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NOVA SCOTIA.

COUNTY COURT, DISTRICT NO. 2.

NOVEMBER 12TH, 1910.

JAMES A. LANGILLE v. NOAH ZINCK

Sale of Goods—Evidence—Jurisdiction of Magistrate.

An appeal from Magistrate's Court.

D. F. Matheson, K.C., for plaintiff.
J. A. McLean, K.C., and J. W. Margeson, for defendant.

FORBES, Co.C.J.:—This action came into this Court by appeal from a judgment in the plaintiff's favour for $3 and costs in the Magistrate's Court.

On the trial the plaintiff gave evidence and swore he sold the defendant an ox waggon as follows: "I said Noah, do you want a tongue, and he said no, I got no use for a tongue as I have no oxen, but a horse, and I said I would not sell it for less than $10 without a tongue, and with a tongue $15, but he paid me $10 then and there for waggon. He took hind part of waggon away and left fore part in my shop till spring, by an agreement with me. In the spring I missed the waggon tongue. In May I went to defendant and asked why he took the tongue out of my shop as I did not sell it to him, and he said I know I did not buy any tongue, but the tongue goes with the waggon. It was objected at the time of sale that I was not selling the tongue as he had no use for it."

Defendant called no witnesses and on this state of facts, the tongue, which is the subject of this suit, was never sold

and an action for debt could not lie. The magistrate has no jurisdiction to try the action, and I cannot find that an appeal will give this Court jurisdiction. There is certainly no implied contract to buy the ox tongue on part of defendant. If this could prevail there would be no limit as to jurisdiction a justice of the peace could not go. I must allow the appeal and dismiss the action. Costs will follow event.

NOVA SCOTIA.

SUPREME COURT.

NOVEMBER 18TH, 1910.

ZWICKER v. LAHAVE STEAMSHIP COMPANY.

Crown Grant — Water Lot — Trespass — Public Harbour — Navigation.

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

J. A. McLean, K.C., and J. W. Margeson, for defendants.

TOWNSHEND, C.J.:—The plaintiff, owner of a lot of land on the LaHave river, obtained from the provincial government a grant of a water lot in front of his land covered by water. The defendant company is a lessee of Getson's wharf adjoining the plaintiff's water lot, which wharf the company use in carrying on their business. In coming to the Getson's wharf the steamers cross the water lot, and in mooring to it portions of the steamers project across on to the water lot. The plaintiff either with the intention of preventing this, or as he says intending to build a wharf on his own water lot put down on the boundary line in the water a number of stakes. The company's steamers either accidentally or designedly in coming to Getson's wharf broke down these stakes, claiming they were an illegal obstruction to navigation. It is for this trespass and for the projections of the steamers on to his lot this action has been commenced, and in my mind there can be no doubt both parties did these acts in assertion of what they believed to be their legal rights.

The defendant has proved that Getson's Cove, where this water lot is situated, is a public harbour so declared by an Order-in-Council in pursuance of the statute. No license

was shewn by plaintiff authorising the construction of the proposed wharf from the Dominion Government, and I think it has been established that the waters covering plaintiff's lot were navigable.

The plaintiff concedes that his ownership of the water lot must be subject to any control vested in the Parliament of Canada in respect to navigation, but contends (1) that he did not obstruct navigation, and (2) that if he did no private individual is justified in interfering, but that the Crown alone can proceed by way of indictment against him for any illegal obstruction of navigable waters.

The right of defendant company to remove obstructions to navigation is disputed, and it is contended that such a nuisance can only be the subject of indictment at the suit of the Crown. It is, however, quite settled that if a private individual is injured by such obstruction he is justified in having it removed, and I think it established in this case that defendant company in navigating their vessels were hindered and impeded by the stakes placed in the river by plaintiff.

Having fully stated the material facts and my findings therein I think it unnecessary to cite and discuss the cases submitted by the parties in their briefs, further than to say that following the law as laid down in Holman v. Green, 6 S. C. R. 707; Wood v. Esson, 9 S. C. C. 239; Attorney-General of Canada v. Attorney-General of Ontario (1898), Ap. C. 700 and Kennelly v. Dominion Coal Company, 36 N. S. R. 495, my judgment must be for the defendant company with costs.

PRINCE EDWARD ISLAND.

SUPREME COURT.

NOVEMBER 11TH, 1910.

CHARLOTTE McWADE v. RONALD McEACHERN AND ANOTHER

Statute Execution—Sale of Land Under—Notice Required—Excessive Levy—Interest on Debt after Maturity.

J. J. Johnston, K.C., for plaintiff.

J. A. Matheson, K.C., for defendants.

SULLIVAN, C.J.:—This is an application to set aside a statute execution issued upon a judgment entered in this case, or to reduce the amount of the levy endorsed on the execution. It was made to Mr. Justice Fitzgerald at Chambers and by him referred to the Court.

The grounds upon which the application is based are:—

First. That although the execution is issued upon a judgment on a warrant of attorney in which there is no stipulation dispensing with two years' notice of sale in the case of freehold estates and one years' notice in the case of leasehold estates, yet the defendant's lands being freehold, are advertised to be sold, and the execution is returnable within a shorter period than two years from its date.

Secondly. That the amount of the levy endorsed on the execution is excessive; that it is more than the amount authorised by the judgment, and that it includes a sum for interest not warranted by the judgment.

With reference to the allegations in the first ground concerning the shortness of the notice of the sale of the lands and the time named for the return of the execution, even assuming them to be well founded they would afford no sufficient reason for setting aside the execution, and of course, none for reducing the amount of the levy. But they are not well founded.

Before the passing of the Act 24th Victoria ch. 5, the law required that on a sale of freehold land under an execution, two years' notice of such sale should be given, and that in the case of an execution against leasehold land one years' notice of such sale should be given; but sec. 8 of that Act provides that "any party executing a warrant of attorney on which judgment is proposed to be entered may, in the defeasance to such warrant of attorney dispense with the two years' notice of sale in the case of freehold estates, or the one year's notice of sale in the case of leasehold estates, and limit the time to be notified in either case to any less period, not less, however, than six months."

So the law remained until the passing of the Act, 38 Vict. ch. 11, which provides that "whenever execution shall issue upon any judgment recovered in the Supreme Court of Judicature, other than judgments entered up "by virtue of" or "referred to in" the 8th Section of 24 Vict. ch. 5, six months' notice of sale of the lands and tenements levied upon

thereunder shall suffice, unless the Supreme Court in its discretion shall otherwise order."

The judgment in this case was not entered up "by virtue of" nor is it one of the class "referred to" in the 8th section of 24 Vict. ch. 5, there being no time limit as to notice of sale of lands to be levied on thereunder expressed in the defeasance to the warrant of attorney on which it is entered. It is therefore governed by 38 Vict. ch. 11; and as the Court has not otherwise ordered under that statute six months' notice of sale, which is, it appears, the notice that has been given, is all that the law requires.

With regard to the second ground, namely, the excessiveness of the amount of the levy, the judgment was entered on a warrant of attorney dated 5th December, 1882, authorising the entering up of a judgment for $300, with the costs of suit. In the defeasance to the warrant of attorney it is alleged that the warrant is given to secure from the defendants to the plaintiff the payment of the sum of $152 in five annual instalments of $30.40 each with interest at the rate of ten per cent. per annum, to be paid on or before the first day of October in each year; and there is a provision authorising the charging of compound interest at the rate mentioned in case of default in payment of the interest, and also that in the event of such default the whole principal sum should become due and payable.

No payment was made by the defendants of any part of either principal or interest until after the time fixed for the payment of the last instalment.

The question that has been argued before us is whether the plaintiff is entitled to charge interest on the judgment, after the date fixed for the payment of the last instalment, such interest being included in the levy, and there being in the defeasance to the warrant of attorney no contract or stipulation for the payment of such interest.

It is a well established rule of law that where a written security for the payment of money at a certain day stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is not implied to be payable afterwards; and in the event of a judgment being entered up for the principal and interest thus secured, the plaintiff, in the absence of statutory authority allowing interest upon a judgment debt, is not entitled to include in a levy under an execution issued on such judgment, any sum for interest subsequently to the date fixed for payment in the

security. Any additional liability is not properly a liability to interest, but to damages, in the discretion of a jury or of the Court. Cook v. Fowler, 7 E. & I. App. 27; in re European Central Railway Company, 4 Ch. Div. 33, Popple v. Sylvester, 22 Ch. Div. 98.

In this province there is no fixed statutory rate of interest chargeable upon a judgment debt, and a judgment silent upon the subject of interest, as the judgment in this case is in Anon., 3 Salk, 213, upon a motion to stay execution on a of course, carry interest. Creuze v. Hunter, 2 Ves. Jr. 162, Hilhouse v. Davis, 1 M. & S. 173.

But it was argued for the plaintiff that, as the defendants in the year 1898 joined in an assignment of the judgment, in which document they admitted that the sum of $318.45 was then due, which sum included interest for upwards of eleven years subsequently to the maturity of the instalments, that amount can be included in the levy. Here again, the law is against the plaintiff's contention. According to the state of the accounts between the parties there was no such sum as $318.45 legally due on the judgment at the date named, and it is common learning that no amount can be incorporated into a judgment beyond what is warranted by its terms. It was stated by Holt, C.J., nearly two hundred years ago in Anon., 1 Salk. 400, that "where a judgment is acknowledged absolutely, and a subsequent agreement made, this does in no way affect the judgment, and the Court will take no notice of it, but put the party to his action on the agreement." Again in Anon., 3 Salk. 213, upon a motion to stay execution on a judgment under pretence of an agreement, made after the judgment was entered, the same very learned Judge laid down the law in similar terms.

In order to ascertain the amount due upon the judgment in question in terms of the warrant of attorney and of the provision therein for the charging of compound interest, in accordance with the view of the law as I have stated it, a reference was made to the prothonotary to make the necessary computation, and the amount found to be due after duly crediting the sums proved to have been paid by the defendants, is $50.47. The levy will therefore be reduced from $497.27 to $50.47, which sum, together with the taxed costs of reviving the judgment, the costs of issuing the exception and all other legal incidental expenses, will be the proper levy.

The plaintiff must pay the costs of this application.

PRINCE EDWARD ISLAND.

PRINCE EDWARD ISLAND ADMIRALTY DISTRICT.

EXCHEQUER COURT. NOVEMBER 19TH, 1910.

DANIEL McGREGOR v. THE SHIP "STRATHLORNE."

Jurisdiction — Action in rem for Wrongful Delivery of Goods—Owners Domiciled in Canada—Colonial Courts of Admiralty Act 1890 (Imp.) sec. 2 (2)—Admiralty Act 1861 (Imp.), sec. 6 — The Admiralty Act, 1891 (Canada)—"British Possession"—Construction.

Motion to set aside the writ of summons, the warrant and all proceedings herein.

J. A. Mathieson, K.C., for plaintiff.

D. C. McLeod, K.C., W. E. Bentley, for defendants.

SULLIVAN, (C.J.), LOCAL JUDGE, now (November 19th, 1910), delivered judgment.

This is a motion on behalf of the owners of the ship "Strathlorne" to set aside the writ of summons, the warrant and all proceedings herein, on the ground of want of jurisdiction.

The "Strathlorne" is a British ship, registered in the registry of shipping at Halifax, Nova Scotia, Canada.

The action is in rem for damages for wrongful delivery at the port of Halifax, aforesaid, of the goods of the plaintiff, shipped at the port of Montague, Prince Edward Island.

By the Colonial Courts of Admiralty Act, 1890, (53-54 Vict. (U. K.), ch. 27), a Colonial Court of Amiralty has, subject to the Act, jurisdiction over the like places, persons, matters and things as the High Court in England has (sec. 2 (2)); and any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were substituted for England and Wales (sec. 2 (3).

Prior to the enactment of the Admiralty Court Act, 1861, (23 Vict. (U.K.), ch. 111), the Court of Admiralty could not have exercised jurisdiction in regard to the claim which

forms the subject of this action, but by sec. 6 of this Act, it is provided that the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port of England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty, or breach of contract, on the part of the owner, master or crew of the ship, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.

It appears by the affidavits of both parties, read at the hearing of this application, that, at the time of the institution of this action the Halifax and Inverness Steamship Company, Limited, a body incorporated under the laws of the province of Nova Scotia, were the registered owners of the said ship "Strathlorne," that they were then doing business in Canada, having their head office in Halifax in the province of Nova Scotia. The owners were therefore domiciled in Canada on the 17th September, 1910, when this action was instituted, and on the ground of their being then so domiciled the motion on behalf of the defendants was rested.

But it was argued for the plaintiff that in this instance the name of the "British possession" to be substituted for "England and Wales," under the provision in the Imperial Act already referred to is not Canada, but Prince Edward Island. It appears, however, to be sufficiently clear from the Colonial Courts of Admiralty Act, 1890, (U.K.), and The Admiralty Act, 1891, (Canada), that the British possession indicated is Canada, not a province of Canada. If direct authority for this construction of the law is needed, it is to be found in the case of The Rochester and Pittsburg Coal and Iron Company v. the ship "The Garden City," 7 Ex. C. R. 94. The cause of action in that case was a claim for necessaries supplied to a ship elsewhere than at the port to which the ship belonged under sec. 5 of the Imperial Admiralty Act, 1861, which contains a provision similar to that in sec. 6 of the same Act regarding the domicil of any owner, or part owner. That decision is, of course, binding upon this Court.

But if the contention on behalf of the plaintiff were to prevail it could not avail him anything in this case, as substituting Prince Edward Island for England and Wales,

where the latter geographical expression occurs in sec. 6 of the Admiralty Court Act, 1861, would render it necessary to prove that the goods in question were carried into a port in Prince Edward Island, whereas the plaintiff has himself proved that they were carried into the port of Halifax, Nova Scotia.

As, at the time of the institution of the action, the owners of the ship "Strathlorne" were domiciled in Canada, it is clear that this Court has no jurisdiction in the present cause. The summons, warrant and all proceedings thereunder must therefore be set aside with costs.

Judgment accordingly.

NOVA SCOTIA.

CAPE BRETON CIRCUIT, SYDNEY.

SUPREME COURT. NOVEMBER 19TH, 1910.

REX v. McKAY.

Liquor License Act—Certiorari — Previous Application for Writ to Another Judge which was Dismissed—Amended Affidavits Used on Second Application—Order Refused.

Motion made before the Judge presiding at Sydney for a writ of certiorari to remove a conviction for violation of the Liquor License Act, 1910.

D. A. Cameron, for prosecutor.

A. D. Gunn, for defendant.

LONGLEY, J.:—This is an application made before me at Sydney for a certiorari to remove to this Court a conviction made against the defendant by a stipendiary magistrate, Ledbetter, for selling intoxicating liquor contrary to the provisions of the Nova Scotia Temperance Act (1910). The ground upon which it is asked is chiefly and substantially that the defendant was not served with a summons.

The prosecution raises several objections to the issue of this writ which it is proper to state in detail.

1. An application was made some days before to Mr. Justice Laurence for a writ of certiorari in this same cause

and upon substantially the same grounds, which the said learned Judge refused on the ground that the affidavits of justification by the bail were insufficient. I have not before me the grounds stated by the learned Judge, except the statements of counsel, but I have his order before me dismissing the application with costs. The applicant has since amended his affidavits of justification and makes this renewed application before me. The counsel for the prosecution contends that this cannot be done. Reg. v. Pickles, et al., 12 L. J. Q. B. 40, is cited in support of this proposition and this decision can be epitomised as follows:—

"Where a rule for mandamus obtained by church-wardens had been discharged with costs on the ground that their affidavits were imperfect, and a subsequent rule was obtained by the same parties on the same ground on amended affidavits, the court refused to hear the second application upon the merits, and discharged the second rule, also with costs. There is no difference whether the applications are made in a public or private capacity."

This authority seems very much in point and is supported by others leaning in the same direction. Indeed, so far as I have examined all the available authorities this represents the practice in England. It was urged in this case that the previous application to Mr. Justice Laurence was disposed of on the ground of want of jurisdiction, thus leaving open the matter of a fresh application on the same grounds. I fail to differentiate between the circumstances of this case and that of Reg. v. Pickles. In any case, I think if a fresh application was to be made it ought to have been to the learned justice who had dealt with it. Except in cases of habeas corpus one Judge is cautious about dealing with matters previously disposed of by another.

There are other preliminary objections to this application, such as that the present affidavits of justification do not conform to the requirements of Chitty's Forms 12th ed. p. 724. The jurat is bad, as it does not state the date when the affidavits were sworn, the recognizance is signed simply "W. G. Hill," without adding his capacity as commissioner, and other more technical objections. I do not now say how far any of them are entitled to consideration since I am basing my present refusal to grant the order for certiorari on the ground that a previous application has been made on similar grounds to another judge and has been refused.

PRINCE EDWARD ISLAND.

IN CHANCERY.

BEFORE THE VICE-CHANCELLOR. NOVEMBER 25TH, 1910.

HURRY & STEWART v. HURRY.

Dower—Election by Widow—Evidence—Notice of Election—Presumption of Election in Favour of Will—Jurisdiction of the Court in an Action not Brought by Widow.

Bill filed to establish the rights and interest of all the parties under will and codicils of Edward Hurry, deceased.

W. S. Stewart, K.C., and J. A. Mathieson, K.C., for complainants.

J. J. Johnston, K.C., and A. A. McLean, K.C., for defendants.

FITZGERALD, V.-C.:—The above named plaintiffs and defendants are the trustees and executors, and the heirs-at-law, and devisees of the late Edward Hurry.

The bill is filed to establish the rights and interests of all parties under the will and codicils of the said deceased.

It claims that the widow, Elizabeth Hurry, elected to accept the devises and bequests given her by the will and codicils, and prays that it may be so found and declared, or in the alternative, in the event of the Court not so finding, that her dower be assigned to her, compensation being made to those of the testator's children as may lose by the widow's election to claim against the will.

The widow, by her answer, denies that she elected to take under the will, claiming that her only election was to take her dower interest, refusing to accept any benefit under the will.

The evidence in support of the widow's election in favour of the will is shortly, that the will and codicils were read over to her the day after the funeral, in the latter of which the provisions for her, were in express terms declared to be in lieu of dower. That her husband died on the twelfth day of March, 1910. That shortly afterwards she consulted with

Mr. Stewart, the executor, asking him who was to collect the rents of the various freehold premises of which deceased died possessed.

That the executor then told her that each devisee would collect the rents of the houses severally given them in the will.

That under said will and codicils, the widow had devised to her a life interest in three double tenement houses, and a similar interest in one-half the residence, and with her step-daughter, Edna Hurry, an equal one-half share in the "Savoy House—" Edna absolutely, the widow for life.

That this house becoming vacant, the widow and Edna advertised for a tenant for it, both signing the advertisement. That when rented at $300.00, the widow received one month's rent thereof, and took some of the furniture out of it to use in the house she was living in, and received some other rents of the premises devised to her in the will, amounting in all to $39.33.

That the executor, Stewart, up to the time he left the province, twenty days after testator's death, consulted with the widow and children, and says, "when I left, each party appeared satisfied to take their share" and he thought the widow understood her position.

On the other hand, no statement of the testator's personal estate, or of the real estate out of which she was dowable was furnished to her, nor was she informed of her right of election, nor required to make such election. That, according to her own evidence, it was not until she had consulted counsel, about one month and a half after her husband's death, that she had any fully informed idea of her position, particularly as to her dower in the Savoy House, held by her husband under a conveyance to uses to bar dower, and in certain premises on which her husband had executed mortgages, or any knowledge as to the value of such dower. And she further stated, that until she had such consultation, she thought she had to take what her husband left her, and that she had no choice of dower.

That immediately, she then (23rd April), made her election, and formally and in writing notified the executor that she had "elected to take her dower interest in the real estate of her husband" and "refused to accept the devises and bequests given to her under her husband's will."

This is a case in which it is asked that the widow's election in favour of the will be presumed from her acts. Such presumption will never be made when she is ignorant of her rights, or where the acts do not amount to the exercise of a deliberate choice made with a knowledge of all the facts and in full view of the consequences, Wake v. Wake, 1 Ves. Jr. 335; Raynard v. Spence, 4 Beav. 106; Sopwirth v. Maughan, 30 Beav. 235, and Coleman v. Glanville, 18 Grant 42.

The evidence satisfies me that previous to the 23rd April the widow did not have the knowledge of all the facts and their consequences requisite to constitute an election. That she certainly did not know the value of her dower interest, and though her acts previous to her full understanding of her position, may, and probably did mislead the executor, they are not such as a Court of Equity should hold as binding on the widow as done with full knowledge and an intention of electing.

I accordingly find that the election of the widow by her letter of the 23rd April is her first deliberate election, and that she accepted the benefits given her by the will in ignorance of her right of dower as the widow of the testator, and decree that one-third of the freehold estate of which the testator died seized, and one-third of the equitable estates to which the said testator died beneficially entitled as of an estate equal to an estate of inheritance in possession, be assigned and set out to the said Elizabeth Hurry for her dower.

It was contended before me that whatever order I might make as to the rights of the parties, and as to whether there had been an election by the widow to take under the will, binding upon her, this Court has in these proceedings no power to assign dower. That such assignment can only be made on proceedings taken by her.

In considering that point, I assume as unquestioned law, that, notwithstanding the statutory provisions of this province regulating proceedings in the Supreme Court for an assignment of dower. (31 Geo. 3rd ch. 2, and 36 Vict. ch. 22, sec. 304 & 305), this Court has not been ousted of its original jurisdiction in such matter. It has been so held in Ontario by its Appellate Court in Green v. Woodruff, 1 Ont., App. 617, where similar legislation exists; and the recent case of Williams v. Thomas, 1909, 1 Ch. Div. 713, is equally decisive.

The Master of the Rolls in that case upheld the full and firmly established jurisdiction of the Courts of Equity to assign dower," and added: "But not only did the Court of Equity assume jurisdiction, but they enlarged the widow's rights. They gave her one-third of the rents and profits from the intestate's death until assignment of dower, and they granted an account of such rents and profits, not only against the heir, but also against the representatives of a deceased heir, etc."

And the statute of this province of 62 Vict. ch. 13, giving the widow dower in her husband's equitable estates makes it apparently imperative, when such dower is sought—as it is in this case—that the proceedings to enforce it should be taken in a Court of Equity.

The contention of the widow here therefore is practically, that on proceedings (I must hold rightly taken), by the trustees and executors and some of the heirs-at-law to establish the rights and interests of all parties under this will, in which it is held that her election to take dower is the only one binding upon her, the Court has no further power to order the proper allotment of such dower.

Jurisdiction, or power, is not given by the filing of a bill by any particular party, though the practice of the Court undoubtedly regulates how that power should be invoked. From the earliest times bills, praying that the widow make her election either to accept the benefits under the will, or to claim her dower, and that in case she should elect her dower, the same should be settled, and all necessary orders made as to the residue of the real estate have been filed by the heir at law. Boynton v. Boynton (1785), 2 Brown, 444, exemplifies such practice.

A bill praying for a decision as to what election the widow has really made, and, in the event of the Court holding that she has elected to take dower, that it be settled and allotted to her, is surely in accord with that practice. The heir-at-law being rightly before the Court, in both cases asks—in one, in the event of an election, in the other, on a judicial determination, that the Court complete their adjudication and assign to the doweress her dower lands, and put her in possession of them.

It would be strange that the point having been settled that the widow has claimed, and is entitled to dower, and a bill having been filed in relation to such dower praying in

that event for a settlement of such dower, that the Court should refuse it, requiring another and a wholly unnecessary bill to be filed asking for the same thing.

If there were no practice binding on me, I would under the powers conferred in the Chancery Act, 1910, determine the whole matter in this suit, and so save the parties useless and unnecessary expense.

There will accordingly be an order of reference to Master Gaudet to enquire what freehold lands or equitable estates the said Edward Hurry died seized of wherein the widow is dowable. And to take an account of the rents and profits thereof accrued since the death of the said Edward Hurry received by the trustees and executors, heirs-at-law, or devisees, or by any other.

And let the said widow be assigned her dower in such freehold lands and equitable estates, and let Master Gaudet allot and set out particular lands and tenements for that purpose, and after they have been so set out and ascertained, let the trustees and devisees and others entitled deliver possession to said widow of the lands and tenements that shall be so set out and ascertained, and let the tenants thereof attorn, and pay their rents to the said widow.

And let one-third of what shall be coming on the said account of said rents and profits be paid to the said widow by those receiving the same as aforesaid, in respect of her dower out of such lands and tenements.

And let the said Master report as to compensation to such of the said testator's children as may lose by the assignment of dower to said widow.

Further consideration adjourned.

Leave to apply, etc.

NOVA SCOTIA.

SUPREME COURT. NOVEMBER 20TH, 1910.

TRIAL AT AMHERST

CORBETT v. PIPES.

Cumberland Sewers Act — Acts N. S. 1893, ch. 80 — The Marsh Act—Construction of Dyke and Aboiteaux—Prescription—Lost Grant.

T. S. Rogers, K.C., for plaintiff.

W. T. Roscoe, K.C., and J. L. Ralston, for defendant.

DRYSDALE, J.:—The plaintiff is a commissioner of sewers for Cumberland county, and this action is to recover from defendant his portion of an expenditure made in building an aboiteau near the mouth of the Forrest Creek, in the Amherst Point Marsh, so-called. The claim is put in two ways, first, that from time immemorial the proprietors of the bodies of marsh known as letters A. B. and C. bodies and the Forrest body and New Marsh, have built, repaired, replaced and kept up an aboiteau at or near the mouth of the creek for the common benefit of the proprietors of said bodies, and that such proprietors have always contributed their fair and reasonable proportion of the expense, and that such proportion has been determined in analogy to the method by which extra expense would ordinarily be determined under the statutes of the province relating to marsh Forrest and the New Marsh, and the defendant is a proprietor whereby the proprietors covenanted among themselves respecting and establishing such a liability is set out and by reason of prescription or lost grant a liability of defendant is set up. The second claim is under an assessment alleged to have been regularly made by virtue of the Cumberland Sewers Act.

The plaintiff is one of the proprietors in bodies A, the Forrest and the New Marsh, and the defendant is a proprietor in bodies A. C. the Forrest body and the New Marsh. As to the claim made under the head of prescription or lost grant, Roach v. Ripley, 34 N. S. R. 352, was relied upon, but an examination of that case convinces me that it is founded upon a definite agreement between the predecessors in title of the respective parties creating a liability that ran with the land; while I am asked here to presume a tenure or liability under which defendant's lands came to him charged with the liability set up. I am confronted by the fact that all the lands in question are situate within organised bodies of marsh lands, that such lands are and have been organised under the Sewers Acts apparently as far back as any evidence of contribution is established, and I think I must assume that not only were the contributions taken by virtue of the acts relating to compulsory payments by proprietors but that the evidence very clearly establishes that all contributions to which references were made expressly purported to be made under and by virtue of such acts. The Sewers Acts in question seem to have been in force and in operation further

back than any date at which contribution is relied upon. While it seems reasonably clear that proprietors have been paying by virtue of assessments made by commissioners of sewers under acts of parliament, or purporting to be so made, I think I am not at liberty to speculate as to lost agreements or assume prescription as a basis of liability.

This leaves the question of liability to turn upon the validity of the assessment made by the plaintiff as against defendant under the Cumberland Sewers Act.

It seems that the aboiteau at the mouth of Forrest Creek has heretofore always been kept up by the four bodies mentioned. How they proceeded with former ratings as to the different bodies is not very clear. It is clear, however, that they were organised as separate bodies from time to time and were all rated for the upkeep of the aboiteau. They were the bodies having an immediate and vital interest in the aboiteau. Such aboiteau being in a dangerous state in the spring of 1907 a majority in interest of the proprietors in said four bodies, viz., A. B. C. and the Forrest and New Marsh, selected the plaintiff as the commissioner to carry on the work of building a new aboiteau. The signers of the requisition constitute a majority in interest of the whole four bodies but not a majority in interest of each of the four bodies. In short, these four bodies organised as a body for the purpose of the construction of said aboiteau and selected a commissioner (the plaintiff) to carry on the work. This is done or purports to be done under section 3 of the Act which in terms authorises a majority in interest of the proprietors of any marsh, swamp or meadow lands within the jurisdiction of a commissioner to select one or more commissioners to carry on any work for reclaiming such lands. It is under this section that all bodies are organised and it is, I think, only reasonable to hold that the words in the section "for reclaiming such lands" must be read not only to include the original reclamation of dyke lands but the necessary works to keep them from the sea. So read, why should not the owners of a large tract, the four old bodies for instance, organise for the carrying on of a particular work an absolutely necessary work such as this aboiteau in question. I think they can, and that the proceedings under the requisition of April 22nd, 1907, under which plaintiff acted were regular

and justified by the act in question. It was strongly urged that because other bodies outside and beyond this tract represented by the April requisition were not parties to the proceedings and would receive some benefit, that this rate could not be made as against the four bodies joining in the requisition; if this were sound it would carry one a long way as not only the marsh lands particularly mentioned by defendant's counsel lying in the vicinity of Amherst Point, but the marshes all over the country clear to Amherst, can be said to be benefited by the sea being kept out at any one point, the level of the whole country being much the same. I think two-thirds (sic. majority) of the proprietors of any body large or small can organise under the act for a particular work and assess the proprietors of such lands having regard to the quantity and quality of the land of each proprietor and the benefit by him received. After an examination of the commissioner's proceedings under the act I fail to find any valid objection to the assessment.

It was objected that the assessment was not made according to the benefits received by the land. The assessment on its face purports to be and I think it was. It was further urged that interest on money laid out was included but I find the Act provides for this. Again it was urged that the commissioner selected an overseer not a proprietor and that this was illegal. I do not think so. Section 5 is merely an enabling section and there was nothing wrong, indeed it was commendable in the commissioner getting a competent man outside for such a work. The only other objection urged against recovery based on the regularity of the proceedings was to the effect that the assessment is against E. B. Pipes and heirs of late Jonathan Pipes, and that Miss Pipes, the owner of a certain portion of the land assessed was not joined. This objection does not go to the merits and can be remedied if desired by joinder.

The plaintiff is entitled, I think, to a declaration of liability on the basis of the assessment.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. NOVEMBER 26TH, 1910.

THE GORTON-PEW FISHERIES CO. v. THE NORTH SYDNEY MARINE RAILWAY CO. LTD.

Negligence—Injury to Vessel on Marine Slip—Evidence — Inference of Negligence from Facts Proved — Notice Limiting Liability—Effect of.

Appeal from the judgment of RUSSELL, J., in favour of plaintiff in an action claiming damages for negligence by which plaintiffs' vessel was injured.

W. B. A. Ritchie, K.C., and T. R. Robertson, in support of appeal.

H. Mellish, K.C., contra.

LONGLEY, J.:—The defendants are the owners of a marine slip at North Sydney, carrying on the business of hauling vessels from the water upon such marine slip for purposes of examination and repairs.

On the 11th day of June, 1909, the plaintiffs, who were the owners of the fishing schooner "Athlete," which had sustained some damages to her bottom by touching a ledge, sent the vessel to the marine slip for the purpose of being hauled up and repaired. The defendant company, by its officers and servants on said date, took charge of the said vessel and proceeded to haul her up, and while in the act of hauling her up the said vessel toppled over and sustained damages. The plaintiffs allege that this toppling over was due to negligence of defendants, and they ask to recover damages for whatever loss they sustained.

The issue was tried before RUSSELL, J., without a jury, and various questions of some delicacy and difficulty were raised. In a lengthy judgment the learned Judge sets forth in detail the leading features of the testimony and the various theories which were put forth by the parties. He does not make a specific finding as to any act of negligence of the defendants, but he concludes that the accident and injury arose from the negligence of the defendants, though he does not profess to be able to put his finger on the act which was negligent. He says in effect: I believe if she (the

vessel) had been adequately stayed by bilge blocks fore and aft, with the keel resting on the keel blocks fore and aft, she would not have fallen over. He gives judgment for plaintiffs.

It was urged by the appellants against this judgment that to recover in an action for negligence it is necessary that some specific act of negligence be established. In most cases this is the rule and in many cases a verdict of negligence would be set aside for failing to state the proximat cause of the injury and the act of negligence which caused it. But this is not applicable to all cases of negligence and recent authorities make it clear that in some cases and under certain conditions negligence may be sustained from inferences from proved facts. The latest definition or exposition of this principle was recently given in the House of Lords by the Lord Chancellor, Lord Loreburn. He says: "In the affairs of life where much is often obscure we have to draw inferences of fact from slender premises. A plaintiff or claimant must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that if there is no evidence in his favour upon which a reasonable man can act he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident and so was drowned, then the case is proved." Marshall v. Owners SS. "Wild Rose" (1910), App. Cas. 487.

Although the Lord Chancellor was delivering a dissenting opinion yet the judgment of a majority of the House in no way contravened the general principle here laid down.

Reference may be made to one more case recently decided in the Judicial Committee, McArthur v. Dominion Cartridge Co. (1905), App. Cas. 72.

It was urged in that case that the French cases were unanimous in exacting proof of the fault which certainly caused the injury. Lord Macnaghten, in delivering the judgment of the Court, says: "It is enough to say that although the proposition for which they were cited may be reasonable in the circumstances of a particular case it can hardly be made applicable when the accident causing the injury is the work of a moment and the eye is incapable of detecting its origin or following its course. It cannot be of universal application, or utter destruction would carry with it complete immunity for the employer."

As the consideration of this case turns very largely upon a question of fact a careful perusal of the evidence was essential and the Court were facilitated in this regard by the learned counsel for the appellants who in his full and very able opening read nearly every line of the entire evidence. While the case is not free from difficulty, and while, perhaps, it may be that the learned trial Judge was justified in refusing to give any specific reason for the toppling over of this vessel, a careful examination of the evidence satisfies me that the learned Judge had facts before him which would have justified him in a more definite finding. I am disposed to think that the testimony as a whole leads strongly to the conviction that after the stern of the vessel had rested upon the keel blocks of the cradle the bilge blocks were placed under the vessel before the bow had taken the keel blocks, and hence the vessel when drawn out instead of resting both fore and aft on the keel blocks was not resting on the keel blocks at the bow, and when her weight began to rest upon the bilge blocks, where they had been set up, too soon spread them, lost her balance and toppled over. If the evidence supports this theory and justifies the inference, which must be drawn from it, it is scarcely possible to say that the defendants were not guilty of negligence which caused the ship to fall over.

The Judge below distinctly rejects the ingenious theory put forward by the defence that the vessel was tipped by a projecting piece of false keel, and in my view the evidence justifies this conclusion. Viewing the circumstances as a whole it may be remarked that vessels placed in a marine slip by way of a cradle do not usually fall over and under ordinary conditions nothing like this happens. The very nature of the accident suggests something wrong in the method of procedure when such a result occurs.

There remains one further question which requires consideration. When the defendants undertake to place a vessel in the slip they enter into a written contract with the vessel owners, as was done in this case, and in this contract certain conditions appear which it is urged rebut liability in the present case. The conditions specially relied upon for this purpose are as follows:—

"The North Sydney Marine Railway Company give distinct notice to all parties intending to use or using the railway, and it shall be held to be part of their contract with all

such parties that the company will not be liable for any injury or damage by accident, fire or otherwise, which vessels or their cargo or machinery may sustain on the railway or whilst being moved thereon, or being launched therefrom, nor for any demurrage or damages for detention arising out of any such accident or damages to the railway or any such vessel or cargo." And "the company bear only the risk of damages to their railway; owners and all concerned must bear the risk of vessels with their machinery and cargoes using it."

The learned trial Judge in dealing with this point referred to a note in the case of Czech v. Gen. Steam Navigation Co. L. R. 3 C. P. page 19, in which it is laid down that: "general exemptions whether by law or contract from liability for damages by accident are limited to accident without fault."

A great many authorities were cited upon this point which might be quoted but I content myself with saying that the whole trend of judicial opinion on this subject is that a contract to avoid liability for accident in connection with any undertaking in no wise limits the responsibility of either party for acts of well established negligence. This is in accordance with sound reason. Apply the principle to the present case. Can it with any pretence of reason be urged that because the parties have agreed not to hold each other responsible for accident, that either of them should therefore escape the consequences of negligent conduct even?

I find no authority for any such proposition. The second clause quoted does not, in my view, bear any legal relationship to the question of negligence. It is in effect a repetition of the first. It simply means that the defendants will not lay claim for any injury which the vessel occasions the slip in its natural course, and the vessel owners will bear any risk for any incidental injury to the vessel or cargo, but this can scarcely be construed as assenting or agreeing to a proposition that either of the parties shall be exempt from the consequences of palpable negligence.

I think a case of negligence has been established and that the evidence supports the findings of the learned trial Judge, and the appeal from his judgment should therefore be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. NOVEMBER 26TH, 1910.

BENTLEY v. MORRISON.

Debtor and Creditor — Husband and Wife — Separate Business Carried on by Wife—Insolvency—Unregistered Bill of Sale of Stock made by Husband — Sale of Stock by Mortgagee—Fraud on Creditors—Judgment—Execution.

Appeal from the judgment of LAURENCE, J., in favour of plaintiff, in an action to set aside a bill of sale and for an accounting, etc. Reported, 8 E. L. R. p. 456.

H. Mellish, K.C., in support of appeal.

T. S. Rogers, K.C., and H. McLatchy, contra.

RUSSELL, J.:—The facts of this case cannot be better presented than in the language of the learned trial Judge, who states the case as follows: "Lannis H. Betts in 1904 and previously carried on business as a general merchant at Wallace, N.S., under the name of 'L. H. Betts & Co.,' and becoming unable to meet his liabilities as they matured he assigned in that year (1904). The assignee sold his assets or stock in trade at public auction in the same year to one W. A. Fillmore, who purchased them, as I find, for and on behalf of Mrs. Annie M. Betts, the wife of Lannis H. Betts, who had on or about the 23rd day of March, 1904, obtained her husband's consent to do business in her own name, which license was filed on or about the same day, and on the 31st day of March, 1904, she registered a declaration of her intention to carry on business under the firm name of 'Betts & Co.' She being the sole member of such firm, and from that time the business of 'Betts & Co.' went on L. H. Betts managing the business under a power of attorney dated the same day, March 23rd, 1904, given by Annie M. Betts and 'Betts & Co.'"

The business of "Betts & Co." went on in this way until in 1907 it became indebted to various persons, among others the plaintiff, and also the defendant, D. A. Morrison, and in the fall of that year was unable to pay its liabilities as they fell due. Morrison having a claim of $1,700, on the 4th of

November, went to Wallace and obtained from Lannis H. Betts a bill of sale executed in his own name, by which he undertook to convey all the goods and stock in trade of "Betts & Co." to said Morrison in consideration of the debt then due him by "Betts & Co." This bill of sale has never been registered or filed, by agreement as I find, between Morrison and L. H. Betts. At the time when this bill of sale was given a note was made by "Betts & Co.," to Morrison, drawn up and signed by L. H. Betts in the name of "Betts & Co." for $1,700, the debt mentioned in the bill of sale payable on demand. Again the business of "Betts & Co." went on and further liabilities were contracted, that to the plaintiff amounting to $1,400.

In June, 1909, Annie M. Betts was sued by her sister for a large sum, and, later on, conveyed her lands to her sister to secure her; then the defendant Morrison, on the 23rd June, 1909, appeared again with his bill of sale given to him as stated by L. H. Betts eighteen months before, and which was in his solicitor's safe during that time, and proceeded under such bill of sale to sell and did sell to one John Charman the entire stock in trade of "Betts & Co." for the sum of $1,700, taking a note therefor made by Charman to "Betts & Co." or order, and at his request endorsed by "Betts & Co." to him.

This sale to Charman though apparently discharging Morrison's claim, did not do so, although Charman has actually paid $1,000, on account of his note, and has given a new note for the balance, for on the following day, June 24th, he Morrison, issued a writ against L. H. Betts & Co. on the note for $1,700 given in June, 1907, with the bill of sale. On this, judgment was entered for the sum of $1,870, and $22.50 costs against "Betts & Co.," upon which judgment, execution was at once issued and delivered to the sheriff.

This present action was commenced by the plaintiff Bentley on the 23rd June, 1909, on behalf of himself and the creditors of "Betts & Co.," other than the defendant Morrison, to set aside as fraudulent and intended to defeat and prejudice creditors the sale by Morrison to Charman, and the judgment entered up by Morrison against "Betts & Co.," and for an order that Morrison account for the moneys received by him from the sale of said goods to Charman, and an injunction restraining Morrison from disposing of the Charman note, and further proceeding under said judgment.

The learned trial Judge has upheld the contentions of the plaintiff both as to the chattel mortgage and as to the judgment, and this decision is appealed from.

The defendant contends that the business of "Betts & Co." was really that of Lannis H. Betts, the arrangement as to the consent to the wife's carrying on business and the wife's declaration being all a sham. Certainly it looks like a sham. She says that when she gave a power of attorney to her husband she considered herself thereafter to be relieved from all responsibility, and it is the fact that she took no interest whatever in the business and did not meddle in any way in its affairs. The bill of sale to Morrison does not purport to have been made under the power of attorney from Mrs. Betts but it describes the goods as those contained in the shop in which the business of "Betts & Co." was carried on. It looks very much as if the business was the same old business of Lannis H. Betts, continued in the name of Betts & Co., under the form of a license to the wife but being really, as it had been before the change, the business of Lannis H. Betts. But I do not see how this contention helps the defendant. If the bill of sale was made by Lannis H. Betts of his own stock he was in reality "Betts & Co." and vice versa, then it seems to me to follow that the bill of sale to Morrison was made by an insolvent and was a preference and therefore void as against the creditors of the firm who have been delayed or postponed by the preferential bill of sale. It was a transfer of property made by an insolvent person to a creditor with intent to give such creditor an unjust preference over other creditors of the firm of Betts & Co., whoever that firm may be held to consist of. I cannot find any evidence of such pressure as would prevent the application of the statute.

If the goods and the business really belonged to Mrs. Betts and the bill of sale was not within the authority conferred by the power of attorney, or if not purporting to be made under the power of attorney, it cannot be upheld as an exercise of that power,—it seems to follow that the goods continued, notwithstanding the bill of sale, to be the property of Mrs. Betts until transferred to Charman, who, in June, 1909, bought the goods from D. A. Morrison and gave his note therefor to Mrs. Betts who endorsed it to Morrison.

On this supposition of the property continuing down to this date in Mrs. Betts there was at this date a transfer to Charman of the goods for $1,700, which she either made or ratified, and a transfer of the note for that amount to Morrison which being made within sixty days of the action would be presumed to be with intent to give an unjust preference, and therefore void as against the creditors postponed, unless that presumption could be rebutted.

The action does not seem to have been framed exactly on this theory, but the learned trial Judge has ordered all necessary amendments to be made, and if it were necessary to support the judgment by this reasoning, I see no difficulty in the way.

Assuming the bill of sale to be either a transfer of the goods as the goods of Mrs. Betts or as the goods of Lannis H. Betts,—that is to say, no matter what individual person we assume to be represented by the firm name of "Betts & Co.," and assuming the bill of sale to be operative prima facie in effecting a transfer of the property in the goods described,—that is to say, assuming that the goods being those of Mrs. Betts, there is no invalidity in the transfer merely because of the way in which the authority conferred by the power of attorney was exercised, or because of the transfer being unauthorised by the power of attorney,—I am of the opinion that the agreement which the trial Judge has found on sufficient evidence, to keep it unrecorded was a fraud on the statute and rendered the transfer void as against creditors. It is, I think, quite correct to say as Mr. Mellish contended that the only consequence of non-registration of the bill of sale is to subject the transferee under the instrument to the risk of losing the benefit of the security, but where there is an agreement not to register it, I think the effect of such agreement may be to render it void. Possibly this result may not always follow, although Strong, C.J., seems to have so held in Clark v. McMaster, 25 S. C. R. at page 105, where he says: "Not only was there a non-compliance with the condition of the Act in respect of registration, and taking possession, but there was a distinct agreement between the mortgagor and mortgagee that there should be neither registration nor immediate possession,—in other words that a transaction which the law required should be open and notorious, to be made so either by registering the mortgage or taking possession of the goods, should be concealed from

subsequent creditors, purchasers and mortgagees. This mortgage was therefore given in pursuance of an agreement to contravene the statute, and was therefore, on grounds of public policy, void ab initio."

In Ex parte Kilner, Buck. 104, the doctrine does not seem to be carried quite so far but Baggalay, L.J., said he thought it clear from the way in which the principle was stated by Lord Justice Mellish that it must be for the Court in each case that comes before it to take into consideration all the surrounding circumstances and to see "whether, having regard to these circumstances, there is an intention to commit an actual fraud against the general body of creditors." The actual fraud referred to in these cases is, I take it, either the statutory fraud of obtaining an unjust preference or the actual fraud of inducing persons to become creditors on the faith of an apparent solvency and prosperity which are unreal. The "surrounding circumstances" in the present case would abundantly support the conclusion of the trial Judge that this was the intention with which the bill of sale was taken, and was by the agreement of the parties retained for eighteen months in the hands of the solicitor.

I am unable to agree with the trial Judge, however, as to the judgment. The firm of "Betts & Co." certainly owed Morrison the sum of seventeen hundred dollars. The note for $1,700 had never been discharged. It was a continuing security and the creditor had the same right to sue the defendant on his claim as the plaintiff or any other creditor. If the transfer of the note from Charman is set aside and Morrison is made to account for all moneys received on account of this note, and turn over to the estate all securities held by him in connection with the transfer to Charman, I cannot see that the creditors will not have received all that is coming to them. No question is made as to the value of the goods being greater than the amount for which they were so transferred. It is conceded that the estate has suffered only to the extent of the amount for which the goods were sold and the money for them received by Morrison. The creditors cannot have their cake and eat it. If they realise the amount of the Charman note, Morrison must hold his judgment, except, in so far as it has been reduced by payments other than those received in connection with the Charman transaction. We are not informed as to the extent or amount of such credits,

and I presume that this is a matter than can be dealt with by the assignee in settling with the various claimants.

One of the grounds for setting aside the judgment is that of irregularity, but I do not understand that it can on this ground be attacked collaterally or in the present action. I do not, in fact, see that we are called upon to say anything whatever about the judgment, and, in my opinion, justice will be done by allowing the appeal with costs and varying the order for judgment by striking out the second paragraph.

LONGLEY and DRYSDALE, JJ., concurred.

TOWNSHEND, C.J.:—I agree with Russell, J., in affirming the decision of the trial Judge that the bill of sale is fraudulent under the circumstances of its execution, and the agreement not to register and file it, and that the sale to Charman within sixty days of the commencement of this action was in contravention of sub-section 12, sec. 4 of the Assignments Act. I differ, however, from my brother Russell in respect to the judgment taken on the note given contemporaneously with the bill of sale to the defendant, Morrison. I agree with the Judge below that the taking of the judgment on this note at the time was a part of the fraud to give defendant a preference over Bett's other creditors, and should be set aside and declared null and void. The learned trial Judge decides that there was only $450 due on the note at the time the judgment was taken for $1,870, and concludes that this alone was evidence of the fraud and is a sufficient reason for setting it aside on the authority of several cases cited in the judgment. It is clear from Morrison's own testimony that at the time he sued on the note and at the time he obtained judgment there was no such amount due him on the note—that, in fact, so far as the note represented Betts' indebtedness at the time it was given, he had, by payments, largely, if not entirely, paid it, and that and further indebtedness was for goods subsequently supplied, not covered by this note at all. He says in cross-examination: "Yes, at the time of the giving of the bill of sale this account was carried in the bank by me on paper of various amounts and due at various dates; these notes would come due and Mr. Betts invariably made his remittances to me, whatever they were, instead of the bank. These notes which made up the amount of the bill of sale were carried on from time to time. Sometimes he paid them;

sometimes he renewed part of them. From the first of November, 1907, to the first of November, 1908, in the course of the year, I would probably get $2,000 to $2,500 from him. The same time I was carrying the account along he would be buying new goods from me—at the same time representing this amount I had other notes and drafts, part of which would be in the bank. Without looking at this memorandum the lowest sum the balance of this account would be in the vicinity of $1,000 to $1,100. When I got this note from Wallace, this Charman note, I discounted it and placed it to my credit; it would about wipe out my account. They were purchasing goods constantly and making payments on the different drafts as they matured." Reading this evidence in the light of all the other facts and circumstances connected with the whole transaction, I cannot doubt that so far as the judgment is concerned it was recovered on a note which had been either reduced to the amount found by the learned trial Judge, or had been entirely paid by Betts' remittances between the time it was given and the taking of the judgment, and that Betts, in suffering judgment to be taken against him for an amount not due on the note, was a participator in the fraud which was attempted in order to give the defendant, Morrison, a preference over other creditors.

In my opinion this appeal should be dismissed with costs.

MEAGHER, J., read a concurring opinion.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. NOVEMBER 26TH, 1910.

McCALLUM v. WILLIAMS.

Principal and Agent—Commission on Sale of Real Property —Contract—Construction—Evidence.

Appeal from the judgment of CHIPMAN, Co.C.J., in favour of defendant in an action to recover commission claimed in connection with a sale of land. Reported, 8 E. L. R. p. 376.

W. F. O'Connor, K.C., in support of appeal.

F. L. Milner, contra.

TOWNSHEND, C.J.:—The learned Judge below was right in rejecting all oral evidence offered for the purpose of explaining the meaning attached by one of the parties to the written contract. There is no ambiguity in its terms, although I construe the language used as wholly opposed to the view of the Court below. The whole question is whether the plaintiff was to be paid a commission on the sale of defendant's farm after it had been registered, in any event, that is to say, whether sold for him by the plaintiff or by the defendant himself without the plaintiff's assistance. The sale was in fact made by the defendant himself without any interposition on the part of plaintiff. The contract is very shrewdly and carefully drawn, and it appears to me so drawn as to meet just the defence now set up.

By the first clause defendant requests plaintiff to register the property mentioned in his real estate register and authorises him to sell it at a fixed price, and further to advertise it for sale, but without cost to him, except such as is covered by commission in case of a sale. It then proceeds as follows:—

"In consideration of said W. D. McCallum registering my said real estate property for sale in his real estate register, I hereby agree to pay him a commission of three per cent. of the price obtained whenever a sale of the property or any part thereof takes place. Such commission to be paid by me whether the said real estate or property is sold, either at the price mentioned above or at such other price that I may hereafter accept for said real estate or property. If, however, property does not sell no commission will be charged."

Now it seems to me this language means, and can only mean, any sale of the property by whomsoever made. It will be observed that he engages to pay him the commission "whenever a sale of the property, or any part thereof, takes place." It does not limit the payment to a sale made by plaintiff. If that had been intended, how easy to have added the words "by him," or equivalent words. We cannot add them, because it is quite unnecessary to do so in order to give a clear meaning. The further words, "said commission to be paid by me whether said real estate or property is sold either at the price mentioned," carried out and emphasizes the previous sentence. It carefully leaves out any words which would confine the commission only to a sale

made by plaintiff personally, and is certainly broad enough to include, as no doubt intended, any sale whatever by whomsoever made.

The consideration, moreover, is for registering defendant's real estate in his real estate register which plaintiff did, and not for the sale. The commission was only payable when a sale was effected. The concluding words are also of some force: "If, however, the property does not sell no commision will be charged." If we were to adopt defendant's contention that some words like the following should have been used, "if, however, he does not sell," but this was carefully and no doubt designedly avoided.

It may be that defendant did not clearly appreciate the scope of the language in the contract but that will not avail him when no fraud or misrepresentation is set up.

The authorities cited by the learned Judge in support of his judgment are all valuable in ordinary cases where there is no special contract such as we have here, but are not pertinent to the question before us on this appeal.

In my opinion the appeal must be allowed, and judgment below reversed and entered for the plaintiff for $120, with costs of trial and this appeal.

RUSSELL, J.:—I think the evidence of conversations was properly excluded. If there is any ambiguity it is patent on the face of the writing, not latent. The question to be decided is simply as to the construction of the writing. The facts may well be taken into consideration that the plaintiff was advertising farms all over the province and in other countries as well, and the defendant contemplated a benefit from this wide advertisement of his farm. If, in consequence of this advertisement, a number of persons should become interested in the farm and one of them should buy from the defendant directly, the sale would be due to the plaintiff's expenditures and exertions, and the latter might therefore very reasonably stipulate for a commission in the event of any sale whatever, whether made by himself as agent, or by the owner directly.

It seems fair also to remember that in the greater number of cases the purchaser would deal with the owner directly. He would not wish to buy a property without seeing it, and he would naturally wish to chaffer with the owner as to the price. In such cases, which it is fair to assume would at least be very frequent, the plaintiff would have brought

about the sale, and yet under the judgment appealed from would be entitled to no commission, at all events unless he was able to prove the very difficult proposition that the sale had been brought about through his instrumentality. It seems reasonable, therefore, to interpret the contract, if possible, in such a way as to entitle the plaintiff to commission in event of a sale, no matter by whom effected.

The form of words seems to point to this intention. The clause as to commission makes the registering of the farm the consideration for the commission. There would be no point in mentioning this consideration if the commission applied only to a sale made through the agency of the plaintiff. The selling itself and the handling of the money would be in that case consideration for the commission. It seems to point to a commission to be earned in the event of any sale whatever. The last clause also uses a form of words suggesting, although it may be faintly, the possibility of a sale by the owner directly. The commission is to be earned whether the property is sold at the price mentioned "or at such other price that I may hereafter accept for the property." He could have said "such other price as I may hereafter authorize my agent to accept." Furthermore, the commission is to be earned "whenever a sale of the property or any part thereof takes place." The plaintiff had no authority to sell part of the property, and this, therefore, seems to contemplate a possible dealing directly between the owner and the purchaser.

Looking at the nature of the business, I think this is not an unreasonable reading of the agreement, and I conclude, though not without considerable doubt, that this is what the writing means. Of course, the liability of the defendant may be terminated by notice, but I doubt if it was terminated in this case, or could be by the mere fact of a sale. He is authorized to sell, and if before being notified to the contrary he binds himself to a purchaser, the defendant must indemnify him. Whatever contract there was with the plaintiff under the agreement must have continued until he was notified of the withdrawal of the authority, unless, perhaps, under the principle of Dickinson v. Dodds (1876), 2 Ch. D. 463, it terminated when he became aware of the sale, but I cannot agree that the defendant by the mere fact of selling revoked the authority. The consequence of a decision to that effect would be that the defendant could allow the

plaintiff to continue to expend money in advertising for months after the property had been sold, and give him no remuneration for his services or expenditures, either before or after the sale, that is, if the construction contended for by the defendant were correct.

DRYSDALE, J.:—Plaintiff is a real estate agent at Truro and defendant placed in his hands for sale a farm under the following terms:—

"I hereby request W. D. McCallum or assigns to register the real estate or property mentioned herein in his real estate register and constitute and appoint him my lawful agent, and authorize him to sell the above described real estate or property for me and on my behalf at the price mentioned above or such lesser price that I may afterwards agree upon; and I authorize him to advertise such property in such manner as he may wish, such advertising, however, to be without cost to me except such as is covered by the commission in case of a sale.

In consideration of said W. D. McCallum registering my said real estate or property for sale in his real estate register, I hereby agree to pay him a commission of three per cent. of the price obtained whenever a sale of the property, or any part thereof takes places.

Said commission to be paid by me whether said real estate or property is sold, either at the price mentioned above or at such other price that I may hereafter accept for said real estate or property. If, however, property does not sell no commission will be charged."

The plaintiff failed to sell the property and defendant subsequently made a sale with which plaintiff was in no way connected. It was conceded on the argument that plaintiff was not the efficient cause of the sale, but the case was argued for him on the ground that under the agreement the plaintiff is entitled to a commission on three per cent. on any sale of the property, no matter by whom made or when, and even although the plaintiff had nothing whatever to do with effecting it. The case for plaintiff is put on the broad ground that the agreement entitles the plaintiff to a commission even although he fails to sell, and defendant is obliged to employ and pay another estate agent to make the sale, or even in the event of a judicial or execution sale of the property adversely to defendant under process of the court.

I cannot find anything in this agreement that distinguishes it from the ordinary contract that any householder makes when he entrusts his house to a real estate broker and authorises him to sell. The law is well settled that in such a case if the broker by any act of his really brings about the relation of buyer and seller he is entitled to the stipulated commission, or if no commission be stipulated, then to a reasonable commission. The later authorities establish beyond controversy that under such a contract the plaintiff must shew that some act of his was the causa causans of the sale or was an efficient cause of the sale. This rule is not questioned, as I understand plaintiff's counsel, but he puts the extraordinary claim made here upon what is termed the special wording of the contract under which plaintiff was employed to sell. I scan this contract in vain to find anything on its face that contemplates a payment of commission to plaintiff in the event of his failure to sell. The first part authorizes plaintiff to sell at a price named or such less price as defendant should thereafter agree to. Then plaintiff is authorized to advertise as he may wish without cost to defendant, except such as is covered by the commission in case of a sale. In other words, plaintiff is authorized to advertise if, and as he wished, but the expense of so doing, if any, is covered by the stipulated commission in case of a sale. Then follows a stipulation for a commission of three per cent. whenever a sale takes place. A sale by whom? Surely a sale brought about by the man employed to sell. The last clause simply provides that the commission is to be paid whether the estate is sold at the price mentioned or such other price as defendant may agree to accept. And, finally, if the property does not sell, no commission is to be charged.

Surely this is all one agreement dealing, and only dealing, with the employment of the plaintiff by the defendant to sell the property mentioned, and is throughout dealing with a sale or no sale by reason of such employment. I am totally unable to find any language here that can be reasonably construed according to the plaintiff's contention.

I fully agree with the learned County Court Judge, and am of opinion the appeal should be dismissed with costs.

LONGLEY, J.:—I am disposed to accept the interpretation of the contract in this case made by Drysdale, J., and therefore agree with his conclusion that the appeal should be dismissed. If I were compelled to accept the interpre-

tation of the majority of this Court I should regard the contract as one ingeniously drawn for the purpose of inducing persons unwittingly to agree to something which would likely work great unfairness. If the transaction were a single one no comment would be necessary, but the plaintiffs are an agency for selling land, with wide connections and with printed contracts, and if this contract which they are submitting as the basis of this action means what they contend for it would contravene, I think, the general principle upon which commissions are awarded for services in bringing about sales under the common law, and, if not carefully considered, might work injustice to the unwary.

MEAGHER, J..—I concur substantially in the view expressed by the Chief Justice and my brother Russell. I have no recollection of its having been conceded upon the argument that plaintiff's efforts were not the efficient cause of the sale, but plaintiff's counsel relied upon the agreement whether plaintiff's efforts were the efficient cause or not.

LAURENCE, J.:—I concur in the opinion of the Chief Justice.

NEW BRUNSWICK.

DECEMBER 12TH, 1910.

SAINT JOHN PROBATE COURT.

RE ESTATE OF JOHN THOMSON.

Application by Executor for Discharge—Executorship Merged into Trusteeship — Liability of Executor as Trustee — Application Refused—Costs.

Earle, Belyea and Campbell, in support of the application.

ARMSTRONG, PROB. J.:—This is an application made by and on behalf of Robert Thomson, one of the executors and trustees, for an order removing and discharging him from his position and office of an executor of the said estate, and for an order vesting the said trust property and estate solely in his co-executor and trustee, the widow of deceased, the grounds alleged for such application being that he cannot without making great sacrifices of his personal business and affairs, spare the time to longer continue in office. To this application the widow and children of deceased signify their consent.

The deceased died more than six years ago, leaving a large estate. By his will he appointed his brother, the peti-

tioner, and his widow executors and trustees, and directed practically that his widow should have use of the estate for life and after her decease that the property should go to his children.

At the recent passing in this Court of the accounts of the executors and trustees it appeared that among other assets which the executors found in the estate upon its coming into their hands, were shares in steamboat companies, shares in a tugboat, shares and bonds in gold mines, shares in a patent medicine company and other similar ventures, some of considerable value, others of little value, which have not been realized or disposed of, and the tugboat has been and still is being operated on account of the estate and other owners.

The will does not give the executors authority to hold such investments. These the executors state, they could not previously dispose of to advantage. I think they should have been realized on. Any profit which arises by holding such assets goes to the estate, while on the other hand a loss might fall on the executors and the loss on one asset could not be set off against the profit on another. This is a risk which the executors are not called on and ought not to assume.

Until all the securities and assets of the estate which cannot legally be held by trustees are realized the executors have not completed the trust which they undertook when they proved the will and cannot resign or be removed from office except for malfeasance and other grounds as provided in the Act.

An executor is regarded in some sense as a trustee. When the assets which cannot legally be held have been realized and the funeral and testamentary expenses, debts and legacies, if any, have been satisfied and the surplus has been invested in such securities as a trustee can properly hold, then the executor drops that character, and becomes a trustee in the proper sense, and on his accounts being passed and allowed, the result is that his liability as such then ceases. (See Lewin on Trusts, star page 673.) I do not think it is in the interests of this large estate that Mr. Thomson should not continue as executor and trustee, but entirely apart from this opinion the application for the reasons above stated is refused, and as the life tenant and residuary beneficiaries assented to the application, the costs will be paid out of the estate.

Application refused.