to which he was entitled under his will or in any way derivable through or from him" to his wife, E. A. H. her heirs and assigns forever.

Held, on the authority of *Right* v. *Creber*, 5 B. & C. 866, the question in cases of this kind being one of mere intention, and as the language of a will must be construed in the light of circumstances surrounding the testator at the time of its execution, and on consideration of all its provisions; and the will in this case being made in Nova Scotia, where primogeniture is opposed to the genius of the institutions of the country, and to the letter of the laws regulating the descent of real estate.

That the words "heirs of the body" in the will of the testator, J. P., meant *children*, and that J. G. P. H. took a vested remainder in fee at the death of the testator in the realty devised to his mother as aforesaid, and a vested interest in the personalty so bequeathed to her, which opened to let in her after-born children successively, and that all the interest of the said J. G. P. H. in the said real an dpersonal estate passed to his widow under his will.

THIS was a special case on the construction of the will of John Peeples, and was very fully argued during last Michælmas Term by *McCully, Q. C.* and *James Thompson* for the plaintiffs, being three of the sons of Maria C. Haliburton, who was the daughter of the testator,—and by the *Solicitor General* on behalf of Ellen Amelia Haliburton the widow, and also the sole devisee and legatee, of John Gustavus P. Haliburton, another son of Maria C. Haliburton, and who predeceased his mother.

All the material portions of the case and of the will of the testator, John Peeples, are sufficiently set out in the judgment.

James Thomson contended that John Gustavus P. Haliburton never had a vested interest under the will of John Peeples, or that if he ever had it became divested by a contingency contemplated by the testator in the will.

McCully, Q. C., who appeared on behalf of one of the plaintiffs, argued that Gustavus had but a contingent remainder, and no interest during the life of his mother which he could devise or convey by any instrument whatever.

Solicitor General contrà] contended that Gustavus had a vested remainder.

WILKINS, J., now delivered the judgment of the Court.

This case, stated for the opinion of the Court, is in substance as follows:—John Peeples by will duly executed, dated 30th February, 1811, (his death having occurred in the following year) devised and bequeathed certain real estate and personal property to three trustees, (who are since dead), their executors, administrators, and assigns, upon trust that they, their *heirs*, executors, and administrators should during the life of the testator's daughter, Maria C. Haliburton, wife of George M. Haliburton, pay and dispose of the clear moiety

of the rents, issues and profits of his real estate, in Nova Scotia, (after deducting for the repairing and upholding of the same), as also the interest of his moneys in the funds of England or elsewhere, unto such persons, and in such manner as his daughter should, notwithstanding her coverture, appoint, free from the control of her husband; and, *upon the decease of his said daughter, testator gave the said moiety of his real estate and personal estate in Nova Scotia unto the heirs of the body of his said daughter lawfully begotten forever, share and share alike.* Testator then declared as to the other moiety of the rents &c., of his real estate (after deducting for repairs as aforesaid) also of the interest of his funded and other moneys, that his trustees, their *heirs*, executors, administrators, and assigns, should during the life of his son John S. Peeples, pay the said last mentioned moiety unto his said son as he might require the same, and, on his decease, the testator gave the said last mentioned moiety of his real and personal estate unto the heirs of the body of his said son lawfully to be begotten, forever, share and share alike. In the event of the death of either of his said children, *without lawful heirs as aforesaid*, the testator declared that, then, the survivor should have the whole of the rents, &c., during her or his life; and "*at her or his decease descend to the lawful heirs of her, or his body, lawfully to be begotten as aforesaid.*" The testator further declared that, if both his children should die *without lawful heirs*, he gave all his estate, both real and personal in the said Province, unto his brother, Thomas Peeples, and to his heirs forever.

The testator finally declared that, in the event of both his children dying *without heirs as aforesaid*, he gave the money in the funds unto Susannah Rumford and Mary Rumford, share and share alike.

The son died many years ago, and without issue. The daughter of testator died in February, 1865. She left five children, four of whom survived her, one of them being insane, and confined in an asylum for the insane. Her eldest son, John Gustavus P. Haliburton, whom she survived, was living at the death of the testator. He, by will, dated 29th of May, 1856, devised and bequeathed all his estate, real and personal, to his wife (who is now living) and to her heirs, &c., forever.

The case is brought before the Court in the form of a petition of three of the sons of the said Maria C. Haliburton, who pray for a partition of the said real estate, and an assignment to them of their respective shares thereof; and they ask for the opinion of the Court, as to whether they are entitled to three-fourth parts, or three-fifth parts in the estate of the testator.

We must, of course, without regard to these particular questions construe the will. The learned Solicitor General, arguing for the devisee and legatee under the will of J. Gustavus P. Haliburton, deceased, contended, mainly on the authority of *Right* v. *Creber*, 5 B. & C. 866, that the said Gustavus, being alive at the death of his grand-father took a vested remainder in fee in the realty, at the death of the testator, which opened to let in the after-born children of the testator's daughter successively.

He took *that* estate so vested, if the will manifests an intention (strong enough to countervail the technical meaning of the words 'heirs of the body,') that those words should be read 'children'; and he must have taken by *purchase*, because, the rule in Shelley's case not operating, there was no inheritable estate in his mother, the tenant for life. The estate taken by the trustees under this will was commensurate with the purposes of the trust, and was, therefore, co-extensive with Mrs. Haliburton's life.

The question which we are called on to decide is, "Who are meant by the words 'the heirs of the body of Maria C. Haliburton lawfully begotten &c.," as we find them in the will before us? The question is one of mere intention, and the language must be construed in the light of circumstances surrounding the testator at the time of the execution of the will, and on consideration of all its provisions. Lord Alvanley, in *Poole* v. *Poole*, 3 B. & P. 627, said, "The words 'heirs of the body' give an estate tail, unless the intent appears so plainly to the contrary that no one can misunderstand it." Lord Eldon in *Jesson* v. *Wright* said, "These words mean *primâ facie* all descendants, and they shall take under them, unless clearly qualified and restricted by other words, so as to give them a more *limited* sense; and the controlling intent must be as clear as the intent expressed by the words:" but "the

rules of construction freely permit the use of the words 'heirs of the body' in the limited sense of 'children', those rules requiring only a clear explanation of intention to justify a departure from the ordinary meaning." See *Hayes on Limitations, p.* xxxv.

It is not possible to review the authorities that bear on this question, without feeling that there exist opinions and criticisms of text writers which detract somewhat from the force of *Right* v. *Creber*, considered apart from its weight as a judgment of the high Court that pronounced it; but the case has not been overruled by competent authority. It is true that *Jarman* and *Hayes* consider it in effect to have been overruled, and the former mentions *Doe* v. *Featherstone*, 1 B. & Ad. 944, as one of the decisions to which that effect may be ascribed. But, from what fell from Patteson, J., in the last mentioned case it would appear that he did not refer any such operation to it. *Right* v. *Creber* was relied on by counsel without disapproval of the Court, in *Abram* v. *Ward*, 6 Hare, 165, and in *Toller* v. *Attwood*, 15 Q. B. 929. See also, the significant note to *Sugden on Real Property*, p. 251. Observe also, that the Chancellor in Ireland, in *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47, (*Sugden on Real Property*, 252), thus limited the authority of the antagonistic case of *Jesson* v. *Wright*. The learned Chancellor said, "*Doe* v. *Jesson* only decided that the words 'heirs of the body' would operate as words of *limitation*, where otherwise the issue would not take estates of inheritance;" adding, "it is of deep importance that *Doe* v. *Jesson* should be put on its true grounds."

Viewing *Right* v. *Creber*, then, as a binding authority, I proceed to inquire, "whether it does not govern the case before us." Excepting that in this case there is, and in that there was not a devise over, the two cases are not distinguishable. In it no importance, or, at least no great importance seems to have been attached by the Court to the superadded words of limitation, viz., "their heirs and assigns forever." But here we have the word 'forever' which is sufficient in a will to pass a fee, to say nothing of the effect of the word 'estate.'

Can we gather from the language of this will, viewed in the light of the testator's circumstances when he executed it, sufficient evidence of his intention that the words, 'heirs of

the body' were used in the sense of 'children'? He died in Nova Scotia, and resided in that Province when he made his will. At that time, and at his death, and when his daughter died, primogeniture was opposed to the genius of our institutions, and to the letter of our laws regulating the descent of real estate. It is not pretended that an estate tail vested in the daughter. The testator, therefore, designed an original gift of some sort to those intended by the words 'heirs of the body.' His use of the words 'share and share' alike imports that he intended more persons than one to be objects of his bounty. Great effect has been given in English Courts and in our Court to these distributive words, and adverting merely to the intention of the testator, it would scarcely seem justifiable to reject them, especially when we consider that the testator used them when making provision for the then unborn issue of his children, with regard to whom he cannot be supposed to have intended to disinherit any of them. I can find nothing in the will which necessarily shows that the testator designed that one only—the oldest son of his daughter who might happen to be living at her death—should take his whole estate. Such, however, is the inevitable legal consequence of interpreting strictly the words, 'heirs of the body.' The common law rule must govern; as our statute law did not, at the time of the death of the tenant for life, nor at the previous time of the death of the testator make any provision for the case. It provides, and provided only for the descent of estates held in fee simple, or for the life of another. (See *Corbin* v. *Healy* 20 Pick. 514, decided in the Supreme court of Massachussetts when its statute law was in this respect identical with ours. See also, 1 *Washburne on Real Property*, 81, s. 53.)

Unless the words 'the heirs of her body &c.,' be read, 'children,' as contended for by the Solicitor General, they import, necessarily, *that individual* who would be, and was at the death of the tenant for life, (who had in herself no inheritance to transmit), *tenant in tail;* and he took by purchase, *per formam doni.* (See the case of *Tipping* v. *Casin*, Carth., 262, mentioned by *Butler*, in his note 1 to *Co. Litt.* 376, b. See, also, *Hayes'* 1st and 2d propositions.) Moreover, on the strict construction of the words, the oldest surviving son, to the exclusion of all the other children, took absolutely,

at his mother's death, all the personal estate in which she took a life interest under the will. *Washburne on Real Property*, 74; 2 *Bl. Com.* 113; *Green* v. *Stevens*, 17 *Vesey*, 73.

If we look at the disposition of the *personalty* alone, whilst the inference from the words "share and share alike," is, "that the testator intended more than one of the lineal descendants of his daughter as the objects of *that* bounty," the consideration "that by a strict construction the oldest son at the death of the tenant for life would take, and exclude all the other children from a participation in *it*," strengthens an interpretation which would read the words as if written "children." It is possible, though I think very improbable, under the circumstances, that the testator may have designed to preserve his *real estate* in a line of succession through the eldest male child of his daughter her surviving, but I cannot bring myself to conclude that he contemplated excluding from an enjoyment of the *personalty* all the other children, born and unborn.

The testator's disposition of his realty may, I think, be read thus, as respects the daughter and her line of descendants, to which alone we need refer, at present, as she survived her brother who died unmarried:—viz., "I give an equitable estate for life to my daughter, with a legal remainder in fee to her son (Gustavus) now living (*Doe e. d. Pilkington* v. *Spratt*, 5 B. & Ad. 731), the same to open and let in, successively, after born children of her in fee," thus satisfying the words "share and share alike forever." (*Baldwin* v. *Karver*, Cowp. 309; *Doe* v. *Perryn*, 3 T. R. 484; *Meredith* v. *Meredith*, 10 East, 503.)

Lord Alvanley's rule of construction above noticed, viz.: "that the words, 'heirs of the body,' give an estate tail unless the intent appears so plainly to the contrary that no one can misunderstand it," however applicable as regards England, would, in my judgment, if strictly observed in Nova Scotia, in relation to a will made, and to operate there, if it were in terms like that before us, be more likely to defeat, than to carry out the real intentions of the testator. It appears to me that if we reflect on the different policy, laws, and usages on the point of the entailment of landed estates, which prevailed in England, when *Right* v. *Creber* was de-

cided, from those that obtained in Nova Scotia when this will was executed, this case is even stronger than that for presuming an intention contrary to the technical sense of the particular words in question. I have carefully examined all the leading cases on the point of our inquiry from the period when Lord Kenyon enunciated the principle, which has since been followed by the Courts, to the effect, "that a particular expressed intent must yield to a general one." C. J. Abbott adopted it in *Doe* v. *Harvey*, 4 B. & C. 620, when he said, "It appears clearly established by authorities that a particular intent expressed in a will must give way to a general intent."

The rule in England has been applied to the extent of rejecting the words "share and share alike," when superadded to words that technically express an estate tail, the words last referred to being considered to convey the general, and the former the particular intent.

Bailey, J., an eminent Judge, formed one of the Court that decided, in the King's Bench, *Wright* v. *Jesson*, and subsequently, *Doe* v. *Harvey*; and, therefore, could not but have known how far *Right* v. *Creber*, which he decided, was affected by the authority of the judgment of the Lords that reversed *Wright* v. *Jesson*, and by the decision in *Doe* v. *Harvey*. Mr. Justice Patteson in *Doe v. Featherstone*, referring to *Right* v. *Creber*, said, "That case took for its guide the intention of the testator in the particular instance, which must be the governing principle so far as is consistent with the rules of law."

This will is drawn in a somewhat inartificial manner, as may be perceived, not only from the mode in which the estate is given to the trustees, but from the mode in which both realty and personalty are disposed of in the devises and bequests over;—e. g.,—a clear moiety of the interest of moneys funded in *England and elsewhere* is appropriated to the use of the daughter for life:—at her death, however, a moiety of the personal estate in *Nova Scotia* is given to the heirs of her body, whilst a moiety of the money in the English funds, of which she had the interest whilst she lived, is left altogether undisposed of by the will, except on a remote contingency that never happened. Again, when she survived

her brother, to whose use half the rents of the realty, and half the interest of all monies, wherever funded, were appropriated during his life,—the provision fund applicable to her and the heirs of her body, as regards the moiety of realty and personalty primarily intended for the son, is in terms as follows:—"(she) the survivor shall have the whole of the rents, etc., during her life, and at her decease to *descend* to the lawful heirs of her body, lawfully to be begotten as aforesaid." In the clause there is no previous mention of *personalty*, the only antecedent language being "the whole of the rents, issues, and profits."

A devise of *the rents and profits* would, indeed, carry the legal as well as beneficial interest in the *land;* but the context pretty plainly indicates that such effect was produced in this clause of the will, by accident and not from the advised use by the framer of it of those words. Thus, instead of such a disposition having been expressed by explicit words,—the daughter took under the will, on the happening of her survivorship, the use, for her life, of the interest of the son's intended moiety of the personalty, and the 'heirs of her body,' took an estate in the son's intended moiety of the realty, *by implication alone.* That the language of the will, viewed as a whole, supports that implication is, as it happens, clear. See 2 *Jarman on Wills*, 478; 1 *Hilliard on Real Property*, 522, sec. 17, and the cases therein referred to.

The estate in the moiety of the realty, primarily intended for the son, thus taken by the heirs of the body of the daughter lawfully begotten, &c., was clearly the same in quality and quantity with that which the heirs of the body, &c. took by express gift as regards the other moiety; and subject to the same incidents as to vesting, &c. I can see no reason why it should not be held to have vested in Gustavus, though subject to be divested in case the son of the testator should marry and have children. (On this point see the important case of *Phipps* v. *Akers*, (House of Lords), 4 M. & G. 1107.) In a will evincing, as this does in the form of its provisions, a want of professional skill and accuracy, it would be unsafe to attach much importance in construction to technical expressions, of which the meaning was possibly not fully considered by the framer of the instrument. This consideration avowedly

influenced the judgment of the Court in *Richards* v. *Davies*, to which I shall presently refer. Here the whole argument for a construction which would exclude the devisee of Gustavus rests on the technical effect which it would assign to the words "heirs of her body."

When I first read the case of *Richards et. al.* v. *Davies*, 13 C. B. N. S. 70, it struck me as having, in the point of the decision, an important bearing on that before us, and as overruling, in effect, *Right* v. *Creber*; but on a careful subsequent examination of it I perceive that it is essentially distinguishable from the last mentioned case, in this, namely that whereas in *Right* v. *Creber* the question was whether the words "heirs of the body" could be read "children," the word "children" occurred in the will which the Court were required to construe in *Richards* v. *Davies.*

The testator in that case devised property to trustees and their heirs to the use of his daughter Ann James, for life; and, after her decease, in trust for such one or more of her *children*, or his, her, or their issue, in such manner and form, &c. as Ann James should appoint by will; and, in default of appointment, "in trust for all and every of her *children* and the heirs of their body or bodies lawfully begotten in equal shares and proportions." The testator then proceeded, "and in case of the death of my said daughter, Ann James, without leaving any child or children her surviving, and in the event of such child or children her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs forever." Ann James had a son who died in her life time, having previously joined with her in the execution of a disentailing deed.

The only difficulty in the case arose out of the latter words of the will, viz., "in case of the death of my said daughter without leaving any child her surviving, and in the event of such child or children her surviving dying without leaving any issue of his or her body, then in trust for my own right heirs forever." The counsel for the plaintiffs, admitting that the former words created tenants in tail with cross remainders between them, contended "that the gift in tail was subject to the contingency, expressed in the latter words of the will just referred to, of the son (who died in his mother's life time) sur-

viving the mother, and that he having died in her life time, the estate never vested in him, and therefore the disentailing deed was inoperative against the right heirs."

Erle, C. J., expressly stated his opinion to be, that but for the latter clause of the will there could have been no doubt that the son of Ann James would have taken a vested estate tail in the property, and in that opinion the whole Court concurred. The Court, *hesitante* Williams, J., were clearly of opinion that the son of Ann James, as soon as he came *in esse*, took a vested estate tail. The learned Chief Justice said, " We give effect to the plain words of the will by holding that an estate tail vested as soon as there was a child *in esse* capable of taking." " It is," he added, " the duty of the Court, in construing a will, to hold an estate to be vested rather than contingent, if the language used is capable of that construction."

This reasoning would be important on the point of the estate having, as my opinion supposes, vested, in the particular case, in Gustavus Haliburton at the testator's death, were it not for the consideration that the language of Chief Justice Erle did but thus express a recognized principle of construction.

The words which the learned Chief Justice subsequently uttered have, in principle, a bearing on the case before this Court. He continued to say, "As I read this will, it seems to me its words are capable of being construed so that the estate tail must be held to have vested. Looking at the power of appointment and the persons in whose favor it is to be exercised, I think it is impossible to suppose that the testator could have intended that if Ann James had children who died in her life-time leaving issue, the grand-children should be disinherited. It is plain to my mind that he intended to provide for the line of his daughter Ann James and her issue, and that, in the event of the line of her descendants failing, the estate should go over to his own right heirs. This perhaps is not giving a sensible construction to the clause at the end of the will. But, it must be borne in mind that the instrument was evidently drawn by an unskilled person, having no very precise idea of the effect of technical expressions. The general scheme of the will is, as it seems to me,

that the daughter was to take an estate for life with remainder to her issue in tail; and, in the event of her leaving no issue, then the estate was to go to the right heirs of the testator."

These words of the learned Chief Justice appear to me to fortify many of the reasonings which I have expressed as influencing my conclusions in the case before us. For instance, I have considered the estate to have vested in Gustavus, although it was contended that such a construction militated against the testator's gift of the property to his brother in the event of his children dying without heirs of the body, it being contended that had Gustavus died before his mother, without issue, and neither her nor her brother leaving issue at his or her death, the estate would have gone over to the testator's brother.

Such a difficulty, if existing, would be similar in kind, indeed, but less in degree, than that which the Court, in *Richards* v. *Davies*, got over in view of the general intention of the testator which they gathered from the language of his will.

Again I have thought it right not to stand too strictly on technical expressions, because I thought I was bound to infer (as the Court did in *Richards* v. *Davies*) that the will in question was prepared by a person who did not thoroughly understand the meaning of the terms he used.

Again, I have argued for the construction that I have adopted from the apparent harshness of a contrary construction—so did the Court in the case which we have just been reviewing.

On the whole, I have felt myself at liberty to adopt the principle of construction, which, according to Mr. J. Patteson, influenced the Court in deciding *Right* v. *Creber*, and I trust it has conducted me to a sound conclusion.

YOUNG, C. J., made a few observations expressive of his concurrence in the judgment of the Court as delivered by Wilkins, J.

JOHNSTON, E. J., observed that he had not arrived at results with the same clearness as his brethren. He had been unable to give to the words "share and share alike" the controlling effect which they did, nor could he ascribe to *Right* v. *Creber*

the effect which they had given it. He was inclined to consider that the words used in the will in this case conveyed an estate tail. In 10 *Bing.* 235, Tindal, C. J. said that he took it to be a general rule, with respect to the vesting of contingent remainders, that they must vest at the earliest possible moment at which they are capable of vesting. In *Doe d. Winter* v. *Perratt*, 10 Bing. 198, (the case in which Chief Justice Tyndal made the remark to which he had just referred), five Judges had given their judgment, and there were four different opinions, only two of the Judges concurring. He enunciated these views with considerable hesitation, and rather to show the tendency of his mind than to express any formal opinion.

DesBarres, J.* had nothing to add to what had been said by Judge Wilkins and the Chief Justice. He had looked into the cases cited and had formed his own opinion,—an opinion largely influenced by *Right* v. *Creber*, which he viewed as a controlling case. He fully coincided in the judgment of the Court as delivered by Judge Wilkins.

Rule accordingly.

Attorney for plaintiffs, *James Thomson.*
Attorney for defendant, E. A. Haliburton, *Solicitor General.*

McKENZIE and Another, Administrators of Ross *v.* McLEAN and McDONALD.

July 26 & 27, 1866.

R. took a promissory note from McL. and McD. (the defendants) by agreement between him and them as security until McL. should give him a mortgage of certain lands. McL. and his wife executed a mortgage of the lands to R. in the usual form, and McL. brought and tendered it to R., who was then very ill, he did not read it to him. R. then said to McL., "You had better take the mortgage over to A," (the registry office was situate there) "and when you bring me back a certificate that it is left in the office, you will get the note." McL. took the

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* Dodd, J., being a relative of one of the parties in the cause, gave no opinion.

mortgage to A. and had it registered,—but this was not until a fortnight after R's death, and about three weeks after the above conversation. No intermediate incumbrance, however, intervened. McL. obtained the certificate but did not bring it to R.'s administrators. R. died intestate and his administrators brought this action on the note.

***Held*, That McL. had substantially fulfilled the agreement between himself, McD., and R.,—and the jury having found for the defendants, (the question of the delivery of the mortgage to R. in his life time having been left to them), and having also found that McL. acted in perfect good faith, the Court refused to disturb the verdict.**

ASSUMPSIT on a promissory note. Pleas (among others) that, by agreement between James Ross (the intestate) and the defendants, the said note was given as a security for the sum of fifty pounds advanced by the said James Ross, deceased, to Donald McLean only till such time as the said Donald McLean (the first named defendant) should convey by way of mortgage to the said James Ross certain premises called the "Meagher lot"; that the said mortgage was made within a reasonable time and in the life time of the deceased, and duly executed by the said Donald McLean and wife, and was delivered to, and registered at the request of the said deceased, and that the said mortgage was accepted by him in full satisfaction and discharge of said note.

At the trial before Young, C. J., at Antigonish, in June, 1866, the allegations set out in the pleas as above were substantially proved. It further appeared that Angus McDonald (the second named defendant) was a surety on the note—that a mortgage of the premises in the usual form was executed by McLean with a promissory note annexed thereto, payable a year after the title was cleared, and tendered to Ross, who was sick in bed, that the mortgage was exhibited to him, but not read, and, that he said to McLean, "you had better take the mortgage over to Antigonish, and when you bring me back a certificate that it is left in the office, you will get the note." McLean took the mortgage to Antigonish accordingly, and had it registered, but Ross died in the meantime, his death having occurred a fortnight before the registration was effected, and about a week after this conversation with McLean. McLean obtained the certificate but did not give it to the plaintiffs, but to McDonald, the other defendant, who returned it to him again some years afterwards, and McLean subse-

quently lost it. The administrators of Ross found the note among his papers, and brought this action on it, treating it as a distinct debt.

The learned Chief Justice, in his charge to the jury, stated that he considered that the execution of the mortgage by McLean and wife in the usual form, with a promissory note payable a year after the title was cleared, was a reasonable fulfilment of the contract made by defendants that McLean should give a mortgage, &c. His lordship left the question to the jury as to whether there had been a delivery of the mortgage to the intestate in his life time. He stated, however, that the registry of the mortgage, though not effected until after the death of the intestate, seemed to him sufficient, there being no intermediate incumbrance.

The jury found for the defendants, and a rule *nisi* having been taken to set the verdict aside, it was now argued.

McDonald, Q. C. in support of rule. [YOUNG, C. J. The whole point is whether I should have left the question of the *delivery* of the mortgage to the jury, and whether there is evidence to support the finding on that point. WILKINS, J. Was not the bringing of it to the intestate, &c., a delivery? YOUNG, C. J. I had no doubt of it.] McLean was to give a mortgage in the usual form. I contend that your lordship was bound to tell the jury that he had not done so, because there was no evidence of it. There was no evidence that the mortgage was read to Ross. McLean testified that he went with the mortgage to a man who was dying and that he never read it to him, and there is no proof that he showed him the contents. The agreement was not to be concluded until the certificate of the mortgage being recorded was brought back to Ross. [YOUNG, C. J. The mortgage was registered on the 16th November, 1858, a fortnight after Ross' death, he having died on the 2nd November, 1858. McLean fulfilled the essence of the contract.] More than a fortnight intervened between the time at which he was directed to register the mortgage, and the time when he did register it. [YOUNG, C. J. If any other incumbrance had intervened, then there would not have been a fulfilment of the contract, but none intervened.

WILKINS, J. There is clear authority to show that a deed may be executed to a party behind his back and be good. JOHNSTON, E. J. If the facts detailed do not prove a completion of the agreement, do they not at, all events, amount to a delivery? Suppose the mortgage had been left with Ross, and he had sent it by his own son to be recorded.] Then there would have been an acceptance by Ross. [YOUNG, C. J. There was nothing about the mortgage being recorded in the original agreement with the surety. I think, however, that the reasonable interpretation of the contract between defendants and Ross is that a mortgage from McLean to Ross should be recorded with a clear title in the former, and that was done.] I think your lordship should have put to the jury the question as to whether the agreement was complied with. Strict compliance is necessary in such cases as this. 2 *M. & S.* 122. An accord to make a good plea must be perfect, complete, and executed. 1 *Selwyn's Nisi Prius*, 133. Here the agreement was not executed, because the certificate was not brought back. [YOUNG C. J. This was not *accord*, it was the *substitution* of one security for another. JOHNSTON, E. J, It was all one agreement.] The certificate was never brought back. [JOHNSTON, E. J. It was only the evidence of a thing which was actually done,—the mortgage was actually recorded.] A plea of accord, to be a good plea, must show an accord which is not executory at a future day, but which ought to be executed, and has been executed, before action brought. 3 *Bing. N. C.* 920; 1 *Smith's Leading Cases*, 150 *m. p.* (Cites also, 2 *Camp.* 383.)

YOUNG, C. J. We all think it impossible to sustain this motion. We agree with the plaintiffs' counsel to this extent, that we consider that the agreement required that a substantial security should be given,—a perfect mortgage, a recorded security. That was done, and there was, therefore, a substantial compliance with the agreement. The great point is, did McLean in bringing the mortgage to Ross and getting it recorded act in good faith. We are dealing here with a surety as well as with the original debtor. The jury have found that McLean acted in perfect good faith, and, as

already stated, there was a substantial compliance with the agreement.

*Rule discharged.**

Atttorney for plaintiffs, *Attorney General.*
Attorney for defendants, *Hugh McDonald.*

MILLS v. SMITH.

August 2, 1866.

An English certificated bankrupt is privileged from arrest in this Province for any debt provable under his bankruptcy in England.

The plaintiff on the 17th August, 1864, had drawn at Bangor, in the State of Maine, in the United States of America, bills of exchange (payable 60 days after date) on the defendant, who was then a trader in London and resident there. The defendant accepted the bills of exchange in London, but did not pay them. He was adjudged a bankrupt on the 14th November, 1864, in the London Court of Bankruptcy, and subsequently obtained an order of discharge. On the 12th July, 1866, being then casually in Nova Scotia, he was arrested on a *capias* at the suit of the plaintiff for the amount alleged to be due on these bills.

Held, That the debt being provable under the bankruptcy in London, and the defendant having obtained an order of discharge or certificate from the Court of Bankruptcy there, he was privileged from arrest for the debt in this Province.

Also, that the order of discharge or certificate was "sufficient evidence of the bankruptcy."

Construction of Imperial Act, 24 & 25 Vic. ch. 134, secs. 161 & 203, and of Provincial Act, Revised Statutes, ch. 135, sec. 28.

J. N. RITCHIE on a former day in this Term had obtained a rule *nisi* for the discharge of the defendant (who had been arrested under a *capias*) as a certificated bankrupt.

The rule was very fully argued by *J. N. Ritchie* for the defendant, and *Weatherbe* for the plaintiff.

All the material facts appearing in the various affidavits are sufficiently set out in the judgment.

WILKINS, J., now delivered the judgment of the Court.

This is an application for discharge from arrest on bailable process, made to this Court by Frederick Smith, on the ground—the only one remaining for consideration—of his being, at the time of his arrest a bankrupt, adjudicated to be such in the London Court of Bankruptcy. In support of the

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* *W. A. Johnston*, for defendants, was not called on.

application he has produced and authenticated a document under the seal of that Court, declaring him a bankrupt on the 14th November, 1864, by the name and description of Frederick Smith, of 34 Fenchurch Street, in the city of London, commission merchant trading under the style and firm of Frederick Smith & Co., and residing at Sussex Villa, the Grove, Sydenham, in the county of Kent.

This document is dated on the 27th February, A. D. 1865. The affidavits and the process before us show that the applicant was arrested on the 12th day of July, A. D. 1866. The affidavit on which he was held to bail, and the process viewed in connection with it, show the subject matter of the action to have been two several bills of exchange drawn by the plaintiff, at Bangor, in the State of Maine, United States of America, (for £1000 sterling each), at sixty days after date, (17th August, 1864), and accepted by the defendant (on the applicant) *in London.*

The applicant is shown by affidavit, at some undefined time, previous to the year 1865, to have resided in London, and to have been a trader there.

Being thus called on to decide on an application for discharge of a party arrested under our own process, on the ground of his being entitled to liberation under the provisions of an Act of the Imperial Parliament, we should have felt a deep sense of embarrassment and difficulty, had it been necessary for us to construe judicially a voluminous, complicated, and intricate statute, novel to us in theory and practice. But that necessity does not press upon us, and all that we have to decide is, (and to that we carefully confine ourselves), viz., whether a British subject being casually in this Province and arrested here for a debt declared to be due to a subject of a foreign Government, and applying for his discharge on the ground that he had been duly adjudged a bankrupt in London, and that the particular debt was provable under his bankruptcy,—is entitled to his discharge on production of sufficient evidence of his bankruptcy, and that the debt for which he was arrested was provable under it.

It is necessary to refer to the existing English Acts of Bankruptcy and Insolvency so far, and so far only, as may be necessary in order to decide the question before us.

If there were nothing in these Acts which might be construed as imposing a duty on this Court to act in the matter before us, *in a mode prescribed by them;* still, in order to determine the question which involves the personal liberty of the applicant, who, though a foreigner, is entitled to the protection of our laws—we should be obliged carefully to consider the Imperial statutes on which he relies for his discharge from our process.

It is enacted by the 24 & 25 Vict. chap. 134, sec. 203, that "any petition for adjudication, or arrangement, adjudication of bankruptcy, assignment, appointment of official or creditors' assignee, certificate, deposition, or other proceeding or order in bankruptcy, or under any of the provisions of this Act, appearing to be sealed with the seal of any Court under this Act, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this Act, *or otherwise*, be admitted in all Courts *whatever* as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of such Court, without any further proof thereof." And by section 204 judicial notice is required to be taken by all Courts, Judges, Justices, and persons judicially acting, and other officers of the signature of any commissioner or registrar of the Courts, and of the seal of the Courts subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of the Act.

Now, without stopping to enquire whether the language of the 203rd section, viz., "*all Courts whatever*," be comprehensive enough to include the Courts of the Queen in Nova Scotia, it is sufficient to consider, in the first place, the *ex necessitate rei*, and, in order to the protection of an English bankrupt happening to be in this Province, and there arrested for a debt *provable*, this Court must interfere, in the spirit of the English Bankruptcy Acts, to prevent its own process being perverted to the violation of the liberty of a person deprived of it contrary to the express provisions of those Acts; and secondly, and especially, that all doubts, if any, arising as to the application of section 203 to Nova Scotian

Courts are completely set at rest by the express provisions of our own statute, (Rev. Statutes, chap. 135, sec. 28), that makes every document which by any law (at the passing of the Act) in force, or thereafter to be in force, was or should be admissible in evidence of any particular in any Court of Justice in England, or Wales, or Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, *admissible* in evidence *to the same extent and for the same purposes in any Court of Justice in this Province, &c., without proof of the seal or stamp or signature, or of the judicial or official character of the person appearing to have signed the same.*

Thus then, this "order of discharge" is evidence before us to the same extent as it would be evidence in the Supreme Courts at Westminster.

Whether it would be there, or ought to be here regarded as *conclusive* evidence we are not called on to determine, and on that point we give no opinion. *Primâ facie evidence it unquestionably is "of the bankruptcy and of the proceedings precedent to the order of discharge."* Of such we must view it as practically conclusive evidence, until it be at least impeached by a suspicion cast on the validity of the bankruptcy, or of the precedent proceedings, or of the order of discharge. Such impeaching evidence does not, in this case, exist even in the slightest degree.

The "order of discharge" then, on which this arrested party relies as entitling him to his discharge from our process, absolutely entitles him to it by force of section 161 of the Imperial Act of 1861, chap. 134, provided he has brought himself within its provisions by showing to this Court that the particular debt for which he stands arrested was "a debt, claim, or demand *provable* under his bankruptcy." This he has established by evidence entirely uncontradicted and unimpeached. It is in proof that he was arrested, under the process that detains him, on bills of exchange drawn by a resident in one of the United States of America on this party, who accepted the bills in London,—on a party—duly adjudicated to be a bankrupt in the London Court of Bankruptcy. That the particular debt was a debt provable under his bankruptcy is, therefore, a point not in controversy.

We are, therefore, of opinion that the rule must be made absolute.

Rule absolute.

Attorney for plaintiff, *Weatherbe.*
Attorney for defendant, *J. N. Ritchie.*

JOHN McSWEENY *v.* T. J. WALLACE.

August 2, 1866.

Whereon an application to set aside pleas as false, frivolous, and vexatious, facts, showing the pleas to be essentially false, are positively sworn to, and are only partially, but not directly and explicitly denied in the affidavits on the other side, the Court will set the pleas aside.

Though an affidavit to set aside pleas as false must, in general, be made by the plaintiff himself, this rule does not apply where the facts on which the plaintiff relies are in the knowledge of the attorney and not of the plaintiff.

A motion to set aside false and vexatious pleas applies equally to a foreclosure as to a common law suit.

THIS was an appeal from the decision of Wilkins, J., at Chambers, on the 13th March last, setting aside the pleas and ordering a sale of the mortgaged property. The action was brought to foreclose a mortgage made by the defendant to the Reverend Patrick Dunphy, and assigned by the executors of the said Patrick Dunphy to the plaintiff.

In his first plea the defendant says that the "alleged mortgage is not his deed." In the remaining pleas (thirteen in all) most of which are very voluminous, he admits the making of the mortgage, but sets up various defences, the principal of which are no consideration,—that the mortgage was executed voluntarily,—that it was a condition precedent before the payment of the amount due thereon that the plaintiff and one Rev. Patrick Dunphy, deceased, (who together with himself were co-executors of the Very Reverend Dean Dunphy), should obtain for him releases and discharges from the next of kin and all parties interested in the estate of the said Very Reverend Dean Dunphy, and should also indemnify him against all claims against the said estate, including the claims

for legacy, and succession duties, that such releases, discharges, and indemnification had not been obtained, and that, therefore, he was entitled to resume the executorship (from which he had withdrawn in order to settle certain disputes between himself and his said co-executors) as he had done, and to retain in his own hands the money secured by the said mortgage.

The appeal was fully argued early in the present Term by *J. W. Johnston, junr.*, and *W. A. Johnston* for the defendant (the appellant), and by *J. N. Ritchie* for the plaintiff.

The statements in the various affidavits of J. N. Ritchie, of the defendant, and of H. Blanchard, (being all the affidavits used on the appeal), and in the exhibits annexed thereto, and the points taken at the argument are sufficiently set out in the judgment.

Young C. J. now delivered the judgment of the Court.

The present action of foreclosure has arisen out of the celebrated case of *Dunphy et al* v. *Wallace*, which occupied so much of our time in Michaelmas, 1863, and made us familiar with all the facts. I forbear from going into these as our judgments are on file, and are in course of publication in Mr. Oldright's reports.* It now appears that, in May, 1864, the three executors entered into the agreement annexed to Mr. Ritchie's affidavit, and which the defendant does not dispute. The object and intent of this instrument are apparent from the recitals and covenants, which seem to us very clear and precise, though it was said at the argument that it had been hurriedly drawn.

The leading recitals referring to the estate of the Very Reverend James Dunphy are as follows:—

"Whereas differences have arisen between the said executors touching the management of the said estate, the control of the funds, and the construction of certain clauses in the said will,

And whereas the said John McSweeny and Thomas J. Wallace as such executors have each received into their hands and possession large sums of money belonging to the said estate,

And whereas the said Patrick Dunphy and John McSweeny

* See *ante* vol. 1, p. 383.

have commenced a suit on the Equity side of the Supreme Court of this Province against the said Thomas J. Wallace, which is still pending and undetermined;

And whereas for the sake of settling the said suit, and all matters in difference between the said parties under the said will, the said Thomas J. Wallace has agreed to relinquish the said office of executor and trustee under the said will, and to release to the said Patrick Dunphy and John McSweeny all his right and title to any portion of the said estate for fees or commissions, and any claim he may have at law or in equity under the said will or otherwise howsoever, and to pay over to the said Patrick Dunphy and John McSweeny the sum of sixteen thousand dollars in full of all the monies of the said estate remaining in his hands, subject to the several deductions therefrom mentioned in the schedule hereunto annexed marked "A," which are to be borne by and paid out of the said estate;

And whereas the said Patrick Dunphy and John McSweeny have agreed to indemnify and save harmless the said Thomas J. Wallace, his heirs, executors, administrators, and assigns, of and from any liability and responsibility under the said will, and from any claim or demand of the next of kin of the said James Dunphy, and from all or any other person or persons claiming under the said will, to be brought against him personally, or as such executor and trustee under the said will as aforesaid."

Now, it is known to us from the original suit that the other two executors, in accepting $16,000 from the defendant on behalf of the heirs and legatees of Dean Dunphy, surrendered a large sum which was in the defendant's hands, and which in fact was the price paid for his relinquishment of the trust. It was a costly, and, we may presume, considering the state of feeling between the parties, it was a prudent and wise compromise which a Court would uphold if it could.

The covenants on the part of the defendant carry out the recitals, and he accepts the covenants of his co-executors as sufficient guarantees for his protection.

He might have stipulated for actual releases from the heirs, for the actual payment of legacy duties, for his resumption of the executorship in case Mr. Patrick Dunphy should die

before the estate was closed, or for any other provision that he thought essential for his interest or his safety. There are no such stipulations, and as the agreement was witnessed by his present counsel, was executed in the office of the Equity Judge then acting for the two executors, and was fully understood by all parties, we concur with our brother Wilkins in thinking that for all the purposes of this argument the defendant is bound by it.

This mortgage of $11,000 is given as part of the $16,000, and ought to have been paid two years ago. It was accepted as equivalent to cash at three months, and the now plaintiff having been obliged to come into this Court to foreclose it, the question is, whether under our practice it is competent to the defendant to raise the defences which are contained in his voluminous pleas.

Now we are all of opinion that it is not competent for him to do so. The money in this mortgage is not his money. It belongs to the estate, and by our original decision ought to have been paid into this Court for the protection and safety of the legatees and heirs to whom it really belongs. This was our judgment when the defendant was still an executor, —*a fortiori* it is our judgment now when he has ceased to be one.

We beg to be understood, however, as giving no opinion whatever upon the right he now claims to resume the executorship, and the management of the whole or any part of the estate. These questions or any other it is perfectly open to him to raise in a suit for that purpose,—all we say is,—that he has no business to raise them in this suit in the face of his agreement under seal. We will take care, however, that no injustice is done him. We are disposed to do more for him, in fact, than he did for himself. From the fact that the plaintiff has the confidence of Dr. Hannan and Mr. McIsaac, the executors of Mr. Patrick Dunphy, and the natural guardians of the rights of their church and of the legatees, we are satisfied that the defendant runs no risk of being called upon for legacy duties or any other liabilities of the estate, but we will not expose him even to that remote risk. In granting the foreclosure we will direct the proceeds to be paid to the Accountant General, and out of these will see that all just

demands are discharged. On this account we think the want of the schedule of little moment,—the want of it does not vitiate the agreement, and the contemplated deductions will be ascertained and settled here, if not already paid.

The other objections that were taken, and which were chiefly of a technical kind, may be easily disposed of. It was said that the affidavit to set aside the defendant's pleas ought to have come from the plaintiff himself, and not from his attorney, and no doubt that is the rule where the facts are in the knowledge of the plaintiff or of his authorized agent. But here the execution of the agreement is proved by the examination of Mr. James W. Johnston, now of counsel for the defendant, and the defendant's admissions, which are partially but not directly denied, were made to Mr. Ritchie in person. His affidavit is thus of some avail, while that of the plaintiff who resides in the adjoining Province would have amounted to nothing.

It was then urged that a motion to set aside pleas as false could not be made in a foreclosure suit, and, if we were governed by the English practice, or the rules of an Equity Court, this objection would be fatal. But by the fourth section of our Equity Act, in all cases formerly determinable in Chancery and now conducted in the Supreme Court, the practice of the Supreme Court as far as it is applicable shall be observed, and we hold it to be the practice of this Court which experience has shown, within its legitimate bounds, to be a wholesome and highly convenient practice, that a motion to set aside false and vexatious pleas will apply equally to a foreclosure as to a common law suit.

If, indeed, fraud had been alleged in the defendant's pleas as tainting this mortgage or impeaching its consideration, we would probably have thought it right to remit it to a jury. If, again, the defendant had ventured to deny that the mortgage was his, that is a question which we would not have tried on affidavits, but would have considered this summary jurisdiction as at an end. Now it is to be noted how this essential point is handled in the affidavits. The mortgage is witnessed by Mr. James, a barrister of this Court, who proves it for registry before Mr. James W. Johnston. It is registered accordingly, and the defendant pays $1,000 of the

CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

IN

MICHAELMAS TERM XXX VICTORIA.

ANDERSON *v.* MASON.

December 15, 1866.

The directing of the writ, in a suit before a Stipendiary Magistrate for seaman's wages, to any of the constables of the county, instead of to the sheriff or his deputy is not a nullity, but a mere irregularity which is waived by appearance.

The jurisdiction of the Stipendiary Magistrate under Revised Statutes, chap. 75, is concurrent only with that of two Justices of the Peace, and not exclusive.

In this case the writ was signed by and made returnable before the Stipendiary Magistrate, but two Justices of the Peace were substituted for him on the trial by the request of the defendant.

***Held*, that the irregularity, if any, was cured by the assent of the defendant.**

Construction of Revised Statutes, chap. 75, sec. 25, and of Provincial Act of 1865, chap. 1, sec. 13.

THIS was an action for seaman's wages brought up by *certiorari* from a Stipendiary Magistrate's Court.

The case was argued during the last November Sittings by *Coombes* for plaintiff, and *B. C. Gray* for defendant.

The facts stated in the various affidavits, and the points taken at the argument, are sufficiently set out in the judgment.

YOUNG, C. J., now delivered the judgment of the Court.

This was a suit commenced by summons, signed by and returnable before Mr. Shiels, the Stipendiary Magistrate, and addressed to any of the constables of the county. The defendant appeared, and at the request of the Stipendiary Magistrate who was too ill to attend, and by the special concurrence of the defendant, the case was tried before two Justices of

the Peace. This was done in the language of Mr. Coombes' affidavit at the express request of the defendant, in order that he might not, as he stated it, be delayed from proceeding to sea by any postponement of the trial. The suit was for seaman's wages, and the justices having examined the parties and their witnesses gave judgment for the plaintiff,—debt $44.37, costs 95 cts.

Mr. Gray moved for a nonsuit on the ground that the contract had not been completed, but no objection was urged or offered by the defendant or his counsel as to the authority of the Court to try the cause, nor to the magistrates composing the Court.

The case was brought up by *certiorari;* and it was contended, first, that as the Act of 1865, chap. 1, sec. 13, referring to chap. 75 of the Revised Statutes, under which the action was brought, provides that process under that Act shall be directed to the sheriff or his deputy, or where the sheriff is interested to the coroner,—the process in this case was not merely an irregularity but was void, and for this Mr. Gray cited 1 *Chitty's Arch. Q. B. Prac.* (10th edition) 572, and the cases in the note thereto. But though it may be true, that, in some instances, a writ directed to any other person than the sheriff would be void, as we would probably hold where a warrant to levy the amount by distress and sale of the defendant's effects, and *a fortiori* by sale of his vessel, was issued under Chap. 75 of the Revised Statutes, this does not apply to a summons followed by an appearance. The rule is rather to be gathered from the cases cited in *Archbold* as follows:—

(His lordship here read the following memorandum of cases:—

Counsel *arguendo*, 1 *Strange*, 155, said "I do admit that any error in *mesne* process is salved by the party's appearance, and he shall not afterwards take advantage of it: because the only intent of *mesne* process is to bring the party into Court, and when he does come that is out of the case, for he might have come in upon the writ without it." If the sheriff be a party and the writ be directed to him, the Court or a Judge will set aside the proceedings for irregularity.

Writ directed to a sheriff good, though the sheriff one of the plaintiffs. 1 *Dowl.* 151.

But it is irregular where directed to the sheriff, and he is the only plaintiff. 1 *W. Bl.* 506.

In an action by a sheriff against one of his bailiffs, the *latitat* was directed to the sheriff himself, and not to the coroner. Held irregular, *Ibid.)*

It appears then that the directing of the writ to any of the constables of the county is not a nullity, but a mere irregularity which is cured by appearance.

It was objected, secondly, that the writ being returnable before the Stipendiary Magistrate under section 25, he alone could try the cause, and no consent of the defendant could give the two justices jurisdiction. Now we are of opinion that the jurisdiction of the Stipendiary Magistrate under Revised Statutes, Chap. 75, is concurrent only, not exclusive, and as two justices could have issued the summons and tried the case, we can see no objection in principle to their being substituted for the Stipendiary Magistrate, with the concurrence and at the instance of the defendant. It is not as if two parties had been called in who had no original authority—they had authority under a proper writ independent of the defendant's assent—and that assent might be viewed as equivalent to an appearance without process, or at all events as a waiver of any objection to the process.

We think, therefore, that the judgment below must be affirmed.

Judgment affirmed.

Attorney for plaintiff, *Coombes.*
Attorney for defendant, *B. G. Gray.*

HARRIS *v.* F[illegible]DER.

December 15, 1866.

An affidavit is sufficiently entitled in the cause, although the words "plaintiff" and "defendant" are omitted in the heading after the names of the parties.

The changing of the venue in a cause depends merely on the balance of convenience as regards the trial.

In this case, the Court, being of opinion that the cause could be more conveniently tried in another county than that in which the venue was laid, made the rule to change the venue absolute with costs.

Blanchard, Q. C. on a former day had moved for a rule absolute to change the venue in this case.

The rule was argued by *Blanchard, Q. C.* for the defendant, and *Weatherbe* for the plaintiff.

The facts set out in the various affidavits, and the points taken at the argument, are sufficiently set out in the judgment.

DESBARRES, J., now delivered the judgment of the Court.

This was an application for a change of venue from the county of Kings to the county of Halifax, on an affidavit of defendant, stating that the cause of action, if any, arose at Margaret's Bay, in the county of Halifax, distant 92 miles from Kentville in the county of Kings, that he has a good defence on the merits, that he and his witnesses, eight in number, reside at Margaret's Bay, and, being a poor man, he cannot afford to take his witnesses to Kentville.

The application was resisted on the part of the plaintiff on two grounds, first, that the affidavit of defendant is not properly entitled in the cause, it being entitled "Judson D. Harris *v.* John H. Fader," not naming plaintiff and defendant as is usually done; secondly, that all the plaintiff's witnesses, six or seven in number, reside, with the exception of one, out of the county of Halifax, and most of them in the county of Kings, within a few miles of Kentville, and that more expense will be incurred by plaintiff in taking his witnesses to Halifax than the defendant would incur by taking his witnesses to Kentville.

In the first place, we think on the authority of *Richard* v. *Isaac*, 1 C. M. & R. 136, that although the affidavit of defendant does not designate the parties as plaintiff and defendant as is generally done, it is, notwithstanding the omission of these words, sufficiently entitled in the cause. In the case referred to the affidavit being entitled "Thomas D. Isaac at the suit of John Richard" was held to be a deviation from the usual mode, which Gurney, B., said had never been allowed, observing that the proper mode of entitling it was "A. B. *v.* C. D.", just as the affidavit of the defendant in this case is entitled.

Lastly, having read and considered the affidavits on both sides, we are under the impression from the facts and circum-

stances therein respectively set forth that this cause can more conveniently be tried in this than in the county in which the venue is laid, and that there must, therefore, be a rule absolute to change the venue with costs.

Rule absolute.

Attorney for plaintiff, *Weatherbe.*
Attorney for defendant, *Blanchard, Q. C.*

THE QUEEN *v.* HENRY P. ALLAN.

January 2, 1867.

In a prosecution for bigamy, where there is a foreign marriage, the foreign law must be strictly proved.

This, however, is not necessary, where the marriage has been admitted by the defendant, and there are corroborating circumstances strengthening the admission.

The testimony of the minister who married parties that he had a marriage license which was brought to him by one of the parties—that he duly returned the same—that all the forms of law were observed as required by the license, and that the marriage was performed according to the rites and ceremonies of his church is sufficient proof of the license having been issued and returned, and of the marriage having been duly solemnized,—Wilkins, J. *dubitante.*

In this case, the first alleged marriage was contracted in Boston, Massachusetts, and no proof whatever was given of the marriage law of Massachusetts. There was evidence, however, by a witness present thereat, of a marriage ceremony, and of subsequent cohabitation as man and wife. Another witness testified as follows:—"I spoke to the defendant at Parrsboro'. A woman claiming to be his wife was looking after him. She is now present. I asked him what made him leave his wife in the States and marry another woman at Parrsboro'. He said he did not think his wife would follow him from the States. He thought she never would trouble him, but as long as she had followed him, he would take her and support her as long as they lived. We were old acquaintances and I asked him about his wife who was claiming him."

Held, that there was no necessity for proof of the marriage law of Massachusetts, as the marriage was sufficiently proved by the admission of the defendant and the corroborating circumstances.

BIGAMY tried before Young, C. J., at Amherst, in October last.

The counsel for the prisoner at the trial (Townshend) contended that there was no sufficient evidence of either of the alleged marriages, as regards the first, which was contracted in Boston, Massachusetts, because no proof had been

given of the law of Massachusetts with reference to marriages,—as regards the second, which was solemnized in this Province, because the license had not been produced, nor an extract from the records of marriages certified by the Financial Secretary under Revised Statutes, chap. 120, sec. 44.

The defendant was convicted, but the learned Chief Justice reserved both points for the consideration of the Court.

The evidence with regard to the first marriage was as follows:—

Evelina Bremner, a witness for the Crown, said:—"In August, 1855, I lived in East Boston; my sister, Angeline, (the defendant's alleged first wife) lived with us. She was there married on the 12th of the month to Henry P. Allan (the defendant). The Rev. Mr. Allan, the Methodist Episcopal minister, married them there at his church, which he attended for two years. The 12th was the Sabbath day. At the hour appointed he drove to our house with a span of white horses, which took me, the bride, and another sister, and a man called Henry B——, to the church. The marriage took place at the altar. We then went down the other aisle and were carried to the bridegroom's boarding house at East Boston. They lived together for two years as man and wife. They had one child before I left Boston for Halifax. The defendant is the man. He and his wife were at our house almost every evening. I have not seen him since I left Boston till last Monday. Had no difficulty in recognizing him. Seven months after I was in Halifax I returned to Portland, where my sister came to see me with a second child. She has now a third child about three years old. I saw Rev. Mr. Allan administer the sacrament and baptize."

John Dow, another witness for the Crown, said: "I saw defendant in the month of August last year at Parrsboro'. Saw him first time at Parrsboro' in the meeting house. The second time I saw him, I spoke to him and he owned to his being the same Henry Allan—the same man.—He is the same man else I am wild.—We worked two months together in the same yard at Eastport, 17 years ago. A woman, claiming to be his wife, was looking after him when I spoke to him at Parrsboro'. She is now present. The defendant was sober. I asked him what made him leave his wife in the States and marry another

woman at Parrsboro'. He said he did not think his wife would follow him from the States. He thought she never would trouble him—but as long as she had followed him, he would take her and support her as long as they lived. She had a little boy with her. We were alone at this conversation. Defendant said at first he did not know me. I then called him Henry Allan and he owned to it. Defendant told me his first wife was dead. We were old acquaintances, and I asked him about his wife who was claiming him. I think he did not want to know me at Parrsboro'. He said, afterwards, he knew me well enough."

As regards the second marriage the following evidence was given.

Rev. Duncan McKinnon said: "I am the minister of the Presbyterian Church at Parrsboro'—the settled minister.—The defendant, and a brother of Jane Grant, called at my house in May, 1865, to have defendant and Jane married. I celebrated matrimony between them a few days after, in the house of Jane's father. I had a license for the marriage. I married them May 24th, 1865. I returned the license to Mr. Bradley shortly after. He is the issuer of licenses and gave me a receipt. The license was brought by the defendant to me. The Grants adhered to my congregation. I performed the marriage according to the rites and ceremonies of my church. The defendant told me he was a shipwright, born in Eastport. All the forms of the law were observed as required by the license."

The case now (Decr. 22nd), came on for argument.

Oldright, for the defendant. Strict proof of marriage is required in prosecutions for bigamy, and admissions of the defendant are not sufficient. 1 *Taylor on Evidence*, 157; 13 *M. & W.* 261, 5; 4 *Burr.* 2057, *S. C.* 1 *Will. Bl.* 632; 1 *Doug.* 171. *Weaver* v. *Weaver*, M. S. Court of Marriage and Divorce in this Province. The first is a foreign marriage, and the foreign law must be proved. 8 *Beav.* 527; *Roscoe's Crim. Evidence*, 304, 295; *Lindo* v. *Belisario*, 1 Hagg. Cons. Rep. 216 and Appendix, p. 7. No such proof has been given here, and the conviction cannot, therefore, be sustained. The admission of the defendant is not enough. It is vague

and general in its terms, and even if much more explicit, it would not be sufficient. 2 *C. & K.* 782, 227; 1 *C. & K.* 164 n; 1 *East's Pleas of the Crown*, 470. The first marriage was no marriage by the common law of England. *Reg.* v. *Millis*, 7 Jurist, 911, 983; *Beamish* v. *Beamish*, 5 Law Times Reports, 98. The second marriage must be equally valid with the first. *Roscoe on Criminal Evidence*, 295. Either the license or banns are indispensable. Either the license should have been produced, or a certificate from the Financial Secretary's Office, which, by the Act of 1866, takes its place as *prima facie* evidence. Rev. Statutes. chap. 120, sec. 44; Provincial Act of 1866, chap. 28, sec. 43.

Blanchard, Q. C., for the Crown, contrà. The admission of defendant coupled with proof of the marriage and of cohabitation is sufficient. In the case cited from *Car. & Kirwan*, there was no corroboration of the admission. The evidence was for the jury. 1 *Russell on Crimes* 216, 217, 218, note. An admission only has been held to be sufficient. It was not necessary to prove the license to establish the second marriage. *Rus. & Ry.*, 108. A settled minister here acting under a license is on the same footing with an Episcopal minister. (Cites 3 *British Crown Cases*, 267.) The license here is recorded; the minister himself is the best evidence. The defendant admitted the second marriage in effect. (Cites Prov. Act of 1865, chap. 32.) The identity of the defendant and actual marriage having been proved, the conviction will be sustained. 1 *Doug.* 171.

Oldright, in reply. The position that there must be strict proof of the foreign law has not been successfully met. In Massachusetts they have legislation that we have not here. Massachusetts Laws, 1810 and 1841. (Cites 37 *Eng. Law & Eq. Rep.* 609.)

Cur. ad. vult.

YOUNG C. J. now (Jan. 2, 1867) delivered the judgment of the Court.

After stating the case, and the evidence with regard to the first marriage, his lordship said:—

It is a principle of the law of evidence, that, on a prosecution for bigamy and in actions for *crim. con.*, the marriage must be strictly proved. The cases cited at the argument from 4 *Burr.* 2057, 1 *Will. Bl.* 632, and 1 *Doug.* 171, and the uniform practice, says Baron Parke, ever since these decision, seem to have settled (we may now indeed say have conclusively settled) that in actions for *crim. con.* and on an indictment for bigamy it is necessary for the plaintiff or prosecutor to show what the Courts call a marriage in fact—that is an actual marriage, valid, or avoidable and not yet avoided (3 *Inst.* 88): and that acknowledgment, cohabitation, and reputation, which raise a presumption of a valid marriage are not sufficient.

The marriage, also, if it be a marriage abroad, must be proved to have been celebrated according to the laws of the country in which it took place.

These are admitted rules, but the quantity and kind of proof which the law recognizes, it is not quite so easy to determine. Proof, according to *Archbold* in his *Criminal Evidence*, 752, that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony, according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it so as to throw upon the defendant the *onus* of impugning its validity, and he cites *Rex* v. *Inhabitants of Brampton*, 10 East, 282. But this was a case of settlement, to which the stricter rule does not apply, and although the law will be satisfied, in this case as in most others, to act upon certain presumptions, I cannot help thinking that in the above passage the learned author has gone further than the cases will justify. It must be conceded, I think, that a foreign marriage must be proved to have been in accordance with the foreign law, and it was established by the *Sussex Peerage Case*, 11 Cl. & Fin. 85, 134, overruling *The Queen* v. *Dent*, 1 Car. & K. 97, that the foreign law must be proved by an expert—a person *peritus virtute officii* or *virtute professionis*. It is evident that a failure of justice will often be occasioned by this strictness. In case of a second marriage, shocking it may be the moral sense of the community, how is the first to be proved which may have

taken place in a remote corner of Europe or on the other side of the globe? This is a question, however, more for the Legislature than the Courts, and notwithstanding the minuteness of detail, the solemnity and the perfect good faith of the first marriage in this case, we should have held the proof insufficient but for the admission of the defendant. In aid of this evidence, the train of circumstances proved by the principal witness, (for the wife herself, though present at the trial, could not be a witness), and the subsequent cohabitation and birth of children appear to us to be all-powerful. An admission, not corroborated as this is, has been held in some of the cases to be enough as in *Rex* v. *Upton*, 1 Russell on Crimes, 218, where it was proved that the prisoner, being charged with bigamy, made a statement before a justice, in which he expressly declared that he had married his first wife, who was then present, and Mr. J. Erskine left the case to the jury, observing that this was not an incautious statement, made without due attention, but that the prisoner's mind was directed to the very point by the charge made against him; on which the editor observes, in a note, that it is quite clear that this is the proper course, as everything which a prisoner says against himself is evidence to be left to the consideration of a jury.

So Mr. *Starkie* says in his *Law of Evidence*, 2894, "I have known a prisoner to be convicted of bigamy upon proof of his deliberate admission of both marriages, in the presence of his first wife, before a magistrate."

Truman's case, 1 East's P. C. 470, proceeded on the same principle, though there the admission was backed by the copy of a proceeding in a Scotch Court against the prisoner and the first wife.

In *Regina* v. *Norton*, 2 M. & Rob. 506, the Court said, "Declarations hastily or lightly made were entitled to very little weight; but what the prisoner said deliberately and when it was obviously his interest to deny his marriage, if he did not know it to be a valid one, was undoubtedly evidence entitled to the very serious consideration of a jury."

Now, what evidence have we here? The prisoner had contracted a second marriage at Parrsborough under a different christian name, Charles H. in place of Henry P. Allan. The

first wife hearing of this pursues him. An old acquaintance who had not seen him for seventeen years recognizes and accosts him—with some hesitation he owns that he is the same man—and when asked what made him leave his wife in the States and marry another woman at Parrsboro', he does not repudiate the marriage or allege its illegality, he says only that he did not think his wife would follow him from the States; he thought she never would trouble him, but as long as she had followed him, he would take her and support her as long as they lived.

Here was an admission that satisfied every requisition in *The Queen* v. *Norton* and the other cases. It was not hastily nor lightly made—it was made when the interest of the prisoner was all the other way—and it is corroborated by the proof of an actual marriage solemnized. A mere admission said Pollock, C. B., 2 *Car. & Kir.* 783, of the first marriage is not enough—you must give some evidence beyond it. Here there is evidence beyond it, so circumstantial and so plain that the objections to a simple acknowledgment no longer apply, and the first marriage must be held, we think, to be clearly established.

And now as to the second marriage.

(His lordship here stated the evidence as to the second marriage.)

This evidence would open a much wider field than we have been hitherto surveying. There is, first of all, the question whether the second marriage must be equally valid with the first, on which there are various opinions. Then would come the far more important question, whether this second marriage solemnized by a Presbyterian minister stands on the same footing in this country as a marriage in presence of a clergyman episcopally ordained. On this cardinal point—that is, on the extent to which the common law as it has been declared by the House of Lords in the case of *The Queen* v. *Millis* is to be accounted the common law prevailing in this Province—or whether we have the power of limiting its operation as has been done by the Courts of New York, Pennsylvania, and others of the United States—these are very large and important questions, on which it is unnecessary and would be improper for me to enter, as differences of

opinion exist among ourselves, and the present case can be determined on a narrower ground. Now, it is admitted that with the production of the license, or with a certificate from the Chairman of the Board of Statistics, the evidence of this second marriage would be *omni exceptione major*.

Section 44 of the Revised Statutes, chapter 120, now represented by section 43 of the Acts of 1866, chapter 28, declares that an extract from the records of the Board, duly certified by the Chairman, shall be evidence of the entry certified, and *primâ facie* evidence of the fact asserted or claimed in the entry. But while the Act confers these facilities and makes the certificate *primâ facie* evidence, it does not make it the sole nor even the best evidence of the facts to be proved. Let us see, then, what we have here. The prisoner brings to the clergyman a license, which he could only have obtained, in due course, under section 7 of the above chapter 28, from the deputy registrar after giving bond with sufficient sureties and payment of the fee of two dollars and fifty cents. This license, if good on the face of it, must have contained the name of the minister and the names, abodes, and additions of the man and woman to be married. It is received and acted on by the clergyman as genuine. All the forms, he says, required by the law were observed. He returns the license to the deputy registrar within ten days after the celebration—being the same paper in official form, purporting to be subscribed by the registrar with his own name and with the exact date of issuing—the blank certificate endorsed thereon having now been filled up by the minister, stating the fact of the celebration, the names, abodes, and additions of the couple married, the time and place of such marriage and the names of at least two persons present thereat besides himself. The minister thereupon takes a receipt from the deputy registrar, and receives the fee to which he is entitled for such return of marriage so made, provided it has been made conformably to law. All this has been done, and if the proof of its having been so done is not enough without a further certificate, it is plain, that in the distant counties, or where, as in this case, misapprehension or accident, it may be, renders it impossible to obtain this further proof, the crime of bigamy, so fatal to the happiness of the woman often

abandoned without cause, and to the good order and decencies of society, will frequently go unpunished. Presumptions we have seen are sometimes admitted in criminal as in civil cases. In the *Queen* v. *Langille*, argued before us in 1864, the first marriage was celebrated by an ordained minister of the Presbyterian body—there was no proof either of license or publication of banns—yet we all held that the one or the other was to be presumed from the lapse of time and that the marriage was valid. And why should we not presume upon the principle of *omnia rité acta* that the public officer who issued, and, after it was issued, recognized this license, and the minister whose good faith is unimpeached, discharged their several duties as they ought? It is surely a most violent presumption that such a paper could be forged and escape the observation of both. We think, therefore, that there is sufficient proof of the license having been issued and returned, and of the second marriage having been duly solemnized.

The conviction of the defendant is for these reasons upheld, and no judgment having been given, we order pursuant to section 101, chapter 171, Revised Statutes, that judgment shall be given thereon at the next term of the Supreme Court at Amherst, the prisoner, in the meanwhile, to be detained in custody.

WILKINS, J. intimated that he had some doubts whether there was sufficient proof of the second marriage having been duly solemnized.

Conviction sustained.

Attorney for the Crown, *Blanchard, Q. C.*
Attorney for the defendant, *Townshend.*

HALIBURTON TRUSTEE OF THE ESTATE OF GOHEGAN v. DEWOLFE AND OTHERS, ASSIGNEES OF COOMBES.

January 2, 1867.

A debtor, on the 22nd March, 1864, made a deed of assignment in favor of all his creditors who should execute the deed within three months. Notice thereof

was published in the "Royal Gazette," at Halifax, to the effect that all creditors wishing to participate in the assets of the estate should execute the deed within the three months. All the creditors, except the plaintiff, did execute it within that time. The plaintiff took a note from the debtor on the 2nd June, 1864, for the amount of his claim. The parties beneficially interested who were represented by the plaintiff, resided in England, (though the plaintiff himself resided in Halifax), and they had no notice of the assignment until the three months had nearly expired, and, as soon as possible thereafter, they gave the plaintiff authority to come into the assignment and execute the deed, but the assignees and the other creditors refused to allow him to do so. The three months had then expired, but there had been no distribution of the proceeds of the estate.

Held, under the special circumstances, there having been no negligence on the part of the plaintiff or the parties whom he represented, and no dividend having been paid, that in equity the plaintiff was not precluded from coming in and sharing with the other creditors in the distribution of the estate, and that he should be allowed to execute the deed.

SPECIAL CASE stated for the opinion of the Court, all the material portions of which are as follows:—

William Gohegan Coombes, one of the executors of the will of Richard Gohegan, late of Bath Road, Surrey County, England, deceased, and also a guardian under said will of the testator's minor children, duly proved a copy of said will at Halifax, Nova Scotia, on the 23rd May, 1863, and subsequently became indebted to the testator's estate in the sum of £1500 or thereabouts.

Proceedings having been instituted in the Court of Chancery in England to compel said executor to account for funds which had been received by him, the executor afterwards gave his promissory note for £1500, dated 2nd June, 1864, to Robert G. Haliburton, acting on behalf of the solicitors of the estate in England, which note said Haliburton held in trust for said estate.

An assignment for the benefit of his creditors was executed by said William Gohegan Coombes at Halifax on the 22nd day of March, 1864, an abstract of which, marked (B), is hereunto annexed, and notice thereof was duly published in the "Royal Gazette," at Halifax, aforesaid, to the effect that all creditors wishing to participate in the assets of said William Gohegan Coombes should execute said assignment within three months from the date of said assignment, and all creditors with the exception of the estate of said Richard Gohegan did, within the time specified in said notice, execute said assignment.

The solicitors of the *prochein ami* of the minor children of

said Richard Gohegan were, by letter dated 27th May, 1864, informed of said assignment by the said Robert G. Haliburton, who received in reply the letter, a copy whereof is hereunto annexed, marked (A).

After the three months specified in said assignment had expired, but before any distribution of the proceeds, the said Robert G. Haliburton, alleging that he had, since the expiration of the said three months, received due authority from England on behalf of said estate of Gohegan, claimed to come into said assignment as a creditor in his right as trustee as aforesaid, which was refused by the assignees and by creditors who had executed said assignment. No distribution has ever been made by the assignees of said William Gohegan Coombes' estate.

The question for the Court is whether by law or in equity the said Robert G. Haliburton, trustee, and duly empowered as aforesaid, was and now is precluded from coming in and sharing with other creditors in the distribution of said estate, who have duly executed said assignment within the time therein limited.

(A.)

62 *Moorgate Street, E. C.,*
London, 30th June, 1864.

Dear Sir,—

We duly received your letter containing the terms of the proposed arrangement with Coombes' trustees and immediately applied to the Court of Chancery for permission to carry out your suggestions, and we have obtained an order for you to proceed as you think most for the benefit of Mr. Gohegan's estate.

* * * * * * *

We will send you the Chancery order for your authority and guidance as soon as possible,—it is not quite ready for this mail.

Yours truly,

ROBERTS & SIMPSON.

R. G. Haliburton, Esq.,
Halifax, Nova Scotia.

(B.)

Indenture tripartite dated 22nd March, 1864, *between* W. G. Coombes, trader, of first part, Thomas S. DeWolfe and Chas. H. M. Black of second part, and the several other persons whose names are hereunto subscribed and seals set, creditors of the said W. G. Coombes, of the third part,

Witnesseth that said Coombes, by and with the consent of his said several creditors, parties hereto (testified by their respectively signing and sealing these presents), hath granted, &c.

Upon trust to pay and discharge the debts of all creditors who shall have executed these presents; and, after full payment, to distribute the residue (if any) amongst all the creditors of said W. G. Coombes in equal shares; and, should any surplus remain thereafter, to pay over the same to said W. G. Coombes.

Witnesseth further full release to Coombes by all creditors executing this Indenture,

Provided that no creditor shall be entitled to any benefit, &c., who shall not execute these presents within three months from the date hereof.

NOTE.—The Trust Deed contains no provision for giving notice of the assignment to creditors.

The case was fully argued during the present Term by *B. G. Gray*, for the plaintiff, and *Shannon, Q. C.*, for the defendant.

YOUNG, C. J. now delivered the judgment of the Court.

The question submitted to us is, whether by law or in equity the trustee of the estate can come in and share with the other creditors under the assignment, although he has not executed the same within the period of three months limited therein. Assuming, therefore, in this case, the functions of a Court of Equity, we have to enquire whether we have authority, in the face of the proviso that no creditor shall be entitled to the benefit who shall not execute within the period, to deal with the plaintiff as an executing creditor and permit him under the special circumstances to come in.

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