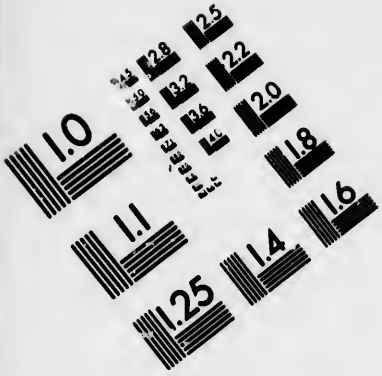

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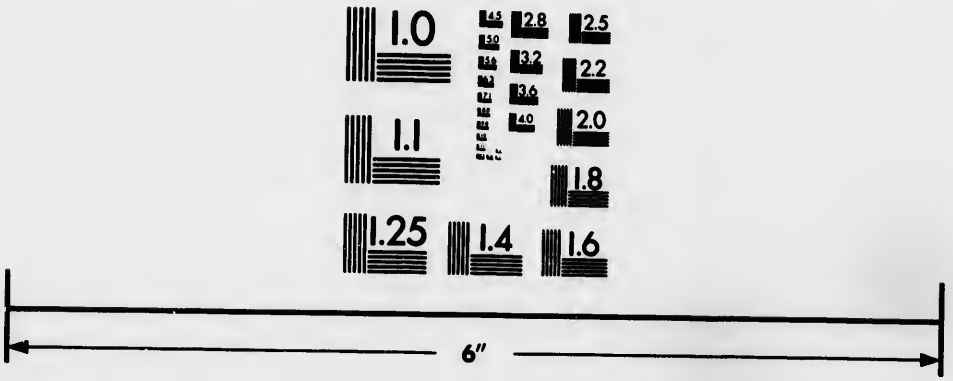

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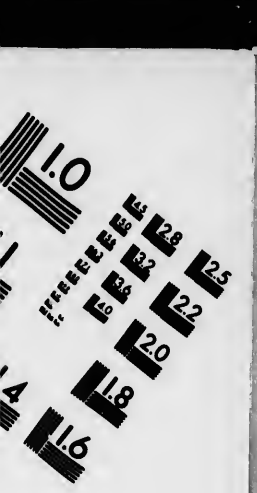

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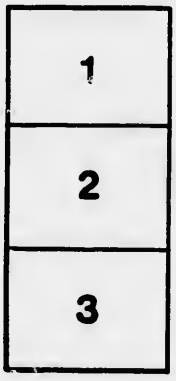

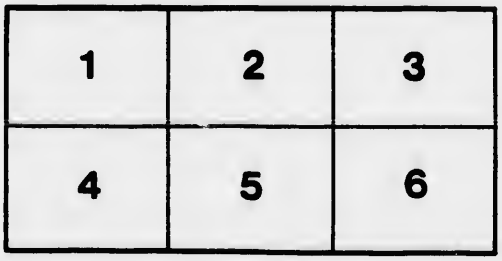

NEW BRUNSWICK EQUITY CASES

BEING A SELECTION OF HITHERTO
UNREPORTED CASES

DETERMINED BY

THE SUPREME COURT IN EQUITY

OF NEW BRUNSWICK

FROM

1876 TO 1893

COLLECTED, EDITED, AND ANNOTATED

BY

WALTER H. TRUEMAN, LL.B.,
BARRISTER-AT-LAW
REPORTER TO THE COURT.

TORONTO:
THE CARSWELL CO., LIMITED, 22-30 ADELAIDE ST. EAST
1898.

TO

THE HONORABLE

Andrew G. Blair, Q.C., LL.D., M.P.,

MINISTER OF RAILWAYS AND CANALS

AND

FOR MANY YEARS

ATTORNEY-GENERAL

FOR THE

PROVINCE OF NEW BRUNSWICK,

THIS VOLUME

IS

MOST RESPECTFULLY

DEDICATED

WITH SENTIMENTS OF PROFOUND REGARD.

PREFACE

PRIOR to the creation in 1894 of the office of Reporter of the decisions of the Supreme Court in Equity by Act of the General Assembly of that year, the decisions of the Court were never published except occasionally in the public prints in cases of general interest. The result was that the decisions of the Court at a formative period of its history relating to its practice, and oftentimes founded upon the construction of Statutes peculiar in many of their features to the Province of New Brunswick, as well as decisions upon general principles of equity jurisprudence applied under circumstances special and local in their character, were inaccessible to the profession. They obtained at best a fugitive and futile existence in the memory of a few practitioners, and their currency eventually depended upon tradition in its most fragmentary and precarious form. Such a condition of affairs could not fail to be attended with grave inconveniences, opposed to the regularity of the practice of the Court, and productive of confusion and surprise. It thus also often fell out that the same question was the subject of frequent litigation with the same result, in ignorance of its previous determination. To rescue as many of such decisions from the partial or complete oblivion that had passed upon them as it was possible to reclaim seemed to me a simple duty upon my appointment to the position of Reporter of the Court immediately after the passing of the Act creating the office. I assumed the task would be well nigh a monumental one, as I confidently expected the judgments would be on file in the Clerk's office, and that their

number would be legion. A search abundantly verified the assurance of the Clerk that the practice of the Judges of filing their decisions in equity with him had been far from uniform. I was rewarded, however, with a fair number, and was able to supplement them by the kindness of members of the Bar who had either the original judgments or copies, by reason of being interested in the cases in which they were delivered. A few, I regret to say, I had to take from newspaper files. In all, they made a collection sufficient, both in variety of subject-matter and in their essential worth, to deserve preservation. The wisdom of annotating them did not commend itself to me until after they had gone to press, and consequently the notes were prepared under a pressure not favorable to the best results or the highest kind of workmanship. This circumstance, I hope, will be accepted in part explanation at least of their many imperfections, particularly in form and arrangement, and which further reflection might have avoided.

WALTER H. TRUEMAN.

St. John, N.B.,
June 1st, 1898.

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ERRATA.

Page 2, line 20 from bottom, for "adoideau" read "aboideau."
" 38, line 10 from top, for "land" read "laid."
" 49, line 5 from bottom, for "change" read "charge."
" 73, foot note, for "16 L. J. Ch. (N.S.) 217, read "1 Ph. 790."
" 79, line 3 from bottom, for "Winkledon" read "Wimbledon."
" 93, line 5 from top, for "Westling" read "Westbury."
" 178, line 2 from bottom, for "L. R. 10 Ch." read "10 Ch. D."
" 256, foot-note, for "2 Eq." read "12 Eq."
" 303, line 22 from bottom, for "Pr." read "Ph."

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CASES DETERMINED

BY THE

SUPREME COURT IN EQUITY

OF

NEW BRUNSWICK.

JARDINE ET AL. v. SIMON.

1876.

November 10.

Grant of riparian land—Construction of grant—Bed of river ad medium filum—Erection in bed of river—Right of action if probability of damage.

The M. creek is a tidal water emptying into the Bay of Fundy. Previous to the erection of an aboideau across its mouth it overflowed its banks at high tide. The aboideau was erected in the latter part of the last century by a riparian owner, and was fitted with gates adjusted to open at ebb tide and close at half flood tide, with the result of preventing the creek overflowing its banks. A considerable quantity of fresh water drains into the creek in times of freshets and heavy rains. Above the aboideau is a natural pondage or basin, sufficiently large to hold any heavy drainage into the creek when the gates are closed at flood tide. The creek is navigable for small boats, but ingress or egress is barred by the aboideau. In 1837 C., a riparian proprietor, conveyed a part of the land on the westerly side of the creek adjoining the aboideau to S., and described the land as bounded by the margin or bank of the creek. Ultimately this piece of land was conveyed to the defendant. In 1874 the defendant placed sills and posts in the bed of the creek between high and low water mark and erected a barn thereon. The posts were objected to by riparian owners as tending to obstruct the free course of the creek by causing the collection and deposit of floating material about their base and decreasing the area of the pondage, and eventually producing an overflow. The bed of the creek was divested out of the Crown by the original Crown grant of the marsh lands.

Held, (1) That the conveyance to the defendant's predecessor in title did not pass the soil of the creek, and that the same was reserved for the benefit of all the riparian owners.

(2) That assuming the title passed in the soil *ad medium filum aquae* it was subject to an easement in all the riparian owners to have the creek kept open for pondage purposes.

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(3) That the riparian owners were entitled to have the erections removed without proof of actual damage, if there was a probability of damage being done to them, and to prevent the defendant setting up a right to maintain the erections by acquiescence.

The Great Marsh, situated partly in the city of St. John and partly in the town of Portland and the parish of Simonds, is traversed by a creek emptying into the Bay of Fundy. Prior to the erection of an aboideau across its mouth the creek overflowed its banks at high tide and submerged an extensive portion of the marsh. The aboideau was erected by James Simonds in the latter part of the last century, who was then the owner of a considerable portion of the marsh, and was fitted with gates adjusted to open at half ebb tide until low water, and close at half flood tide, thereby preventing an excess of water flowing into the creek, and preventing it from overflowing its banks. A number of fresh water rivulets drain through the marsh into the creek, and were it not for a large pondage or basin at the aboideau would produce at flood tide an overflow in times of freshets or heavy rains. The creek is navigable for small boats, but owing to the erection of the adoideau there is no means of ingress or egress. The bed of the creek was conveyed by the crown grant of the marsh lands to the original grantee, James Simonds. Hon. Ward Chipman was at one time the owner of a tract of the marsh situate near the aboideau, and on the westerly side of the creek, and in 1837 conveyed a portion of it to the St. John Water Company. The boundary of the land was described in the deed as beginning at a post on the northern side of the City road, situate three hundred feet distant in an easterly direction from the angle formed by the intersection of the northern line of the said road with the easterly line of the road leading towards land owned and occupied by Henry Gilbert; thence from the said post northerly, at right angles to the City road, until it meets the southern boundary of said Gilbert's land; thence easterly, along the same boundary, to the Marsh Creek; thence southerly along the bank or margin of the said creek, following the several courses thereof, to the public road at the Marsh

Bridge aboideau, so called; thence westerly, on the same public road and the City road, to the place of beginning.

In 1854 the St. John Water Company conveyed the land to William Jack by deed containing the same description. In 1873 William Jack conveyed the land to the defendant by the following description: "All of that lot or parcel of land in the city of St. John, situate at or near the Marsh Bridge, commencing at the south-east corner of a lot sold by the said William Jack to one McGowan, on the north side of the City road; thence northerly along the line of McGowan's lot one hundred feet; thence at right angles thereto easterly forty feet; thence southerly parallel to the line of McGowan's lot to the road crossing the aboideau; thence westerly along the said road and the City road to the place of beginning." This description would include a portion of the bed of the creek. In 1874 the defendant placed sills in the bed of the creek, between high and low water mark, and erected thereon bents and frame work for the support of a barn. The plaintiffs, Alexander Jardine, Charles A. Everett, and William Smith, Commissioners of Sewers for the Great Marsh, and the other plaintiffs, who are riparian owners of land traversed by the creek, brought this suit for a mandatory injunction to compel the defendant to remove the sills and erections as being an obstruction of the drainage of the creek, calculated to fill up the pondage at the aboideau by the collection of alluvial matter, and produce an overflow of its banks. The defendant claimed, *inter alia*:

1st. That, as riparian proprietor, he was owner of the bed of the stream to the middle thereof, and entitled to build upon it if no injury was done to the public, or any riparian owner.

2nd. That the amount of damage, if any, was too small to be appreciable.

3rd. That the injury, if any, was remediable at a very trifling expense by the Commissioners of Sewers, and therefore no action lay.

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4th. That the Commissioners were empowered to remove obstructions without proceeding in equity to compel the defendant to do so.

The plaintiffs contended:

1st. That the deed from the Hon. Ward Chipman, through which the defendant claimed, conveyed the land to the bank or margin of the creek, and passed no title to the soil beyond, and that it was the intention to reserve the stream as an open watercourse.

2nd. That no erection could be placed in the bed of the stream with the effect of injuring, or tending to injure, the property of the remaining riparian owners.

3rd. That the pondage being necessary to hold the drainage water during the time the gates of the aboideau were closed at high water, the right to have the pondage free from obstruction was an easement appurtenant to the lands of all the riparian owners.

G. G. Gilbert, for the plaintiffs.

William Jack, Q.C., for the defendant.

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I wish for a moment to examine some of the circumstances of this case. Nearly a century ago James Simonds constructed a dyke and aboideau, whereby a large tract of land belonging to him, which had previously been worthless, was reclaimed from the sea, and was rendered valuable for the purpose of cultivation. Its value, however, in this respect, would largely depend upon its being protected from overflowage, whereby 't might become more difficult of cultivation, and whereby the crop on it might be exposed to injury. Then, as now, no doubt, freshets were not unusual; and on these occasions all the available space between the banks of the creek would be required to hold the accumulations of water, whilst the gates of the aboideau were closed by the tide. Moreover, it might become necessary to dredge the creek, or to make alterations in its bed, with a view to improving the drainage or securing additional pondage. Would not such considerations as these be present to the minds of the original proprietors when making

conveyances of this land? Does not the suggestion of Mr. Justice Blackburn, in the case to which I have referred, strike us as peculiarly applicable to them, under the circumstances? Was it not desirable for them to retain control of the stream "so as to keep it open *for the benefit of the rest of the property?*" Or must I *presume* —although the language itself of the deeds is inadequate to express such a purpose—as Mr. Jack in effect argued, that the grantors intended to convey to each purchaser on both sides of the Marsh Creek, throughout its whole length, a right to the soil under it *ad medium filum aquae*; and, as incident thereto, a right to place whatever erections thereon they chose, subject only to any actions which other proprietors might bring for damage thereby occasioned to them? Carried to its logical results, that was Mr. Jack's proposition, and I certainly cannot accede to it. In my opinion there was not, in this case, that absence of motive on the part of the original owners of the marsh, for retaining the property in the soil of the creek which would warrant a *presumption* that they intended to part with it; it would not be, to adopt the language of Mr. Justice Coleridge, "absurd to suppose," under the circumstances, "that the grantors reserved to themselves the right to the soil of the creek *ad medium filum fluminis.*" On the contrary, the converse of such a proposition would be true. And having discovered a motive which might induce the grantors to retain it, the legal presumption which would extend the boundary into the creek is repelled; and we must construe the deeds and plans according to the language used and the line defined. So construing them, I think that we will find a very clear intention expressed to limit the boundaries of the land conveyed to the bank of the creek. In the deed from James Simonds to Geo. G. Gilbert, in 1819, of the land directly opposite to the defendant's lot, the boundary is made to commence "*at the eastern end* of the aboideau *across the creek;*" and from thence it extends southerly and northerly, following the creek in its various courses, "as by reference to a plan annexed will *more particularly* appear." On reference to the plan, the boundary,

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at the creek, is found designated by a red line, extending along the top of the bank, northerly and southerly, from the east end of the aboideau. In the deed made in the same year, by Ward Chipman, Esquire, as administrator of the estate of the Hon. Wm. Hazen, deceased, to Henry Gilbert, of the lands immediately adjoining those afterwards conveyed to the Water Company, the principal tract is described as bounded, on the side next the creek, "by the *bank* or *margin* of the creek," according to a map or plan annexed. The boundaries of two other lots, included in the same conveyance, but a little further up the creek, on the same side, are even more specifically described. They are said to commence at *stakes set up on the bank* of the said creek; and the distances are said to be measured "along the said creek" *from these stakes*; and again, as to these lots, a reference is also made to a map or plan, for a more particular description of them. On reference to this plan, the boundaries at the creek, of all the land conveyed by the deed, will be found designated by a red line along the top of the bank; the stakes mentioned in the deed are shown on the plan on the top of the bank, and they are connected together by the red line already referred to. I think that the language of these conveyances is sufficient of itself to show that the grantors never intended to pass any of the soil of the creek itself. It is much more specific than that used in the deed referred to in the English authorities, where the soil of the stream was held to pass—vide *Lord* v. *Commissioners of Sidney* (1); *Simpson* v. *Dandy* (2); *Berridge* v. *Ward* (3). But a reference to the plans for a more particular description, which is found there, seems to place the matter beyond any doubt. As to the effect of plans when referred to in a deed in defining a boundary of land, vide *Boyle* v. *Mulholland* (4). In that case a conveyance from the Incumbered Estates Court granted "All that part of B., together with the kelp-shore, containing 443 acres, and described in the annexed map; together with the sea-weed cast on

(1) 12 Moo. P. C. 473.
(2) 8 C. B. (N. S.) 433.
(3) 10 C. B. (N. S.) 400.
(4) 10 Ir. Com. Law Rep. 150.

the said kelp-shore, etc." The map annexed to the deed drew the boundary line along the high water mark upon the shore; and the description of the kelp-shore in the schedule tallied in measurement with the deed, supposing the boundary line to be the high-water mark. It was held that the shore between high and low water mark did not pass by the deed; that the kelp shore was, by reference to the map, reduced to a certain specific description. And so, by reference to these plans, the red line on the top of the bank of the creek is a certain and specific description. If the language of these deeds construed in connection with the plans referred to, is not sufficient, in the absence of any legal presumption to the contrary, to show an intention on the part of the grantors to limit the boundary of the lands conveyed by them to the bank of the creek, I am at a loss to know what will do so.

The same eminent lawyer who, in 1819, as the administrator of the Hon. Wm. Hazen, conveyed a piece of land adjoining this to Mr. Henry Gilbert, and bounded it by the *bank or margin* of the creek, in 1837, then being Chief Justice of this Province, conveyed in his own right, the block which includes the defendant's lot to the Water Company; and he used the same identical language as to the boundary, in the latter deed, that he had done in the former. And I have no doubt in the world that his intention was the same in both cases; and when the company conveyed to Mr. Jack, they described the boundary of the creek in the same language; and the latter, in my opinion, took a title with land bounded by the bank of the stream, and he could convey no title beyond that. I think that the original proprietors intended to reserve out of their conveyance the title to the soil between the banks of the creek, so as to secure the free and unobstructed use of that space for drainage and pondage, for the benefit of the whole marsh.

But assuming that the riparian proprietors, according to the strict technical construction of the conveyances, could be held to take a title to the soil of the stream, *ad medium filum fluminis*, it would not justify them in placing erections thereon, such as those complained of. Even

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in that case, the space between the banks being *necessary* for drainage and pondage, in order that the owners of land on the marsh should cultivate it to advantage, the law will imply a grant of an easement of that kind from the original proprietors; and the riparian proprietors would take their title to the soil in the bed of the stream subject to such an easement. The original owners of the marsh themselves possessed the right in question (vide 48 Geo. III. c. 4, and 25 Vict. c. 53); and when they granted the land they will be taken to have granted everything that was necessary to the full enjoyment of the thing granted: *Pyer* v. *Carter* (5).* In that case the houses of the plaintiff and the defendant adjoined each other. They had been one house; but, having been converted into two, one was conveyed to the defendant, and the other, *at a subsequent time*, to the plaintiff. At the time of the conveyances a drain or sewer ran under the plaintiff's house, and from thence under the defendant's house; but, in the conveyance to the defendant, there was no reservation of an easement. The defendant blocked up the drain where it entered his property; and, in consequence, whenever it rained the plaintiff's house was flooded. The defendant was not aware of the sewer being there, at the time of the conveyance to him; and the plaintiff for £6 might construct a drain directly from his own house to the common sewer. It was held that the plaintiff was entitled to the use of the sewer underneath the plaintiff's house. "It seems," said Watson, B., in delivering the judgment of the Court, "in accordance with reason that where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and be subject to all the drains them necessarily used for the enjoyment of the adjoining house, and that, without express reservation or grant, inasmuch as he purchases the house *such as it is*." Lord Westbury, indeed, by a dictum in *Suffield* v. *Brown* (6), impugned the authority of this

(5) 1 H. & N. 916. * See *Jones* v. *Hunter*, 1 N. B. Eq. 250.

(6) 33 L. J. Ch. 249; 10 Jur. (N. S.) 111.

case; and his observations upon it were approved of by Lord Chelmsford in *Crossley* v. *Lightowler* (7). Lord Westbury conceded that, if the dominant tenement had been conveyed first, the purchaser of the servient tenement would take his title subject to the easement. But, reversing the order of conveyances, he was of opinion that the first purchaser took his title, according to the contract; and that the vendor could not, by a subsequent deed, derogate from his former grant. I do not follow his Lordship's reasoning. The right in question, either way, was an implied one. And it is difficult to understand why, if the easement was really necessary to the enjoyment of the dominant tenement, there might not be an implied *reservation* as well as an implied grant; and, if there could be, it begs the question to say that the first purchaser of the servient tenement took according to his contract; for the implied reservation would be a part of his contract; and, being a part of his contract, the subsequent conveyance of the dominant tenement to another, with such an easement, would not derogate from the former grant.

I am relieved, however, from the necessity of deciding between the conflicting opinions of such high legal authorities by the very late decision of the Lord Justices in *Watts* v. *Kelson* (8). In that case Lord Justice Mellish said: "I think that the order of the two conveyances, in point of date, is immaterial; and that *Pyer* v. *Carter* is good sense and good law. Most of the common law judges have not approved of Lord Westbury's observations on it." And Lord Justice James said: "I also am satisfied with the decision in *Pyer* v. *Carter*."

And, both upon principle and authority, I am of opinion that even if the riparian proprietors of the Marsh Creek be the owners of the soil *ad medium filum*, they must now take it "as it is," and as it has been for nearly a century, subject to the easement of using the creek for sewerage and pondage. Whether one of the purposes for which it has been used is called "pondage," or by any term known to the common law or not, I think is

(7) Law Rep. 2 Ch. 486. (8) Law Rep. 6 Ch. 166, at p. 170.

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unimportant, provided we understand what is meant by the term, and provided it signifies a right, the enjoyment of which equity will secure to the plaintiffs. The varied employments of commerce, and the changing aspects of society, are constantly giving rise to new terms unknown to the common law, many of which have already acquired a recognized place in legal nomenclature. "Slippage," "boomage," and "stumpage," are examples of such words; and, if "pondage" be an apt word to describe the right here claimed, I know no reason why it should not be employed for that purpose.

It is true that the plaintiffs have not shown that they have, as yet, sustained any actual damage by the erection in question; nor was it necessary for them to do so. The defendant has done an act which is wrongful now, but which, if acquiesced in by the plaintiffs, would in course of time become a right. Although no actual damage has been shown, the effect of the erection complained of is already apparent. Earth and other substances have already been noticed as collecting around the posts in the short time which has elapsed since they were placed there. Judging from the effect produced by the posts of the railway bridge, the obstruction in the course of time will be much greater. If the defendant be permitted to retain these posts where they are, and also to place others, even to the centre of the stream, the consequences will be even more serious. If the plaintiffs by their acquiescence in the defendant's conduct, permitted him to acquire a right, other riparian proprietors would assume that they had a similar right, and would also extend erections into the stream, until at length irreparable injury and great damage would be occasioned to the owners of the Marsh property. For these reasons, it is proper for the plaintiffs to interpose at once, and have their rights declared and indicated by the decree of this Court. In *Bickett* v. *Morris* (9), the question was "whether the respondents were entitled to a declaration that 'the appellant had no right or title to erect any building or *otherwise to encroach upon* or to interfere

(9) Law Rep. 1 H. L. Sc. 47.

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with the *solum* of the river which is immediately opposite their property, beyond a certain line, and to a decree ordering him to take down and remove the building or other erections, in so far as these extend into or encroach upon the *solum* of the river beyond the said line, and interdicting them from erecting any building, or otherwise encroaching upon the *solum* of the river.'" The judgments of the Law Lords in that case so completely dispose of the question of damage, and also of the rights which Mr. Jack claimed for the defendant as a riparian proprietor, that I will make rather copious extracts from them. Lord Westbury said: "This will be the first decision establishing the important principle that an encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor, without the necessity of proving, either that damage has been sustained *or that it is likely to be* sustained from that cause. . . . I am, however, convinced that the proposition, as it has been laid down in the Court below, and as it has received the sanction of your Lordships in your judgments, is one that is founded on good sense, and ought to be established as a matter of law. . . . It is wise to lay down the general rule, that, even though immediate damage cannot be described, even though the actual loss cannot be predicated, yet, if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury which the Courts will take notice of, as an encroachment which adjacent proprietors have a right to have removed." And Lord Cranworth said: "By the law of *Scotland*, as by the law of *England*, when the lands of the two conterminous proprieters are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the soil of the *alveus*, or bed of the river, *ad medium filum aquae*. The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if, from any cause, the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them up to what was the *medium filum aquae*, in the same way as

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they were entitled to the adjoining land. The appellant contended that, as a consequence of this right, every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the *alveus*, so long as other proprietors cannot show that damage is thereby occasioned, or likely to be occasioned to them." The contention almost to the very letter of Mr. Jack in this case. "I do not think," continues Lord Cranworth, "that this is a true exposition of the law. Rivers are liable, at times, to swell enormously, from sudden floods and rain, and in these cases there is danger to those who have buildings near the edge of the bank" (or as here crops on the marsh), "and indeed to the owners of the banks generally that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting any building in the stream so as to divert or obstruct its natural course. . . . If the proprietor on one side can make an erection far into the stream, what is there to prevent his opposite neighbour from doing the same? . . .

"The most that can be said in favour of the appellant's argument is, that the question of the probabilities of damage is a question of degree, and so if the building occupies only a very small portion of the *alveus* the chance of damage is so little that it may be disregarded." Here again is Mr. Jack's argument to the letter. "But," continues Lord Cranworth, "this is an argument to which your Lordships cannot listen. . . The owners of the land on the banks are not bound to obtain or be guided by the opinions of engineers or other scientific persons, as to what is likely to be the consequence of any obstruction set up in waters in which they all have a common interest. There is in this case and in all such cases there ever must be a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say, 'We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.' This is a plain, intelligible rule, easily understood and easily followed, and from which I think

your Lordships ought not to allow any departure." Lord Chelmsford quoted the language of Lord Benholme, Judge of the Court of Second Division of the Court of Session in Scotland, to the same effect, and approved of it, and the appeal was dismissed with costs.

In *Attorney-General* v. *Earl of Lonsdale* (10), the principle of this case was applied to tidal rivers; and other points involved in it are illustrated by *Crossley* v. *Lightowler* (11); *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (12), and *Attorney-General* v. *Great Eastern Railway Co.* (13).

I think then for the reasons given that the title to the land beyond the bank of the creek did not pass to Mr. Jack, and he could not convey it to the defendant; but even if it did, and if the defendant has an interest in the soil *ad medium filum*, he had no right to place upon it the erections complained of.

As regards the other minor questions discussed, I am of opinion that the Commissioners of Sewers are rightly joined as parties to the bill. Even if they are not, the objection of misjoinder will not avail to prevent the other plaintiffs from obtaining the remedy sought: *Jones* v. *Calkin* (14).

And I think that the bill is properly filed by the Commissioners of Sewers and the Marsh proprietors. The injury complained of is one done to them, and to them only. The public at large, apart from the Marsh proprietors, have not been injured, and are not likely to be by the obstructions in question. Therefore, the Attorney-General need not be a party to the bill.

The bed of all navigable rivers, and of estuaries, and arms of the sea is *prima facie* the property of the Crown: Malcomson v. O'Dea, 10 H. L. Cas. 593; Blundell v. Catterall, 5 B. & Ald. 304; Carter v. Murcot, 4 Burr. 2164. In England a river is held to be navigable which is actually navigable, and in which the tide ebbs and flows: Smith v. Andrews, [1891] 2 Ch. 678; Hargreaves v. Diddams, L. R. 10 Q. B. 582; 44 L. J. Q. B. 178; Mussett v. Burch, 35 L. T. (N. S.) 486; Reece v. Miller, 8 Q. B. D. 626; Pearce v. Scotcher, 9 Q B. D. 162. In Reece v. Miller, *supra*,

(10) Law Rep. 7 Eq. 377.
(11) Law Rep. 3 Eq. 279.
(12) Law Rep. 1 Eq. 161.
(13) Law Rep. 6 Ch. 577.
(14) 3 Pugs. 356.

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Grove, J., said: "The question what constitutes a tidal navigable river has been discussed in various cases, and in my judgment a river is not rendered tidal, for this purpose, at the place in question by the fact that it may be affected by the tide on the occasion of unusually high tides, when the action of the tide is reinforced by a strong wind, or some such exceptional circumstance causes the tide to rise unusually high. In order that the river may be tidal at the spot in question it may not be necessary that the water should be salt, but it seems to me that the spot must be one where the tide in the ordinary and regular course of things flows and reflows." See also Murphy v. Ryan, Ir. Rep. 2 C. L. 143. In the United States it has been held by some Courts that the test is not whether a river is tidal, but whether it is in fact navigable. See Rowe v. Granite Bridge Corporation, 21 Pick. 344; People v. Canal Appraisers, 33 N. Y. 461; Child v. Starr, 4 Hill, 369; Denn v. Jersey Company, 15 How. 426; Angell on Tide Waters, 38, 76; Angell on Watercourses (6th ed.) 130; Gould on Waters, s. 17; and per Lord Selborne, Lyon v. Fishmongers' Co., 1 App. Cas. 662, 683. In Canada the question was considered in The Queen v. Robertson, 6 Can. S. C. R. 52. Strong, J., there said: "I do not hesitate to say that the rule which appears to have been adopted as a principle of the Common Law as administered in England, that no rivers are to be considered in law as public and navigable above the ebb and flow of the tide, is not applicable to the great rivers of this continent, as has been determined by the Supreme Court of the United States and by the Courts of most of the States, and I think that with us the sole test of the navigable and public character of such streams is their capacity for such uses." See also Steadman v. Robertson, 2 P. & B. 580.

Where land is granted on a non-navigable river the grant is presumed to convey the soil of the bed *usque ad medium filum aquae*: Crossley v. Lightowler, Law Rep. 3 Eq. 279; Beckett v. Corporation of Leeds, Law Rep. 7 Ch. 421; In re McDonough, 30 U. C. Q. B. 288. The presumption may be rebutted: Marquis of Salisbury v. Great Northern Railway Co., 5 C. B. (N. S.) 174; Blount v. Layard, [1891] 2 Ch. 681, per Bowen, L.J.; Ecroyd v. Coulthard, [1897] 2 Ch. 554. As by proof of surrounding circumstances in relation to the property in question which negative the possibility of there having been an intention to convey the bed of the river *usque ad medium filum*: Duke of Devonshire v. Pattinson, 20 Q. B. D. 263. In Micklethwait v. Newlay Bridge Co., 33 Ch. D. 133, Cotton, L.J., said: "The presumption may be rebutted. In my opinion, you may look at the surrounding circumstances, but only to see whether there were facts existing at the time of the conveyance and known to both parties, which showed that it was the intention of the vendor to do something which made it necessary for him to retain the soil in the half of the road or the half of the bed of the river, which would otherwise pass to the purchaser of the piece of land abutting on the road or river. There may be facts, whether appearing on the face of the conveyance or not, from which it is justly inferred that it was not the intention of the parties that the general presumption should apply, but in my opinion, it is not sufficient that circumstances which afterwards occur show it to be very injurious to the grantor that the conveyance should include half of the bed of the river or half the soil of the road. It may be that if the vendor and purchaser had thought of those circumstances they would have introduced into the conveyance something to show that the half of the bed of the river

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was not to pass, but the mere fact that circumstances not within the contemplation of the parties at the time afterwards arise, which show it to have been to the disadvantage of the vendor that the soil of half of the river should pass, will not, in my opinion, prevent the presumption from arising."

A description of land as bounded on a river or upon its margin passes the soil to the centre of the stream: Tilbury v. Silva, 45 Ch. D. 98; Kirchhoffer v. Stanbury, 25 Gr. 413; Kains v. Turville, 32 U. C. Q. B. 17; Robertson v. Watson, 27 U. C. C. P. 579; 3 Kent Com. (12th ed.) 427. "In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to show that that is not the intention of the parties," per Cotton, L.J., Micklethwait v. Newlay Bridge Co., 33 Ch. D. 133. And Lindley, L.J., there said: "The question is whether the plaintiffs are or are not the owners of the southern half of the bed of the river. That depends upon the true construction of the deed of conveyance, and in order to determine what is its true construction we must look at its terms, and at those circumstances which are legitimately in evidence for the purpose of construing it, such as the position of the property and the circumstances under which the deed was executed. There obviously is nothing on the face of the deed which shews an intention to reserve to the grantor any portion of the bed of this river. The grant is of land delineated in a plan and therein coloured pink, and described by quantity, and as abutting on the north on the River Aire. Neither the colouring on the plan nor the quantity named includes the half bed of the river. When we come to apply the ordinary and well-settled rules of law to that conveyance, we find it settled by authority which it is impossible for us to ignore or overrule, that those circumstances as to colouring and quantity do not alone prevent a moiety of the bed of the river from passing. The law upon that subject is not new. The earliest authority on the subject I have found is that referred to in Mr. *Elphinstone's* very useful book on the interpretation of deeds. Rolle's Abridgment, 'Grant's' P., p. 6: '*Si home grant un messuage vocatum Falstolfe Place prout undeque includitur aquis; per ceux paroles le soile del motes en que le eve est passera.* P. 9, Car. B. R. *Enter Stint & Morgan per curiam resolve sur un trial at barr.*' From that time down to this the rule has been laid down and acted upon as an ordinary rule of conveyancing, a well-settled law of real property, and it has been expressed in various ways by the Courts when necessity has arisen to discuss it, and nowhere that I know of better than in Berridge v. Ward, 10 C. B. (N. S.) 400, and Dwyer v. Rich, Ir. Rep. 6 C. L. 144." Under a conveyance of land, on a non-navigable stream, described as running to the northern side of the river, and then along its bank, Spragge, C., inclined to think that the grantee was bound by the bank of the river: McArthur v. Gillies, 29 Gr. 223. In Lock v. Cleveland, 1 All. 390, it was held that where land situated on both sides of a tidal river was bounded by the shore of the river the title of the grantee did not extend beyond high water mark. And see Cram v. Ryan, 25 O. R. 524.

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The question whether the owner of the soil of a river may erect on the bed of the river works which cause no obstruction to the navigation, and no injury to the rights of the riparian owners, or whether such erections are illegal *per se*, has given rise to conflicting decisions; but it would now seem settled that such erections are not illegal in themselves, if they cause no actual or probable injury either to the public rights or to adjoining riparian proprietors: Bickett v. Morris, L. R. 1 H. L. Sc. 47; Attorney-General v. Lonsdale, L. R. 7 Eq. 377; Attorney-General v. Perry, L. R. 9 Ch. 423; Kirchhoffer v. Stanbury, 25 Gr. 413; McArthur v. Gillies, 29 Gr. 223. In Orr Ewing v. Colquhoun, 2 App. Cas. 839, Lord Blackburn refers to the principal English and Scotch cases, and states the law to be as follows, at page 853: "I think and submit to your Lordships that the principle on which they were really decided was that where any unauthorized erection is a sensible injury to the proprietary rights of an individual, there is *injuria*, for which he might in a Court of Law in England recover at least nominal damages. A Court of Equity in England, or the Court of Session in Scotland, in the exercise of its equitable jurisdiction, would not order the removal of the erection if convinced that the damage was only nominal, but where there is an injury to the proprietary rights in running streams, the present injury now producing no damage may hereafter produce much. And I understand the principle of Bickett v. Morris to be that where an erection is a present sensible *injuria* to the proprietary right of the owner of the other part of the *alveus*, or of the opposite bank of a running stream, he may have it removed on the ground that there is a present injury to the right of property, if it is impossible to predicate that it may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage. And I think the same principle will apply where the complaining party is not a proprietor, *ex adverso*, of the spot where the erection is made, but is a proprietor of land on the banks of the stream below the spot, but so near to it that the erection *in alveo* alters the natural flow of the water on the complaining party's land. But I do not think it was intended to be decided, and I do not think it is the law, that an erection *in alveo* of a natural stream is illegal *per se*, if all who have property on the banks of the stream consent to the erection."

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1877.
August 25.

Prevention of conflagrations—Brick building—Brick-cased building—Act 35 Vict. c. 56.

By Act 35 Vict. c. 56, intituled "An Act for the better prevention of conflagrations in the City of St. John," all dwelling houses, store-houses, and other buildings to be erected in the city of St. John, on the eastern side of the harbour, within certa in limits, must be made and constructed of stone, brick, iron, or other non-combustible material, with "party or fire walls" rising at least twelve inches above the roof; and the roof must be covered on the outside with tile, slate, gravel, or other safe materials against fire. The defendants were erecting a building resting on stone foundation walls, and consisting of a wooden frame with brick filling four inches thick between the studding, and the whole encased with brick four inches thick. In a suit by the Corporation of the City of St. John for an injunction to restrain the defendants from erecting the building as being in violation of the Act:

Held, (1) That the suit was properly brought in the name of the plaintiffs and should not be by information in the name of the Attorney-General on their relation. (2) That the building was in violation of the Act, and an injunction should be granted.

The facts fully appear in the judgment of the Court.

W. H. Tuck, Q.C., for the plaintiffs.

A. L. Palmer, Q.C., for the defendants.

1877. August 25. WELDON, J.:—

This bill is filed by the Mayor, Aldermen and Commonalty of the city of St. John against the defendants for an injunction restraining them from erecting a building on the northern side of Princess Street, in the city of St. John, in violation of an Act of the Legislature made and passed in the 35th year of her present Majesty's reign, entitled "An Act for the better prevention of conflagrations in the city of St. John"—by which said Act it was enacted that "All dwelling houses, store houses, and other buildings (except as hereinafter excepted) which, from and after the passing of this Act, shall be built, erected or set up in that part

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of the city of St. John on the eastern side of the harbour, within the limits hereinafter mentioned and described, shall be made and constructed of stone, brick, iron, or other non-combustible material with 'party or fire walls' rising at least twelve inches above the roof; and the roof of every such dwelling house, store house, or other building, shall be covered on the outside with tile, slate, gravel or other safe materials against fire; such bounds or limits to be within a line described as follows," etc. (The limits described in said Act embrace Princess Street upon which the defendants are erecting the building complained of). It was also provided and excepted that the Act should not extend or be construed to extend to dwelling houses, store houses, or other buildings not exceeding, if flat-roofed, twenty-four feet in height from the highest level of that part of any street fronting on which the same may be built, or if not flat-roofed, then not exceeding thirty feet in height, from such level to the peak ridge or highest part of any such building; provided also, that all steeples, cupolas and spires of public buildings may be covered with boards or shingles.

The bill sets forth that by the great fire which occurred on the 20th June last, nearly all the buildings or erections within the bounds or limits mentioned and described in the said Act, were destroyed, including the wooden house and premises situate on the north side of Princess Street, between Charlotte Street and Germain Street, in the city of St. John, and occupied before the said fire by the said defendants as a dwelling house.

That the defendants have, since the 20th day of June last, begun to build upon the said lot of land on the north side of Princess Street, within the prescribed district in which all buildings are to be erected and built of materials as set forth in the said Act.

That the plaintiffs by Hurd Peters, the city engineer, on the eleventh day of August, instant, notified the defendant, John E. Ganong, that the building in course of erection by him was in violation of the said Act, and unless such building was forthwith reduced to height allowed by the said Act, legal proceedings

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would be taken against him. That such proceedings were taken on the fifteenth of August according to the provisions of the fifth section of the said Act before the Police Magistrate, and a penalty imposed, but that the defendant persists in proceeding with the building.

The plaintiffs, therefore, pray the interposition of this Court for an order of injunction, restraining and enjoining the defendants from proceeding in the erection of the said building as being in violation of the Act of the Assembly for the better preventon of conflagrations in the city of St. John.

The matter came to hearing before me on notice to the defendant, and Mr. Tuck, recorder of the city, was heard on behalf of the plaintiffs, and Mr. Palmer on behalf of the defendants. An objection was taken by Mr. Palmer, that the plaintiffs have not shown by their bill any right to make this application, unless as relators to an information which should be filed by the Attorney-General. It was also contended that the plaintiffs do not show by their bill that they are injured, and that they stand to the defendants only as a private person would.

It was further contended that the building is within the Act; that in the ordinary and popular sense it is a brick house and not a wooden house as no wood is exposed on the outside.

It was pointed out that the Act of 1837 (7 Wm. IV., c. 11). was similar in its provisions, and that buildings were erected under it similar to the one in question, and the present Act being in substitution for it thereby recognized buildings of that description.

The building is not a dangerous building, but, on the contrary, a safe building.

The affidavit of the defendant, John E. Ganong, states the building is being made and constructed of brick, stone and iron, with party walls running at least twelve inches above the roof, that the building when finished will be constructed as follows: The foundation walls stone; the wall all around outside of brick from the foundation to the top, about eight inches in thickness; that the studding on which the inside finish of the house is to be placed is set into the brick walls so that

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there will be brick on three sides of each stud; that the cornices at the projection of the eaves are to be galvanized iron, and the roof to be flat and gravelled, so that no wood will be exposed on the outside of the said building on any part except the window sashes, which if necessary will be made of iron.

That ever since both fire laws have been in force parties in St. John have built brick buildings with a wall around them outside of only four and a half inches of brick, and they have been treated in the law as buildings built of brick and have stood without objection.

The defendant says, a building such as he has described is a building commonly known and understood as a brick building, and is not a dangerous building, as the whole outside of the building is of brick.

The affidavits of Augustus Quick, John Frederickson, Levi H. Waterhouse, Benjamin W. Potts, George F. Hennigar, George Wilson, George M. Bustin, Andrew Lawson, Silas H. Brown, William H. Bowman, William C. Godsoe, and Jason R. Colby concur in the opinion of the defendant, that a building constructed as he has stated will be as secure against fire as any brick or stone building in St. John, and all, with the exception of J. R. Colby, speak of such buildings being allowed to stand as brick houses ever since the fire law was established in St. John. J. R. Colby says: "I consider it will be a building constructed of brick, stone and iron, and other non-combustible materials, because the whole outside of the building will be of such material except the sashes."

The defendant also produced a model wall, showing how the wall is composed, as he described.

The first question which I have to consider is more of a technical character than to the merits of this case—whether the plaintiffs can sustain their bill, or must they do it through the Attorney-General, as relators. In the case of the *Mayor, etc., of St. John* v. *Brown*, which came before me in Equity to dissolve an order of injunction granted by the then Mr. Justice *Allen*, four grounds were taken; one was that the suit should have been in the name of the Attorney-General. I decided in favour of

all the objections; upon appeal to the full Court (1), the Court sustained my judgment in dissolving the injunction upon one ground; the others they did not consider necessary to express an opinion upon. But in *Brown* v. *Reed* (2) the Court intimated that as the charter of St. John granted very full powers, and having been confirmed by Legislative enactment, the aid of the Attorney-General need not be evoked; and that the corporation could file a bill in their corporate capacity for an injunction to restrain a nuisance in violation of a law within the city. I have referred to a bill filed to obtain an injunction for violating the Act of 1837, entitled "An Act for the more effectual prevention of fires in the city of St. John," in a cause wherein Frederick A. Wiggins was plaintiff, and John O'Donnelly and Michael O'Donnelly were defendants; the plaintiff there only set out the facts and charged that the defendants in erecting the building well knew that they were doing so contrary to the express terms and enactments of the said Act of the General Assembly. The late Chief Justice Parker on the 6th December, 1856, granted an order of injunction against the defendants from proceeding to raise their building, and on the 22nd of December, on an application to dissolve the injunction, confirmed his order and sustained the bill, holding that a citizen had a right to file a bill to restrain the violation of the Act. I think the corporation is the proper party to file this bill, if the act of the defendants contravenes an Act of Assembly made for the better prevention of conflagrations in the city of St. John, and that it is their bounden duty as guardians of the city to take care that all laws made to preserve the property of citizens are carefully enforced.

That the law of 1837 has been violated, and little or no attention paid to its provisions, I have not the least doubt, and it may be because it was so disregarded by those for whose benefit it was enacted, that the Legislature in 1870 repealed it. In 1873, by Act 35 Vict.

(1) 1 Pug. 103.

(2) 2 Pug. 206.

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c. 56, it was re-enacted with some alterations, certainly not for the better. The third and fourth sections of the Act 3 Vict. c. 1 are entirely omitted and the penalties are very materially reduced.

I cannot agree with Mr. Palmer that the Act 35 Vict. c. 56 recognized the building of houses contrary to the provisions of the Act of 1837. A rule of law in the construction of statutes is that where an Act has received a judicial construction, and the Legislature has used the same words in a subsequent Act *in pari materia*, there is a presumption that they are used to express the meaning which had been judicially put upon them; and unless there be something to rebut that presumption the new statute is to be construed on the same principle as the old one. See *Maxwell* on Statutes, 277.

I am not aware that any case has arisen which has required the Court to give a construction to the words "stone, brick, iron, or other non-combustible materials." The Legislature, no doubt, intended this should be the walls. It would have been more correct for them to have described the thickness the walls of a building should be, so that persons who have to build under the Act might know with some degree of certainty how to prepare their walls; to take the literal construction of the words the whole building is to be stone, iron, brick or other non-combustible material.

The evidence contained in the affidavits for the defendants goes to show that if the exterior of the building shows no wood, there is a compliance with the Act. The first section of the Act states the roof of every dwelling-house, stone house or other building shall be covered on the outside with tile, slate, gravel or other safe materials against fire. Now this shows that thinner material may cover the roof, from which it may be inferred, the walls are to be of more substantial material in regard to thickness.

What then shall the walls of a building consist of; shall it be a frame with brick filling between the studding, which is part of the frame, and then four inches of brick outside of the stud—making the stud and brick outside equal to the thickness of the bricks

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between the studding? Would a wall built in that way stand to support beams without the studding? I should think not. Unless it would do so, it was not such a building as contemplated in the Act.

Brick buildings and brick cased buildings are certainly very different, whatever they are called in common parlance, every one will, I think, admit, and although brick cased buildings may be impervious to a light fire, I cannot divest myself of the opinion, that in a pressure of heat such a building would give way.

The Legislature, in my opinion, clearly intended the walls of all buildings within the fire district should be wholly and solely constructed of stone or brick or iron. Would a wooden building covered with sheet iron, with no wood exposed, be a compliance with the Act? I think not. Why should then a building cased with brick be any better? The object of the Act is that the material of the wall shall substantially be constructed of non-combustible material.

It was urged that the corporation, having allowed buildings of that kind to be erected previous to the 20th of June last, and while the Act of 1837 was in force, was evidence of recognition by them of their being within the provisions of the Act for defining how buildings should be erected; and this being the case, the Court ought not to entertain the application for an injunction without the question whether it is in violation of the Act having been settled by a jury.

If this application had been of a private nature, there would be great force in this objection, but it cannot be said that any private rights are invaded, upon which the Court could direct an issue to ascertain the fact. The Legislature have thought it expedient to pass an Act restraining the erection of buildings, except with certain materials and of certain dimensions, in certain districts, to prevent if possible the extending of fires in the city of St. John when they unfortunately occur. The Act is one of prevention; and when an application is made to the Court to exercise its powers to prevent an infraction of an Act made and passed for so beneficial a purpose, it is the duty of the Court to carefully examine and carry

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into effect the law, and prevent its violation, by allowing buildings to be erected contrary to the Act.

I, therefore, come to the conclusion that the building which the defendants are erecting, and complained of in the plaintiffs' bill, is not in accordance with the first section of the Act, and comes within the description of the excepted buildings, but the height violates the prescribed height for such buildings.

The order for an injunction must go in accordance with the prayer of the bill.

"A house described as 'brick built,' is understood to be brick-built in the ordinary sense of the words; not composed externally partly of brick, and partly of timber, and lath and plaster:" Dart on Vendors, 137, 155, citing Powell v. Doubble, Sug. 29; Arnold v. Arnold, 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635; English v. Murray, 49 L. T. 35; 32 W. R. 84. In Tuttle v. State, 4 Conn. 68, a wooden frame with a brick wall was held to be a wooden building. Where buildings described in a policy of insurance as 'brick buildings' were shown to form a part of a block of houses having brick walls on the front and rear, with side walls in the basement and first story of brick, eight inches thick, and above them walls made with joists filled in with brick four inches thick and plastered, it was held to be competent to ask a builder whether they would or would not be called brick houses: Fowler v. Ætna Fire Ins. Co., 7 Wend. (N. Y.) 270. The Metropolitan Building Act, 18 and 19 Vict. c. 122 (Imp.), enacts that "every building shall be enclosed with walls constructed of brick, stone, or other hard and incombustible substances, and the foundations shall rest upon solid ground or upon concrete, or upon other solid sub-structure." In Stevens v. Gourley, 7 C. B. (N. S.) 99, Erle, C.J., said that the words were a distinct command to build the walls of incombustible materials, and a prohibition against building them of combustible materials. Section 19, s.-s. 1, of the last named Act provides that the roof of every building shall be covered externally with "slates, tiles, metal, or other incombustible materials." Where the roof of a building was covered externally with materials consisting of woven iron wire coated with an oleaginous compound which would ignite and burn away, leaving the iron work unimpaired, it was held that the roof was not covered with "incombustible materials" within the meaning of the Act: Payne v. Wright, [1892] 1 Q. B. 104. A contract for the erection of a building in contravention of the Acts 41 Vict. c. 6, and 41 Vict. c. 7, is illegal and cannot be enforced: Walker v. McMillan, 21 N. B. 31; 6 Can. S. C. R. 241; Spears v. Walker, 11 Can. S. C. R. 113; Stevens v. Gourley, 7 C. B. (N. S.) 99. By s. 9 of 41 Vict. c. 6, any dwelling house, etc., erected in contravention of the Act is declared to be a public nuisance. Section 10 provides as follows: "In addition to any indictment which may be found, or any action which may be brought for such nuisance, the person or persons who may erect or cause to be erected, or attempt to erect or cause to be erected, any such dwelling-house, etc., shall be liable to a penalty not exceeding twenty dollars, and to the further penalty of not less than ten dollars a day for each and every day on and during which such

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nuisance may be maintained or continued; and every such penalty shall and may be recovered with costs before the police magistrate of the city of St. John, on the information or complaint of the inspector of buildings of the said city or of any ratepayer thereof, by summary conviction, in the same manner and with like effect as other penalties are recovered and enforced before said police magistrate; and such fines and penalties shall, when collected, be paid into the hands of the chamberlain of the city of St. John, and form part of the funds of the corporation of the said city." By the Summary Convictions Act, c. 62, s. 13, C. S. N. B., "every information shall be laid within six months from the time when the matter thereof arose, unless already provided for by law." It would seem that the information could be laid at any time during the continuance of the erection, though more than six months have elapsed since its completion: London County Council v. Worley, [1894] 2 Q. B. 826. Where a statute creating an offence provides a remedy no other remedy can be pursued: Reg. v. Lovibond, 24 L. T. 357; 19 W. R. 753, decided under 25 & 26 Vict. c. 102 (Imp.), in amendment of the Metropolis Local Management Acts.

YEATS v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF ST. JOHN.

1878.

August 30.

City of St. John—Charter—Power to alter level of street—Injury to private property—Compensation—Injunction—Delay.

By the charter of the city of St. John, the corporation were given power to establish, appoint, order and direct, the making and laying out all other streets . . . heretofore made, laid out or used, or hereafter to be made, laid out and used, but also the altering, amending and repairing all such streets heretofore made, laid out, or used, or hereafter to be made, laid out or used in and throughout the said city of St. John and the vicinity thereof. . . . So always as such . . streets so to be laid out do not extend to the taking away of any person's right or property without his, her or their consent, or by some known laws of the said Province of New Brunswick, or by the law of the land. The charter is confirmed by 26 Geo. III. c. 46. By Act 41 Vict. c. 9, intituled "An Act to widen and extend certain public streets in the City of St. John," it was provided that Dock Street should be opened to a width of sixty-two feet by taking in twelve feet on its easterly side, and carrying the north-eastwardly line twelve feet to the eastward through its entire length from Market Square to Union Street, and that Mill Street should be opened to the same width from Union Street to North Street by widening its eastwardly line. The effect of widening Dock Street made it necessary either that Union Street should be lowered and graded to its level, or that Dock Street should be graded up to its level, and that if Union Street was lowered, George Street, opening off it, should also be lowered. The corporation, in January, 1878, decided to excavate and lower Union Street to the extent of twelve or thirteen feet after hearing the report of the city surveyor and the petitions of citizens for and against the cutting down of Union Street, and immediately thereafter entered upon the work by contractors. The plaintiffs were owners of a lot on the corner of Union and George Streets, upon which they had erected expensive business

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premises, and which, by the lowering of the streets, would be twelve or thirteen feet above them. When the work of cutting down Union Street was about two-thirds done, and approaching the plaintiff's premises, and after several months had elapsed from the time it was entered upon, the plaintiffs being unable to obtain compensation from the corporation, brought this suit for an injunction to restrain the continuance of the work.

Held, (1) That the corporation were unauthorized to cut down Union Street, and that the plaintiffs were entitled to compensation, for which they had a remedy at law; but (2) that the injunction should be refused on the ground of delay in the application.

The facts fully appear in the judgment of the Court.

J. J. Kaye, Q.C., and *H. H. McLean*, for the plaintiffs.

S. R. Thomson, Q.C., and *W. H. Tuck*, Q.C., for the defendants.

1878. August 30. WELDON, J.:—

This was an application for an injunction restraining the defendants from cutting down Union Street, in the city of St. John, whereby the plaintiffs' buildings will become utterly valueless—unless taken down and rebuilt at an expense of not less than $8,000 or $10,000.

It appeared by affidavits and papers in support of the application, and in answer thereto, that Union Street, on the north side of which the plaintiffs' buildings are erected, was laid out in the year 1816; that the streets on the south side thereof, in the city of St. John, are bounded on and by that street; that the streets in the northern part of the city also are bounded on and by the said Union Street. The plaintiffs are owners and occupiers of a lot bounded on the east corner of North Street, abutting on the said Union Street, and upon which expensive buildings have been erected. That the defendants, by the contractors, McGourty and McGuiggan, are excavating Union Street, and lowering the same to the extent of twelve or thirteen feet below its ordinary surface, whereby the plaintiffs are raised that number of feet above the street without any access to the same, and their property is thereby become valueless, unless these buildings are taken down and the lots are levelled to the extent of the said twelve or thirteen feet, to which Union

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Street is cut down. That the expense of so doing to the plaintiffs will cost a large sum of money, to the amount of eight or ten thousand dollars at the least; that the corporation refuse to make any compensation for the injury and damage which must arise to the plaintiffs; that the contract by the corporation with the other two defendants was entered into some time in January last; the work has been in progress and is now approaching the plaintiffs' premises, and they ask the interposition of the Court to restrain the corporation from continuing the work.

The corporation contend that this work is carried on by them under the powers vested in them by their charter; that the widening of Dock Street and Mill Street, on either side of Union Street, by the report of the city surveyor renders it necessary; that the Act does not authorize them to make compensation to persons to the eastward of Dock Street on Union Street; that the work of cutting down Union Street has been three-fourths done, and they believe the same is necessary for the convenience of traffic and travel in that part of the city.

The application for an order of injunction was resisted on two grounds:—

1st. That the corporation by their charter and Acts of the Legislature have an undoubted right and power to alter the grade of any street within the city, and this grading was in the exercise of this power, and in so doing they have not exceeded their power or acted arbitrarily, carelessly or oppressively; that they did this in discharge of a public trust conferred on them by their charter.

2nd. That the plaintiffs having delayed since January last, when the Common Council heard the petitions for cutting down the street and the petitions against it, and an order of the Common Council was made to proceed with the work—and the work having been two-thirds, at least, done—the Court will on these grounds not entertain the application.

At the close of the able arguments, which were addressed to me, and the several authorities cited, I was of opinion the delay which had taken place would not justify

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me in retaining the injunction; and therefore to prevent any inconvenience to the contractors and to the corporation I discharged the order; but upon the first ground I was rather inclined to the opinion that the plaintiffs had rights which the Court would protect had they come in proper time.

As to the first ground, I shall take up the charter and the several Acts.

By the 13th paragraph of the charter, vol. 3, Revised Statutes, page 999, "The said Mayor, Aldermen and Commonalty, and their successors, shall from time to time, and at all times hereafter, have full power, license and authority, not only to establish, appoint, order and direct the making and laying out all other streets, lanes, alleys, highways, water-courses, bridges and slips heretofore made, laid out, or used, or hereafter to be made, laid out and used, but also the altering, amending and repairing all such streets, lanes, alleys, highways, water-courses, bridges and slips heretofore made, laid out, or used, or hereafter to be made, laid out or used in and throughout the said city of St. John, and the vicinity thereof throughout the county of St. John, hereinafter mentioned and erected, and also beyond the limits of the said city, on either side thereof, so always as such piers or wharves so to be erected, or street so to be laid out, do not extend to the taking away of any person's right or property, without his, her or their consent, or by some known laws of the said Province of New Brunswick, or by the law of the land."

This charter was fully confirmed by Act of the General Assembly, 26 Geo. III. c. 46.

58 Geo. III. c. 12, restricted the Common Council to laying out any street of less width than 50 feet.

9 Geo. IV. c. 4. The preamble recites that in consequence of the irregularities of the ground upon which St. John is laid out, it is expedient to level the streets and that it is necessary to vest the corporation with power to allow steps or stairways to be erected to the extent of one-tenth of the street. This Act is continued to 1880.

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Act 3 Wm. IV. c. 13. The corporate powers are restricted to the city, and provide for an assessment of statute labour for repairs of streets.

Act 3 Vict. c. 2, authorized the widening of Dock Street after the fire of 1839, and provided for compensation.*

Act 18 Vict. c. 10, authorized the opening of a street called Canterbury Street.

Act 21 Vict. c. 43, enabled the corporation to effect certain improvements in streets. This Act authorized the corporation to borrow £5,000, and to contract for the cutting down, raising, levelling or improving any streets; but the powers of the Common Council are limited to contracting for the cutting down of streets to the extent of the money to be raised under the Act.

Act 23 Vict. c. 59, authorized the Common Council to appoint additional city surveyors.

Act 30 Vict. c. 73, authorized the borrowing of $12,000, to be applied to the cutting down, raising, levelling and improving the streets on the western side of the city of St. John.

Act 30 Vict. c. 74, authorized the paving of the sidewalks and footpaths on certain streets—one-half to be defrayed by the owner, and no sidewalk to be laid down until resolution of the Common Council was published four weeks before work commenced.

Act 32 Vict. c. 65, relates to the extending of Dorchester Street and compensates owners of land taken.

Act 41 Vict. c. 9, authorized the widening of certain streets and extending the same and providing for compensation.

By this Act Dock Street, which was 50 feet wide, was extended in width by taking 12 feet from off the owners on the eastwardly side thereof, from Market Square to Union Street, so that the north-eastwardly line should be distant throughout sixty-two feet from the present south-westwardly line of said street. Mill Street was to be opened to a width of 62 feet from Union Street to North Street. The north side of Union Street lying

* See also 3 Vict. c. 83.

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between Mill Street and Drury Lane (so called) was to be widened to the full width of that part of the north side of Union Street lying between Drury Lane and Smyth Street; and then it was directed how Smyth Street was to be widened. The Act made provision for compensation to all those affected by such widening. For Union Street as follows: The commissioners to determine what benefit the public derived by such widening to be paid by the Common Council, the remainder of such estimated benefit to be paid by the parties owning or interested in lands fronting on Union Street so widened or lying within the vicinity thereof.

It may be observed by this Act that Union Street is referred to as where the widening of Dock Street on the south side ends, and where the widening of Mill Street commences on the north side. The widening of Union Street on one side is below,—nearer to the waters of the harbour. Nothing in this Act has the least reference to the cutting down of Union Street to the eastward. The widening of Dock Street would approach to Union Street abruptly, unless sloped up the level of Union, but the grade of the 50 feet street before widening would be on the same grade as the other parts of Dock Street, and be levelled up to the line of Union Street where crossed to Mill Street.

There is nothing in the Act which rendered it a duty on the Common Council to cut down Union Street, which had been laid out in 1816, or to be so altered in 1878 as to produce such injury and damage to the owners of property abutting on Union Street, even supposing the words "but also the altering, amending and repairing all such streets," qualified by the words "so always . . or streets so to be laid out do not extend to the taking away of any person's right or property without his, her or their consent, or by the law of the land," authorized the corporation to cut down the street.

The Act of 1877 authorized the widening of Union Street on the north side, lying between Mill Street and Drury Lane, but is silent as regards any change in Union Street above Mill Street and Dock Street.

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Mr. Hurd Peters, the city engineer or surveyor, states in his affidavit that it was necessary to grade Union Street to some extent, and the grade proposed by the Common Council was the proper one; and the cutting down of George Street became necessary in consequence of the grading of Union Street.

This is what the plaintiffs more particularly complain of, and they contend the grading and cutting down of Union Street, in the manner contemplated to be done, was quite unnecessary, and not warranted or authorized by the charter or any Act of Assembly. That Union Street as laid out and used for the last 60 years was ample for the purposes required, and the cutting of Union Street, as now being done, will involve damages to the properties on the said street to a large sum of money; and that the expense of relaying water and sewerage pipes, and gas pipes, and the amount to the proprietors of property and citizens cannot be less than $50,000 to $75,000. Petitions from one hundred of the property owners and citizens interested in the locality were presented to the Common Council against the proposed cutting; a petition of about thirty ratepayers was presented in favour of the cutting.

It was contended by the defendants' counsel that the Common Council having exercised their discretion the Court will not interfere with it. But it must be borne in mind that the Council had exercised their discretion in laying Union Street in 1816; it had been improved, and parties owning land adjoining thereon had made improvements and acquired rights which ought not to be interfered with without great cause; that the discretion to be exercised in making changes and alterations in such cases, where rights of parties are involved, should have a regard to those rights, and substantial reasons be given for changes. The cutting down of Union Street involves the cutting down of George Street, which places the building of Mr. Foster fifteen feet above the level of the street, and to restore his buildings in the same condition as before will involve an outlay of $10,000. This shows a necessity that the discretion of the Common Council ought to be exercised with due

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regard to law and the rights of individuals, and there ought to be a power to control such decision when so exercised to the injury of property owners. But does the law or their charter authorize such cutting down on streets as has been done, of which plaintiffs complain? Most certainly not.

In *Leader* v. *Moxon* (1), it was laid down that if "Parliament intended to demolish or render useless some houses for the benefit of others, it would have given express powers for that purpose, and given an equivalent for the loss that any individual might have sustained thereby." This case has been doubted by some of the Judges, but has not been overruled, and has been spoken approvingly of by the late very distinguished Judge Willes.*

In *The Governor and Company of the British Cast Plate Manufacturers* v. *Meredith* (2), the action was for raising a street. The defendants acted as pavers of streets, and they raised the street in question 4 feet. An Act had been passed authorizing them to raise the street. By the 13th section of the Act, the commissioners were empowered to cause the said street to be paved, repaired, raised, sunk or altered; the 46th section authorized the commissioners "to make any allowance or pay part of the expenses incurred by the proprietors of any such house or building, in removing any of the obstructions, nuisances, or annoyances, as aforesaid, in such cases where the proprietors should or might be materially injured on account of the pavement being necessarily raised or lowered, and whereby such cases might be particularly entitled to some compensation."

Lord Kenyon, C.J., said: "If this action could be maintained, every turnpike Act, paving Act, and navigation Act, would give rise to an infinity of actions. If the Legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power the parties are without remedy, provided the

(1) 2 W. Bl. 924. (2) 4 T. R. 794.

* *Reg.* v. *Vestry of St. Luke's*, Law Rep. 7 Q. B. 148.

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commissioners do not exceed their jurisdiction. . . . I doubt the accuracy of the report of *Leader* v. *Moroni*." Fuller, J., based his decision on the section empowering the commissioners to give compensation, and *that express power had* been given to the commissioners to raise the pavement.

In this case *express power* by the Act was given the commissioners to raise the pavement. In such case they were only held liable in case of excess of jurisdiction and doing the work in an unskilful manner.

Boulton v. *Crowther* (3); *Sutton* v. *Clarke* (4); *Jones* v. *Bird* (5), are all to the same effect.

In *Callender* v. *Marsh* (6), the action was against the surveyor of the city of Boston for cutting down a street, which caused the plaintiff to sustain damage, but the Act of 1786, which gave the authority to the surveyor, was in express words, viz., "to dig down or raise a street"; the Court held that if he did it with discretion and not wantonly no action would lie. The Court further said, p. 434: "If the reducing or raising of streets which have been laid out for a number of years, and on which houses have been erected, should be made a matter of adjudication, like that of altering, widening or turning a street, and subject to the same provision for damages, the mischief would be cured. . . . Levelling a street is not anywhere found to be considered an alteration of it; nor do we find that the injury it may produce has been compensated."

This case turned upon the powers of the Legislature of the State authorizing the act to be done by the surveyors, without compensation, as being in conflict with the constitution of the State.

In *Bigg* v. *The Corporation of London* (7), a public body had been empowered by Act of Parliament to lower and alter the level of the roadway of the Thavies Inn, so as to give access to the Holborn Viaduct, and in carrying out this work had exceeded their powers by cutting into

(3) 2 B. & C. 703.
(4) 6 Taunt. 31.
(5) 5 B. & Ald. 844.
(6) 1 Pick. 417.
(7) Law Rep. 15 Eq. 376.

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the plaintiffs' cellars, without any notice to treat for plaintiffs' house or offer to assess compensation for it. A bill was filed by the plaintiffs for the purpose of restraining the corporation from remaining in plaintiffs' cellars, or other parts of plaintiffs' house, until compensation was made or it had been ascertained what damage would be done and paid for, and that the defendants might be ordered to reinstate plaintiffs' cellars to the state and condition they were in previously to the commencement of the defendants' occupation.

At the hearing of the cause in January, 1872, the Court being of opinion that the corporation, in carrying out the works authorized by the Act, had exceeded their powers by cutting through the plaintiffs' cellar without taking their house, a decree was made for a perpetual injunction as prayed by the bill, with costs to be paid by the defendants, and in case the parties differed as to the damages an enquiry by the Clerk was to be made.

The damages were assessed. The question arose as to the sum of £150 for depression of the trade carried on by one of the plaintiffs caused by defendants' works. This sum the Court also allowed.

Sir James Bacon, V.C., in referring to that sum, said: "The case I have to deal with here is that of a corporation who are entitled to lower the surface of the ground in Thavies Inn. That power is given them by statute, and it cannot be questioned. In the course of doing it they inflict an injury and wrong upon the plaintiffs, and for that they are required to make compensation, and the amount of compensation for that injury is assessed and is not in dispute." His Lordship then adverted to the depression of trade carried on by one of the plaintiffs during the progress of the work, which he thought was too remote.

The case very clearly shows that if the corporation has been guilty of any excess in carrying into effect the widening of Dock Street, which rendered the cutting down of Union Street injurious to the plaintiffs, they are entitled to the injunction order; but if they had no

authority to alter and cut down Union Street, an injunction order would be granted if applied for in proper time. The corporation are, doubtless, liable for all the damages sustained or that may be sustained by such act.

In *Glover* v. *North Staffordshire Railway Company* (8), Mr. Justice Wightman says: "Suppose no Act of Parliament had passed, and that had been done which has been done, would not an action have been maintainable? I think it would."

In *The Grocers' Company* v. *Donne* (9), the commissioners were bound to act upon the recommendation of the surveyor of works under the 4 Geo. IV. c. 114, and the defendants' counsel contended the Common Council were bound to act upon the report of Mr. Hurd Peters, the city engineer. I am unable to find in the charter or any Act of Assembly such power or immunity given to the report or recommendation of an engineer; there is no officer of that nature named in the charter, only city surveyor—no effect is given to those certificates—the order of the council of November 7, 1877, is based upon the report of the engineer upon his plans, upon which the Common Council considered it necessary by the widening of Dock Street twelve feet to cut down Union Street—a slight alteration in the grade of this part would bring it to the level of Union Street, and rendered the cutting down of Union and George Streets necessary. I therefore come to the conclusion that the act of cutting down and lowering Union Street was not authorized by the charter which gave the Common Council in the 13th paragraph, page 999, vol. 3, Rev. Stat., power of *altering, amending or repairing*—and the Act 9 Geo. IV. c. 4, did not extend any power beyond what is there expressed. The Act 21 Viet. c. 43, authorized "the cutting, raising, levelling or improving any street," and confined it to the expenditure of the £5,000 therein decided to be raised for that purpose. The Act 30 Viet. c. 73, for the "cutting down, raising, levelling, and improving the streets on the western side of the harbour," is a recognition of the

(8) 16 Q. B. 912.

(9) 3 Ring. N. C. 34.

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absence of such authority without legislation to give it. So in 30 Vict. c. 74, as to the paving of sidewalks; and it is very clear that the Act 41 Vict. c. 9, did not assist; on the contrary, it would rather lead to the conclusion that in bringing up the width of 12 feet on Dock Street to Union Street, it was not done in a judicious manner if it rendered the cutting down of the street to the extent which the surveyor reported or the Common Council authorized. The Legislature having authorized the widening of Union Street, between Mill Street and Drury Lane, and the Act being silent in regard to any part of Union Street east of Dock Street, appears to me conclusive that no further change in Union Street was contemplated and certainly was not authorized.

In a recent case in England, *Reg.* v. *Vestry of St. Luke's* (10), where the owner of land was complaining of the injury to his property by reason of a change of level in the street, Kelly, C.B., said: "I cannot but observe in a case like this, that, wherever it appears that the case is one in which it is plain that very serious injury may have been done to the premises of the party claiming compensation, I think we must put a liberal construction upon the Acts of Parliament before us in determining the points raised. Unless it is perfectly clear that the language of the different Acts is not sufficiently ample or extensive to embrace the case in question, we ought to hold that a party whose property is injuriously affected, and to a very great extent, by the operations of a public body, shall be entitled in a Court of law to compensation."

Mr. Justice Willes, in giving judgment in this case, refers with approbation to the judgment of the Court in *Leader* v. *Moxon*.

I am unable to discover from any case in the English reports in reference to the cutting down of streets, that where they are to be cut down special authority is not required and given by the Acts giving the power, and great care must be taken; some of the Acts require special reports of engineers, and the Acts particularly refer to

(10) L. R. 7 Q. B. 145.

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such reports being acted upon and by so doing are justified, if no carelessness or negligence takes place; but there is no such efficacy given to a report of a surveyor or engineer to the Common Council of the city of St. John, by their charter, and no Act of the Legislature has done so; and therefore it may be shown that the cutting down of Union Street might be done without injury to property owners. On the first ground I am of opinion that the Common Council was not authorized to cut down Union Street, and cause damage to the plaintiffs' property without compensation, and that where they have sustained damage their remedy is at law. See *Roberts* v. *Read* (11).

As to the second point, I am of opinion the plaintiffs should have come to this Court before the defendants had expended so much labour and money. Had the plaintiffs come earlier to this Court, before this work had been commenced, and if the opinion I entertain of the powers of the corporation being limited and unauthorized to cut down this street is correct, steps doubtless would have been taken to test their powers in respect to cutting down Union and George Streets, as contemplated by the Common Council, and compensation would doubtless have been provided for the parties injuriously affected by the contemplated works; but this has not been done; the defendants have been allowed to proceed with the work; the plaintiffs must take all the consequences of their proceeding. I therefore refuse to continue the injunction.

As regards the costs, if I could arrive at the conclusion that the widening of Dock Street twelve feet could have rendered this work at all necessary, I might have granted costs, but in view of the question arising in connection with a street like Union Street, which has existed for sixty years, upon which buildings have been erected with the supposition that the street was permanent, and in view of the injury the plaintiffs will sustain, I must refuse costs to the defendants.

The power of the City of St. John under its charter and amending Acts to alter the level of streets was fully recognized in the later decision of Puttison v. Mayor, etc., of St. John,

(11) 16 East, 215.

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Cassels Dig. (ed. 1893) 174, reversing the decision of the majority of the Court below, 2 P. & B. 636. In the Court below Daff, J., in delivering the judgment of the minority of the Court, said: "I think that the raising of a street in front of a person's property is not such an interference with the rights of property as will come within the restrictive clause in the charter. The charter empowers the defendants: 1st, to make and lay out streets other than those designated on the original plan of the city; 2nd, to alter, amend and repair all the streets already laid out, and also all those which shall be thereafter land out, 'so always as such streets so to be laid out do not extend to the taking away of any person's right of property, without his consent or by the law of the land.' The qualification of the defendants' authority applies only to new streets 'to be laid out.' No new street could be laid out and made without taking a portion of the land which had already been granted to the inhabitants; wherefore it must not be done, unless it be according to law or with the owner's consent. But every owner of land in the City of St. John, when he acquired his title to it, knew 'the irregularities of the ground upon which that city was laid out,' and the necessity of making various and extensive 'alterations in the levels of the streets,' which are referred to in 9 Geo. IV., c. 4; and he purchased his property subject to all the inconveniences which might result from any such alterations. In view of the character of the ground upon which the city is built, the power given by the charter to 'alter and amend' the streets involved, necessarily, the authority to alter their levels. The authority to do so is recognized, not only by the 9 Geo. IV. c. 4, but also by 21 Vict. c. 43, s. 4, and 30 Vict. c. 34. Apart from any legislative recognition at all, the charter itself is amply sufficient for that purpose." In Williams v. City of Portland, 29 N. B. 1, and 19 Can. S. C. R. 159, power to the defendants to open, lay out, regulate, repair, amend and clean streets was held to include power to alter the level of a street. The plaintiffs in Yeats v. Mayor, etc., of St. John, subsequently to the decision in the case brought an action at law for damages against the corporation, but, upon decision being given in Pattison v. Mayor, etc., of St. John, allowed the case to be taken down to trial by proviso when verdict was entered for the defendants.

"Parliament has constantly thought fit to direct or authorize the doing of things which but for that direction and authority might be actionable wrongs. Now a man cannot be held to be a wrong-doer in a court of law for acting in conformity with the direction or allowance of the supreme legal power in the State. In other words, 'no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one.' The meaning of the qualification will appear immediately. Subject thereto, 'the remedy of the party who suffers the loss is confined to recovering such compensation (if any) as the Legislature has thought fit to give him:' Geddis v. Proprietors of Bann Reservoir, (1878) 3 App. Cas. 455, per Lord Blackburn; Caledonian Ry. Co. v. Walker's Trustees, (1882) 7 App. Cas. 293; Mersey Docks Trustees v. Gibbs, (1864-6) L. R. 1 H. L. 112. Instead of the ordinary question whether a wrong has been done, there can only be a question whether the special power which has been exercised is coupled, by the same authority that created it, with a special duty to make compensation for incidental damage:" Pollock on Torts (4th ed.) 116. And see London & N. W. Ry. Co. v. Bradley, 3 MacN. & G. 336, 341, per Lord Truro; and Cracknell v. Mayor,

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etc., of Thetford, L. R. 4 C. P. 629; 38 L. J. C. P. 353, "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute has provided it; and this is clear on the legal presumption that the act creating the damage being within the statute must be a lawful act," per Cottenham, L.C., Duncan v. Findlater, 6 Cl. & F. 894, 908. If no compensation is given, that affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others: Hammersmith Ry. Co. v. Brand, L. R. 4 H. L. 171; Metropolitan Asylum District v. Hill, 6 App. Cas. 193; 50 L. J. Q. B. 353. In London & N. W. Ry. Co. v. Evans, [1893] 1 Ch. 28, Bowen, L.J., said: "The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it sees fit to do so, but it is not likely that it will be found disregarding it, without plain expressions of such a purpose."

Under Acts giving compensation for injuries to private property from the execution of works of a public nature it has been held that the landowner is entitled to compensation if the means of access to his house or land from the highway has been rendered less convenient from the highway being raised or lowered: Chamberlain v. West End of London, etc., Ry. Co., 2 B. & S. 605; 32 L. J. Q. B. 173; Reg. v. Vestry of St. Luke's, L. R. 6 Q. B. 572; 7 Q. B. 148; 41 L. J. Q. B. 81; Adams v. City of Toronto, 12 O. R. 243; Yeomans v. County of Wellington, 43 U. C. Q. B. 522; or if the house has been permanently depreciated in value from the highway being narrowed: Beckett v. Midland Ry. Co., L. R. 3 C. P. 82; 37 L. J. C. P. 11. Where a local Board of Health gave notice to the owner of a house abutting on a street to level and pave it, and, in default of the owner, did the work themselves, and, by the alteration so caused in the level of the street, the access to the house was rendered difficult and dangerous, it was held that the owner was entitled to compensation: Reg. v. Wallasey Local Board, L. R. 4 Q. B. 351.

Statutory compensation is given only for acts authorized by statute, and in respect of which the right of action is taken away: Turner v. Sheffield, etc., Ry. Co., 10 M. & W. 425; Broadbent v. Imperial Gaslight Co., 26 L. J. Ch. 276. If damage is caused by an act which, notwithstanding the statute, is not made lawful, the remedy by action is not taken away: Brine v. Great Western Ry. Co., 31 L. J. Q. B. 101; Clowes v. Staffordshire Potteries Waterworks Co., L. R. 8 Ch. 125; 42 L. J. Ch. 167; Cripps on Compensation, 160. If a party is aggrieved by an act done in pursuance of a statute he must follow the statutory remedy, and cannot resort to an action for damages: Watkins v. Great Northern Ry. Co., 16 Q. B. 968; Jolly v. Wimbledon, etc., Ry. Co., 1 B. & S. 807; 31 L. J. Q. B. 96; Chamberlain v. West End, etc., Ry. Co., 2 B. & S. 605; 32 L. J. Q. B. 173; Boyfield v. Porter, 13 East, 208; Mayor, etc., of Blackburn v. Parkinson, 1 E. & F. 1; Adams v. City of Toronto, 12 O. R. 243. If the powers of the Act have been exceeded, or are not strictly pursued, or the act authorized to be done has been negligently or carelessly done, and the damage is the result of negligence,

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an action for damages must be brought, and compensation cannot be claimed: Whitehouse v. Fellows, 10 C. B. (N. S.) 765; 30 L. J. C. P. 305; Lawrence v. Great Northern Ry. Co., 20 L. J. Q. B. 296; 16 Q. B. 643; Clothier v. Webster, 12 C. B. (N. S.) 790; 31 L. J. C. P. 316; Brownlow v. Metropolitan Board, 16 C. B. (N. S.) 546; 33 L. J. C. P. 233; Brine v. Great Western Ry. Co., 31 L. J. Q. B. 101; Reg. v. Darlington Local Board, 5 B. & S. 515; 6 Ib. 562; 33 L. J. Q. B. 305; 35 Ib. 45; Biscoe v. Great Eastern Ry. Co., L. R. 16 Eq. 636. And see City of New Westminster v. Brighouse, 20 Can. S. C. R. 520.

"An owner is not injuriously affected or entitled to compensation unless the damage is the consequence of an act which would have given a right of action, if the works causing such damage had not been authorized by statute:" Cripps on Compensation, 161. And see in addition to cases there cited: New River Co. v. Johnson, 2 E. & E. 435; Reg. v. Metropolitan Board, 3 B. & S. 710; 32 L. J. Q. B. 105; Hull v. Mayor of Bristol, L. R. 2 C. P. 322; 36 L. J. C. P. 110; Reg. v. Vaughan, L. R. 4 Q. B. 190; Ricket v. Metropolitan Ry Co., L. R. 2 H. L. 175; 36 L. J. Q. B. 205; City of Glasgow Union Ry. Co. v. Hunter, L. R. 2 Sc. App. 78. See, however, Fritz v. Hobson, 14 Ch. D. 542; 49 L. J. Ch. 321.

Where an Act empowered the undertakers of a river to clear, scour, and deepen the river, and to lay dredgings taken from it on the banks or lands adjacent to the places where the same should be taken out, giving satisfaction to the owners of such lands for any damage thereby occasioned, it was held that payment of compensation by the undertakers was not a condition precedent to the exercise of their powers: Bentley v. Manchester, etc., Ry. Co., [1891] 3 Ch. 222. And see Harding v. Township of Cardiff, 2 O. R. 329.

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August 6.

GASKIN v. PECK ET AL.

Married woman—Contracting with reference to separate estate—Chapter 72, C. S. N. B.

Where it is sought to charge the separate property of a married woman with a debt contracted by her, it must be shown under chapter 72, C. S. N. B., that she expressly contracted with respect to her separate property.

Where it is sought to charge the personal property of a married woman, her consent thereto must be given under chapter 72, C. S. N. B., and a joint and several note signed by her and her husband in payment of the husband's debt, is not such a consent as is required by the Act.

Observations that property belonging to a married woman is made her separate property by chapter 72, C. S. N. B.

The facts are fully stated in the judgment of the Court.

R. A. Borden, for the plaintiff.

The defendants did not appear.

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The bill in this suit alleges that the defendant, Annie E. Peck, wife of Judson N. Peck, on or about the 9th of June, 1877, purchased from the plaintiff, in her own name and in her own right, and for her sole and separate use, a horse for $90, upon which she paid $40, and that she and her husband gave to the plaintiff their joint and several promissory note for the balance, dated the 12th of June, 1877, payable on the 6th of July following, and that no part of the note has been paid. The bill further alleges that the plaintiff is informed and believes that the female defendant has other separate property than the said horse, and that it should be charged with the payment of the plaintiff's claim; that the defendant Judson N. Peck has no real or personal property in his own name, and that the plaintiff is without remedy, unless her claim is paid out of the separate property of the female defendant.

Section 1 of chapter 72, Consolidated Statutes, enacts as follows: "The real and personal property belonging to a woman before, or accruing after marriage, except such as may be received from her husband while married, shall vest in her and be owned by her as her separate property, and it shall be exempt from seizure or responsibility in any way for the debts or liabilities of her husband, and it shall not be conveyed, encumbered or disposed of during the time she lives with her husband, without her consent, testified, if real property, by her being a party to the instrument conveying, encumbering or disposing of the same, duly acknowledged as provided by the laws for regulating the acknowledgments of married women; and after her abandonment or desertion by her husband, or upon her being compelled to support herself, or upon her living separate and apart from her husband, not wilfully and of her own accord, although neither deserted, nor abandoned by him, then her real and personal property may be disposed of as provided for in this chapter, as if she were a *feme sole*, but her separate property shall be liable for her own debts contracted before marriage and for judgments against her husband for her wrongs."

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Section 2 makes provision for a married woman suing in her own name in cases therein mentioned. Section 3 puts her in the position of a *feme sole* as to her property in the events occurring as therein stated, and section 4 excludes any interest in the husband in the wife's property in the cases it mentions.

In the present case the husband and wife appear to be living together. It is not suggested that the wife is compelled to, or that she in any way supports herself; nor is there any intimation that credit was given to the wife in respect to or in consequence of her separate property. Indeed the contrary is rather to be inferred, as in paragraph 4 of the bill it is alleged "that as the plaintiff is informed and verily believes she (the defendant) has other sole and separate property, and that such property ought to be chargeable with the payment of the amount of the said promissory note and interest due thereon, and the plaintiff ought to receive and recover the same from the said Annie E. Peck's property." Paragraph 5 is, "That the plaintiff is informed and verily believes that the said defendant, Judson N. Peck, has no property, real or personal, in his own name, and that it would be impossible to recover the amount due on said promissory note from the said Judson N. Peck." The plaintiff does not say the female defendant had any separate property when the note was given, nor does she say when or from whom she received information of her having it; nor what is the probable value of such property; nor how or from whom she received it. If received from her husband it would be liable for his debts under the first section of the Act quoted. Plaintiff stating she is informed of the fact she puts forward without saying when she was informed, induces me to think she was not aware of the existence of such separate property, and had no idea that the female defendant was contracting with respect to her separate property when the note was given. Her broad allegation that the separate property ought to be holden for the amount might have been materially fortified by a statement to the effect that it was understood and agreed that the separate property should be looked to for liquidating the amount. If there

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was any understanding to that effect it certainly would have been more satisfactory than giving the Court the benefit of her legal opinion that it is holden and chargeable with the amount. It may be the husband has ample property to pay the amount, and it is not stated he had not when the note was given. The 5th paragraph is that she is informed and believes that the husband has no property, real or personal, in his own name, not saying by whom or when so informed, or giving us the slightest means to judge of the correctness of her information, or whether there is anything to justify her belief. This is most unsatisfactory; besides, for aught appearing to the contrary, the husband may have a registered title to real estate amply sufficient to pay the amount. There is no statement of any search having been made. The information, vaguely as it is stated, only professes that he has no property in his own name; he may have property in another person's name, which would be available under execution. See section 10, c. 47, Consolidated Statutes. To the plaintiff's somewhat reckless statement that it would be impossible to recover the amount due from the husband I give no weight.

The main question as to the liability of the wife's separate estate to payment of the debt is one, no doubt, of much importance.

Johnson v. *Gallagher* (1), is a very leading case. Lord Justice Turner's judgment, at page 508, is quoted with approval in *Picard* v. *Hine* (2), and in *Butler* v. *Cumpston* (3), by Sir R. Malins, V.-C. At page 509, Lord Justice Turner says: "It is to be observed in the first place that the separate estate against which these rights and remedies exist and are to be enforced, is the creature of Courts of Equity, and that the rights and remedies themselves therefore can exist and be enforced in those Courts only." Under our law a married woman is in no wise beholding to a Court of Equity for her separate property rights. They are absolutely given to her by statute, and, I think, this position of matters with the

(1) 3 DeG F. & J. 491. (2) Law Rep. 5 Ch.
(3) Law Rep. 7 Eq. 20.

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provisions contained in the first section of c. 72, Consolidated Statutes, already quoted, to which I shall in the course of my remarks refer, most materially alters the liability of a married woman's estate. When the right depended upon the Court of Equity, that Court might very reasonably impose its views of doing equity upon the holder of the estate of its own creation, but when the right is created by statute, to my mind a marked difference arises. Lord Justice Turner proceeds: "The Courts of law recognize in married women no separate existence; no power to contract, and, except for some collateral and incidental purposes, no possession or enjoyment of property separate and apart from their husbands. They deny to married women both the power to contract and the power to enjoy." Our statute does recognize such separate existence; it gives large protective powers and absolutely protects the married woman's property from the slightest interference or control of her husband, in several specified cases, and gives her the absolute disposal of it, quite irrespective of the husband, by will, gift, grant, mortgage or deed, in the same manner as if she were a *feme sole*. In the instances provided for, her separate property shall be at her disposal, and not subject to the debts, interference or control of her husband. I do not specify the particular instances referred to in the Act. To continue the judgment of Lord Justice Turner: "Courts of Equity, on the other hand, have, through the medium of trusts created for married women, rights and interests in property, both real and personal, separate from and independent of their husbands. To the extent of the rights and interests thus created, whether absolute or limited, a married woman has in Courts of Equity power to alienate, to contract, and to enjoy, in fact, to use the language of all the cases from the earliest to the latest, she is considered in a Court of Equity as a *feme sole* in respect of property thus settled or secured to her separate use. It is from this position of married women, and from the rights and powers incident to it, that the claims of creditors against separate estates of married women have arisen. It has not, so far as I am aware, ever been disputed that married

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women may incumber their separate estates by mortgage or charge. When any question has arisen on such securities, the question has been not on the right to create the security, but upon the circumstances under which it has been created, as in *Mores* v. *Huish* (4), a case which I take to have been decided wholly upon the circumstances. Again, there are very many cases which have established that the bonds, bills of exchange, and promissory notes of married women are payable out of their separate estates. There has, indeed, been much question as to the mode in which these instruments take effect against the separate estate, but that in some mode or other they take effect against it cannot upon the authorities be denied." At page 514 his Lordship says: "The weight of authority seems to be in favour of the liability" (that is of the separate estate for general engagements). "I think, too, that the principle on which all the cases proceed, that a married woman in respect of her separate estate is to be considered as a *feme sole*, is also in favour of it; and upon the whole, therefore, I have come to the conclusion that not only the bonds, bills and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the Statute of Frauds may interfere where the separate property is real estate. I am not prepared to go the length of saying that the separate estate will, in all cases, be affected by a mere general engagement. The cases of *Jones* v. *Harris* (5), and *Aguilar* v. *Aguilar* (6), show that the engagement which, if the married woman was a *feme sole*, the law would create for repayment of the consideration of a void annuity, would not affect it. It seems to follow, that to affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband, might not, as I apprehend, affect it in the case

(4) 5 Ves. 692. (5) 9 Ves. 493. (6) 5 Madd. 414.

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of a married woman living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term 'general engagement,' when applied to a married woman, seems to import something more than a mere contract, for neither in law nor in equity can a married woman be bound by contract merely: *Aylett* v. *Ashton* (7). According to the best opinion which I can form of a question of so much difficulty, I think that in order to bind the separate estate by a general engagement it should appear that the engagement was made with reference to and upon the faith or credit of that estate, and that whether it was so or not is a question to be judged of by this Court upon all the circumstaces of the case. Lord Langdale, addressing himself to this question in *Tullett* v. *Armstrong* (8), expresses himself thus: 'It is perfectly clear that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate, and therefore the inference is conclusive that there was an intention, and a clear one, on her part that her separate estate, which would be the only means of satisfying the obligations into which she entered, should be bound. Again I apprehend it to be clear that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act. But in a case where she enters into no bond, contract, covenant or obligation, and in no way contracts to do any act on her part where the instrument which she executes does not purport to bind or to pass anything whatever that belongs to her, and where it must consequently be left to mere inference

(7) 1 My. & C. 105.

(8) 4 Beav. 319.

whether she intended to affect her estate in any manner or way whatever, the case is entirely different either from the case where she executes a bond, promissory note or other instrument, or where she enters into a covenant or obligation by which she, being a married woman, can be considered as binding her separate estate.'" At page 518 his Lordship says: "There has been much question in the cases on what grounds the Court has subjected the corpus of the property to the debts; in most, if not all of these cases, the liability of the corpus has been put upon the ground that the instruments by which the debt was created or secured operated as executions of the power of appointment, but it seems clear that such instruments cannot operate as appointments in the strict sense of the term." Referring to *Owens* v. *Dickenson* (9) he continues: "Lord Cottenham, after giving his opinion that transactions of this description have no resemblance to the execution of powers, has said that what they are it is not easy to define, and no doubt there is much difficulty in defining them. Perhaps the nearest approach to a definition of them may be that they are transactions which create a debt payable out of the separate estate, and out of that only, and which in that sense, but in that sense only, have the character of appointments, and this, perhaps, is what Sir John Leach may have meant in *Field* v. *Sowle* (10), where he speaks of the Court acting on the security of the wife, not as an agreement to charge her separate property, but as an equitable appointment. In addition to what has been said in the cases with reference to such transactions taking effect as appointments, I may observe that it is difficult to see why, if they do so take effect, the creditors should not be entitled to immediate payment out of the corpus, although it has been uniformly held they have no such right.

"The doctrine of appointment seems to me, however, to be exploded, *Owens* v. *Dickenson* (11), and *Anonymous* (12), and it is scarcely less clear that the transactions do not create any lien or charge on the separate

(9) Cr. & Ph. 48.
(10) 4 Russ. 12.
(11) Cr. & Ph. 48.
(12) 18 Ves. 258.

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estate. It may well be asked, then, how do they operate? I think the answer to this question is to be found in *Hulme* v. *Tenant* (13). Where a man contracts a debt both his person and property are by law liable to the payment of it. A Court of Equity having created the separate estate, has enabled married women to contract debts in respect of it. Her person cannot be made liable either at law or in equity, but in equity her property may." At page 521, "The defendant Jane Gallagher, at the time when the goods for which the plaintiffs claim to be paid were ordered and furnished, was living separate from her husband, and the evidence, I think, shows that the tradesman who supplied the goods supposed and believed that she had separate estate, and dealt with her upon that assumption. So far therefore as they were concerned they dealt on the footing of separate estate. How was it then on the part of the defendant Jane Gallagher? She was, I have said, living separate from her husband, and had separate estate, and I think that, where under such circumstances a married woman contracts debts, the Court is bound to impute to her the intention to deal with her separate estate unless the contrary is clearly proved. The Court cannot impute to her the dishonesty of not intending to pay for the goods which she purchased. The circumstances preclude the inference that she expected her husband to pay, and in this particular case it is impossible that she could so intend, as she was actually supporting her husband."

The extensive quotations from *Johnson* v. *Gallagher* I have made show that previous to the decision of that case in equity the separate property of a married woman would be reached where she has given a promissory note (among other instances given), and that case establishes the right to proceed against the separate estate for general engagements in the instances specified which have been already mentioned. In *La Touche et al.* v. *La Touche* (14), it was held that a promissory note given by a married woman as a security for advances made to her

(13) 1 Bro. C. C. 15.

(14) 34 L. J. Ex. 85.

husband, and which in equity binds her separate estate, is a good cause for another promissory note given by her after her husband's death for a balance then due, although the former note is barred by the Statute of Limitations. The fact that the debt had been contracted during coverture, either as principal or surety for herself or for her husband, or jointly with him, seems to have been ordinarily held *prima facie* evidence to charge her separate estate without any proof of a positive agreement or intention to do so: Story's Eq. Jur., sec. 1400.

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In sec. 1401 (*a*) the views of the learned author upon *Johnson* v. *Gallagher* are thus expressed: "Not many years back, this subject underwent a careful examination in the Court of Chancery Appeal; and after a thorough revision of the leading cases upon the subject from the earliest period, Lord Justice Turner, who delivered the leading opinion, came to the conclusion that a Court of Equity having created for married women a separate estate has enabled them to contract debts in respect of it, and that their separate estate may be subjected to the payment of such debts; and that a Court of Equity will give execution against it. But it was there held that something more is necessary to bind the separate estate of a married woman than the mere existence of such facts as would create a debt against a single woman. It should appear that an engagement was made with reference to and upon the faith and credit of the estate. And where a married woman, living apart from her husband and having separate estate, contracts debts, the Court will impute to her the intention of dealing with her separate estate unless the contrary is shown." The section concludes: "But where the wife becomes a party to an accommodation note, as surety merely, her separate estate is not liable for the payment of it unless she expressly change it for that purpose," citing *Willard* v. *Eastham* (15) All of the cases refer to the separate estate of the married woman being the creation of a Court of Equity, and being such a Court of Equity has power and right to deal with it. As I have before

(15) 15 Gray, 328.

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mentioned, in this Province such rights are created by statutory enactment, and in dealing with the separate property we must be governed by such statutory provisions. Such property is thereby declared to be exempt from seizure or responsibility in any way for the debts or liabilities of her husband, and it shall not be conveyed, encumbered or disposed of during the time she lives with her husband without her consent, testified, if real property, by her being a party to the instrument conveying, encumbering or disposing of the same, duly acknowledged as provided by the laws for regulating the acknowledgments of married women. The plaintiff has not informed us whether the separate property he refers to is real or personal property, but if personal property, her consent expressed in some way is necessary, the statute says testified. This is a debt of the husband; the wife is incapable of contracting a debt at law outside of what is provided for by our statute. Then what evidence is there of her consent? The giving the note is not, in my opinion, such consent, any more than the husband's giving a note would amount to a consent that his property should be taken. If you get a judgment against the husband, you can take any property of his that may fortunately be discovered for the purpose, and this, whether with consent or otherwise, to affect the married woman's property for a liability of this description, I think there must be an express consent of which there is no evidence. The statute says, "consent testified, if real property," etc., etc. She is living with her husband; at all events it is not hinted that she is not; it does not appear that there was any understanding that her separate property was to be liable, or that any credit was given in any way to such separate property. In the absence of such consent, and I think an express consent is necessary, I am not prepared to make a decree to charge the separate property of the married woman.

See *Lea* v. *Wallace*, 33 N. B. 492; and on appeal to the Supreme Court of Canada, not yet reported.

ARBUTHNOT v. THE COLDBROOK ROLLING MILLS COMPANY.

1880.
January 8.

Practice—Appearance after notice to take bill pro confesso—Costs —chapter 49, C. S. N. B., section 29.

Under section 29 of chapter 49, C.S.N.B., a defendant not appearing within one month after the filing of the bill, but seeking to appear before motion is heard to take the bill *pro confesso* for want of an appearance, will only be allowed to do so on offering to pay the costs of the notice of motion and undertaking to answer within the time he would have had had he properly appeared.

The facts fully appear in the judgment of the Court.

G. Sidney Smith, for the plaintiff.

G. G. Gilbert, Q.C., for the defendant.

1880. January 8. PALMER, J.:—

This was a motion to take the bill *pro confesso* against The Coldbrook Rolling Mills Company in this suit. It appears that the summons was duly served forty days previous to the filing of the bill; that the bill had been on file since the 2nd of December last; that thirty days had elapsed from the filing of the bill without any appearance, plea, answer or demurrer having been filed; but that on the 6th of January, just previous to the motion being made in Court, an appearance was filed for the defendants. The practice of the Court, which was established under section 7, chapter 2, chapter 18 of the second volume of the Revised Statutes, has hitherto been to allow an appearance to be entered at any time before the motion was made. This practice has now been altered by the 29th section of chapter 49, Consolidated Statutes (1).

(1) Section 29. "If the defendant in any suit shall not appear within one month after filing of the bill, any Judge at any monthly sitting may, on affidavit of the facts, and on production of the Clerk's certificate of the filing of the bill, and the non-appearance of the defendant, be moved that the said bill be taken *pro confesso* against such defendant, and the same shall be ordered without further order or proof." See now section 32 of The Supreme Court in Equity Act, 1890 (53 Vict. c. 4).

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which is quite different from the section repealed by it, and admitting of a different construction. The practice now is that an appearance must be filed within the time required by the statute, and if a defendant seeks to appear after that time, and before motion made, he ought to offer to pay the plaintiff the costs of the notice of motion and to answer within the time he would have been allowed if he had appeared in proper time, or he may make special application on such terms as the Judge may under the circumstances direct. In reference to the present motion, I regret that I cannot grant it, but I do not feel justified in enforcing the new practice of the Court without notice to practitioners. I direct that the defendants file their answer within the time they should have done had they appeared, and that the costs of this motion be costs in the cause.

By the 76th Chancery Order of May, 1845, "Upon the execution of an attachment for want of answer against any defendant, or at any time within three weeks afterwards, the plaintiff may cause such defendant to be served with a notice of motion to be made on some day not less than three weeks after the day of such service, that the bill may be taken *pro confesso* against such defendant; and thereupon, unless such defendant has in the meantime put in his answer to the bill, or obtained further time to answer the same, the Court, if it so thinks fit, may order the bill to be taken *pro confesso* against such defendant, either immediately or at such time or upon such terms, and subject to such conditions, as, under the circumstances of the case, the Court shall think proper." Under this rule it was held that the Court might order the costs of the motion to be paid by the defendant, though he put in an answer before it was made: Spooner v. Payne, 2 De G. & Sm. 439. Where the right of a party to an order for which he has given a notice of motion is intercepted by a step taken by the other side, he is entitled to his costs, but he should not bring on the motion, if the costs then incurred are tendered: Dan. Ch. Pr. (4th Am. ed.) 1601, citing Newton v. Ricketts, 11 Beav. 164. See notes to Manchester v. White, *post*, p. 59.

CHASE v. BRIGGS.

1880.
May 25.

(No. 1, post, p. 80).

Practice—Cause at issue—Interrogatories by defendant—Chapter 49, C. S N. B., ss. 31, 37.

An application to set a cause down for hearing cannot be made until fourteen days after the replication is filed, the defendant having that time, under sections 31 and 37, chapter 49, C. S. N. B., in which to file interrogatories.

The facts appear in the judgment of the Court.

J. J. Kaye, Q.C., for the plaintiff.

D. S. Kerr, Q.C., for the defendant.

1880. May 25. PALMER, J.:—

In this case the replication was filed on the 24th of January last. On the 23rd the plaintiff presented a petition to me alleging that the cause was at issue, and on which I made an order to set the cause down for hearing for the first Tuesday in March then next.

The plaintiff alleges that he gave defendant's solicitor notice of such hearing, and that such notice was served by Mr. Straton, the clerk of the plaintiff's solicitor, shortly after the replication was filed, and this is proved by the positive affidavit of such clerk, and is as positively denied by Mr. Kerr, the defendant's solicitor. The cause was accordingly set down and heard at the last March sittings, *ex parte*, no counsel appearing for defendant; but I have made no decree in the matter. At a later day in such sittings Mr. Kerr obtained an order nisi, calling on the plaintiff to show cause why the order that I made to set the cause down for hearing and all subsequent proceedings should not be set aside with costs, or failing in that that the cause be reheard on terms; against this Mr. Kaye showed cause at the April sittings; and the question arises, what is the practice in bringing a cause on for hearing on *viva voce* testi-

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mony under the 37th section of chapter 49 of the Consolidated Statutes.

The first question to be determined is whether it is the right of either party without the order of the Court or Judge to have his cause heard on *viva voce* evidence. This they were not entitled to by the practice of the Court as established by the statute 17 Vict. c. 18, which was the practice of the Court of Chancery in England prior to the 23rd day of March, 1839, together with the then existing practice of the Court of Chancery in this Province, and this practice was continued by section 2 of chapter 49 of the Consolidated Statutes, except so far as the same is altered by the provisions of the said chapter 49. By such former practice, which existed before the Act 17 Vict. c. 18, there was no such thing as a *viva voce* hearing before the Court; such practice had its origin in section 15 of 17 Vict. c. 18, which enacted that all cases in Equity might after issue be ordered to be heard on *viva voce* testimony either at the sittings or at a Circuit Court. By this it is clear that the parties had not the right to have their cause heard *viva voce* at the sittings without an order, but the same had to be ordered by a Judge. The next enactment in order is section 6 of 26 Vict. c. 16, which enacted that when a cause was at issue by filing a replication it might be heard on evidence taken *viva voce* at one of the monthly sittings on fourteen days' notice, etc. This did not repeal the fifteenth section of 17 Vict. c. 18; and I think the combined operation of these two sections was that by the 15th section of 17 Vict. c. 18, a party had a right to apply to a Judge to have the cause heard *viva voce*, and without such order he had no such right, and after he had obtained that order it might be heard after issue joined upon fourteen days' notice to the other side. Under that practice the proper course, I think, was for the plaintiff who wished to have his cause heard on *viva voce* testimony, after he had filed his replication, to apply to a Judge for an order to have it so heard under the 15th section of 17 Vict. c. 18, and the Judge should grant an order nisi and make it absolute after giving the other party an opportunity to be heard; and although both

these sections are repealed by the 49th chapter of the Consolidated Statutes, yet both sections are in effect re-enacted by section 2 of that chapter, except so far as they are altered by any of the provisions of that chapter; and the only way that chapter so alters them is that the 31st and 37th sections of chapter 49 allow the defendant fourteen days to file interrogatories after the cause is at issue; thereby compelling the plaintiff to wait fourteen days after the cause is at issue by filing the replication in which the defendant may file interrogatories, and in case he does, until he has put in a sufficient answer thereto, before applying for an order to have the cause tried on *viva voce* testimony. I therefore think that the proper practice of the Court now is that the plaintiff is obliged to wait for fourteen days after issue is joined in the case; and then if defendant has filed no interrogatories, the plaintiff can apply to a Judge for an order to have the cause heard on *viva voce* testimony at one of the monthly sittings, and not before; and if the defendant files interrogatories the plaintiff must wait until he has put in a sufficient answer thereto, and then make the same application; that such order ought not to be an *ex parte* order, and after it is obtained that then he should give fourteen days' notice of the hearing. In this case the order was obtained before the cause was at issue at all. In any view of the case the only notice of the hearing that was given was given long before the fourteen days had elapsed after the cause was at issue and so wrong, and even if I could think that the order obtained in this case was wholly unnecessary, I would, I think, have to set it aside. The defendant could not let it stand, as, if he did, it might materially interfere with his applying to a Judge to have the cause heard. It follows that the order and all subsequent proceedings are erroneous and must be set aside, and as they were proceeded with *in invitum*, I think I am compelled to give the defendant, who has not been in fault, the costs of this application.

Order:—That the order to set the cause down for hearing and all subsequent proceedings in this cause be set aside for irregularity with costs, and that such costs

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be paid by the plaintiff to the defendant or his solicitor within ten days after taxation, and if not so paid the defendant to have liberty to issue a *fieri facias* therefor.

By the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 55, "Any defendant, after putting in a sufficient answer, and within fourteen days after the plaintiff shall have joined issue thereon, as hereinafter provided, may file interrogatories for the examination of the plaintiff, or any one or more of the plaintiffs, and shall deliver a copy thereof to the plaintiff's solicitor, which shall be answered by the plaintiff within twenty days after service of such copy, in like manner and under the same rules of practice, as a defendant is bound to answer the plaintiff's interrogatories," etc. By section 56, a plaintiff has twenty days to except to a defendant's answer, and if no exception is taken within that time the answer is deemed sufficient. By section 75, "the plaintiff shall, within twenty days after the defendant shall have answered, unless he except thereto, or desire to go to hearing on bill and answer, file a replication, and serve a copy thereof on the solicitor of the defendant putting in such answer, on which the cause shall be considered at issue," etc. In Sibbald v. Lawrie, cited in note to Lafone v. Falkland Islands Co., 2 K. & J. 276, interrogatories were allowed to be filed under 15 & 16 Vict. c. 86, s. 19, although the time allowed the plaintiff for excepting to the answer under 1st Art. of Cons. Ord. XVI. r. 16 (18th Ord. of Nov. 1850), had not expired, subject to the right of the plaintiff to move to take the interrogatories off file, with costs, if the answer should turn out to be insufficient. As to what is meant by a sufficient answer in section 55, *supra*, see Lafone v. Falkland Islands Co., 2 K. & J. 276, and Mertens v. Haigh, 1 J. & H. 231. Where exceptions to the defendant's answer are heard, but are neither allowed nor disallowed, being ordered to stand over to the hearing that their materiality may be ascertained, interrogatories by the defendant cannot be filed without permission: Mertens v. Haigh, *supra*. The answer of an infant cannot be excepted to: Lucas v. Lucas, 13 Ves. 274; Copeland v. Wheeler, 4 Bro. C. C. 256.

In Dan. Chan. Pr. (4th Am. ed.) 580, it is said that interrogatories by a defendant are on a different footing from those for the examination of a defendant in the respect that a plaintiff is not entitled to a discovery of the defendant's case, but a defendant may ask any question tending to destroy the plaintiff's claim, citing Hoffmann v. Postill, L. R. 4 Ch. 673. In that case the suit was brought for an infringement of a patent, and the defendant denied its validity. The plaintiff having declined to answer certain interrogatories on the ground that they related to his own case, the defendant filed exceptions. Giffard, L.J., in the course of his judgment allowing the exceptions, said: "It is the defendant's business to destroy the plaintiff's case, and there the defendant has a right to ask all questions which are fairly calculated to show that the patent is not a good patent, or that what he alleges to be an infringement is not an infringement." The accuracy of the proposition was admitted by Lord Romilly, in Commissioners of Sewers v. Glasse, L. R. 15 Eq. 302. In Grumbrecht v. Parry, 32 W. R. 558, however, Brett, M.R., denied that there was any distinction in this respect between the right of a plaintiff and of a defendant, and that either party was entitled to administer interrogatories for the purpose of impeaching or destroying his opponent's case. And see Hennessy v. Wright, 36 W. R. 879; Hall v. Llardet,

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(1883) W. N. 175. Adverting to the question, Bray in his treatise on Discovery, 468, says the true view seems to be that if it is a part of the plaintiff's object in the action to destroy the defendant's case, he is as much entitled to discovery for the purpose as is a defendant in the converse case. The subject arose for consideration in the recent case of Bidder v. Bridges, 54 L. J. Ch. 798; 29 Ch. D. 29, where Kay, J., delivered a lengthy judgment on the principles applicable to discovery, and held that a defendant pleading a mere denial and not setting up a substantive defence is not entitled to ask questions destructive of his adversary's case. It will be noticed, however, that on appeal from his decision some of the interrogatories allowed by the Court of Appeal were for the purpose of destroying the plaintiff's case, though the defence upon the points covered by the interrogatories was a general traverse. Kay, J., said: "Now, the rule is laid down in a book which has always been considered of the highest authority on this subject, the late Vice-Chancellor Wigram's book on Discovery. Proposition 2, on page 15, is as follows: 'It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery, upon oath, as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on to trial, and which the defendant does not by his form of pleading admit.' Then proposition 3 is this: 'The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which the defendant's case is to be exclusively established'—that is one thing—'or to evidence which relates exclusively to his case.' There are two things which a plaintiff may not require discovery of from the defendant. One is the manner in which the defendant's case is to be established, and the other is the evidence which relates exclusively to that case. Now, I turn to page 288, and there, after a very careful examination of a good many authorities, it is stated in *placitum* 375, 'The preceding cases must establish, if authority can establish, the original privilege of a defendant to withhold discovery appertaining to his own case alone, and the absence of all original right in the plaintiff to call for such discovery; and from those cases it will be seen that the privilege of the defendant is the same whether he is defendant in an original suit in which relief is sought, or is plaintiff in that suit, and is made defendant to a cross-bill for the purpose of discovery.' Then, in the note, are a number of cases which are referred to in the preceding *placita* which I have examined, and which seem entirely to support that statement. . . . Therefore, I must take the rule to be the same in the case of a defendant seeking discovery now, as it would have been in the case of a defendant seeking discovery by a cross-bill under the former practice in equity; and that rule is in the words which I have read from the book of Sir James Wigram. Now, it is objected to that, that there are certain cases which establish a difference. But, first of all, before I consider them, I will refer to the mode in which Vice-Chancellor Wigram established these propositions, and to certain authorities to which he refers, which seem to me very much indeed in point. It is quite plain, according to those authorities, that if a defendant meets the case of a plaintiff who is seeking to establish some title, whether it be to land or anything else, by a mere direct negative, that would not entitle the defendant under the old practice to file a cross-bill to make out how the plaintiff's

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case was to be established, or to discover evidence which related exclusively to his case; and it cannot be said that because the defendant meets the plaintiff's case with a direct negative, therefore the evidence which the plaintiff will adduce in support of his own case relates also to the defendant's case in such sense as to entitle the defendant, who only pleads a direct negative, to examine that evidence." His Lordship then proceeded to examine the case of Eade v. Jacobs, 3 Ex. D. 335; 47 L. J. Ex. 74, in which occurs the dictum of Cotton, L.J., that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce. After remarking that if these words were meant as a general proposition, he would entirely disagree with them, the learned Judge says: "It seems to me that to ask a plaintiff who has properly pleaded his case, 'What facts do you rely on to make out your case?' is only another way of asking, 'What is your evidence?' And he refers to a number of cases in support of his position. His Lordship then directed his attention to an examination of the proposition enunciated in Hoffmann v. Postill, *supra*, by Giffard, L.J., and said: "That is a case which, to my mind, as far as the decision goes, is very clear and simple. It was a case in which the bill had been filed by the owners of a patent against the defendant for infringement, and the defendant, having answered the bill, filed a concise statement and interrogatories for the examination of the plaintiff. In his answer, he had set up that the patent was void for want of novelty. Everybody familiar with patent cases knows that that is an issue the affirmative of which is on the defendant. He has a perfect right to interrogate as to the want of novelty to any extent he likes, because that is his case, and not the plaintiff's case; and accordingly Lord Justice Selwyn and Lord Justice Giffard thought that interrogatories which went to that part of the case ought to be answered, and Lord Justice Giffard is reported to have used this language: 'As regards the case of Daw v. Eley, 2 H. & M. 725, it must be always remembered that that was the case of a plaintiff exhibiting interrogatories to a defendant, and it was there held that the plaintiff could not call on the defendant to set forth the particulars of his defence. But when you come to the case of a defendant asking questions of a plaintiff, it is a very different thing. It is the defendant's business to destroy the plaintiff's case, and there the defendant had a right to ask all questions which are fairly calculated to show that the patent is not a good patent, or that what he alleges to be an infringement is not an infringement.' As to the first branch of that proposition, there could not be, for the reason I have given, the least doubt. It is not the plaintiff's case, but the defendant's case, that the patent is void for want of novelty. The defendant has a perfect right to search the conscience of the plaintiff, and make that out if he can from the admissions of the plaintiff; but to say that this is to be understood as a general proposition, that in every case whatever where a defendant, not by setting up a substantive case of his own, but by merely meeting the case of a plaintiff by a traverse, is entitled, to use these words, to destroy the plaintiff's case, and to ask all the questions he can to do that, is simply a contradiction of the well-settled rule that the questions which either plaintiff or defendant can ask must be confined to questions which establish their own substantive case, and that they are not entitled to ask questions which relate to the evidence by which or the manner in which their adversary means to establish his own

case. I am quite satisfied that so great a Judge as Lord Justice Giffard never intended those words, which seem to have been cited in subsequent cases, as establishing the proposition that the defendant has a larger right of discovery than the plaintiff, to have any such significance." It may be that the question is concluded for New Brunswick by the language of section 55, *supra*.

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MANCHESTER ET AL. v. WHITE ET AL

1881.

July 30.

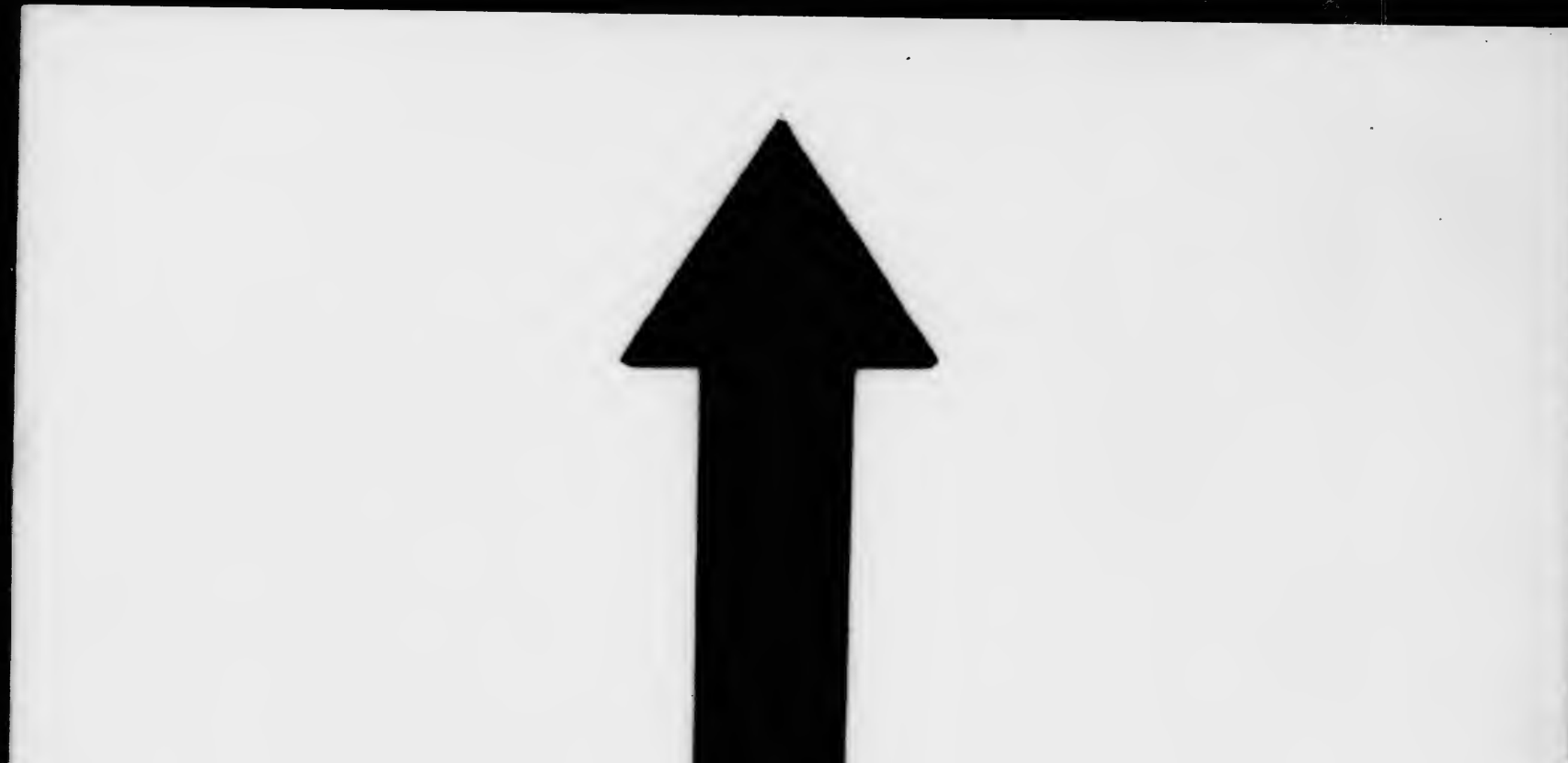
Practice—Motion to take bill pro confesso—Answering after notice—Costs —Chapter 49, C. S. N. B., s. 28.

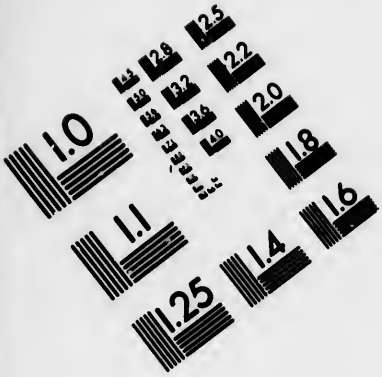
Where, after notice of motion under section 28 of chapter 49, C. S. N.B., to take the bill *pro confesso* for want of a plea, answer or demurrer, the defendant files and serves an answer, he must offer to pay the costs of the motion up to the time of filing the answer, or be subject to terms of payment of costs on being let in to defend.

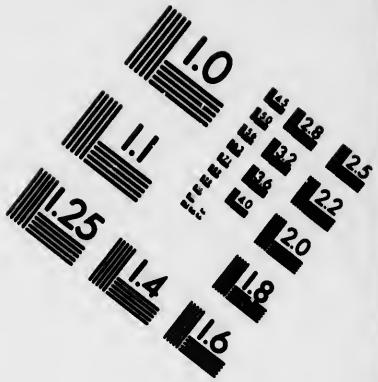
This was an application on behalf of the defendant Ada H. White, to set aside the order of the Court that the bill in the cause be taken *pro confesso* against the defendants so far as the order affected the applicant. It appeared that the summons was issued December 7th, 1880; that an appearance by the defendant Ada H. White was filed and served on January 18th, 1881; and that the bill and interrogatories were filed April 9th and served April 14th. A notice of motion to take the bill *pro confesso* for want of a plea, answer or demurrer was served June 3rd, to be heard July 5th. An answer was filed by the defendant Ada H. White on June 28th, and served June 30th. The motion was made in accordance with the notice on production of the Clerk's certificate, dated July 5th, that no plea, answer or demurrer had been filed by any of the defendants. On the present application it was shown that the Clerk had mistakenly omitted from his certificate that the applicant had filed an answer on June 28th. The application was heard July 30th, 1881.

A. O. Earle, and *A. S. White*, for the application.

G. G. Gilbert, Q.C., and *W. J. Gilbert, contra.*







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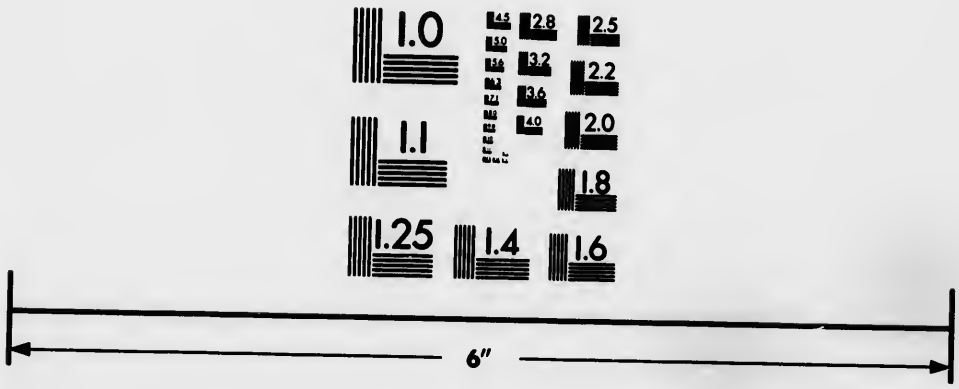

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I am very glad that the question involved in this application has arisen, as it is desirable that the practice of the Court in regard to it should be settled. My opinion has always been that the certificate of the Clerk relates back to the expiration of the thirty days from the service of the bill in which the defendant must answer, although the practice of the Court has been the other way. The rule hereafter will be, until a Court of Appeal decides otherwise, that a defendant wishing to file a plea, answer or demurrer, after notice of motion to take the bill *pro confesso*, must offer to pay the costs incurred by such motion up to the time of filing; otherwise on being let in to defend on the merits he will be subject to terms of payment of costs. In reference to this application, I consider that Mr. White has relied on the previous practice of the Court, and that he should not be obliged to pay the costs of this application, but that they should be made costs in the cause. The order will be vacated as to the defendant Ada H. White. Cross-interrogatories must be filed within three days after notice of acceptance of answer, or the cause to be at issue, and four days' notice of hearing must be accepted after the cause is at issue.

By the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 40, a defendant may file a plea, answer or demurrer, at any time after notice of motion served, and before the day for which the notice has been given, upon payment or tender to the plaintiff's solicitor of the costs properly incurred by the plaintiff in preparing for the motion. If the defendant answer after service of motion to take the bill *pro confesso* the paintiff may bring on the motion for the purpose of obtaining his costs: Spooner v. Payne, 2 De G. & S. 439; 17 L. J. (N. S.) Ch. 130; 12 Jur. 642; or he may apply for the costs of the notice of motion: Sayre v. Harris, *post*, p. 94. Where after a defendant gave notice of motion to dismiss the bill for want of prosecution plaintiff filed a replication he was ordered to pay defendant the costs of the motion: Corry v. Curlewis, 8 Beav. 606. See also Spurrier v. Bennett, 4 Madd. 39; Jones v. Hewett, 8 Ir. Eq. Rep. 517; Young v. Quincey, 9 Beav. 160; Dan. Ch. Pr. (4th Am. ed.) 804. At p. 805 Daniell says: "Where at the time of service of the notice upon the plaintiff, the defendant had a right to move to dismiss the bill, yet, if the plaintiff files a replication or serves an order to amend the bill, before the hearing of the motion, the defendant's right is intercepted, and the plaintiff will be allowed to retain his bill: Waller v. Pedlington, 4 Beav. 124; Heanley v. Abraham, 5 Hare, 214.

Where, however, the plaintiff adopts this course, the Court usually orders him to pay the costs of the application for dismissal; and even though the defendant had notice that the plaintiff, by taking a step in the cause, had prevented any order being made upon the motion to dismiss, yet, where the plaintiff had not tendered the costs of preparing and serving the notice of motion, it was held that the defendant had a right to bring his motion before the Court, for the purpose of obtaining his costs; where the plaintiff had tendered the costs of preparing and serving the notice of motion, there seems to have been some difference of opinion as to the right of the defendant to bring on the motion to obtain taxed costs: Attorney-General v. Cooper, 5 Sim. 379; 2 Jur. 917; Piper v. Gittens, 11 Sim. 282; Wright v. Angle, 6 Hare, 109; 12 Jur. 34; but the practice would now seem to be that the defendant is entitled to the costs actually incurred, and that he may in all cases, if necessary, bring on his motion for the purpose of obtaining them: Hughes v. Lewis, 6 Jur. N. S. 442; Findlay v. Lawrence, 11 Jur. 705. It would seem, however, that if the plaintiff tenders the costs which have been incurred, it is improper for the defendant to bring on his motion, and that he would not be allowed subsequent costs: Newton v. Ricketts, 11 Beav. 164." In Snider v. Snider, 11 P. R. 34, a statement of defence delivered after the proper time, and on the same day on which the plaintiff set the action down to be heard on motion for judgment, was held irregular, and the Court ordered that it should be struck out and judgment granted for the plaintiff, unless the defendant paid the costs of setting down the action and of the motion for judgment within a limited time.

Where after notice of motion by defendant to dismiss the bill for want of prosecution the plaintiff obtains leave to amend he must pay the costs of motion: Findlay v. Lawrence, 11 Jur. 705; Davenport v. Manners, 2 Sim. 514. So where the plaintiff obtains leave to file replication: Jardine v. Vaughan, 26 N. B. 244. "Where the right of a party to an order for which he has given notice of motion is intercepted by a step taken by the other side, he is entitled to his costs, but he should not bring on the motion if the costs then incurred are tendered:" Dan. Ch. Pr. (4th Am. ed.) 1601, citing Newton v. Ricketts, *supra*; and see Jardine v. Vaughan, *supra*, at p. 254. In Woodhouse v. Boyd, 8 Ir. Eq. R. 512, defendant's answer was received after the cause had been set down for hearing *pro confesso* on paying costs. Where an answer is on file, the bill cannot be taken *pro confesso*, whether the fact appears by the admission of plaintiff's counsel, or otherwise: Per Allen, J., Lockhart v. Sancton, January, 1870, Stev. Dig. (3rd ed.), 649; Sayre v. Harris, *post*, p. 94. For cases under the English and Irish practice see Robinson v. Stanford, 2 Hare, 149; Sidgier v. Tyte, 11 Ves. 202; Hillhouse v. Tyndal, 12 Ir. Eq. R. 316; King v. Bryant, 6 L. J. (N. S.) Ch. 151. Upon a fair case made on petition the Court will allow a defendant to put in an answer after the bill has been taken *pro confesso*, upon the terms of paying the costs of the plaintiff, of the application and of the suit: Inglis v. Campbell, 2 Eq. Rep. 1130; 2 W. R. 396; Redford v. Todd, 6 P. R. 154; Dan. Ch. Pr. (4th Am. ed.) 529. On motion to discharge order to take bill *pro confesso*, on payment of costs, and an offer to put in answer, the Court required to see what answer it was proposed to put in: Herne v. Ogilvie, 11 Ves. 77. And see as to necessity of affidavit of merits: Delany v. Doolan, Fl. & K. 182.

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July 30.

Bank—By-law fixing date of annual meeting—Power of directors—Banking Act (34 Vict. c. 5. [D.]), ss. 28, 30 and 33—Suit by shareholder in his own name—Multifariousness—Objection not raised by demurrer—Injunction order—Dissolution after object effected.

The plaintiff, a shareholder of the Maritime Bank, by his bill set out that on the 11th of February, 1873, the directors of the Maritime Bank passed a by-law fixing the first Tuesday in June in each year thereafter as the day of the annual meeting of the shareholders for the election of directors; that on the 26th of April, 1880, the directors passed another by-law fixing Friday, the 4th of June next, for the then next annual meeting; that the Bank of Montreal was the owner of 1,070 shares of the Maritime Bank, upon all of which there were unpaid calls, and had appointed the defendant B., its attorney, to attend and vote at the annual meeting of the Maritime Bank shareholders called for the 4th of June. The bill prayed for an injunction to restrain the Bank of Montreal and its attorney from voting at such annual meeting, on the grounds: (1) that there were unpaid calls upon their shares; (2) that by Act 42 Vict. c. 45, s. 2 (D.), one bank cannot hold stock in another bank; (3) that the Bank of Montreal could only vote by its own officer and not by an attorney; also to restrain the Maritime Bank from permitting the Bank of Montreal and its attorney to vote at the meeting; and to restrain the Maritime Bank from holding the meeting, on the ground that the power to pass a by-law fixing a day for the annual meeting of the shareholders is vested in the shareholders. The Maritime Bank was incorporated by Act 35 Vict. c. 58 (D.) No provision is made in the Act as to by-laws. By section 6 it incorporates into its provisions the Bank and Banking Act, 34 Vict. c. 5 (D.) The 33rd section of the latter Act enacts "That directors, etc., shall have power to make such by-laws and regulations (not repugnant to the Act or the laws of the Dominion of Canada) as to them shall appear needful and proper touching the management and disposition of the stock, property, estate and effects of the bank, and touching the duties and conduct of the officers, clerks and servants employed therein, and all matters as appertain to the business of a bank. . . . Provided always, that all by-laws of the bank lawfully made before the passing of this Act as to any matter respecting which the directors can make by-laws under this section . . . shall remain in full force until repealed or altered under this Act." By the 30th section it is enacted that the directors shall be "elected on such day in each year as may be or may have been appointed by the charter, or by any by-law of the bank, and at such time of the day, and at such place where the head office of the bank is situate, as a majority of the directors for the time being shall appoint. The 28th section enacts "That the shareholders in the bank shall have power to regulate by by-law the following matters, *inter alia*, incident to the management and administration of the affairs of the bank, viz., the qualification and number of directors . . the method of filling up vacancies in the board of directors whenever the same may occur during the year; and the time and proceedings for the election of directors, in case of a failure of any election on the day appointed for it." On an application by the defendants to dissolve an *ex parte* injunction obtained by the plaintiff:

Held, that no power was vested in the directors to pass the by-law in question, and that it therefore was *ultra vires*; but that the injunction should be dissolved on the ground:

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(1) That the plaintiff could not maintain a bill in his own name alone respecting an injury common to all the shareholders;
(2) That the bill was multifarious by the joinder of grounds of complaint against the Maritime Bank and the Bank of Montreal and B. that were independent and distinct.
Though the objection of multifariousness in a bill has not been taken by demurrer, the objection may be taken by the Court.
Where a company was restrained by *ex parte* injunction from holding its annual meeting on the date fixed therefor, it is no ground for refusing a motion to dissolve the injunction that the purpose for which it was granted has been served.

This was an application by the defendants to dissolve an *ex parte* injunction obtained by the plaintiff from Mr Justice *Duff*.

The facts fully appear in the judgment of the Court.

Argument was heard July 15th and 16th, 1880.

S. R. Thomson, Q.C., and *J. R. Armstrong*, for the plaintiff.

C. W. Weldon, Q.C., for the Bank of Montreal.

C. A. Palmer, for the Maritime Bank.

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The bill in this cause sets forth that the plaintiff is the owner of four shares in the Maritime Bank; and, as he believes, no by-law has ever been made by the shareholders of the bank appointing a day for the annual meeting of directors. That about the 14th February, 1873, the directors passed a by-law fixing the first Tuesday in June, in each year thereafter, as the day of such meeting. That such elections have ever since taken place on that day, except in the years 1875 and 1876, when, for some reason unknown to the plaintiff, they were held on the first Wednesday in June. That about the 26th April last the directors passed another by-law appointing Friday, the 4th of June last, as the day for holding the then next annual meeting; for which day notice had been published, as required by the statute. Some time in the year 1879, the Bank of Montreal, as the plaintiff was informed and believed, became the absolute owners of 1,070 shares of the capital stock of the Maritime Bank,

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and these shares still stand in their hands. These shares had been held by one E. C. Jones, the manager at St. John of the Bank of Montreal, from the year 1876, in trust, until the passing of the Act of the Dominion of Canada, 42 Vict. c. 45, on the 15th of May, 1879, when they were transferred to the last mentioned bank absolutely. The bill also alleges that certain calls had been made on these shares that are still unpaid; and that the Bank of Montreal are not the owners of any shares in the Maritime Bank, upon which all the calls have been paid in full, although the time of payment of the calls has elapsed. The bill further sets forth that the defendant, Barbeau, holds an authority under the corporate seal of the Bank of Montreal, empowering him to attend the meeting of the stockholders of the Maritime Bank on the 4th day of June, and to vote for the Bank of Montreal in the election of directors for the Maritime Bank, upon the stock in the latter bank so held by the former. Barbeau is a resident of Montreal, but is now in St. John for the purpose of attending the said meeting and voting thereat, on the election of directors of the Maritime Bank for the ensuing year; and the directors of the Maritime Bank, as plaintiff, is informed and believes, intend to permit Barbeau to vote at that meeting as the attorney of the Bank of Montreal. The 9th, 10th and 11th paragraphs of the bill are as follows:

9. "The plaintiff charges that, under the foregoing facts, the 4th day of June instant is not the proper day upon which the annual meeting of the shareholders in the said Maritime Bank of the Dominion of Canada, for the election of directors can legally be holden. That no proper by-law was ever passed fixing the day for holding such meeting; and that if any such meeting could have been called for the present month of June at all it should have been called for the first Tuesday in June instant, and not for Friday the 4th day of June instant."

10. "The plaintiff also charges that the defendant, the said Bank of Montreal, has since the passing of said above recited Act" (42 Vict. c. 45) "now no power or authority to hold the said shares in the capital stock of

the said Maritime Bank of the Dominion of Canada, or at all events, no right to vote on the same, and that its power of attorney for that purpose to the defendant, Edmunde J. Barbeau, is illegal and *ultra vires* of the said Bank of Montreal."

11. "The plaintiff also charges that, by reason of the non-payment of calls, as aforesaid, the Bank of Montreal has no right or authority to vote at such meeting, by attorney or otherwise, for the election of directors for the said Maritime Bank of the Dominion of Canada."

And the bill then prays: "That the defendant, the Bank of Montreal, and the said Edmunde J. Barbeau may be restrained by order of injunction of this Honourable Court, from voting at such meeting of shareholders of the said Maritime Bank of the Dominion of Canada called for the fourth day of June instant; and that the defendant, the Maritime Bank of the Dominion of Canada may be restrained, by the like order of injunction, from permitting the said Bank of Montreal, or the said Edmunde J. Barbeau, as its attorney, from voting in such election at the said meeting; and from recording any votes which, at such meeting, may be filed by the said Bank of Montreal, or by the said Edmunde J. Barbeau, as its attorney. And that the said defendants, the Maritime Bank of the Dominion of Canada, be restrained, by the like order of injunction, from holding the said meeting of stockholders for the purpose of electing directors, on the 4th day of June instant, and from receiving or recording, at such meeting, any votes of shareholders for that purpose."

The bill was sworn to on the 3rd of June last; and, on that day I made an order of injunction *ex parte*, and in the terms of its prayer.

On all *ex parte* applications the practice requires the strictest good faith to be observed in the statement of facts upon which they are made; and in the event of any material concealment or misrepresentation of facts the injunction will be dissolved without reference to the merits. Without infringing, however, any positive rule of practice, counsel will often—unconsciously no doubt

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—present the facts, and discuss the points of law arising on them, solely from that point of view which they deem most likely to secure a successful result to their applications. And, under such circumstances, it frequently becomes matter of great difficulty—in the absence of any one to represent the other party—for the Judge to escape an erroneous decision.

One of the ablest Judges who ever adorned, by his legal acquirements, the Bench of this Province, once told me, on the occasion of an application which I made to him for an *ex parte* order of injunction, that he had rarely made an order of that kind, which he had not afterwards felt himself constrained to dissolve, upon facts disclosed in new affidavits, and upon further discussion of the subject. My own short experience is in accordance with that of his Honour. He has already furnished me with more than one illustration of the danger of granting orders of this nature; and the present case will afford me another.

Motions upon affidavits were made before me, on 15th instant, on behalf of the respective defendants, to dissolve the injunction which I had granted; and having heard the affidavits read, and the arguments of counsel, I am of opinion that it should be dissolved.

I cannot accede to Mr. Thomson's proposition that, even assuming the order to have been erroneously made, still it ought not now to be dissolved inasmuch as its object has already been effected, it having prevented the election of directors from taking place on the 4th of June, and can do no more harm, and no useful purpose can now be accomplished by its dissolution. Surely the party who has succeeded in procuring the order to be made, under such circumstances, cannot be permitted to employ such an argument, and to found it upon such an assumption. I cannot assume that, whilst "the strong arm of Equity" enfolds the defendants, its grasp is either unfelt or harmless; or that it will be no relief to them to have its hold relaxed from aronnd them. As soon as I am shown that the restraint which my order has placed upon them has been improperly imposed, that moment it becomes my duty to remove it.

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The application for the order of injunction was made on several grounds, upon one of which, at all events, I entertained a very strong opinion. I thought that the by-law made by the directors of the Maritime Bank, and whereby Friday, the 4th day of June last, was appointed as the day for holding the annual meeting of the shareholders for the election of directors was *ultra vires*, and void. In my opinion the authority to pass a by-law was in the general body of the shareholders, and not in the directors, and I still retain that opinion, the arguments which I have heard on this motion to the contrary notwithstanding.

It is said that corporations are the creatures of the statute or grant whereby they are created; and so they are to the extent of the provisions therein made. But the moment that a corporation is called into existence, independently of any express provisions contained in its charter, the common law invests it with a variety of powers and attributes necessary to enable it to effect the object of its creation. "The common law of every state or country annexes to this local or artificial person, when created, certain incidents and attributes, and both by the laws of England and the United States, there are several powers and capacities which tacitly and without any express provisions, are considered inseparable from any corporation." Amongst these is "the power to make by-laws, which are considered as private statutes for the government of the corporate body": Angell and Ames on Corporations, section 110. And that power, in the absence and independent of any provisions in the charter, vesting its exercise in a select body of men, such as the directors, is vested in the general body of the shareholders at large: *Angell* on Corporations, section 327; *Sutton's Hospital Case* (1); *Company of Feltmakers* v. *Davis* (2); *Rex* v. *Westwood* (3).

The defendants, "The Maritime Bank of the Dominion of Canada," are incorporated by 35 Vict. c. 58, of the Statutes of Canada; and that Act is entirely

(1) 10 Rep. 31 b.

(2) 1 B. & P. 100.

(3) 7 Bing. 1; 2 Dow. & Cl. 21.

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silent on the subject of by-laws. But by section 6 it incorporates the provisions of 34 Vict. c. 5, being an Act intituled "An Act relating to Banks and Banking"; and the 28th, 30th and 33rd sections of the latter contain provisions relating to the making of by-laws, to which I will refer. The 33rd section enacts "That the directors . . . shall have power to make such by-laws and regulations (not repugnant to the provisions of this Act or the laws of the Dominion of Canada) as to them shall appear needful and proper, touching the management and disposition of the stock, property, estate and effects of the bank, and touching the duties and conduct of the officers, clerks and servants employed therein, and all such matters as appertain to the business of a bank. . . . Provided also, that all by-laws of the bank lawfully made before the passing of this Act, as to any matter respecting which the directors can make by-laws under this section, . . . shall remain in full force until repealed or altered under this Act."

From this provision, it is evident that the authority of the directors to make by-laws was intended to be a limited one; and the enacting portion of the section enumerates the subjects to which its exercise is restricted. And it is also evident that the Legislature used the word "bank" in the provision, as distinguishable from its directors. And, when we turn to the 30th section, which makes provision for the calling of the annual meeting, we find that it is the "bank" and not the "directors," to whom power is given to make the by-law in relation to it. By the latter section it is enacted that the directors shall be "elected on such day in each year as may be or may have been appointed by the charter, or by any by-law of the bank; and at such time of the day and at such place where the head office of the bank is situate, as a majority of the directors for the time being shall appoint." It is the "bank" which must make the by-law appointing the day for holding the annual election; but the "directors for the time being" shall name the hour and place, in each year, where and when it shall be held.

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So far as regards the by-law appointing the general annual meeting for the election of directors, there is nothing in the 30th section, or in the Banking Act, or in the Act itself, inconsistent with the exercise, by the shareholders, of the power to make it which was vested in them by the common law. On the contrary, a fair construction of the language of that section shows the intention of the Legislature to have been to leave the authority to do so just where the common law placed it, viz., in the general body of the shareholders, who, as distinguishable from the directors, of necessity constitute "the bank." Quoad that by-law, therefore, the authority to make it remains in the bank. See *Rex* v. *Westwood*, supra.

The counsel for the Maritime Bank directed my attention to the 28th section of the Banking Act (34 Vict. c. 5), whereby it is enacted, "The shareholders in the bank shall have power to regulate by by-law the following matters incident to the management and administration of the affairs of the bank, viz., the qualification and number of the directors, . . the method of filling up vacancies in the board of directors whenever the same may occur during each year; and the time and proceedings for the election of directors, in case of a failure of any election on the day appointed for it." And he argued that this was the only authority which the shareholders possessed to make by-laws. It would be strange, indeed, if the Legislature should have taken so much care to give the shareholders the power to make by-laws providing for an accidental omission or failure to elect directors at the regular annual meeting, and for a possible vacancy occurring in the board during the year; and yet, by the same Act, should have deprived the shareholders of the authority which they already possessed of passing a by-law providing for the holding of the annual meeting, and for the election of the whole board.

If the common law had not placed the power of making by-laws in the shareholders; if the authority to make them was required, in every instance, to be specially given by the charter, and if, in this instance,

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the language of the 33rd and 30th sections afforded us no guide at all to the intention of the Legislature upon the subject, then there might possibly be something in such an argument. But, under the circumstances, I do not think it entitled to any weight at all.

I have no doubt that the by-law made by the directors of the Maritime Bank on the 26th April last, whereby the annual meeting for the election of directors was appointed to be held on the first Friday in June in each year, was *ultra vires* and void, at all events until confirmed by the general body of shareholders; and that no meeting could legally have been held for the election of directors on the 4th June last.

The affidavit read in support of this motion on behalf of the Maritime Bank furnishes me with no satisfactory ground for dissolving the injunction. I cannot but regard that affidavit as very untrustworthy. In saying this, however, I entirely exonerate the gentleman who made it from any intentional misstatement, and from any blame, beyond what everyone is subject to who signs an affidavit, which may be prepared for his signature beforehand, without a very careful perusal of its contents. When an affidavit is read over rapidly to a layman he is very apt to overlook expressions contained in it which may have been carefully prepared, and which convey a great deal more than he intends to say. For this reason Mr. Chitty, in his General Practice, lays it down that "Every affidavit should be in the genuine natural language of the deponent; and, where there are several deponents, each should swear in his own peculiar terms." I will quote the 4th, 5th and 6th paragraphs of this affidavit: 4th—"That the shareholders of the said Maritime Bank of the Dominion of Canada never themselves made or attempted to make any by-law on the subject of fixing the day for holding the annual meeting, but at the annual meeting held on the first Tuesday in June, in the year of our Lord 1879, it was mentioned by a number of shareholders that it was desirable that the annual meeting, as fixed by a by-law made by the directors (as is hereinafter stated) should be altered, and another day fixed, and that it was decided

that the shareholders could not do so, and that the directors were the proper persons to do it, and they were accordingly requested to do so." 5th—"That on the 14th day of February, A.D. 1873, the following by-law was passed by the directors, viz., that the annual general meeting of the stockholders of this bank shall be held on the first Tuesday in June in each and every year, and that every election of directors was therefore held under that by-law, until another by-law was passed on the 26th day of April, A.D. 1880, by the directors of the said 'the Maritime Bank of the Dominion of Canada,' in pursuance of the said request of the said shareholders at the last annual meeting as hereinbefore stated, which said by-law is as follows: 'That the next annual general meeting of the stockholders of this bank for the election of directors shall be held on the first Friday in June next, and on the first Friday in June in each and every year hereafter.'" 6th—"That a notice of the holding of such annual meeting was duly published in the usual way, and such notice was, on the 13th day of April last past, published in the usual form in the Daily Sun, a newspaper published daily in the city of St. John, and its publication continued therein."

These sections have more the appearance of the language of crafty counsel than the "genuine natural language" of the deponent. The bill alleges that in the years 1875 and 1876, respectively, the annual meetings were held on the first Wednesday in June and not on the first Tuesday. This is an important statement, which the plaintiff has made under oath; and if it were not true, one would have expected an unequivocal denial of it. The statement in the fifth paragraph may possibly amount to an argumentative or colourable contradiction of it, but it is not a distinct denial. I am not aware that Mr. Ray's attention was ever called to the allegation in the bill; nor can I say whether, if it had been, he would have distinctly denied its truth. What number of shareholders, at the annual meeting in June, 1879, spoke of the desirableness of having the day of the annual meeting changed from the first Tuesday in June? Who decided that the shareholders could not

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make a by-law for that purpose, and in what manner were the directors requested to make such a by-law? The only mode in which the stockholders could legally make such a request would be by passing a resolution to that effect. Was such a resolution ever passed? No affidavit was necessary to show that the shareholders had not made any by-law appointing the day for holding the annual meeting. That fact is stated by the plaintiff himself in the third section of the bill; and it constitutes the very groundwork of his objection to the by-law appointing the first Friday in June as the day for holding it. The whole of the fourth section seems to have been artfully prepared by the person who drew the affidavit, not with the object of furnishing evidence of the substantial facts stated in it, but with a view to a subsequent reference to it in connection with the by-law of 25th April last. Having got Mr. Ray to swear that at the meeting in June, 1879, some of the shareholders spoke about fixing a day for the annual meeting without telling us how many mentioned it, or what they said about it, further than that it was desirable to change it from the day already fixed; having also got him to state that it was decided that the shareholders had no authority to change it, but that the directors must do so, without condescending to inform us who had pronounced a decision upon the question; and having made Mr. Ray swear that "they (the directors) were accordingly requested to do so," without showing either by whom or in what manner they were requested thus to assume the exercise of an authority which they did not possess, the affidavit proceeds to state that on the 26th April last the directors "in pursuance of the request of the said shareholders at the last annual meeting, as hereinbefore stated," made the by-law appointing the first Friday in June as the day of the annual meeting. The request, "as hereinbefore stated," may have been the request of two or three shareholders, or may have been the request of 200, but it amounts to nothing, as stated. In the next paragraph Mr. Ray swears that the notice of holding such annual meeting—the meeting of Friday, 4th June—under the by-law of

the 26th of April, was published in the Daily Sun on the 13th day of April, and that its publication therein was continued until the day of meeting, that is to say, notice of the meeting under the by-law of the 26th April was published thirteen days before the by-law itself was passed. What am I to understand by this? Was the notice published first and then a by-law made to fit it, or is this simply a mistake? In short, the whole affidavit, as drawn, is of such a character as not deserving the weight which it would deserve if it spoke only Mr. Ray's "genuine natural language."

I am of opinion, however, that the order of injunction which I granted in this case must, nevertheless, be dissolved. Several of the grounds taken by Mr. Weldon impressed me as very strong; but without expressing any opinion upon the others, two of these grounds especially I think are fatal to the order. These are:

First—That the bill does not show any equity in the plaintiff, individually, or any special injury to him, as resulting from the facts alleged, other than such as might be common to the shareholders of the Maritime Bank generally. In *Mozley* v. *Alston* (4), it was held that an individual shareholder could not sustain a bill in his own name alone respecting a matter common to all; but that where there was a common object and the interests of all were identical, a bill might be sustained by individual shareholders of the company on behalf of themselves and all other shareholders. In that case to a bill by four shareholders in a railway company against the directors, and against the company, alleging that twelve out of eighteen directors ought, at a certain time prescribed by the Act of Parliament, to have balloted out one-third of their number, and to have elected new directors in their stead; and alleging that by their refusal or failure so to do, the twelve recusant directors were all rendered incompetent to act and ceased to be directors *de facto*; and praying for an injunction to restrain them from voting or acting any longer as directors, and for a transfer of the corporate seal and funds

(4) 16 L. J. Ch. (N. S.) 217.

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to the six lawful directors, a general demurrer for want of equity was allowed by the Lord Chancellor, reversing the decision of the Vice-Chancellor of England. And see also *Foss* v. *Harbottle* (5).

Second—That the bill is multifarious. And the order having been granted on the sworn bill alone, the vice of multifariousness affects the evidence as well as the pleading. "By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature, against several defendants in the same bill." Story Eq. Pl. s. 271.

I think that the claim or ground of complaint in this bill against the Maritime Bank is entirely separate and distinct from that against the Bank of Montreal and Mr. Barbeau. The ground of complaint, as against the Maritime Bank, is set forth in the 1st, 2nd, 3rd and 9th sections of the bill. It is that a general meeting of the shareholders of that bank was about to be held on the 4th June, under a by-law made in April previous, appointing that day for the purpose, which by-law, the bill charges, was not properly made; wherefore, it is alleged, that was not the proper day for holding such meeting. And the following portion of the prayer is exclusively applicable to this part of the bill, viz., "that the defendants, the Maritime Bank of the Dominion of Canada, be restrained by the like order of injunction from holding the said meeting of shareholders for the purpose of electing directors on the said 4th day of June instant."

The complaint against the Bank of Montreal and Mr. Barbeau is contained in the 4th, 5th, 6th, 7th and 8th paragraphs of the bill. It is that E. C. Jones, the manager of the bank, some time in the year 1879, and after the passing of the Act of the Parliament of Canada on the 15th day of May of that year, intituled "An Act

(5) 2 Hare, 461.

to amend the Act relating to Banks and Banking," and "the Acts amending the same," conveyed to the Bank of Montreal 1,070 shares of the capital stock of the Maritime Bank, which for some time previously he had held in trust. And these shares now stand on the books of the Maritime Bank in the name of the Bank of Montreal, which latter bank is now the absolute owner of them. And although there are unpaid calls upon this stock, the Bank of Montreal has given the defendant, Barbeau, a power of attorney to attend the meeting of 4th June, and to represent and vote for them on the stock in election of directors; and the latter has come from his place of residence in Montreal to St. John, where he now is, prepared to do so.

This ground of complaint is entirely distinct from that against the Maritime Bank. The legality of the meeting called for the 4th June depends upon the validity of the by-law made by the directors, and it derives no support from, neither is its legality impugned by, any allegation in the bill in relation to the Bank of Montreal or to Mr. Barbeau. On the other hand, the legality or illegality of the meeting of June 4th does not affect the question as between the plaintiff and the Bank of Montreal. The right of the Bank of Montreal to vote on the stock which they hold in the Maritime Bank is sought to be impugned, not because the meeting of June 4th was illegal, but upon two grounds:

1st. Because there are unpaid calls upon it (see Banking Act, s. 30).

2nd. Because, as it is alleged, the 42nd Vict. c. 45, s. 2, prevents one bank now from holding stock in another bank.

And, as regards Mr. Barbeau, the ground taken was that, even if the Bank of Montreal could themselves vote, they must exercise their right to do so by their own officers and not by attorney.

Mr. Thomson cited *Addison* v. *Walker* (6), and *Parr* v. *The Attorney-General* (7), and contended all the parties had an interest in the suit, and that the Bank

(6) 4 Y. & C. 442.

(7) 8 Cl. & F. 409.

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of Montreal and Mr. Barbeau were sufficiently connected with the other defendants to prevent the bill from being multifarious.

I think that *Addison* v. *Walker* is very distinguishable from this one. The facts of that case were shortly these: Abraham Walker, on the marriage of his daughter with W. T. Addison, covenanted to settle £2,000 upon her, for her separate use during her life, and after her death to pay the interest to her husband during his life; and, upon the death of the survivor, to divide the principal amongst the children of the marriage, with a proviso that in the meantime the £2,000 should remain in Abraham Walker's hands. The trustees of the settlement were Richard and Ralph Addison, W. Courtois (since deceased) and Edmund Walker. Abraham Walker died without having paid the £2,000, having made a will and appointed executors thereof, of whom the said Edmund Walker was one. All the executors renounced except the testator's widow.

Mrs. W. T. Addison died in 1838, leaving her husband and five children surviving her. The bill was filed by W. T. Addison, his five children, and Richard and Ralph Addison, two of the trustees of the marriage settlement, against Edmund Walker, the other trustee, and also against the executor of Abraham Walker; it alleged non-payment of the £2,000, and that the executor refused to pay that sum, on the ground that Edmund Walker was a mortgagee and judgment creditor of the estate of Abraham Walker to an amount exceeding the whole value of his estate. It charged that the alleged mortgage and judgment against the estate were fraudulent and void as against the plaintiff, having been taken by Edmund Walker after the execution of the marriage settlement, and with notice thereof. The bill, amongst other things, prayed for an account. The bill was demurred to for multifariousness, and the demurrer was overruled. "There are several matters," said Alderson, B., "and I apprehend that in all of them he (Edmund Walker) has some concern. He is concerned in the account, because he is a trustee; for which reason he is very properly made a party."

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In a bill for an account of the trust estate, all the trustees of the marriage settlement were necessary parties either as plaintiffs or defendants; and no decree for an account would be made, unless they were all parties to the suit. And the language of Lord Cottenham in Parr v. The Attorney-General, at page 435, so far from sustaining Mr. Thomson's argument, is against him in this case. "If this matter were split into two cases, which, according to the argument of Mr. Parr's counsel, would be necessary, it would be one information complaining of the bond, and another information complaining of the rate; the case as against the corporation, as to both, being identically the same; the same facts, the same circumstances, all the allegations would be the same."

The case here, as against the Maritime Bank, instead of being the same as that against the Bank of Montreal and Mr. Barbeau is certainly different; involving different allegations, and presenting different points.

If the introduction into the bill of a separate and distinct ground or cause of complaint against the Bank of Montreal and Mr. Barbeau has rendered the bill multifarious, the Court can, sua sponte, take advantage of the defect, although the defendant can only do so by demurrer.

And I think that I ought to take the objection here myself. Because, on the motion for the injunction, when I called Mr. Thomson's attention to the delay which had occurred, and intimated my doubts of its being a case for an order *ex parte*, he referred to the fact that Mr. Barbeau had only recently arrived from Montreal to attend the meeting on 10th June (see sections 7 and 8 of bill), and said that until his arrival here and the production of his power of attorney from the Bank of Montreal, the plaintiff was not aware of the intention of that bank to vote upon the stock which they held in the Maritime Bank. My attention had not been called to the length of time that the notice of that meeting had been published; but the bill itself having alleged that notice of the meeting had been published according

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to the statute (see 34 Vict. c. 5, ss. 30 and 69), I should have referred to the statute and ascertained how long it was required to be published, had I not regarded the delay as sufficiently accounted for by the suggestion with reference to Mr. Barbeau's recent arrival, and the plaintiff's ignorance of the bank's intention to vote, until he came. In fact, there is no doubt I was largely influenced in granting the order by the ingenious way in which the facts of which I am now satisfied are two distinct cases are blended in the bill.

On these two grounds, without discussing the others taken by Mr. Weldon, I am of opinion that the injunction must be dissolved. I will speak of the costs again, on some Chamber day.

By the Bank Act, 53 Vict. c. 31, s. 18 (D.), the shareholders of a bank may regulate, by by-law, the day upon which the annual general meeting of the shareholders for the election of directors shall be held. By section 3 the provisions of the Act apply to certain banks enumerated in Schedule "A" to the Act, and to every bank incorporated after the 1st of January, 1890. Section 18 does not apply to the Bank of British North America, or to the Bank of British Columbia. It applies to the Merchants' Bank of P. E. Island. See Maclaren, Banks and Banking, 19.

Where directors of a company are seeking to do an act which is *ultra vires*, and illegal, and incapable of ratification by the shareholders, an individual shareholder may maintain an action in his own name, without suing on behalf of other persons as well as himself to restrain the directors from doing the act. In Hoole v. Great Western Railway Co., L. R. 3 Ch. 272, Lord Cairns, L.J., said: "I have a very strong opinion that any corporator or member of a company may maintain a bill against the corporation, and the executive to restrain them from doing an act which is *ultra vires*, and therefore illegal." And Sir John Rolt, L.J., said: "If the act complained of is illegal, I do not at present see why any single shareholder should not be at liberty to file a bill to restrain the company from exceeding their powers." In Russell v. Wakefield Water Works Co. L. R. 20 Eq. 474, Jessel, M.R., said: "We are all familiar with one large class of cases. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a bill, indeed, may be maintained by a single corporator, not suing on behalf of himself and of others, as was settled in the House of Lords in a case of Simpson v. Westminster Palace Hotel Co., 8 H. L. C. 712." The question was very fully considered in Cass v. Ottawa Agricultural Ins. Co., 22 Gr. 512. The defendant company was incorporated by statute, which provided that it should not commence business until at least $50,000 of its capital stock should be paid up. The company borrowed this sum and deposited it with the Minister of Finance, and obtained a license to commence business. The plaintiff, one of the stockholders, thereupon filed a bill in his own name to restrain the company from carrying

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on business until the $50,000 should be actually paid up. On demurrer by the company it was held that the bill was properly filed by the shareholder alone, and that it need not be on behalf of himself and others. Proudfoot, V.C., said: "The acts complained of being in my opinion *ultra vires*, has an individual shareholder a right to sue without suing on behalf of himself and the other shareholders except the defendants? There is no doubt that it is competent for one shareholder to institute a suit on behalf of himself and co-shareholders, for the purpose of obtaining relief in respect of illegal acts done or contemplated by directors. And most of the cases have been framed in that form. In Armstrong v. The Church Society, 13 Gr. 562, Mowat, V.C., is said to have gone a step further, and held that the plaintiff must sue in that way. The acts complained of were such as might entitle the corporation to relief against its officers, but did not absolutely, and of necessity, fall under the description of void transactions. The corporation might elect to adopt them, and hold the officers bound by them. In other words, the transactions admitted of confirmation at the option of the corporation. The corporation itself, in ordinary circumstances, might have been the plaintiffs. And in Cooper v. Earl Powis, 3 De G. & S. 688, the bill was to restrain the company from applying to Parliament for an alteration of their charter, a matter which was clearly capable of confirmation by the company. In Mozley v. Alston, 1 Ph. 790, so often cited in questions of this nature, the bill was filed by two shareholders, not on behalf, etc., against a company and the directors, charging improper conduct on the part of the directors in refusing to affix the seal of the company to a resolution of the shareholders to oppose a bill in Parliament for the union of the company with another company; and complaining of irregular conduct in the election of the directors, alleging that twelve out of eighteen directors were illegally in possession of the office. Upon the latter ground the Chancellor held that the Court had no jurisdiction. Upon the former complaint he held that it was an injury to the corporation itself, and the corporation should have been plaintiffs, quoting with approval the decision in Foss v. Harbottle, 2 Hare, 461. It was a matter capable of confirmation by the whole body of shareholders, and the bill alleged that a large majority of them approved of the objects of the bill, so that there was no difficulty in the way of setting the corporation in motion. The marginal note is calculated to mislead. It is true, as there stated, that the plaintiffs could not impeach the illegal transaction there attacked, but it was not because they were mere shareholders, but that the Court had no jurisdiction on the subject complained of. There is nothing in the case to show that to attack an illegal transaction, the plaintiffs must represent all the shareholders except those implicated in it. These cases do not seem to me to establish the proposition that where the acts are void as not authorized by the Act of incorporation, and admit of no confirmation, that an individual corporator cannot sue."

A motion to discharge an *ex parte* injunction on the ground of its having been obtained by misrepresentation is proper, though the injunction would expire on the day the motion was made: Winkledon Local Board v. Croyden Rural Sanitary Authority, 32 Ch. D. 424, per North, J., distinguishing Bolton v. London School Board, 7 Ch. D. 766, 771.

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CHASE v. BRIGGS.

(No. 2. Ante, p. 53.)

Practice—Costs of order to set aside order to set cause down for hearing—Attendance on Clerk—Brief—Abbreviating affidavits—Chapter 119, C. S. N. B.

An order nisi to set aside with costs an order setting a cause down for hearing was made absolute. The order absolute was drawn up by the clerk at the instance of defendant's solicitor with an appointment to settle the minutes. At the taxation of the defendant's costs the clerk allowed $1.34 for attendance on taking out the order nisi and $1.34 for attendance on the order absolute. By the table of fees (c. 119, C. S.), solicitor attending clerk on every decretal order is allowed $1.34, and for all other services not provided for in the table the like fees as are allowed to attorneys on the common law side of the Supreme Court. On the common law side a fee of twenty cents is allowed for every attendance on the clerk.

Held, that the order absolute was neither a decree nor a decretal order, but a special order, and that each attendance should be taxed at twenty cents.

The clerk on the taxation of the above costs allowed five dollars for brief, this being the fee allowed in the table of fees to attorneys on the common law side of the Supreme Court (c. 119, C. S. N. B.), and a service for which no provision being made under the table of fees of the equity side of the Court, the same fees are to be allowed as on the common law side. The table of fees of the equity side provides a fee of twenty cents per folio for drawing bill, answer, plea, demurrer, or other writing, not otherwise provided for, and ten cents per folio for copy.

Held, that brief should be taxed per folio as a writing not otherwise provided for.

Costs allowed of abbreviating affidavits used on the application for the above order, and of making copies of abbreviations.

The facts appear in the judgment of the Court.

J. J. Kaye, Q.C., for the plaintiff.

D. S. Kerr, Q.C., for the defendant.

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In this case Mr. Kerr, on behalf of the defendant, at the sittings of the Court in Fredericton in March last, obtained on affidavits an order nisi to set aside an order that I had made at the instance of the plaintiff, to set the case down for hearing on *viva voce* testimony, and all subsequent proceedings with costs. At a subsequent sittings Mr. Kaye, on behalf of the plaintiff, showed cause, and Mr. T. C. Allen supported the rule on affidavits.

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I, at a subsequent sitting, made the order absolute and ordered the plaintiff to pay the costs. This order the Clerk drew up at the instance of Mr. Kerr, the defendant's solicitor, with an appointment to settle the minutes for the 14th of June last, calling that day "Wednesday" instead of "Monday," and sent copies by mail to the solicitors on both sides. He settled the minutes on Monday, the 14th, Mr. Thomson, the plaintiff's solicitor, not attending, as he thought it was to be settled on Wednesday, not Monday. This is of no consequence now, as he only intended to attend to protest against the right to settle at all, and there is no pretence that the order is drawn up wrongly. The counsel before me very properly agreed to waive any question that might arise in consequence of what I have stated, in consideration that the whole question should be disposed of on this application to review the taxation. The costs were taxed by the Clerk, both parties attending, when the plaintiff's agent objected to all the costs connected with the settling of the minutes on the ground that the order made was neither a decree nor a decretal order, and the practice did not authorize or require the minutes to be settled, and even if the practice did so require, still the fee of $1.34 allowed by the Clerk for attendance on him on settling was not authorized by the table of fees, and therefore should be disallowed.

By the Act 17 Vict. c. 18, s. 2, the practice of the Court of Chancery in England prior to the 23rd March, 1839, together with the then practice of the Court of Chancery in this Province, was made the practice of this Court, and this was continued by the 49th chapter, section 2 of the Consolidated Statutes, and as there are no rules or orders of the old Court of Chancery or of this Court affecting the matter I must look at the practice of the Court of Chancery in England to guide me, and according to that I think the order in question is neither a decree nor a decretal order, but is what is called a special order. Grant in his Practice, vol. I., page 133, says on the subject of orders as follows: "Under this head are not intended the general and standing

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orders of the Court; nor such orders as form part of decrees made on the hearing, termed decretal orders; but, orders on further directions (which are also considered as decretal orders); and interlocutory or other orders, either antecedent to the decree, or subsequent to it, including special orders on motion or petition generally. The orders, therefore, here intended are either orders of course, otherwise common orders or special orders; the former, for the ordinary purposes which the common motion, on petition, seeks, such as for time to answer, and the other various unopposed occasions for forwarding the suit generally; the latter obtained for particular purposes on special application."

From this it will be seen that the order absolute in this case was a special order and neither a decree nor a decretal order; but Grant, on page 135, lays it down that the proceedings to settle the minutes of a special order are the same as settling the minutes of a decree, that is, the solicitor attends the Clerk and leaves with him the brief and other papers necessary, and bespeaks a copy of the minutes, and gets the Clerk to name a day to settle the terms of the order. This is notified to the solicitors of all the parties to the suit, and all such as choose attend at the time appointed, when the Clerk settles the terms of the order, which is called settling the minutes. If all are not satisfied with the terms as settled, anyone may intimate his intention to apply to the Court to rectify them, which may afterwards be done. The proceedings thus necessitate the attendance of the solicitor having charge of the order twice before the Clerk. So it will be seen that the defendant's solicitor attended the Clerk in this case once on the order nisi, which is, in my opinion, a common order, and required no settling at all, and twice on the first special order. For these services the Clerk has allowed $1.34 for attendance on each order, $2.68 in all. In this I think he was in error. The item in the table of fees, chapter 119 of the Consolidated Statutes, under which the Clerk allowed them, is as follows: "Solicitor attending Clerk on every decretal order, $1.34." Then, as I have decided, this is not a decretal order, although there

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were the attendances on the Clerk, as has been mentioned, yet it was not attending on a decretal order. There is a fee on the common law side of twenty cents for every attendance on the Clerk, and the equity fee table says, "That for all other service the like fees shall be allowed as on the common law side," and I think the fees allowed for these attendances are governed by this, and the Clerk should only have allowed twenty cents for each attendance, sixty cents in all, instead of $2.68, and this should be reduced by $2.08.

The Clerk has also allowed $3.10 for abbreviating affidavits used on the application, and has disallowed $1.20 for making copies of such abbreviations. The plaintiff now contends that the law does not allow any fee for abbreviating affidavits, and therefore this should be wholly disallowed. The defendant contends that he is entitled not only to the abbreviations but to making a fair copy of them under the item of making copy of any writing not otherwise provided for, 10 cents per folio. On the first point I think I am precluded by the judgment of the Court in the case of *Hendricks* v. *Hallett* (1), which was an application by Mr. Thomson himself to have the abbreviating of affidavits added to his bill, which the Clerk had struck off, and they were added by the Court, as appears by the judgment of the Chief Justice, and so plain was the point considered to be that it appears to have been admitted by the counsel on both sides that they should have been allowed. This decision was on the table of fees in 17th Vict. c. 18, the words of which are identical with the Consolidated Statute now in force, and are as follows: "Abbreviating bill, answer or other proceedings." But if the matter were res integra I would have no doubt, for this application and order were wholly founded on affidavits, and surely they were part of the "proceedings," and within the plain words of the statute; I, therefore, think this item was properly allowed, and as it has always been considered necessary for the solicitors to engross, that is, make a fair copy of the draft of all writings, I think

(1) 1 Han. 170.

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the Clerk should have allowed for such fair copy of the abbreviations, and that $1.20 must be added for this item.

The five dollars for the brief was objected to and allowed. Although I think this right in any view of the case, as it would come to that sum no matter on what principle it was taxed, yet as I understand the Clerk allowed it under the item of $5 allowed on the common law side, and as I am of opinion he was wrong in this, I think it right to say so.

There never was any specific fee allowed for a brief in this Court, but it was always taxed at 20 cents per folio, for drawing 10 cents, and the like sum for each copy required. Under the item in the table of fees, "Drawing bill, etc.," is 20 cents per folio, and 10 cents per folio for each copy, because a brief was a writing, and it was not otherwise provided for; and, in my opinion, this is the proper mode to tax for it, and it does not come under the item "other services," for which the same fees are given as on the common law side. Then there is a charge of $11 made for Clerk's fees objected to. But it appears by the Clerk's own signature that the defendant had to pay him this amount, and neither counsel can show by the materials brought before me either that the charge is right or wrong, nor can I ascertain from such materials.

Mr. Thomson's contention is that Mr. Kerr ought not to have paid a bill without the Clerk giving him the item of his fees, and that they should appear in the bill of costs. And while I agree that it would be more correct for the Clerk to give the items of his bill, yet I cannot see how Mr. Kerr is to blame because he has not done so. It would be quite as easy for the plaintiff's counsel, on taxation, to ask the Clerk for the items as for Mr. Kerr to do so. At all events, I do not think I can deal with this question without calling the Clerk before me to answer for himself, and in fairness to him I think Mr. Thomson should have asked the Clerk for the items before he brought the matter before me, if he intended to dispute his bill. I suppose Mr. Thomson's main objection to the Clerk's bill was made because he

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thought there was no necessity for settling the minutes of the order, but I think otherwise, and don't see that the Clerk's fees are affected otherwise than as $1 is allowed on decrees which is not allowed on orders. The result of the whole is, that $2.08 is to be deducted and $1.20 to be added to the costs as taxed, thus reducing the amount as taxed by the Clerk 88 cents, and making the costs taxed on the order $84.12, for which the defendant will be entitled to issue a fieri facias unless paid in ten days from this date. As both parties were partially wrong, I allow no costs of this application to either party.

The Clerk's taxation of costs may be reviewed by the Court: Hendricks v. Hallett, 1 Han. 170; New Brunswick Ry. Co. v. Kelly, 1 N. B. Eq. 156, unless there has been an appeal, when the taxation is reviewable before the Supreme Court: Cudlip v. Rector, etc., of St. Martins, 2 Pug. 8; Clark v. Schofield, 29 N. B. 403. The application may be made on motion and affidavit, specifically pointing out the items objected to: Hendricks v. Hallett, *supra*; Cudlip v. Rector, etc., of St. Martins, *supra*; In re Ponton, 15 Gr. 353. The taxation may be reviewed where the clerk has acted upon a wrong principle, but not where the question is one of mere *quantum*: Hendricks v. Hallett, *supra*; Clark v. Schofield, *supra*; Cousens v. Cousens, L. R. 7 Ch. 48; Attorney-General v. Drapers' Co., L. R. 9 Eq. 69; Alsop v. Lord Oxford, 1 M. & K. 564; Russel v. Buchanan, 9 Sim. 167; Re Hubbard, 23 Beav. 481; Re Catlin, 18 Beav. 508; Friend v. Solly, 10 Beav. 329; Attorney-General v. Lord Carrington, 6 Beav. 454; In re Congreve, 4 Beav. 87; Fenton v. Crickett, 3 Madd. 496; Stockton v. Dawson, 5 L. J. (N. S.) Ch. 122; or where the objectionable items are very small: Bell v. Moffat, 2 P. & B. 406; Clark v. Schofield, *supra*. Where, however, there has been irregularity before the Taxing Master, Fenton v. Crickett, *supra*; or where costs had been wrongly omitted from taxation, Greenwood v. Churchill, 14 Beav. 160; Budgett v. Budspect of a particular proceeding, Heming v. Leifchild, 8 W. R.; 9 Ib., or where the charges were exorbitant, Smith v. Buller, L. R. 19 Eq. 473, the taxation was ordered to be reviewed.

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October 1.

WALSH v. McMANUS.

Security for costs —Bond—Obligee—Amount.

The bond for security for costs in the Equity Court is to the Clerk of the Court, and in the sum of $500.

This application was made by the defendant to set aside the bond put in by the plaintiff as security for costs, on the ground that the obligee should be the defendant, and not the Clerk of the Court.

Argument was heard September 29th, 1880.

W. B. Wallace, for the defendant.

L. R. Harrison, for the plaintiff.

1880. October 1. PALMER, J.:—

The question in this cause is whether the bond given as security for costs in this suit was properly given to the Clerk of the Court. It was contended on behalf of the defendant that he should have been the obligee. In this matter I think I am to be governed by the practice of the Court of Chancery in England prior to 1839. By the practice of that Court the bond was required to be given to one of the clerks in Court. By Order 40, r. 6, made April 3rd, 1828, the amount of the security which the plaintiff was required to give was fixed at £100 sterling. The reason why the bond is not given to the defendant is plain, when it is considered that the interests of the parties whom it is the object of the Court to protect are not always the same, and it may be that they are adverse, and a plaintiff may become liable to pay costs to one or more defendants without being liable to all. In many cases the interests of all could not be protected unless various bonds were given, if the practice required that the defendant or defendants should be the obligees. I therefore think that the proper practice is to give the bond to the Clerk; that the plaintiff should only be required to give one bond, and that the amount of such

bond should not exceed $500. (For form of condition of bond, see 1 Grant's Chan. Prac. 438.) The proceedings on the bond are by scire facias: Smith's Chan. Prac., vol. 1, pages 560 and 646.

Where the sole plaintiff or all the plaintiffs reside abroad security for costs will be ordered: Dan. Ch. Pr. (4th Am. ed.), 27; Republic of Costa Rica v. Erlanger, 3 Ch. D. 62; Crozat v. Brogden, [1894] 2 Q. B. 30. But not if there are co-plaintiffs resident within the jurisdiction: Winthorp v. Royal Exchange Assurance Co., Dick. 282; Walker v. Easterby, 6 Ves. 612; D'Hormusgee v. Grey, 10 Q. B. D. 13; Smith v. Silverthorne, 15 P. R. 197. If the plaintiff goes out of the jurisdiction permanently after institution of the suit security may be ordered: Lonergan v. Rokeby, Dick. 79; Green v. Charnock, 1 Ves. Jr. 396; Hoby v. Hitchcock, 5 Ves. 699; Weeks v. Cole, 14 Ves. 518; White v. Greathead, 15 Ves. 2; Blakeney v. Dufaur, 2 De G. M. & G. 771; Edwards v. Burke, 9 L. T. (N. S.) 406; Massey v. Allen, 12 Ch. D. 807; Hately v. Merchants Despatch Transportation Co., 10 P. R. 253. Security was required from a plaintiff who had given up his house in England since the filing of the bill, and had gone to reside abroad, as he stated, for a temporary abode, but who left it uncertain whether and when he intended to return: Kennaway v. Tripp, 11 Beav. 588; and see Stewart v. Stewart, 20 Beav. 322; Snook v. Duncan, 5 Jur. 1078; Wilson v. Wilson, 6 P. R. 152. Security will not be ordered if the plaintiff is residing within the jurisdiction at the time of the application: Newcombe v. City of Moncton, 31 N. B. 386; though he intends to go abroad after judgment: Cambottie v. Inngate, 1 W. R. 533; Redondo v. Chaytor, 4 Q. B. D. 453; Ebrard v. Gassier, 28 Ch. D. 232; Wilder v. Hopkins, 4 P. R. 350; Anderson v. Quebec Fire Ins. Co., 15 P. R. 132. As to what constitutes residence abroad, see Ex p. Brandon, 25 Ch. D. 500.

Security may be required from a petitioner under the same circumstances as from a plaintiff: Ex p. Foley, 11 Beav. 456; In re Norman, 11 Beav. 401; Ex p. Latta, 3 De G. & S. 186; Ex p. Seidler, 12 Sim. 106; In re Doiman, 11 Jur. 1095; except where the petition is presented in a cause to which the petitioner is a party: Cochrane v. Fearon, 18 Jur. 568; *secus* if he is not a party to the suit: Drever v. Maudesley, 5 Russ. 11; Partington v. Reynolds, 6 W. R. 307.

If the plaintiff has substantial property, either real or personal, within the jurisdiction, security will not be ordered: Redondo v. Chaytor, 4 Q. B. D. 453, 457; Hamburgher v. Poetting, 30 W. R. 769; Clarke v. Barker, 6 Times Rep. 256; Redfern v. Redfern, 63 L. T. 780. The rule applies to a foreign company: Re Apollinaris Co.'s Trade-Marks, [1891] 1 Ch. 1. In Ebrard v. Gassier, *supra*, Bowen, L.J., observed that the property must be of a fixed and permanent nature, available for costs; and see Re Howe Machine Co., 61 L. T. (N. S.) 170; Kilkenny Ry. Co. v. Fielden, 6 Ex. 81; Higgins v. Manning, 6 P. R. 147; McKenzie v. Sinton, Ib. 282; Wilson v. Wilson, Ib. 152; Weisbach Gaslight Co. v. St. Leger, 16 P. R. 382. Lord Halsbury, L.C., in In re Apollinaris Co.'s Trade-Marks, *supra*, said that the property might consist of goods and chattels sufficient to answer the possible claim of the other litigant, and available to execution. The plaintiff must prove the nature and location of his property in order to show that it is available to execution: Sacher v. Bessier, 4 Times Rep. 17.

If defendant admits his liability, or has funds in his hands belonging to the plaintiff, he is not entitled to security for costs: De St. Martins v. Davis, W. N. (1884) 86; Re Contract & Agency

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Corporation, 57 L. J. Ch. 5; Crozat v. Brogden, [1894] 2 Q. B. 30; Doer v. Rand, 10 P. R. 165; Anglo-American Co. v. Rowlin, Ib. 391; Duffy v. Donovan, 14 P. R. 159; Thibaudeau v. Herbert, 16 P. R. 420. In Thibaudeau v. Scott, to be reported in 1 N. B. Eq., Barker J., ordered security for costs to be put in for the benefit of the grantor as well as the grantees of a bill of sale in a suit to set it aside as a fraudulent preference, though the plaintiff had obtained a judgment in the Supreme Court for a large amount against the grantor.

Security for costs cannot be required from a person who is compelled to litigate, e.g., by filing a bill to restrain an action at law: Watteeu v. Billam, 14 Jur. 165; 3 De G. & Sm. 516; though the bill also seeks other relief: Wilkinson v. Lewis, 3 Giff. 394.

The insolvency or poverty of a plaintiff is no ground for requiring him to give security for costs: Anon, 2 Anst. 407; Cowell v. Taylor, 31 Ch. D. 34; Rhodes v. Dawson, 16 Q. B. D. 548; Cook v. Whellock, 24 Q. B. D. 658; Dan. Ch. Pr. (4th Am. ed.), 37. The next friend of an infant cannot on the ground of poverty be compelled to give security for costs: St. John v. Earl of Besborough, 1 Hogan; Dan. Ch. Pr., *supra*, note; Fellows v. Barrett, 1 Keen, 119; Jones v. Evans, 31 Sol. Jo. 11. It is otherwise in the case of the next friend of a married woman: Pennington v. Alvin 1 S. & S. 264, overruling Dowden v. Hook, 8 Beav. 399; and see Morgan & Davey on Costs, 7; Martano v. Mann, 14 Ch. D. 419; Schjott v. Schjott, 19 Ch. D. 94; Re Thompson, 38 Ch. D. 317. A married woman suing alone cannot be required to give security for costs, although she has no separate estate and no property available to execution: Re Isaac, 30 Ch. D. 418; Re Thompson, 38 Ch. D. 317.

Where an insolvent brings the suit as nominal plaintiff for the benefit of a third party, security may be ordered: Gerow v. Providence Washington Ins. Co., 25 N. B. 279; Cowell v. Taylor, 31 Ch. D. 38; Mason v. Jeffrey, 2 Chy. Ch. 15; Little v. Wright, 16 Gr. 576; Pendry v. O'Neil, 7 P. R. 52; Bolce v. O'Loane, 7 P. R. 359; Delaney v. MacLellan, 13 P. R. 63; Wallbridge v. Trust & Loan Co., Ib. 67; Delap v. Charlebois, 15 P. R. 45; Gordon v. Armstrong, 16 P. R. 432.

If the defendant takes any step in the suit after becoming aware that he is entitled to security for costs, he will, in general, be held to have waived his right to such security: Morgan & Davey on Costs, 13; Dan. Ch. Pr. (4th Am. ed.), 30; Martano v. Mann, 14 Ch. D. 419; Lydney, etc., Ore Co. v. Bird, 23 Ch. D. 358. As to proceedings to obtain order, see Dan. Ch. Pr. (4th Am. ed.), 33; Leggo's Ch. Forms, 309; and for form of order, Seton (4th ed.), 1643; Morgan & Davey on Costs, 16. The order is that all proceedings be stayed until the plaintiff gives security: Fox v. Blew, 5 Madd. 147. If the plaintiff make default in giving security he may be ordered to give security within a limited time, and in default the suit may be dismissed: Camac v. Grant, 1 Sim. 348; Giddings v. Giddings, 10 Beav. 29; Cooper v. Purton, 1 N. R. 468; La Grange v. McAndrew, 4 Q. B. D. 210; Hollender v. Ffoulkes, 16 P. R. 225. The proposed sureties must be solvent: Cliffe v. Wilkinson, 4 Sim. 122; and if the security becomes altered by the death or insolvency of a surety, fresh security may be required: Lautour v. Holcombe, 1 Ph. 262; Veitch v. Irving, 11 Sim. 122; Gage v. Canada Publishing Co., 10 P. R. 169. The plaintiff's solicitor cannot be surety: Panton v. Labertouche, 1 Ph. 265; Re Norman, 11 Beav. 401. The plaintiff may, instead of giving security, pay $500, together with $100 to cover the expense of paying it in and getting it out: Cliffe v. Wilkinson, 4 Sim. 122; Australian Steamship Co. v. Fleming, 4 K. & J. 407; Ganson v. Finch, 3 Chy. Ch. 296.

DRISCOLL v. FISHER.

1880.
December.

Practice—Parties—Fraudulent conveyance—Setting aside—Suit by assignee—Insolvency Act, 1875 (38 Vict. c. 16.)

An insolvent and wife should not be joined in a suit brought by the insolvent's assignee under the Insolvency Act, 1875 (38 Vict. c. 16), to set aside a conveyance executed by the insolvent and wife prior to his insolvency, with intent to defraud his creditors.

The facts appear in the judgment of the Court.

Argument was heard July 2nd, 1880.

W. B. Chandler, for the plaintiff.

C. H. B. Fisher, for the defendant G. Frederick Fisher.

1880. December. PALMER, J.:—

The only question in this case is whether an insolvent and his wife are either necessary or proper parties to a bill to set aside a conveyance made to defraud the insolvent's creditors before his insolvency. The correct rule as to parties is, I think, given in Calvert on Parties to Suits in Equity, as follows: "All persons having an interest in both the subject and the object of the suit, and all persons against whom relief must be obtained in order to accomplish the object of the suit, should be made parties." See also Mitford and Tyler on Pleading (1).

Then, what is the object of this suit? It is the setting aside a deed from Timothy Driscoll and his wife to the other defendants, by which they conveyed away certain property which, if it had remained in them, would now be vested in the plaintiff, as his assignee in insolvency, under the 16th section of the Insolvent Act of 1875. Then have Timothy Driscoll and his wife, or either of them, any interest in that object? I think not,

(1) Page 36.

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for it can make no difference to them, with regard to the property in dispute, whether their deed is set aside for fraud against the creditors or not. If it stands, the property is all in the other defendants; if set aside, for the above reason, the property is in the plaintiff. In either case they can have no claim to it, and, therefore, they have no interest in the object of the suit. Can any relief be had against them by the suit? I think it equally clear that there cannot; the only relief suggested is discovery, or the costs of the suit.

As to discovery, I am not aware that discovery can be got against a party, unless such discovery can be used as evidence against the party against whom such discovery is sought.

Of what utility would it be to make a person a party to the suit for the mere purpose of discovery? It would not be evidence against any person against whom the plaintiff could have any relief. Timothy Driscoll could be called as a witness when the plaintiff could not only have any discovery that he wanted, but it would be evidence in the case, because the other party would have an opportunity to cross-examine.

Mr. Wigram, at page 200 of his treatise on Discovery, says: "The purpose for which discovery is given is simply and exclusively to aid the plaintiff on the trial of an issue between himself and the defendant."

Now, there cannot be an issue in this case between Timothy Driscoll or his wife and the plaintiff. The only issue would be whether the other defendant has the title or the plaintiff, and the answer of Timothy Driscoll or wife never could aid the plaintiff on such a trial, for it could not be admitted. Having no interest, they are witnesses merely, as no relief can be had against them.

Then as to costs. I do not think that any person can be brought into Court, or made to pay costs, when no other relief can be obtained against him. Costs are given against a party for indemnifying the other party for necessary litigation against him to obtain some right, and I am not aware that a suit ever could be maintained against any person for the costs of such suit merely.

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I think all the authorities bear out this principle. Sir Thomas Plumer, in *Whitworth* v. *Davis* (2), says that a person who has no interest, and is a mere witness, against whom there can be no relief, ought not to be made a party. And Sir John Leach in *Smith* v. *Snow* (3) says: "Persons not interested in the suit cannot be made parties." And again, in *Lloyd* v. *Lander* (4), speaking of a bankrupt, he says: "Having thus neither interest nor power in the subject of the suit, which requires to be bound by the decree of the Court, it is difficult to conceive any principle upon which he can be considered as a necessary party." In the case of *Weise* v. *Wardle* (5), Sir George Jessel, M.R., says: "The real ground of demurrer is that the bankrupt ought not to be a party to the suit. The charge is that the bankrupt has conveyed away part of his property so as to defeat or delay his creditors. Now, in respect of that property, he has no interest, nor is he under any personal liability; why, then, is he made a defendant?" He allowed the demurrer in that case, which cannot be distinguished from this. I must, therefore, allow the demurrer with costs, and the order will be made accordingly, and that Timothy Driscoll's and his wife's name be struck out of the bill, and that the plaintiff pay the costs, which, when paid, he is to be recouped by the estate, and upon payment of such costs the plaintiff to be at liberty to amend his bill, as counsel may advise, if he does so within twenty days after the taxation of costs.

A like decision was arrived at in Buffington v. Harvey, 95 U. S. 99. The bill was filed by the assignee in bankruptcy to set aside, as a fraud upon creditors, a conveyance of real and personal property by the bankrupt. To the objection that the bill was defective for want of parties in not making the bankrupt a party, Bradley, J., said: "The bankrupt had no interest to be affected except what was represented by his assignee in bankruptcy, who brought the suit. As to the bankrupt himself, the conveyance was good; if set aside, it could only benefit his creditors. He could not gain or lose, whichever way it might be decided." See also Benton v. Allen, 2 Fed. Rep. 448.

Where a bill charges the bankrupt with acts of fraud, which, if proved to be true, would entitle the plaintiff to a decree against

(2) 1 V. & B. 545.
(3) 3 Madd. 10.
(4) 5 Madd. 282.
(5) Law Rep. 19 Eq. 171.

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him, the bankrupt cannot demur; for, notwithstanding the bar by the bankruptcy, the charges of fraud must be answered: Hare on Discovery (2nd ed.), 61. Thus, where a creditor, having obtained execution against the effects of his debtor, filed a bill against the debtor, against whom a commission of bankruptcy had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having, by permission of the plaintiff, possessed part of the goods which had been taken in execution for the purpose of sale, instead of paying the produce to the plaintiff, had paid it to his assignees, a demurrer by the alleged bankrupt, because he had no interest and might be examined as a witness, was overruled: King v. Martin, 2 Ves. Jr. 641.

In Redesdale on Pleading, 161, it is said that it seems to have been generally understood that if any discovery is sought of the acts of a bankrupt before he became a bankrupt, he must answer to that part of the bill for the sake of discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignees; and otherwise the bankrupt might entirely defeat justice. And see Hare on Discovery (2nd ed.), 59. In Bray on Discovery, 53, this statement is said to be unsupported by the cases: "The practice of making a bankrupt a party to a suit for relief for the purpose of discovery, though said to be a convenient one, especially in a suit for an injunction against the assignees where he might be the only person having a knowledge of the transaction, was never formally established by any decision: Whitworth v. Davies, 1 V. & B. 548, 551." Story Eq. Pleading (9th ed.), 215, also comments adversely upon the passage, and says that the whole doctrine was shaken, if not overturned, in Whitworth v. Davies, 1 V. & B. 548, and Griffin v. Archer, 2 Anst. 478. In Gilbert v. Lewis, 1 De G. J. & S. 38, Lord Westbury, observed that there must be allegations to show that unless the discovery sought were given there would be a failure of justice, otherwise, relief failing, the discovery must fail also. At p. 50 his Lordship said: "I am by no means disposed to hold, that a bankrupt, who, antecedently to his bankruptcy, has been engaged in a fraudulent transaction, whereby he has acquired property, may not be made a party to a bill for discovery, even although the property has been transferred by law to his assignees. But then the bill must be constructed for the express purpose of obtaining that discovery from the bankrupt. If the discovery sought from the bankrupt is sought merely as incidental to relief, then he, not being a necessary party in respect of that relief, may demur to the portion of the bill seeking it, and therefore to the discovery, which is sought merely as incidental to it." In Attwood v. Small, 6 Cl. & F. 353, Lord Cottenham said the practice ought never to be resorted to, except in a very extreme case, where there was a fear of losing the costs; and that where that was not the case it could not be resorted to except for the purposes of injustice. In Barnes v. Addy, L. R. 9 Ch. 244, Lord Selborne, L.C., said: "I repeat what I said during the argument, that I have been under the impression, and I hope the impression will go abroad, that of late years the Court has set its face against making solicitors or others, who are properly witnesses, and who are not chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone. I know no principle on which they can be charged and made parties for that purpose, unless other and further relief might also be given against them." Referring to this passage, Lord Selborne, L.C., in Burstall v. Beyfus, 26 Ch. D. 40,

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said that he adhered to it, and added that if they could not be made parties to pay costs, *a fortiori* they could not be made parties for the mere purpose of making discovery. In Kerr v. Read, 22 Gr. 529, Proudfoot, V.C., refers to the language of Lord Westlin, quoted *supra*, and points out the special circumstances to which it must be taken as alone applicable. The rule that the grantor of a fraudulent conveyance should not be made a party to a suit brought by an assignee in bankruptcy rests upon the intelligible basis that upon the conveyance being set aside the property falls into the estate of the assignee. Where, however, the suit is brought by a creditor it would seem to be necessary to join the grantor, since upon the success of the suit the property would revert to him, and a decree could be made against him. See Kerr v. Read, 22 Gr. 529, at p. 544. In Commercial Bank of Canada v. Cooke, 9 Gr. 524, it was held that the grantor of a deed of settlement to trustees in favour of a volunteer was not a necessary party to a suit by a judgment creditor of the grantor to set the deed aside on the ground that it was made in fraud of creditors. And see Scott v. Burnham, 19 Gr. 234. In Gibbons v. Darvill, 12 P. R. 478, it was treated as the settled practice before the Judicature Act not to join the grantor in a suit by a simple contract creditor to set aside a fraudulent conveyance. In the United States there is a conflict of decision as to whether the debtor is a necessary party to a creditor's suit to set aside a fraudulent conveyance by him. See Wait on Fraudulent Conveyances, s. 128. After reviewing the numerous authorities this learned writer says: "What inference then is to be deduced from this mass of authority, and which class of cases embodies the best logic? Should the debtor be joined as a defendant in an action to annul a fraudulent transfer? The best reasoning of the authorities seems to establish the rule that the debtor's presence as a defendant is superfluous in suits brought against fraudulent alienees to annul specific covinous conveyances. The transfer is conclusive upon him, and hence his joinder cannot aid the creditor, or benefit the debtor; the suit is a proceeding *in rem* to clear the title to the property only so far as the creditor's needs may require; the debtor can gain nothing by it; he is practically a stranger to the property, nor can he be prejudiced by a decree which applies the property to the payment of a fixed judgment-debt. On the other hand, where the suit is purely a creditors' bill embodying the elements of a bill of discovery, the debtor's presence would seem to be essential to the jurisdiction of the Court. The practitioner must be careful to distinguish between an action to reach specific property fraudulently alienated, and a suit brought to discover equitable interests which are not subject to execution, and the title to which is in the debtor. In the latter case the debtor must of necessity be a party." He concludes by saying that in any case, "the more prudent practice is to summon the debtor as a defendant."

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SAYRE v. HARRIS.

Practice—Answer filed but not served—Motion to take bill pro confesso—Costs—Chapter 49, C. S. N. B., s. 28.

Where, after notice of motion under section 28 of chapter 49, C. S. N. B. to take the bill *pro confesso* for want of an answer, the defendant files an answer without serving a copy, the motion cannot be granted, but the plaintiff may apply either to have the answer taken off file, or for the costs of the notice of motion.

Where defendant files an answer, without serving a copy, the answer may be ordered to be taken off file.

The facts fully appear in the judgment of the Court.

J. Travis, for the plaintiff.

W. H. Tuck, Q.C., for the defendant.

1878. March. ALLEN, C.J.:—

This was an application in the alternative, either to take the bill pro confesso for want of an answer; or, for process of contempt against the defendant for not serving a copy of his answer on the plaintiff's solicitor; or, that the answer filed be taken off the files for irregularity; or, that the defendant should pay to the plaintiff the costs of this application.

The defendant appeared in the suit on the 7th August last, and on the 15th August a copy of the plaintiff's interrogatories was served upon his solicitor; (a copy of the bill had been previously served). On the 2nd October the defendant obtained a Judge's order allowing him three months' further time to answer, which time expired on the 2nd January last. No answer having been filed up to the 14th January, the plaintiff's solicitor, on that day, served a notice of motion to take the bill pro confesso on the last Tuesday in January, but he did not move pursuant to his notice; an answer having been filed on the 28th January, the day previous to that on which he would have been entitled to move. No copy of the answer was served on the plaintiff's solicitor until the 27th February, several days after notice of the present motion was given.

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The question in this case is, whether the filing of an answer, without also serving a copy on the plaintiff's solicitor, is sufficient to defeat an application to take the bill pro confesso for want of an answer. This depends upon the construction to be given to the 28th section of chapter 49 of the Consolidated Statutes, which directs that when a defendant appears a copy of the bill and interrogatories shall be served on his solicitor, and, "if no demurrer, plea or answer be filed, and a copy thereof served on the plaintiff's solicitor within one month from such service, any Judge at any monthly sitting, may, on affidavit of the facts, and on production of the Clerk's certificate of the filing of the bill and interrogatories, and that no plea, answer or demurrer, has been filed by such defendant, be moved that the said bill be taken pro confesso against such defendant," etc.

If the question depended upon the first part of this clause it would be free from difficulty; for the Statute declares as plainly as words can express it, that not only must the answer be filed, but the copy must be served upon the plaintiff's solicitor within a month after the service of the copy of the bill and interrogatories on the defendant's solicitor. But the Statute also directs that the plaintiff, in order to entitle himself to an order to take the bill pro confesso, should produce the Clerk's certificate that no plea, answer or demurrer has been filed by the defendant. If, therefore, the defendant has filed an answer, however recently, it seems to me that the plaintiff could not succeed with his application—as was the view taken by the plaintiff's counsel in this case on his notice to take the bill pro confesso at the Court held on the last Tuesday in January.

But it does not follow, because the plaintiff cannot move to take the bill pro confesso in such case, that he is without remedy. I think he may either apply to have the answer taken off file for irregularity, or he may apply for the costs of the notice of motion to take the bill pro confesso. The case of *Sidgier* v. *Tyte* (1), is an authority for the first proposition, and *Spooner* v. *Payne* (2), for the second. See also Dan. Chan. Pr. (3rd ed.) 592, 625.

(1) 11 Ves. 202.

(2) 2 DeG. & S. 445.

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I consider that the mere filing an answer without also serving a copy on the plaintiff's solicitor is an irregularity, and that the plaintiff in such a case is entitled to move to take the answer off file in order to enable him to move to take the bill pro confesso. So, where the defendant has not answered in time, and the plaintiff gives notice of motion to take the bill pro confesso, and is met with an answer filed just previous to the opening of the Court, why should he be put to the costs of that proceeding, which was caused entirely by neglect of the defendant in not putting in his answer when he should have done it? At the time the plaintiff's solicitor served that notice he had a perfect right to do so, because the defendant was in fault, and if, by the act of the defendant between the time of being served with the notice, and the time when the motion was to be made to the Court, he has prevented the plaintiff from obtaining what he clearly had a right to when he gave the notice, he (defendant) ought in justice to pay the costs which the plaintiff has necessarily been put to in consequence of his default.

I shall, therefore, order the answer to be taken off file, unless the defendant (within seven days after taxation) pays the plaintiff's costs of the notice of motion to take the bill pro confesso in January, and also the costs of the present application.

See notes to Manchester v. White, ante, p. 59.

In Dan. Chan. Prac. (4th Am. ed.), 524, it is laid down that after an answer is actually filed plaintiff cannot have a decree *pro confesso* without in the first instance moving to take the answer off file. But see Hillhouse v. Tyndal, 12 Ir. Eq. R. 316. Where an answer was put in neither signed nor sworn to by the defendant it was ordered off file on the plaintiff's application: Crossman v. Hanington, 26 N. B. 588.

By English General Orders, o. 3, r. 9, where any solicitor or party causes an appearance to be entered, or an answer, demurrer, plea, or replication to be filed, he shall, on the same day, give notice thereof to the solicitor of the adverse party, or to the adverse party himself, if he acts in person. "The omission to give due notice of having filed the answer will not render the latter inoperative; thus it will not deprive the defendant of his right to move to dismiss the bill for want of prosecution, at the expiration of the period allowed for that purpose, from the date of filing the answer: Jones v. Jones, 1 Jur. (N. S.) 863; and see Lowe v. Williams, 12 Beav. 482, 484. It would seem that, in such

a case, the time allowed the plaintiff for taking the next step in the cause will, on his motion, be extended, so as to give him the benefit of the time he would otherwise have lost in consequence of the omission." Dan. Ch. Pr. (4th Am. ed.), 755. In Wright v. Angle, 6 Hare, 107; 11 Jur. 987, it was held that where the plaintiff omitted to give notice of the filing of a replication till the day after it was filed, the proper course was not to move to take it off the file, but to move to enlarge the time for taking the next step in the cause; but see Johnson v. Tucker, 11 Jur. 466; 15 Sim. 599, where the notice not having been given till five weeks after the replication was filed, the latter was ordered to be taken off file. Wright v. Angle was, however, followed in Lloyd v. Solicitors' Life Ass. Co., 24 L. J. Ch. 704; 3 W. R. 640. In Ontario Johnson v. Tucker was followed in Lewis v. Jones, 1 Chy. Ch. 120; 9 L. J. 133; but in Parker v. Brown, 3 Chy. Ch. 354, the practice laid down in Wright v. Angle and Lloyd v. Solicitors' Life Ass. Co. was adopted.

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McGRATH v. FRANKE ET AL.

Practice—Appeal—Stay of proceedings—Terms—Chapter 49, C. S. N. B., s. 66.

1881. March.

Upon a judgment overruling the defendants' demurrer, the Court refused to stay proceedings pending an appeal, considering that greater injury would result to the plaintiff by a delay than to the defendant by a refusal to stay proceedings, but the plaintiff was required to accept an undertaking for the payment of the costs occasioned by the demurrer in case the appeal was dismissed, and to give an undertaking to forego them in case the appeal was allowed.

This was an application by the defendants to stay proceedings pending an appeal from the judgment of the Court, overruling the defendants' demurrer. The facts are sufficiently stated in the judgment.

C. N. Skinner, Q.C., and *J. G. Forbes*, for the plaintiff.

A. G. Blair, for the defendant Luce.

C. A. Palmer, for the defendant Louis Franke.

1881. March. PALMER, J.:—

The defendants' demurrer in this cause having been overruled they gave notice of appeal, and then made

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this application to me to stay the proceedings on such order until the appeal was determined under the 66th section of chapter 49 of the Consolidated Statutes. By this section it is expressly enacted that notice of appeal shall not operate as any stay of proceedings, but it authorizes the Judge making the order to suspend the operation and force of it, and stay the proceedings thereon until the appeal is determined upon such terms as he shall think just. The first question that arises under this section is whether these directions are discretionary or compulsory. I think it is clear, both from the object of the Act and its terms, that they are discretionary, i.e., that a Judge ought to grant or refuse a stay according to whether granting or refusing it would best conduce to the ends of justice.

The right to have such stay could never have been considered absolute, or the Legislature would have made the appeal itself a stay. The fact that the Act requires an order of a Judge to create a stay, and that it declares that there shall be no stay without such order, in my opinion, shows that the Legislature intended that there should be no stay without an adjudication. The words are not that the Judge shall make the order to stay, but that it shall be lawful for him to do so, and this, I think, is a mild way of saying that the Judge may do so. Then, if it is in the discretion of the Judge, what considerations ought to govern him in granting or refusing such order? I think they are these:

First.—As the party appealing has the right to do so, ex debito justitiæ, the Judge ought to see that he gets the full benefit of such right; and if proceeding in the case will deprive him of, or limit such right, then the Judge ought to grant a stay, securing the respondent as far as possible from injury by the terms of the order; but if proceeding in the suit will not deprive the appellant of his full right to appeal, and benefit thereunder, then arises the next question for the Judge to decide before granting or refusing the order to stay, and that is which will work the least injury, and having determined that, to consider what terms he can impose that will have the effect of remedying any hardship that will be occasioned

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to the party against whom he decrees, in case the order appealed from is decided in his favour.

Applying this rule to the case, it will be seen that the effect of not staying the proceedings will not in any way deprive the defendants of the full benefit of their appeal, and in case it is decided in their favour, the suit will be dismissed as against them, and no ulterior proceedings can interfere with such effect. If I stay the proceedings, the effect will be that I will thereby stay the whole proceedings in the cause until the final determination of that appeal. The effect of that on the different parties would be as follows: The defendants, whom I have allowed to take the whole of what the plaintiff charges to be partnership property out of the jurisdiction of the Court, will retain it until the final determination of this cause, and the plaintiff is not only left without his share of such property, but is harassed by claims of creditors, to whom the existence of the property is due, and which claims, if he is right, the property ought to pay; and by the stay this state of things remains for just so much further time as can be consumed in disposing of the appeal. If I do not stay the proceedings, they will have to answer, and the suit will proceed, and just so much more quickly come to an end. But, in case the defendants should succeed in the appeal, they will then have been put to the costs of the proceedings after such appeal unnecessarily, and will have had to pay the costs occasioned by the demurrer, which, in case they so succeed, they ought not to pay; from which it will be seen, if I stay the proceedings and the plaintiff succeeds on the appeal, such order will have injured him by delaying his proceedings and remedy provided by law for some considerable time, and that he will be left to the annoyance of satisfying the creditors of the partnership as best he can; if I do not stay, and the defendants should succeed on the appeal, then they would be wronged in this, that they would have had to pay the costs of the demurrer, which they ought not to pay in that case, and would be put to the costs of putting in an answer, which, in that case, would be unnecessary. The first of these

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objections I can relieve them from by making it a condition of refusing to stay that the plaintiff shall accept an undertaking to pay those costs in case the appeal shall be decided in his favour, and if in favour of the defendants, then to forego them altogether.

The only thing that remains is as to putting in the answer, and as I do not think the hardship of being called upon to do this is at all equal to the injury that the delay would be to the plaintiff in not doing so, and bearing in mind that it is the plaintiff's right to have such answer, unless there is a good legal excuse for not giving it, I do not think it right to stay the proceedings for that cause merely. I know it has been often urged upon me that mere delay in deciding a party's cause is no injury. But while I admit that the nature of Courts of Justice is such that they can only move and do justice with such celerity as is consistent with giving both sides a fair opportunity of being heard, yet I cannot help but think there is but little difference in many cases between delaying and refusing justice altogether, and, in my opinion, a Court is doing as much wrong in delaying to give a suitor that justice to which the law entitles him, as if it refused it to him altogether. Therefore I feel it my duty to see that, as far as I can, suitors are not unnecessarily delayed, either by appeals or other dilatory proceedings, or by delaying my own judgments beyond the time that it is necessary to carefully consider the case. In this case, could it be said that I had done justice to the plaintiff, if, on every interlocutory proceeding, the defendants appealed, and I had stayed the proceedings, and I had thereby enabled the defendants, who are without the jurisdiction of the Court, and beyond the power of the Court to make them pay the costs of such proceedings, to delay the final adjudication of the case for years, and if I finally ordered, as the plaintiff prayed for, that the debts of the partnership, and some $3,000 more, should be paid to the plaintiff out of funds now in the hands of the defendants, when in the meantime the plaintiff had been compelled to pay those debts out of his own private means, and his capital carried off and locked up

in the hands of the defendants? In my opinion all the theories in the world could not make such a proceeding justice.

The order will be that I will refuse the order to stay the proceedings, on the plaintiff's solicitor filing with the deputy clerk an undertaking to accept an undertaking to be approved of by such clerk, to pay the costs occasioned by the demurrer, in case the appeal is dismissed, and in case the appeal is allowed, to forego them altogether, instead of the payment of such costs under the order overruling the demurrers. The costs of this application, and of opposing the same, to be costs in the cause.

An appeal does not suspend any proceedings on the decree or order appealed from, unless by special order of the Judge; but the person in possession of any decree or order is at liberty to proceed thereon as if no appeal had been taken. By 53 Vict. c. 4, s. 108, "No notice of appeal from any order shall operate as a stay of proceedings in any way, or prevent such order being enforced or acted upon. It shall, however, be lawful for a Judge on the application of any party stating his intention to appeal from the same, to suspend the operation and force of such order, and stay proceedings thereon until such appeal be determined, upon such terms and conditions as he shall see fit; provided, that if such appeal shall not be prosecuted and brought to a hearing as soon as the same can be by the practice of the Court in such cases, such Judge may discharge such stay of proceedings, and the original order shall thereupon become in full force, and the same may be forthwith acted upon; provided also, that it shall be lawful for such Judge (or any other Judge in case of his inability to act), on good cause shewn therefor on the application of the party in whose favor such original order was made, at any time while such appeal is pending, to vary the terms and conditions of such stay of proceedings, and order that the same be discharged unless such terms and conditions as varied be complied with." The discretion exercised by a Judge under this section will not be interfered with except in an extreme case. See Hansard v. Lethbridge, 8 Times Rep. 179.

The pendency of an appeal does not suspend the recovery of costs ordered to be paid by the decree appealed from: Tyson v. Cox, 3 Madd. 278; Herring v. Clobery, 12 Sim. 410; Archer v. Hudson, 8 Beav. 321; Bainbrigge v. Baddeley, 10 Beav. 35; Colyer v. Colyer, 10 W. R. 748; Pinkett v. Wright, 4 Hare, 160; Bradford v. Young, 28 Ch. D. 21. In Seton on Decrees (4th ed.), 1617, the rule is said to be settled, that where the order appealed from directs the appellant to pay costs, the costs must be paid according to the order, on the personal undertaking of the respondent's solicitor to refund if the appeal is successful, citing Grant v. Banque Franco-Egyptienne, 3 C. P. D. 202; Morgan v. Elford, 4 Ch. D. 352; Merry v. Nicholls, L. R. 8 Ch. 205; Beattie v. Lord Ebury, 28 L. T. N. S. 458; Gibbs v. Daniel, 4 Giff. 41n. And see also Wilson v. Church, 12 Ch. D. 454; Ashbee v. Appleby, W. N. (1878) 20; Eames v. Hacon, W. N. (1881) 4. These decisions were cited by counsel

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in Attorney-General v. Emerson, 24 Q. B. D. 56, as establishing the invariable practice that the Court will order the respondent's solicitor to give an undertaking to repay the costs paid to him, in the event of the appeal succeeding, or otherwise will stay proceedings as to costs. By order 58, r. 16, "an appeal shall not operate as a stay of execution or of proceednigs under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may order." Lord Esher, M.R., said: "The first question is, whether or not there has arisen a practice, which has become invariable, that the Court will in every case, whether there are particular circumstances in the case or not, make an order to stay proceedings pending an appeal unless the respondent's solicitor gives the undertaking. Cases have been cited in which the order has been made, and expressions used which, it is said, shew that the Courts have laid down as a rule to guide them this practice, which so has become an established practice. Now, expressions used in cases decided before rule 16 was drawn up, are, to my mind, quite immaterial; as soon as the rule was made the Court could not look beyond it. . . . The real question is, what is the construction of this rule? . . . In all the rules the word 'may' has been held to mean 'may or may not.' It has been held to give a discretion, which is called a judicial discretion, but is still a discretion. If the practice contended for be established, in my mind, it alters the effect of the rule. It takes away the discretion to refuse a stay of execution, by imposing a particular term as a condition of the refusal in all cases. The Courts have no power to alter the effect of the rule; no authority to establish any practice in conflict with the rule, and no power to say that it shall be binding upon the Courts. I decline to take any other view than that the Court has a discretion in each case." Lindley and Lopes, L.JJ., delivered judgments to the same effect.

An application for a stay of execution for costs pending an appeal is not to be granted as a matter of course; and there must be evidence to shew that the respondent would be unable to repay the costs in the event of the appellant succeeding: Barker v. Lavery, 14 Q. B. D. 769; The Annot Lyle, 11 P. D. 114.

The costs of an application to stay proceedings must in general be paid by the applicant whether successful or not: Bauer v. Mitford, 9 W. R. 135; Topham v. Duke of Portland, 11 W. R. 813; Waldo v. Caley, 16 Ves. 212; Merry v. Nickalls, L. R. 8 Ch. 205; Cooper v. Cooper, 2 Ch. D. 492; Morgan v. Elford, 4 Ch. D. 352; Wilson v. Church, 12 Ch. D. 454. But in Earl of Shrewsbury v. Trappes, 2 De G. F. & J. 172, L. J. Knight Bruce said that the rule was not an inflexible one. In Burdick v. Garrick, L. R. 5 Ch. 453, the proper rule was said to be that the costs should ordinarily abide the result of the appeal. This rule was followed in Adair v. Young, 11 Ch. D. 136. In Morison v. Morison, 19 Jur. 339, although the application was refused no costs were granted. If the decree or order appealed from is reversed before the application is heard, there being no longer any presumption of the correctness of the decision of the lower Court, the costs of the application will be costs in the cause: Richardson v. Bank of England, 1 Beav. 153, or no costs will be given, Pennell v. Roy, 1 W. R. 271. As to the other terms upon which proceedings will be stayed, see vol. 5, Chitty's Eq. Index (4th ed.), 5334.

THE CORPORATION OF THE BROTHERS OF THE CHRISTIAN SCHOOLS v. THE ATTORNEY-GENERAL OF NEW BRUNSWICK, AND THE RIGHT REVEREND JOHN SWEENY, ROMAN CATHOLIC BISHOP OF ST. JOHN.

1881.
April 8.

Injunction—Restraining application to Parliament for Private Act—Jurisdiction.

Circumstances considered under which a Court of Equity will interfere by injunction in the exercise of its jurisdiction *in personam* to restrain an application to Parliament for a private Act.

1881. April 8. PALMER, J.:—

This is an application for an ex parte injunction to restrain the defendant, the Roman Catholic Bishop of St. John, from promoting before the Legislature of the Province of New Brunswick, a bill affecting the rights of property of the plaintiffs in the bequest contained in the will of the late James Dunphy, mentioned in the Act 37 Vict. c. 118, as created by the said will, and the said Act, and also the Act 40 Vict. c. 39, incorporating the plaintiffs.

As to the rights of the plaintiffs, if any appear by public Acts of Parliament, I think I am bound to take judicial notice of them without proof, as far as may be necessary to enable me to decide the question before me. The bequest, as far as it relates to this matter, is as follows: The testator devised the residue of his estate to his executors in trust to invest, and out of the income to pay the sum of £100 yearly towards the support of a school to be conducted by "our Christian Brothers in the city of St. John, New Brunswick, a society of pious persons professing the Roman Catholic religion established, or to be established, in connection with the Roman Catholic Church in the city of St. John aforesaid."

In order to determine who are entitled to this charity, if the matter had remained as the will intended,

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it would be necessary, I think, to find out what the testator meant by "our Christian Brothers," etc.

The facts relating to this, as far as they have appeared before me, are: That there was at the time of the bequest, and still is, a society in connection with the Catholic Church called the Christian Brothers, whose headquarters are in Paris. That the main object of this society is the teaching of schools for the instruction of the masses in secular education and the tenets of the Roman Catholic religion, and it has no power to establish schools except in connection with said Church, and in order to establish or continue them the permission of the bishop of the Church having jurisdiction in the place must be obtained.

Under the bequest made under the circumstances so appearing, it is difficult to see how the society of the Christian Brothers could have had any beneficiary interest in such bequest.

It appears to me that it was a charitable bequest for the benefit of all the public of St. John who wished their children taught secular education with the tenets of the Roman Catholic faith to be taught by members of the order of Christian Brothers. As well might all the schoolmasters in the country claim to be interested in a bequest for schools. If the Legislature had not interfered, I think it would have been the duty of the executor to have obtained the consent of the Bishop and induced some of the Christian Brothers to establish a school in the city of St. John, and to have expended the £100 a year for that purpose, and if they failed in their duty in that regard, the only person that had sufficient interest in the matter to compel them to do their duty would be the Attorney-General, who could, on behalf of the inhabitants of St. John interested in having the school, demand the interference of this Court to compel the executors to do their duty.

Then comes the Act 37 Vict. c. 118, which in effect fixed the fund out of which this £100 a year was to come at $8,000, and directed it to be invested in Dominion Government bonds, and the Act contains a provision that these bonds were to be held by them (the executors)

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in perpetuity in trust as follows: "For the said society of Christian Brothers in the city of St. John." After this, notwithstanding what I have said with reference to the effect of the will, I think it clear that these Christian Brothers, whoever they were, were the cestui que trustent of this $8,000, and that such right was vested in them by legislative authority.

It was alleged by the bill that a school was at the time of the passing of that Act taught in the city of St. John by members of the Christian Brothers, in connection with the Roman Catholic Church, but it is not alleged who the members of that order who so taught were, or whether they always remained the same, or what, if any, separate existence they had as Christian Brothers of St. John, as distinguished from the whole brotherhood, and consequently it would remain a question whether there was any body in existence which could legally claim as beneficiaries under the name of the Christian Brothers of St. John.

In this state of the case the Legislature passed 40th Vict. c. 39, which incorporated the Christian Brothers who were then teaching school at St. John, by the name of the plaintiffs in this suit, and thus removed the difficulty that I have pointed out. This Act, by section 3, enacts that all property in this Province then held by or conveyed to any person or persons in trust for or to the use of the Brothers of the Christian School, or to the Christian Brothers, is vested in the corporation thereby created (the plaintiffs). If the Act had stopped here, the right of the plaintiffs to this bequest would have been undoubted, but the section proceeds as follows: "Provided that nothing in this Act contained shall be construed to divert or interfere with the bequest contained in the will of the late Rev. James Dunphy towards the support of a school conducted by Christian Brothers in the city of St. John.

There was no attempt made to repeal that part of 37 Vict. c. 118, which declared that this money should be held in trust for the society of the Christian Brothers, and which I think was itself a clear diversion and interference with Mr. Dunphy's bequest, by which, as I have

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before pointed out, the inhabitants of St. John, and not the Christian Brothers, were the beneficiaries. Under these circumstances it is a little difficult to say who is entitled to receive the £100, but I am inclined to think that if this state of the law remains it would be the plaintiffs'. I say nothing as to what they would have been compelled to do in consequence of the receipt of that money.

This being the state of the matter the plaintiffs complain that this money is withheld from them, although they were willing to continue the school, although the defendant, the Bishop of St. John, refused them permission to do so, and consequently they were obliged to leave, and no school could be taught, as contemplated by the said will. They further allege they were induced, by the said Bishop, to come to St. John and establish the said school, by which they expended large sums of money, which were wholly lost in consequence of their being forced to remove. But there is no proof of these facts before me, except the belief of the plaintiffs' counsel. The bill then alleges that in this state of the case the said Bishop is promoting a bill before the Legislature of New Brunswick to deprive the plaintiffs of this £100 a year and prays an *ex parte* injunction to restrain him from doing so. The matter has been ably argued before me by Mr. O'Sullivan of the Ontario Bar, and I am forced to give it hasty judgment, though involving principles of great public interest, and for which reason I should have liked time to write a more considered judgment, although I am clear that it is my duty to refuse the application. It will be seen that this is an application to prevent a person from applying to Parliament. This Court, if it interferes in the way asked, does not attempt to restrain Parliament, but simply acts *in personam* to prevent the defendant from exercising a legal right, that is the right to go to Parliament, which right he can undoubtedly exercise unless he has parted with it or so acted with reference to it that the exercise of it would be a fraud on the plaintiffs. Therefore, in a proper case I would not hesitate to exercise the undoubted jurisdiction of this Court to restrain a person

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by injunction touching proceedings in Parliament for a private bill, or a bill respecting property. The doing that is, I think, in one sense analogous to preventing a party exercising any other legal right that he may have, such as proceeding in a Court of Law, and which this Court constantly restrains, when it can be shown that it would be inequitable to allow the exercise of such right. But the case of going to Parliament differs widely from that of going into a Court of Common Law. The province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable use of such legal right; the ordinary object of Parliament is to abrogate existing rights and create new ones. What would be a proper case for preventing a person from going to Parliament and asking to have existing rights altered is difficult to define or even to conceive. But the authorities show that to deprive a person of the right to ask for any legislation he must have agreed not so to ask, or he must have represented that he would not do so, and induced the party complaining so to act on such representation as to alter his position, so that such legislation would be a fraud upon him.

To show that I am obliged to deny this application, it is enough to say that there can be no pretence that there is in this case any proof of all the facts necessary to make out such a state of things. Whether enough is alleged in the bill or not I am not called upon to decide. I therefore deny the motion, but the plaintiffs can have the liberty to proceed, and I will make it a condition of refusing the application that the defendant appear by his solicitor at once so that the plaintiffs may proceed speedily with the case if they wish.

The proposition contended for by Mr. O'Sullivan was that a person not having rights that could be enforced in a Court should not be permitted to obtain from the Legislature such rights to the injury of the rights of property of third persons; at all events without compensation, and that if this was attempted this Court should restrain him. I am free to admit that the act of spoliation that would be involved in legislating the rights of one man to another without compensation is so

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abhorrent to that sense of justice that subsists in every community where the right of property is recognized, that if such a thing were proposed before any tribunal there could be no doubt as to its duty to do whatever was necessary to preserve such right; but if such duty was wholly disregarded, I do not think that would authorize this Court to assume a jurisdiction that does not belong to it. As I have said, if such a case came properly within my jurisdiction sitting in this Court, there can be no doubt that it would be my duty to decide upon it; but a moment's consideration will show that for this Court to attempt to interfere with the Legislature in this case is to assume that they would do an injustice or decide a matter properly within their jurisdiction wrongly and against justice. Even if I thought they would, my answer is, I am not their judge. The constitution has placed the power of deciding and legislating on these subjects in their hands, not in mine, and for the purpose of protecting the private rights of all by that natural sense of justice of those who form part of such Legislature and which exists in the conscience of all men; besides, by the instructions to the Governor, he is prevented from assenting to any bill unless he has the advice of the Attorney-General that it does not injuriously affect private rights. This advice the Attorney-General is bound to give in a quasi-judicial character.

Why should I assume that he would decide this wrongly? There is no appeal from his decision to this Court, but even if he should fail in his duty in this respect, the party injured is not without remedy, I think; for, as I understand our constitution, he could bring the matter before the Governor-General; and the Minister of Justice would have to examine into the matter, and if it were discovered that private rights had been destroyed without compensation and unjustly, it would, I think, be the duty of the Governor-General in Council to disallow the bill. Except when a person may have deprived himself of the right to go to Parliament either by agreement or fraud, for this or any other Court to attempt to prevent the exercise of the constitutional

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right of going to Parliament to have any law altered or made would result that in all such cases the matter would have to be first discussed in this Court on an injunction bill, and if it survived the injunction bill, then and not till then, it would come before Parliament, its proper tribunal, and in my opinion the only constitutional forum as to whether the law should be made or altered. I for one am not prepared to open the doors of this Court for such litigation. There is not any person who may fear that he will be injured by any proposed legislation who may not apply in person before that tribunal, and by himself, his counsel and witnesses, oppose the passing of any law affecting his private rights; and is not that the old, regular and constitutional mode, and is not an application to this Court a new and irregular mode of proceeding? And if he does show that he has private rights wrongly affected without compensation, then, as I have pointed out, he has an appeal to the Attorney-General, and Lieutenant-Governor in Council, and failing in that, he still has redress by appealing to the Governor-General to disallow the Act —so sacred does our constitution guard the rights of property in all tribunals, whether it be in the Courts of law or the High Court of Parliament. Lord Chelmsford in *Heathcote* v. *North Staffordshire Railway Co.* (1), says:

"What difference can it make whether such pre-existing right exist by the tenure of property or by virtue of contracts? In both cases Parliament has the same power of destroying, altering or affecting such pre-existing rights, providing, as it always does or intends to do, compensation to the party affected; and in neither has this Court a right to interfere by injunction to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound."

The above are my views on the plaintiff's case and the facts presented by them; but it must be remembered

(1) 2 Mac. & G. 100.

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that I have no right to consider anything alleged, or even proved, before me, behind the defendant's back, to be true so far as to finally determine the case as against him, and who has had no opportunity to answer, and who may deny the whole case. As illustrating the principles above referred to, I beg to refer to *In re London, Chatham, and Dover Railway Arrangement Act* (2), and 2 Dan. Ch. Prac. (4th Am. ed.) 1620.

(2) L. R. 5 Ch. 671.

See cases cited 6 Chitty's Eq. Index (4th ed.) 5392.

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Partnership—Dissolution—Account—Costs—Remuneration to negligent managing partner.

In May, 1870, plaintiff and C. B. formed a partnership for manufacturing purposes, under a verbal agreement by which they were to contribute equally to the capital stock, and share equally in the profit and loss. No amount was agreed upon as the capital, or when each was to contribute his proportion of it, or in what manner the business was to be managed. In June following J. B. was taken into partnership, under the agreement that each partner should contribute a third of the capital stock and share equally in the profit and loss. The plaintiff managed the business until August, 1871, when C. B. took over the management, and forbade the plaintiff interfering with the business. In a suit brought in October, 1872, for a dissolution of the partnership and an account, it was found on a reference to take the account that the plaintiff had contributed $4,312.97, C. B., $10,407, and J. B., $7,294. It appeared that under the management of C. B., the business was mismanaged and neglected; that he did not keep the partnership accounts in the firm's books, or in books accessible to the plaintiff; that he repeatedly refused, from the time he assumed the management, to render an account to the plaintiff, or to have a settlement of their accounts; that he gave the plaintiff false information of the assets and liabilities of the business, and withheld information asked for, and that the plaintiff had no knowledge of the amount C. B. and J. B. had contributed to the capital of the firm.

Held, (1) that plaintiff's costs of the hearing should be paid by C. B., and that the costs of the reference should be paid out of the partnership assets after payment of the partnership debts, and if the assets proved insufficient, then by C. B.

(2) That C. B. should receive no remuneration for his services in the management of the business.

The facts fully appear in the judgment of the Court.

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The questions for my decision in this case are: 1st, Whether the defendant Campbell G. Berryman is entitled to any allowance for his management of the partnership business; and 2nd, By whom the costs of the suit are to be paid; the other matters in dispute having been disposed of by the report of the Barrister, to which no exception has been taken.

The agreement of partnership, which was verbal, and was originally between the plaintiff and Campbell G. Berryman, was simply that each partner was to contribute an equal portion of the capital stock, for the manufacture of screw bolts and nuts in St. John, and to share equally in the profit and loss. There was no stipulation as to the amount of the capital stock, or when the partners were to contribute their proportions, or in what manner the business was to be managed. This agreement was made in May, 1870, and the partners then went to the United States and purchased machinery for the purpose of their intended business.

After their return from the United States, in June, the other defendant, John Berryman, was taken into the firm; the terms of the agreement then being that each partner was to contribute one-third of the capital stock, and to share equally in the profit or loss; no other variations from, and no additions to, the original agreement having been made. The business was to be carried on under the name of "The New Brunswick Screw-bolt and Nut Works."

The machinery was put up in the building where the business was to be carried on, and the company got into operation in October, 1870. The business was managed at different times by the plaintiff and the defendant C. G. Berryman, each contributing money from time to time as the business required; or, as his means enabled him to do; the defendant John Berryman never taking any part in the management, but supplying money from time to time to his brother, C. G. Berryman, which he used in the partnership business, and in his own private business.

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The plaintiff appears to have had, substantially, the entire management of the business from its commencement till August, 1871, when the parties purchased another property on Sidney Street, and fitted it up for their business, getting to work there about the 1st October in that year, when the defendant, C. G. Berryman, took the entire management of the business, and so continued till October, 1872, when he was restrained from further interference by an injunction, obtained by the plaintiff, and the business of the partnership put an end to. A decree for a dissolution of the partnership was afterwards made, and a reference ordered to take the accounts.

The Barrister, after a very lengthy examination, has reported that after allowing credit for the amounts received out of the business by the respective parties, they have contributed to the partnership business the following amounts, viz.:—

The plaintiff	$ 4,312 97
Campbell G. Berryman	10,407 47
John Berryman	7,294 02
Total	$22,014 46

Of which sum each party's equal share would be $7,338.15. The plaintiff has therefore contributed $3,025.18, less than one-third of the total amount contributed to the partnership business.

One of the questions referred to the Barrister, in case the defendant Campbell G. Berryman claimed compensation for his services in managing the business, was what sum would be allowed? Such a claim having been made, the Barrister has reported that the sum of $650 would be a reasonable allowance; and by the terms of the reference, the question whether Berryman is entitled to any allowance was reserved for consideration or further directions. It was, therefore, necessary for me to consider the evidence relative to his management, in order to determine whether he should be allowed this sum; and I have examined the evidence on this point with much care.

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The Barrister has made an allowance to the plaintiff for his services in managing the business while he had charge, and has estimated this allowance to Berryman at the same rate per day; and if he is entitled to anything, the amount recommended is not objected to, the contention being that he is not entitled to anything, because he mismanaged the business while he was in charge, and by his negligence caused the firm to lose money.

Though Campbell G. Berryman denies any negligence in his management of the business, the weight of the evidence clearly shows, that after he took charge the business was neglected; that there was a want of proper supervision over the employees; unnecessary delay in starting the works in the morning; incompetent persons appointed and continued in responsible situations; orders given by one person, which were countermanded by another; a very considerable amount of idleness and waste of time; an insufficient supply of iron for the work; and negligence in filling orders sent by customers to the factory.

Whether C. G. Berryman is responsible or not for omitting to procure proper dies for the nut-press which he purchased in the United States, and whether he could have supplied the defect by a proper application to the manufacturers, may not, perhaps, be entirely clear. It is evident, however, that for want of proper dies, the company was unable to manufacture nuts to supply their customers, and lost money in consequence. Admitting that the manufacturers told Berryman that with one-half inch dies they could manufacture nuts of any size, from one-half an inch downwards, it would seem that such a statement was so improbable, that no person possessing any mechanical knowledge should have relied on it; for, to use the words of the witness Anderson, a practical machinist, "it is a contradiction in terms."

If there was neglect and mismanagement of the business after Campbell G. Berryman took charge, he

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alone is responsible for it; because on the 16th October, 1871, he, by letter, forbade the plaintiff from interfering with the business, claiming for himself the sole right to manage it, and the plaintiff, in consequence, did not afterwards interfere.

There is no evidence of any neglect or inattention to the business while the plaintiff had the management of it; and though his business was not that of a machinist, he clearly possessed a considerable amount of mechanical skill and practical knowledge of the business, which the defendant C. G. Berryman does not appear to have possessed. In addition to which, when the plaintiff had charge of the business, it was carried on in the same building in which he carried on his separate business, so that he had a constant supervision of it, and was able to see that the workmen were kept employed. Whereas the defendant, C. G. Berryman, carried on his hardware business at a considerable distance from the bolt works, and could have no supervision of the business there, except when he specially visited the factory, which may, perhaps, have been once or twice a day for short periods, but, according to some of the witnesses, much less frequently. Parker, the bookkeeper, and the defendant's own witness, said that sometimes Berryman would be absent from the factory for three or four days.

With such evidence before me, I do not feel justified in making any allowance to C. G. Berryman for his services in managing a business which he voluntarily assumed the entire control of, and which, I think, it is clearly proved he neglected and mismanaged, and by means of which the partnership must necessarily have sustained loss.

The other question is as to the costs. The general rule is, that the party against whom a balance is reported, is *prima facie* liable to pay costs; but, where a partner has been guilty of improper conduct, and thereby rendered a suit for dissolution and account necessary, costs may be decreed against him: *Hamer* v. *Giles* (1).

(1) 11 Ch. D. 942.

Then, has the defendant's conduct been such as to subject him to costs?

It was clearly proved, and it was also admitted by C. G. Berryman, that after the close of the year 1870, the plaintiff frequently applied to him to make up his account against the partnership, in order that they might know how their business stood, and whether they were making money or not; that Berryman's account was made up, but some of the charges being objected to by the plaintiff, the account was never settled, though the plaintiff made frequent applications to him to meet and settle it, and he was told that the partnership books could not be balanced without his account. Again, in the autumn of 1871, when they were about commencing business in the new building in Sidney street, the plaintiff again made several applications to C. G. Berryman to render his account, and though he promised to do so, he never did make up his account till after the injunction was granted, though the plaintiff's account was made up monthly, and left in the office of the bolt works, of which C. G. Berryman then had the entire charge, and he was also told by the bookkeeper that the plaintiff's accounts were in the office, and that his (Berryman's) accounts were required to enable the bookkeeper to complete the partnership accounts. Furthermore, no correct account of the partnership transactions was kept in the partnership books. Berryman professed to keep an account in his private book at his own place of business of moneys received by him on account of the partnership, of which he sometimes gave memoranda to the bookkeeper at the bolt works to be entered in the partnership books, but these entries were quite unreliable, and it appeared that while C. G. Berryman was in charge he had received considerable sums of money from persons who were indebted to the partnership for which no credit appeared in the books, the fact of which payments was not discovered until the plaintiff, after the injunction, called on these persons for payment of the accounts appearing by the books to be due from them. Berryman admitted that

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the plaintiff could not have ascertained either from the partnership books, or from his (Berryman's) own books, what money he had received.

Another singular feature in the case is that the partnership books contain no entries of the cost of the new buildings on Sidney and Union Streets, though they were partnership property, and no credit for the moneys received by Berryman from the insurance company and from Prescott on the mortgage.

Admitting that he did not (as he states) tell the plaintiff that all the accounts against the building were paid, it is clear from his own sworn admissions that he never gave the plaintiff any information about the cost of the building, and kept no account of it in the partnership books. His complaint against Sharp, the builder, that he was "doing Young's dirty work," because he told Young what the building cost, is entirely without foundation. As one of the owners of the property, Young had an undoubted right to apply to Sharp for this information—particularly as the partnership books gave him none—and Sharp was not only justified in giving, but it was his duty to give the information which the plaintiff asked. It is admitted that he did not give any untrue information. Then, why should he be blamed for telling the truth to the plaintiff, who had a right to know it? Why need there have been any secrecy about the cost of the building? Sharp expressly contradicts Berryman as to some statements which he was charged with having made about the plaintiff.

Berryman having persistently evaded all the plaintiff's efforts to have the partnership accounts settled from the close of the year 1870 till their final quarrel in the autumn of 1872; in September of the latter year, the plaintiff, failing to get the account, asked Berryman to give him, at least, a statement of the amount which he and the other defendant, Dr. Berryman, had put into the business, and what the partnership owed. Berryman then put down the amount of his claim at $12,000, and Dr. Berryman's advances at $300, and the debts at $1,740. He stated on his examination at the hearing.

that Dr. Berryman had paid $6,000 into the partnership business; but he could not tell when the sums composing that amount were paid, nor give any explanation why he had put down the amount at $300 when the plaintiff applied to him, and he admitted that his statement of the amount was "pure guess work." He also admitted that his books would not show how much of the money paid to him by Dr. Berryman during the years 1870, 1871 and 1872, had been advanced on account of the partnership, and how much on account of his (C. G. Berryman's) own separate business. How, under these circumstances, he fixed the amount of Dr. Berryman's advances at $6,000 is not very apparent. To use his own expression on cross-examination he "jumped at" the amount; but on re-examination he said that he made the amount in this way:—That Dr. Berryman was to advance an equal amount with him (C. G. B.), and as his claim against the concern was $12,000, he assumed that Dr. Berryman's amount would be half that sum, leaving it to be adjusted between them afterwards; and that when he (C. G. B.) came to post up his books, he found that his account against the bolt works was more than $12,000. I fail to discover from his premises how he arrived at the conclusion that Dr. Berryman's advance was $6,000. The appropriation of this amount as Dr. Berryman's advance was not made till after the injunction was served, and Dr. Berryman was not aware of it in November, 1872, when he proved in the Insolvent Court against the estate of C. G. Berryman for the whole amount of his advances to C. G. B., about $9,280, which included this sum of $6,000.

It was also proved that C. G. Berryman, in a statement of his assets, made in October, 1872, shortly before he went into insolvency, declared that his own claim against the Bolt Works Company was $6,000, instead of $12,000, as he had given it to the plaintiff about a month before. On his cross-examination at the hearing, he denied that he had stated at the meeting of his creditors that his claim against the Bolt Works Company was $6,000, and said, that if he stated the amount of his

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claim, it was $12,000, and not $6,000, because $12,000 was the amount on his books. But, on re-examination, he gave an explanation of it which was not to my mind very satisfactory. I quote his words: "If I named $6,000 to my creditors as the amount due me from the bolt works, it was in this way, in charging the doctor (Dr. B.) $6,000, and crediting it to the bolt works, I might have stated in that way that my claim was $6,000, because I had it in my mind that my claim was $12,000." He had previously stated that at the time the injunction was granted (19th October, 1872), the partnership was indebted to him in the sum of $15,800. It is difficult to reconcile this with his statement that $12,000 was the amount on his books. There was a great deal of confusion and contradiction in many parts of C. G. Berryman's examination, and he was contradicted by witnesses, apparently disinterested, on several important points, besides those already referred to. I refer particularly to the contradiction of his statement that Yeats had refused to sell iron to him, though he offered to pay cash for it; and to his statement that he had not received partnership funds for the express purpose of remitting to England to purchase iron for the works, which funds he has not so applied.

These contradictions detract very materially from his credibility in reference to other facts of the case, where his evidence and that of the plaintiff's are in conflict, and where neither party is supported by other testimony. But taking C. G. Berryman's own admissions it is clear that he violated his duty as a partner.

It is the duty of each partner to keep particular accounts of the partnership business, and to have them always ready for inspection, so that each may see whether the other is carrying on the business for their mutual advantage or otherwise. See *Peacock* v. *Peacock* (2); *Rowe* v. *Wood* (3). It was Berryman's duty to keep the partnership accounts in the books of the firm, at their place of business, so that the plaintiff could have

(2) 16 Ves. 51.

(3) 2 Jac. & W. 558.

access to them, and not to keep them in his own private book, at his own store, mixed up with his private accounts. The accounts, too, which were kept were also in many particulars entirely false and misleading, whether designedly so, or from negligence, is not very material to the decision of the case; the injury to the plaintiff is practically pretty much the same, for, in either case, he was kept in ignorance of the state of the business, and deprived of his undoubted rights as a partner.

If it should be said that the plaintiff has no reason to complain, because his advances to the partnership business are comparatively small, being not much more than half the amount advanced by Dr. J. Berryman, and considerably less than half the amount advanced by the other defendant, my answer is, first, that it does not appear that the plaintiff was ever called upon to contribute to the business, and failed to do so; and secondly, that though he was the smallest contributor to the partnership funds, he nevertheless had the rights of a partner, and was entitled to know how the partnership business was being conducted, and its gains or losses. C. G. Berryman voluntarily assumed the entire control of the business in 1871, and so far as he could, excluded the plaintiff from any participation in the management of it. It was his own act, therefore, advancing more than his proportion of the capital. Had he made up his account, as he ought to have done, at the end of the year 1870, or in 1871, before they commenced business in the new building, it would have been known what the state of the business was, and the litigation and expense which have resulted from his neglect to do so would probably have been avoided. Considering the attempt to exclude the plaintiff from any share in the Broad property, by the omission of his name from the deed; the letter of C. G. Berryman, of the 16th October, 1871, forbidding the plaintiff to interfere with the business; the continued refusal to render an account so that the partnership books could be balanced; the withholding from the plaintiff information as to the state of the business; and

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giving him untrue accounts of the assets and liabilities of the firm; I cannot avoid the conclusion that C. G. Berryman's object was to get the business entirely into his own hands, and to exclude the plaintiff from any interest in it.

The plaintiff was forced by C. G. Berryman's conduct to commence this suit, or to run the risk of losing what he had invested in the business, and of incurring heavy liabilities as a partner; he is therefore entitled to his costs, though the balance of the partnership accounts is found against him, because that was not caused by any fault of his.

The order will be that the plaintiff's costs of the hearing, including the hearing on further directions, be paid by the defendant Campbell G. Berryman; that all the partnership property, real and personal, be sold under the direction of Mr. Gilbert, the Barrister to whom the reference was made (the real estate to be sold subject to the mortgages if considered desirable by the Barrister), and that out of the proceeds of the sale, the partnership debts be first paid, and then the costs and expenses of the reference, and of taking the account, if enough remains for that purpose after payment of the debts; also if sufficient does not remain for that purpose, that the plaintiff's costs of the reference, or any amount which cannot be realized out of the partnership assets, be paid by the defendant Campbell G. Berryman; and if any balance remains after the payment of such partnership debts and the costs, that the same be divided between the plaintiff and the defendants respectively, in proportion to the amount reported by the Barrister to have been contributed by them respectively to the partnership business. Any share or portion of the partnership property which may be coming to the defendant Campbell G. Berryman to be held by the Barrister, subject to the payment of the costs awarded to the plaintiff.

The parties to be at liberty to apply again, if necessary, for further directions.

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Where one of two partners refused to account and denied the existence of the partnership, and a bill was in consequence filed against him, and by the evidence taken in the cause the partnership was established, he was ordered to pay the costs up to the hearing, and the costs of a consent reference; costs beyond that were refused to either party: O'Lone v. O'Lone, 2 Gr. 125. Chancellor Blake, in the course of his judgment, there said: "In Earl Nelson v. Lord Bridport, 10 Beav. 306, Lord Langdale observed, 'At one time there was more discretion as to costs in cases of this kind than at present. On many recent occasions the Court has brought back the strict rule, though it still retains its discretion, yet it has acted on the rule that, *prima facie* the unsuccessful party is to be charged with costs of the suit.' Experience has, I think, clearly evinced the expediency of determining the question of costs, as far as possible, upon fixed principles; and the rule to which I have referred ought not, in my opinion, to be departed from where it is applicable, unless under circumstances clearly warranting the exception. But it is argued that the rule in question is not applicable to this case, which is said to be analogous to administration suits, in which, as beneficial to all, the costs of all, creditors, legatees, and next of kin—are paid from the fund in Court. . . . Assuming cases of this sort to be analogous to administration suits, and that the same general rule should govern the question of costs, still analogy shows, I think, that the defendant has so conducted himself as to have rendered the rule in question inapplicable. No doubt it is the general practice of the Court in administration suits to provide for the costs of all parties from the fund to be administered; but even of suits in that class, parties may so conduct themselves as to render it absolutely necessary for the ends of justice that they should be charged with costs, instead of receiving them. Executors have peculiar claims from their position to the favourable consideration of the Court; but where executors are wanting in the faithful discharge of their duty, and where a suit is thus rendered necessary, it is the constant practice to deprive them of costs, or to fix them with the costs of the suit, according to circumstances. Applying the principle to be deduced from those decisions to the present case, it is not to be doubted that this litigation has been entirely occasioned by the fraudulent conduct of the defendant. A partnership, the existence of which I see no room to doubt, was utterly denied in his answer; and this unwarranted denial is preceded by a course of conduct without justification—excluding the plaintiff from any participation in the partnership assets, and at the same time rendering nugatory all attempts to accommodate existing differences. . . . It was further urged by the learned counsel for the defendant, that his client's denial of the existence of the partnership ought not to vary the decree as to the general costs of the suit, inasmuch as the litigation being necessary for the purpose of taking the accounts of the partnership, the defendant's conduct can only have the effect of subjecting him to such portion of the general costs as may have been occasioned by his improper defence. Thompson v. Sheppard, 2 Cox, 161, was said to be an authority for this position, and other cases are to be found to the same effect. It is obvious, however, that the principle of those cases can only apply where litigation is unavoidable, irrespective of the inequitable circumstance complained of. The repression of unnecessary litigation is an object always kept in view in determining the question of costs; but this object would be entirely defeated were those chargeable with the inequitable conduct, which has resulted in litigation, permitted to escape from the consequence of their

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conduct, because litigation might possibly have been necessary, although their conduct has been unimpeachable. Where litigation is, at all events, unavoidable, unfounded claims of a subordinate character cannot properly affect the general costs of the suit; but where litigation is not plainly unavoidable, and has actually originated in unfounded and inequitable claims, the effect of such conduct cannot be obviated by speculating on the possibility of litigation on the same subject under different circumstances." Cases of this character are an exception to the general rule that the costs of a partnership action are on the same footing as costs of an administration suit, and therefore payable out of the partnership assets after the rights of the partners have been adjusted: Ross v. White, [1894] 3 Ch. 326.

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DOMVILLE v. CRAWFORD ET AL.

Interlocutory injunction—Suppression of facts—Application to dissolve.

It is the duty of a party applying for an *ex parte* injunction to state all the material facts within his knowledge, and other facts cannot be brought forward to sustain the injunction on an application to dissolve it.

The facts fully appear in the judgment of the Court.

Argument was heard May 29th, 1881.

J. G. Forbes, for the plaintiff.

C. W. Weldon, Q.C., *T. H. McMillan*, and *C. A. Palmer*, for the Maritime Bank.

1881. June 1. WELDON, J.:—

An *ex parte* order of injunction was obtained in this case to prevent the defendants voting for directors in the Coldbrook Rolling Mills Co. on 334 shares of paid-up stock in the said company, which had originally belonged to the plaintiff, and which he alleged had been transferred by him to the defendants Crawford & Co., under certain trusts which they had, in violation thereof, and contrary to the plaintiff's wishes, transferred to the Maritime Bank in a fraudulent and illegal manner—the said Bank being well aware the property in the shares belonged to the plaintiff. The bill sets out: "That the plaintiff gave the said J. D. Crawford a power of attorney to convey

the said 334 shares to the City and District Savings Bank of Montreal, to obtain a loan of money from the said savings bank for the said plaintiff, and to sell or hypothecate the said stock for the use and benefit of the said plaintiff; that money was obtained by Crawford for the benefit of the said plaintiff, and on 15th day of February, 1877, the said plaintiff, through his said brokers, Crawford & Co., paid off the said loan which had been made to him by the said savings bank, and desired the said J. D. Crawford to have the said 334 shares reconveyed to the plaintiff. That instead of so doing Crawford & Co. becoming embarrassed, and indebted to the Maritime Bank, compromised with the said bank, and transferred the said shares to the bank in payment of their compromise and in discharge of their liability, the said bank well knowing the said Crawford & Co. only held the said shares as trustees for the use and benefit of the plaintiff. The transfer to the Maritime Bank being made on the 19th day of September, 1879, and accepted by the transfer in the books of the Coldbrook Rolling Company on the 27th January, 1880, and the said Maritime Bank having received and accepted the said stock, or shares, with a full knowledge of the facts, which the plaintiff alleges was contrary to good faith, and passed no property to the said bank. That the said bank acting on the certificate so alleged to be improperly obtained executed a power of attorney to one J. L. Gibb, of Quebec, to represent them at the meeting of the said Coldbrook Rolling Mills Company in the choice of directors thereat." Upon the bill of complaint laid before me containing these statements, and verified by the affidavit of the plaintiff, I granted an order of injunction to restrain the bank acting upon such transfer, and this application is made to dissolve such *ex parte* order.

I have heard affidavits of Crawford, the officers of the bank, and the solicitors of the plaintiff and the bank, which differ very materially from the facts alleged by the bill. James Crawford declares that the 334 shares were never at any time held by him as attorney, agent, or trustee for the plaintiff, but that a power of

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attorney was executed by the plaintiff to him in order, if occasion should require it, that his firm should become possessed of such shares as collateral security for moneys advanced and responsibilities constantly incurred by his firm for the plaintiff's benefit, and in particular at one time for a loan obtained for the plaintiff from the City and District Savings Bank of Montreal. That the plaintiff well knew he had no right to a transfer of the said shares, as he was indebted to the firm of J. D. Crawford & Co. in $30,744.42 in cash, besides a further sum of $127,469.38 incurred by the said firm on the Rolling Mills account, and the said transfer to the Maritime Bank was well known to the said plaintiff. I have referred to the affidavit of J. D. Crawford, as he is charged with being guilty of a great fraud in the bill of complaint. He contradicts the allegations therein set forth in the most unqualified terms.

The affidavits of other parties I deem it unnecessary to refer to, except the affidavit of Mr. Gilbert, who was the plaintiff's solicitor in the agreement which was made between the bank and the plaintiff on the 10th day of January, 1880, and which I shall refer to more fully hereafter.

The grounds upon which the defendants claim to dissolve the order of injunction are:

First. The plaintiff has not disclosed some very material facts in his bill which, had they been set forth, would have shown that the plaintiff was not entitled to the order of injunction.

Secondly. The delay which the plaintiff has allowed to elapse in taking steps to set aside the transfer of shares to the Maritime Bank by Crawford.

There is no doubt of the rule in Equity when a party applies for an ex parte injunction, he must set out in his bill every material fact and fully disclose all facts which are in his favour, and all within his knowledge which make against him. If he omits this it is fatal to his holding the injunction—he must omit nothing which makes against him. The arrangement made with the bank in regard to these 334 shares of stock in Coldbrook Company was an important matter. The plaintiff says

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he did not understand these shares were included in or referred to in this agreement. But he knew the bank had a transfer of them in the books of the company in January, 1880.

In December, 1879, negotiations commenced between the bank and the plaintiff to arrange matters between them. A committee of the bank met the plaintiff. The solicitor for the bank and the plaintiff had the drafts of the agreement prepared, and whatever was said the whole was included in the agreement. Mr. Gilbert says in his affidavit in the 7th concluding paragraph: "On the occasion on which I was present many statements were made on one side and on the other—and some were assented to and some not. But the intentions and agreement, so far as I could gather, were embodied in the terms of the said document."

Now I will refer to the terms. It must be remembered that the bank had the 334 shares of stock, and which had been transferred to them by Crawford. This must have been known to the plaintiff, when the cashier of the bank in company with the president called at the office of the Rolling Mills Company, on the 8th day of November, 1879, to accept the transfer, and owing to the secretary being away it was not done, and not finally completed until in January following.

The agreement which the plaintiff made with the Maritime Bank on the 10th January, 1880, in very clear and distinct terms refers to the said stock so transferred to them by Crawford—in the words "334 shares, 100 per cent. paid up, of the Coldbrook Rolling Mills Co. stock, $33,400," described in schedule A. The first clause of such agreement states: "The Maritime Bank of the Dominion of Canada agrees to sell, and the said James Domville agrees to purchase the bonds, stocks, claims, actions, causes of action, debts due and demands described in schedules A and B, hereto annexed, for the price and consideration set forth in the second, third, fourth and fifth sections of this agreement."

The second clause describes what the said James Domville agreed to pay to the said Maritime Bank, and the eighth paragraph of the agreement repeats, in case

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of failure by the said James Domville to pay, "The said properties, bonds, stocks, claims, debts, dues, demands, causes of action, choses of action and securities mentioned in schedules A and B, and every part and portion thereof shall be and remain the property of the said the Maritime Bank of the Dominion of Canada, until the said James Domville shall have fully completed and fulfilled all and every the conditions and stipulations of these articles of agreement, except what may have been previously handed over to the said James Domville, or to such third person at his request, under the fifth or sixth articles of this agreement."

The agreement so made is under the seal of the bank, and under the seal of James Domville, the plaintiff in this suit.

That this agreement so made in the most solemn manner under the plaintiff's hand and seal, and a duplicate original in his possession, should have formed a part of the plaintiff's bill, is clear, for it must have a most important bearing upon the mind of any Judge to govern him as to the propriety of granting an ex parte injunction, and to excuse the plaintiff from setting it out would be in violation of the first rules of equity.

In this application to dissolve my order of injunction, it is only necessary for the defendants to show that all the facts in the plaintiff's knowledge, material to the case, have not been disclosed in the plaintiff's bill. Was it not the fact that the bank held the shares of stock in Coldbrook Rolling Mills, by transfer from Crawford, and did he not so understand it? Upon reading the agreement with the bank, they agreed to sell the same to the plaintiff, and the plaintiff agreed to purchase these shares from the bank. It is true, Mr. Domville states, he did not so understand it; but upon reading the agreement and schedules attached, I am unable to conceive how any misunderstanding could arise. The plaintiff further states he has taken proceedings in equity, but more than a year has elapsed since the bank claimed to dispose of these to the plaintiff; he has taken no steps to set aside the sale by Crawford to the bank, but at most to enforce his agreement with the bank. The

charge against Crawford of improperly disposing of these shares to the bank has not been sustained by the plaintiff; his allegations in the bill have been met by the clear and distinct denial of Crawford, and their transfer to the bank for a consideration to the bank has been recognized by the agreement between the plaintiff and the bank. The plaintiff alleges the bank did not communicate to him the arrangement they made with Crawford & Co. for their indebtedness to the bank, and they concealed this from him. There is no special ground stated by the plaintiff why it was necessary the bank should communicate to the plaintiff their arrangement with Crawford & Co. Crawford appeared by the transfer of the savings bank to him to be the owner of the 334 shares of paid-up stock, and he states he paid them the loan for which they were transferred to the savings bank. The plaintiff says he paid it through Crawford, as his agent. Crawford says it was his own means, and his firm had to become responsible for the whole amount so loaned by the savings bank for the benefit of the plaintiff, and the plaintiff never did demand or had at any time a right to demand the said shares from the said J. D. Crawford & Co., because the plaintiff was unable to pay the $30,744.42. No explanation or reference is made by the plaintiff in answer to this statement of the defendant Crawford. The plaintiff residing in St. John and Crawford in Montreal, some communications must have passed between them which would throw some light to explain the discrepancy between Crawford's statement and the allegations which the bill contains. The plaintiff would have to direct the defendant Crawford to transfer to him the shares and must have been in writing. The plaintiff could have given him notice to produce the instructions. It is for the plaintiff to make out his allegations, more particularly when they are as well known to himself as they can or may be to the defendant Crawford.

I will take up some of the grounds upon which Mr. Forbes claims to hold this order of injunction. He contends the defendants have set up a new case, and he only answers it. The injunction order is more particularly

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directed against the Maritime Bank, and they have only set up how they hold the stock. This was as well known to the plaintiff as to the bank, and therefore the plaintiff should have set out this agreement with the bank. Having failed to do so, this objection to his retaining the injunction is fatal.

As to the contention that the Maritime Bank cannot hold the stock of other corporations, I am of opinion there is nothing in the Banking Act to prevent the bank securing debts due, and that it may take the stock of other corporations, but it is not to deal in such more than may be necessary to realize the liabilities due the bank and for which such stock is taken.

The stock of the Coldbrook Company was absolutely transferred to raise money. The money was raised by Crawford. He transferred the stock to the savings bank, and the savings bank transferred it to him when his firm paid them, he says, from the firm funds.

The fourth contention is that the 10th of January, 1880, agreement between the plaintiff and the Maritime Bank still exists. There is no doubt of this, but does not the plaintiff admit by such agreement the right of the bank to sell and he to purchase? I am of opinion that is declared in the agreement, and the plaintiff is concluded by it.

The seventh point is as to Mr. Crawford's stock, and that he only held the shares as security. I am of opinion it goes farther. His whole affidavit must be considered together.

Eighth. I am of opinion that verbal statements of the officer of the bank cannot control an agreement entered into under the seal of the bank and the seal of the opposite party. The bank can only be bound by their resolutions and agreements under seal. It would be a dangerous precedent to allow verbal understandings to invalidate an instrument under seal, when all matters therein had been discussed and reduced to an agreement under the seal of the respective parties.

The same reasons apply to the ninth ground; and the tenth is answered by the rule that a party applying for an ex parte order of injunction must state the whole

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of the case within his knowledge, to enable the Judge to whom application is made to consider whether the order should be made.

The twelfth. That no consideration ever passed to the plaintiff for the surrender of his interest, and this is shown under the agreement. The preamble of the agreement records that the plaintiff is indebted to the bank in large sums of money, and that the bank agreed, upon a certain sum being paid by instalments, to sell and the plaintiff agreed to purchase these shares. I am of opinion this states sufficient consideration, and it cannot be successfully contended that, if the plaintiff was indebted to Crawford, and Crawford was indebted to the bank, and he assigned and transferred these shares to the bank, and the plaintiff was also indebted to the bank and the bank holding these shares, the plaintiff agreeing to purchase them from the bank, a sufficient consideration had not passed to the plaintiff from Crawford, and by the bank to Crawford, and inured to the benefit of the plaintiff, and that he would be estopped both at Law and in Equity from denying the consideration. I am of opinion this ground to retain the order of injunction cannot be sustained.

I need only refer to the decision of the Court in the *Mayor, etc., of St. John* v. *Brown* (1), decided some years ago, when the matter was well considered. Mr. Justice (now Chief Justice) Allen in delivering the opinion of the Court said: "It is quite clear that, unless the plaintiffs can sustain the injunction on the facts stated in the bill, they cannot do so on any other ground, for they must distinctly state the ground on which they put their case, and have no right to set up a new case." In *Castelli* v. *Cook* (2), Wigram, V.C., says that the rule in ex parte applications is this. That parties making them are considered as coming under a species of contract with the Court, to state the case fully and fairly. If they fail to do that, then when the other parties apply to dissolve the injunction, and they show that something has been

(1) 1 Pug. 100.

(2) 7 Hare, 89.

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improperly suppressed, the Court refuses to try the case upon the merits, upon the ground that the applicant has broken faith with the Court, and then the injunction is dissolved.

Rolfe, B., in *Dalglish* v. *Jarvie* (3), says that the application for an ex parte injunction is governed very much by the same principles as insurances, where the party applying to insure is bound to use the utmost good faith, and to state, not only all matters within his knowledge which he believes to be material, but all such as in point of fact are so, and might influence the party about to insure; and that if a party applying for an injunction abstains from stating facts which the Court thinks are material to enable it to inform its judgment, he disentitles himself to the relief which he asks.

I am therefore bound under all authorities to dissolve this injunction order, the agreement made and entered into between the Maritime Bank and the plaintiff in January, 1880, not having been set out in the bill of complaint, which has a material effect. The order of injunction must be dissolved, and, I think, with costs.

Where an *ex parte* injunction is dissolved on the ground of concealment of the true state of facts, it is proper to dissolve it with costs; and "with costs" in such case means "with costs payable forthwith:" Walton v. Henry, 13 P. R. 390. In this case MacMahon, J., said: "When I gave judgment dissolving the injunction, it was upon the ground of the suppression by the plaintiff of material facts when the *ex parte* injunction was granted; and I made the order with costs. In Hilton v. Lord Granville, 4 Beav. 130, at p. 132, the Master of the Rolls, in dissolving an injunction for like reasons, said: 'The consequence is, that this, as an *ex parte* injunction, cannot be maintained, and it must be dissolved with costs.' Almost the same language is employed in Hemphill v. McKenna, 3 Dr. & W. 183, at p. 194. And see also Clifton v. Robinson, 16 Beav. 355, where the plaintiff on a motion to dissolve an *ex parte* injunction on the ground that a material fact had been suppressed in the affidavits used in the application, set up in answer that he had forgotten the fact. The Master of the Rolls said, if forgetting a fact in that case would form an excuse, it would be so in every instance; and the order made was: 'Dissolve the injunction with costs.' See also Holden v. Waterlow, 15 W. R. at pp. 139, 140. Mr. Hunter, for the plaintiff, urged that when an injunction was dissolved with costs, it meant that the costs were to be costs in the cause to the defendant, and that that was the usual practice,

(3) 2 Mac. & G. 238.

and he cited Morgan on Costs, 2nd ed., pp. 47 and 51; Kerr on Injunctions, 3rd ed., pp. 31-33; Marsack v. Reeves, 6 Madd. 108; Dan. Ch. Pr., 6th ed., 1171, and cases there cited. See also Hodges v. Hodges, 25 W. R. 162. I consulted the learned Chancellor regarding the practice, and he informed me that when an injunction is dissolved on the grounds on which the injunction was dissolved in the present case, the practice is to dissolve it with costs *payable at the time.* This, therefore, must be the meaning of 'dissolved with costs' in the cases from which I have made citations; otherwise there would have been the direction made in those cases which Mr. Hunter claims should have been made in the present case."

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B. N. A. Act, s. 91, s.-s. 21—Bankruptcy and insolvency—Bills of Sale Act, c. 75, C. S. N. B., s. 1.

That part of section 1 of the Bills of Sale Act, chapter 75, C. S. N. B., providing that a bill of sale as against the assignee of the grantor under any law relating to insolvency, or insolvent, absconding or absent debtors, or an assignee for the general benefit of the creditors of the maker, shall only take effect from the time of filing thereof, is not ultra vires of the Legislature of New Brunswick, as legislation dealing with bankruptcy and insolvency within the meaning of the British North America Act, 1867, section 91, s.-s. 21.

The facts fully appear in the judgment of the Court.

Argument was heard June 10th and August 5th, 1881.

F. E. Barker, Q.C., for the plaintiff.

J. J. Kaye, Q.C., and *C. W. Weldon*, Q.C., for the defendants.

1881. August 16. PALMER, J.:—

The bill was filed to compel the defendants Vroom & Arnold to account for certain spools manufactured by the Petitcodiac Lumber Company, and placed in their hands and by them sold and the proceeds deposited with the defendants, the Bank of New Brunswick.

The facts, as far as they are necessary to be stated to decide the case in the view I have taken, are as follows:—

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A firm of merchants called L. H. DeVeber & Sons, composed of J. S. Boies DeVeber and R. S. DeVeber, together with one D. J. McLaughlin, owned the greater part of the shares of the company, of which R. S. DeVeber was president, L. H. DeVeber & Sons furnishing the only capital used in carrying on the company's business by advancing the same to McLaughlin and charging the amount so advanced to him.

On the 3rd day of October, 1879, the company was not indebted to DeVebers unless the advances to McLaughlin can be considered an indebtedness, and the company then and ever afterwards were unable to pay its debts out of its own means, and were dependent upon DeVeber's ability and willingness to make McLaughlin the advances to enable the company either to continue its operations or to meet its engagements. DeVeber, wanting funds, drew a bill of exchange on Singleton, Dunn & Co., of Glasgow, for £1,000 stg., and Boies DeVeber indorsed it in the name of the firm and sold it to the Bank of New Brunswick on the 3rd day of October aforesaid, and when so selling told Lewin, the president, as was the fact, that Singleton, Dunn & Co. were the company's agents for delivery of the spools and collecting the pay. Mr. Lewin was examined as a witness before me, and testified that the above was all that took place at the time he purchased the bill. This bill was presented, dishonoured, and notice of dishonour sent the bank by cable on the 17th of October.

Afterwards DeVeber told Lewin "that there had been a delay in shipping the spools, in consequence of the vessel not arriving to take them, but the bank should have security on them as the bill had been drawn against them."

On the 27th day of October, R. S. DeVeber took the defendant, Vroom, to Petitcodiac, where the company carried on its business, and as president of the company executed an absolute bill of sale to Vroom & Anderson of the whole of the spool wood and spools the company had in or about the factory then, without any authority or direction of the directors, and gave him symbolical delivery thereof, leaving the property in possession of

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the company, who continued to manufacture it, and as manufactured sent it to St. John to McIntyre, DeVeber's clerk. McIntyre received it in the month of December, and handed it over to the defendants Vroom & Arnold, who shipped it, both DeVebers and McLaughlin having in the meantime failed and assigned in insolvency.

DeVebers, at the time of all these transactions, were, as it afterwards appeared, hopelessly insolvent, and they stopped payment on the 3rd of November, a few days after the execution of the bill of sale. The company must also have stopped at the same time, as their ability to continue depended upon DeVebers supplying the funds; but funds were obtained to continue the manufacture of these spools by McLeod, the official assignee for the city and county of St. John, at the instance of DeVebers on their agreement that such advances should be a part charge upon the estate of the company if it went into insolvency, and he afterwards paid such advances, in all amounting to $900, out of the company's assets.

On the 3rd of December Vroom & Arnold executed a declaration of trust, declaring that they would sell the spools and apply the proceeds first to pay the bill to the bank and the balance to the company. They did sell in the spring following, and the whole proceeds were paid to the defendants the Bank of New Brunswick. Neither the bill of sale nor declaration of trust was ever registered under the Bills of Sale Act.

The company assigned in insolvency on the 26th of December; the plaintiff was appointed assignee and demanded the proceeds, both from the bank and the other defendants. They denied the plaintiff's right and refused to account to him, whereupon this suit was brought. The only facts in dispute between the counsel material to the case in my view of it are:—

Whether at the time DeVeber sold the bill to the bank the company were really indebted to the DeVebers, and although I think the case does not turn on this, yet I have thought it right to say that I have come to the conclusion that the company were not so indebted. In other words, I think if all the evidence given in this case

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were put before me, and I was asked to find that the DeVebers had a cause of action against the company for a debt, I would have to find against them. The only claim they pretended to have was for money they had advanced to McLaughlin for the business of the company, and which they charged to McLaughlin who, to their knowledge, had charged and claimed it against the company, and who had paid off a considerable part of the amount out of his own means. This, I think, would and did enable McLaughlin to claim it against the company, and I know of no way that the assignee can get rid of such a claim. Such evidence seems to me to be almost conclusive that this debt was due by the company to McLaughlin and not to DeVebers. Further evidence on this point was offered by the plaintiff of DeVebers' deposition on their making up their statement previous to assigning in insolvency, in which they swore that they had this claim against McLaughlin and not against the company. I rejected the evidence, and in this, I think, I was right, and I formed my opinion irrespective of it.

The only evidence against the above to prove the debt is the statement of J. S. Boies DeVeber, on oath before me, that the company owed them a large amount. On cross-examination, he explained that he meant by this that they owed the amount so charged to McLaughlin, and the transaction was as I have above stated.

It did not appear that the company ever presumed to pay DeVeber, or admitted that these transactions were other than appeared on their face. It follows, I think, that DeVeber's statement can amount to no more than that in his opinion, in point of law, such transaction created a debt due from the company to their firm, but I think he is mistaken in this, and there is no such legal indebtedness.

The other matter is whether the company were insolvent at the time of the assignment of those spools, and was such assignment made in contemplation of insolvency. I am satisfied that the company were hopelessly insolvent at the time, and also that the assignment was made in contemplation of that insolvency.

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I do not think it necessary to discuss these points further, as in my view the plaintiff would be entitled to these funds, even if I were wrong in these conclusions. Mr. Vroom was on the stand and gave his evidence in such a clear and fair manner as left me in no doubt as to what this transaction really was, as far as Vroom & Arnold were concerned. He frankly stated that he took and claimed the property and received the proceeds under and by virtue of the bill of sale and the declaration of trust, and in no other way, and he acted throughout according to and under and by virtue of these alone.

That being so, the first question I have to decide is: What are the rights of the parties under these documents, they not having been registered and the company having assigned in insolvency? This must depend upon the construction of the Bills of Sale Act, cap. 75, Con. Stats., the first section of which enacts: "That every bill of sale of personal chattels, etc., shall be filed with the Registrar of Deeds, etc., otherwise such bill of sale as against subsequent purchasers, the assignee of the grantor under any law relating to insolvency, or insolvent, absconding or absent debtor, or an assignee for the general benefit of the creditors of the maker or as against the execution creditors of the maker, etc., shall only take effect from the time of filing thereof." If that Statute is in force, I cannot use more apt language to show the rights of the parties than the Statute itself. This bill of sale was not filed, and I think I must say in the very words of the Statute that it had not any effect when the company assigned in December, nor has it yet against the plaintiff, who is the assignee of the grantors under a law relating to insolvency.

Then, if this is so, what is the position of Vroom & Arnold under such a bill of sale? It was perfectly good against the company until some one of the contingencies mentioned in the Act occurred. Then it had no effect. The position of the parties was, in my opinion, just the same as if there had been no Bills of Sale Act in force, and a condition was in the bill of sale itself that in case the grantor assigned in insolvency and an assignee was

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appointed, it should have no effect against such assignee.

Then what would have been Vroom & Arnold's duty under such an instrument? Surely to account to the grantors if their estate remained in them, or if it went over to the assignee to account to him.

The property was put into their hands by the company, they undertaking to account for it, and unless the bill of sale has taken effect and transferred some beneficial interest to the bank, there can be no pretence but that they must account to the company or the assignee. They have no right to it themselves, and how is it possible for me to say that any of it belongs to the bank by virtue of that bill of sale, unless I am prepared to disregard the Statute and say the bill of sale has some effect against the plaintiff?

An attempt was made on the part of the bank to claim an interest in the property by virtue of what took place between Boies DeVeber and the president at the time the bill was sold to the bank, as creating an equitable lien on the property. But the slightest consideration will show that none could have been created in this case. To do this there must have been an agreement capable of specific performance with reference to specific and ascertained property. The law is thus laid down in *Mornington* v. *Keane* (1).

In order to create a charge on this property there must have been a contract by the company charging some specific property. So far from that being the case here, this transaction was not between the bank and the company at all, but between DeVeber and the bank, and I am at a loss to see how Boies DeVeber could make a contract binding on the company, and even if he could, I do not see how I can construe what took place between him and Lewin, as a contract between the company and the bank creating a charge on any specified property. All that Boies DeVeber said was that the bill was drawn against a cargo of spools from the company, and

(1) 2 DeG. & J. 292.

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that Singleton, Dunn & Co. were the agents of the company for collecting and paying. Here was no promise from the company to the bank. The most that could be suggested is, that DeVeber expected, or the company had promised, to furnish them with the cargo of spools, or with the proceeds, out of which they, the DeVebers, expected to pay the bank; and if the contract had been with the company there was no specific property named. Any cargo of spools would have answered it. But even if there had been a cargo of spools shipped, to which such contract could apply, I do not think I ought to construe what took place into such a contract, or any intention to create a charge, for such would be a direct violation of the Bank Act. I do not wish to be understood to decide that if a contract creating such charge was clearly made that it would be void, or rather that a party getting a benefit under it could avoid it, merely because it was contrary to the Act; but I think I am not at liberty to find either that any such contract was made, or even that any such was intended, as would be a violation of that Act, if I can give any other fair construction to what took place. I think it would be very unfair to Mr. Lewin, the president of the bank, and Mr. Boies DeVeber, one of the bank directors, to find that they had entered into a contract to give the bank security on personal chattels for money loaned to DeVeber in direct violation of the law of the land, under which they alone were allowed to do business, or that they intended to do so. The 40th section of the Banking Act (34 Vict. c. 5), (D.), enacts, inter alia, that a bank shall not lend money or make advances upon the security, mortgage or hypothecation of any goods, wares or merchandise, except as authorized by the Act, and it is clear that this case would not come within such exception. The question is: Did the bank loan this money to DeVebers on the security of these goods? The bank, by their counsel, say they did, and if so, it is impossible to deny that they have done so in defiance of the law. The plaintiff, on the other hand, contends that they did not, and that neither Lewin nor Boies DeVeber intended anything of the kind at the time, but the bank's counsel has set it up since

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in order, if possible, to save the money for the bank, which would be otherwise lost. It certainly presents an extraordinary issue for the counsel of the bank to ask me to find that such security was intended to be given and in consequent violation of the law by their own clients; but I think I am bound to decide this as a question of fact, and I am happy to say I have no difficulty in finding that neither Mr. Lewin nor Mr. Boies DeVeber ever intended to take or give such security, and, consequently, I can clear them from any violation of the Act. Supposing this was a suit by a stockholder asserting that the bank, through Mr. Lewin, had taken security on these goods and complaining of his illegal conduct in so doing, or a proceeding to forfeit the bank's charter by reason of the bank's taking security on personal chattels for money loaned, in violation of the Bank Act, and this was denied by the bank, Mr. Lewin, the president, and Mr. Boies DeVeber, one of the directors, and the same evidence was given as in this case, what would there be to prove that such security had been given? Only this, that when Lewin discounted the bill and loaned the money to DeVebers, Boies DeVeber told him that the bill was drawn against a cargo of spools from the company, and that the drawees were the agents of the company for the delivery of the spools, and to receive the pay. Might not the bank fairly say this shows no intention to give security on the spools? That this was said by DeVeber to show the bank that he had a fair expectation that the drawees would accept the bill, and that he would likely be able to control funds out of a cargo of spools shipped or to be shipped by the company to meet the bill when it came due. That the bank did not and never intended to make any contract with the company whatever, much less to enter into an agreement with them that Lewin had no right or authority to make for the bank but which is prohibited by law. The bank, I think, might fairly say that any agreement to have the effect to give the bank a charge upon the property must refer to some specified property. That no particular property was specified by DeVeber,

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and if he meant a cargo of spools to be shipped, any spools that the company might get or cause to be shipped would fulfil such a contract, and so such a contract could not be applied to specific property. True, any property afterwards acquired by the company with the intention to perform the agreement might create the charge, but nothing of the kind took place afterwards, except the giving of the bill of sale which the law, as I have before pointed out, makes of no effect against the plaintiff. The absurdity of the bank claiming a charge on this property by reason of what took place between Lewin and DeVeber when the bill was taken is very apparent if we consider the case as standing on what then took place alone. The case then would be this: The bank loaned the money to DeVebers, taking their bill, Boles DeVeber representing to the bank that it was drawn against a cargo of spools shipped by the company, and that the drawees were the company's agents.

Spools were afterwards manufactured by the company, shipped in two cargoes and were on their way to persons to whom they had agreed to deliver them when the company assigned in insolvency. The spools were afterwards delivered to the purchasers and the proceeds paid to the company's agents. If this were all, can there be a doubt that the money would belong to the company's assignee? I confess myself unable to see what claim either at Law or in Equity the bank could have to it superior to that of any other creditor of the company, nor how such a transaction could create a debt due by the company to the bank, much less the charge for the payment of such a debt. Then, so far from what took place afterwards with reference to the bill of sale creating such a claim, I am inclined to think if there had been such an agreement between the bank and the company, that the company should give security on those spools, and they chose to take in fulfillment of that agreement a bill of sale which was perfectly good against the company themselves, but not against their assignee, they could not have claimed the money. Whether a parol agreement could have been made to charge personal property as security for a debt which would prevent the

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necessity of registering such security I am not called upon to decide. I have purposely refrained from reciting and criticizing the numerous cases in the books deciding a variety of questions arising under the Imperial Bills of Sale Act, that Act and ours being so entirely different with respect to the point involved in this case. Both were passed to remedy the evil of secret bills of sale, but in different ways, the Imperial Act allowing such bills of sale to operate against creditors without registry for a certain time, and to become void if not registered at the time designated, and not allowing any registering of it afterwards to make it good. Ours, on the other hand, making such bills of sale entirely inoperative against creditors until registered, and allowing it to operate against them by being registered at any time afterwards from the time of such registry. But it is said that the part of our Bills of Sale Act that declares that it shall not have any effect as against the assignee of an insolvent is ultra vires the Local Legislature. The considerations that I have already mentioned show, I think, that there is nothing in such contention. The subject dealt with by the Local Legislature by such legislation is the right of property. In other words as to the interest, if any, acquired by the defendants by the bill of sale as the law stood at the time of the passing of the Act, they would have acquired an absolute right against all the world to what they claim in this property, and it became expedient to alter that law and make such instrument inoperative in certain specified events, one of which is if the grantor assigns in insolvency or, say, commits a crime. In both cases the power to create the crime or compel the insolvency is in the Dominion Parliament, and the question is which is the proper legislature to legislate on the subject of the right of property in the way I have mentioned.

The thing to be directly affected is the property of the defendants, a subject over which the Local Legislature has, by section 92, sub-sec. 13, of the British North America Act, exclusive power to legislate, and the Dominion Parliament is given no such power expressly. The only power they can have to affect that subject is

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what they may do as incident to the exercise of their power to legislate with reference to subjects mentioned in section 91, one of which is insolvency.

This incidental power is in derogation of powers exclusively given to the Local Legislatures, and only given by implication and ex necessitate rei, and, therefore, must be confined strictly to such necessity, and, perhaps, the Act can present no more difficult subject for construction than where to draw that line of necessity. Lawyers attempting this must always be met with the difficulty that they are, to some extent, allowing the Dominion Parliament to exercise legislative powers that are, by the express words of the Act, not only given to another legislative body, but given to it exclusively.

Chief Justice Ritchie in *Valin* v. *Langlois* (2), says (3):

"While the legislative rights of the Local Legislatures are in this sense subordinate to the right of the Dominion Parliament, I think such latter right must be exercised, so far as may be, consistently with the right of the Local Legislatures; and, therefore, the Dominion Parliament would only have the right to interfere with property or civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada." *

Even if this power to legislate so as to affect the right of property does not exist in both legislatures concurrently, I cannot see how a law made for the protection of creditors and bona fide purchasers against secret bills of sale allowing them to have full force against parties making them, but of no effect in case of an assignment in insolvency or otherwise, could so prevent the Dominion Parliament legislating generally and effectually on the subject of insolvency as to prevent the local parliament legislating on the subject so exclusively and expressly given them.

(2) 3 Can. S. C. R. 1. (3) At p. 15.

*See Cushing v. Dupuy, 5 App. Cas. 409; and Tennant v. Union Bank of Canada, [1894] A. C. 31.—Editor.

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This law, as I before pointed out, has made a bill of sale not registered defeasible by several conditions subsequent, and there is all the right the bank ever had under it or the grantor ever transferred. The rest remained in him and would be in him even if it were not for the 16th section of the Insolvent Act of 1875 (4), which enacts that all the rights of an insolvent are vested in the assignee in the same condition as he had them himself, and when one of the conditions happened which defeated the bank's right to the property and made it revert to the insolvent, it was transferred by force of the section to the assignee. This in my opinion was a legislation by the Dominion Parliament that would give the plaintiff a right to this money.

It must also be borne in mind that the Insolvent Act gives the assignee the rights of the insolvent's creditors. It follows that this money belongs to the plaintiff, and I must decree accordingly. I would, if the amount had not been agreed upon, have referred the matter to a barrister to take the accounts, but this is unnecessary, and as to the costs, as there does not appear to be anything in this case to take it out of the general rule, I must be governed by such rule, and therefore they will abide the event.

The decree will be that the bill of sale and declaration of trust in the bill mentioned are of no effect against the plaintiff, and the proceeds of the property mentioned in it belong to him, and I further order the defendant to pay the same to the plaintiff, together with the costs of this suit on demand.

All parties have liberty to apply for further directions.

See Attorney-General of Ontario v. Attorney-General of Canada, [1894] A. C. 189, where it was held that the provisions of s. 9 of c. 124, R. S. O., intituled "An Act respecting assignments and preferences by insolvent persons," and which relate to assignments purely voluntary, and postpone thereto judgments and executions not completely executed by payment, are merely ancillary to bankruptcy law, and as such are within the competence of the Provincial Legislature so long as they do not conflict with any existing bankruptcy legislation by the Dominion Parliament. The question decided in the principal case was similarly decided in In re DeVeber, Ex p. The Bank of New Brunswick, 21 N. B. 401.

(4) 38 Vict. c. 16 (D.).

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1881.
November 28.

Security for costs—Several defendants—Form of bond.

But one application may be made for security for costs where there are several defendants, and the bond should be for the benefit of all the defendants.

This was a summons by the defendants for security for costs on the ground that the plaintiff resided out of the jurisdiction of the Court.

Argument was heard November 26th, 1881.

G. W. Burbidge, in support of the application.

C. A. Palmer, contra.

1881. November 28. PALMER, J.:—

Upon consideration my order will be that the plaintiff give security for costs by one bond to the Clerk in the sum of $500 to be for the benefit of all the defendants. I may add that where there are several defendants I will only hear one application for security for costs, and will order that the security be for the benefit of all the defendants.

In Dan. Ch. Pr. (4th Am. ed.) 34, it is said that where one or more of several defendants have obtained an order for security, it is advisable to extend the bond to the costs of all the defendants, as otherwise the defendants who have not obtained the order may afterwards apply for a further bond as to their costs; and it is presumed that, where a bond embracing the costs of all the defendants is lodged with the Record and Writ Clerk, and notified to them, he will hold the bond on behalf of all the defendants, Lowndes v. Robertson, 4 Mad. 465; and that a separate bond or bonds cannot afterwards be required. Whatever number of bonds, however, may be given, they all form a security for one sum only: Lowndes v. Robertson, *supra*. By the Ontario practice, under rules of Court, where the application is made by one of several defendants the order is that the security is to answer the costs of all the defendants: Delap v. Charlebois, 15 P. R. 325. Ferguson, J., in this case referred to Leftwick v. Clinton, 26 How. P. R. 26 (N. Y. S. C.), which was decided upon a statute providing as follows: "Such security shall be given in the form of a bond in the penalty of at least two hundred and fifty dollars, with one or more sufficient sureties to the defendant, conditioned to pay on demand all costs that may be awarded to the defendant in such suit." It was held that the defendants could not appear separately, and each require a bond to him as security for his costs; but that the one bond should be for the benefit of all the defendants. The decision was followed in Rothchild v. Wilson, 19 N. Y. C. P. R. 76.

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January 28.

ARMSTRONG v. RAYNES ET AL.

Trade-mark—Injunction—Colourable imitation—Words calculated to deceive.

Plaintiff was a manufacturer of lime at Greenhead, and sold it in barrels marked "Greenhead Lime," and it had a market value and reputation as such. The defendants manufactured lime at the same place, and were restrained by injunction from using the plaintiff's trade mark, or any colourable imitation thereof. Subsequently the defendants marked their lime as "Extra No. 1 Lime, manufactured by Raynes Bros. at Greenhead." The general appearance of the defendants' mark resembled the plaintiff's.

Held, that there had been a breach of the injunction.

This was an application to commit the defendants for breach of an injunction order. The facts appear in the judgment of the Court.

Argument was heard January 23rd, 1882.

W. H. Tuck, Q.C., for the plaintiff.

W. Pugsley, for the defendants.

1882. January 28. PALMER, J.:—

On the 7th of January, 1879, an injunction order was granted in this cause by Mr. Justice *Wetmore*, restraining the defendants from placing on casks or barrels containing lime, the words "Greenhead Lime," or other marks in imitation thereof, or only colourably differing therefrom, such marks being the plaintiff's trade-mark.

The plaintiff before me complained and made oath that he saw the defendants shipping lime at Indiantown, on the 4th of November last, branded as follows: "No. 1 Greenhead lime, manufactured by John Raynes & Son," and asked me by Dr. Tuck, his counsel, to commit them for a breach of the injunction order. To this the defendants have answered by several affidavits that the said casks were not marked as alleged by the plaintiff, but as follows: "Extra No. 1 lime, manufactured by Raynes Bros. at Greenhead," and I am myself satisfied that the plaintiff is mistaken, and that this was what was really on the casks.

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The only question in the case is whether or not the doing of this is a breach of the injunction order, or rather, whether it is such a breach that I ought to commit the defendants.

Mr. Pugsley contended before me that the defendants could not be restrained from using the word "Greenhead" in connection with their lime, although it might deceive purchasers and make them think they were buying the plaintiff's lime, as it was, in fact, manufactured at Greenhead as well as the plaintiff's. I cannot take this view of the case, the order having been made restraining the defendants from using any imitation of the mark "Greenhead Lime," or any colourable imitation thereof. I think I must take it for granted that the plaintiff has made out that he has manufactured a lime of value in the market known as "Greenhead Lime," and that he and he alone has a right to represent any lime as "Greenhead Lime" (meaning, of course, the lime that he had been in the habit of manufacturing and selling). In my opinion the law is clear that no man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign, symbol, device, or other means whereby, without making a direct false representation himself to a purchaser who purchases from him, he would enable such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. I think there is no such thing as a monopoly or property in the use of any name. Any person may use any name to designate goods, subject to this, that he must not use directly, or through the medium of another person a false representation that his goods are the goods of another person known or unknown. There is no difficulty to define this to be the law of the case, but the difficulty is in applying that law to the facts of this case.

The facts are that the plaintiff is entitled to be protected in the use of the words "Greenhead Lime," because they designate a lime manufactured by him, and which by a long exercise of skill and honesty he has

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made so known and sought after as sure to be a good article, and it is altogether likely that a great many of the customers, who ultimately bought and used this lime, did not know by whom it was manufactured, although they would come to know that whoever manufactured what was called "Greenhead Lime" made what they wanted. That being so, is the fact that the defendants called and put upon their lime "Extra No. 1 Lime, manufactured by Raynes Bros. at Greenhead," calculated to deceive and make a false representation as between somebody who did not know who the real manufacturer of Greenhead lime was, and the vendor of it? If so, it is, in my opinion, a breach of the injunction order. It is unnecessary that there should be any fraudulent intention in thus marking, if the natural consequence of doing so, even in circumstances not known to the defendants, is that they will represent their lime to be the plaintiff's lime, known as "Greenhead Lime." Then it is wrongful and fraudulent in them to continue the use of such marking after the fraud is brought to their knowledge.

Now I must consider what is relied on by the plaintiff as showing that this mark is reasonably calculated to induce possible buyers to think this to be the article the plaintiff was in the habit of selling as "Greenhead Lime." 1. Both the marks "No. 1" and "Greenhead" are stamped on the casks, and in such a way as the plaintiff himself was deceived and thought it was an exact copy of the former mark. 2. The general appearance of the mark is the same as the plaintiff's. 3. But the strongest contention, in my opinion, is this: That these marks would enable a dishonest vendor to represent to his customers, who might have used plaintiff's lime under the name of "Greenhead Lime," and who were ignorant as to who was the manufacturer of the lime he so used, that this was the same as he had so used and which had been usually called and sold as "Greenhead Lime." This I have already pointed out the defendants have no right to enable any purchaser to do by any means whatever, and I must confess that I am inclined to think the plaintiff is right in this; but, on the

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other hand, there is the entire absence of any evidence that any person has ever been so deceived, in fact, except plaintiff himself, or of experts in the matter, or that such would likely be deceived. Feeling that I ought not to commit any person for an unintentional breach of an injunction order unless the case is clear beyond doubt, I shall decline to commit. The greatest doubt is raised in my mind by some of the passages in the defendants' affidavits, and by the contention of their counsel, leading me to think that they intend to continue to use the marks "No. 1 lime" and "Greenhead," even if the so doing is calculated to make customers think when they are buying defendants' lime, they are buying the same description of lime as had been sold by the plaintiff as Greenhead lime, but there must be no mistake on that head. I am clearly of opinion that they have no right to do that, and if they do, or attempt to do it, no matter by what device, it will be a breach of the injunction order, and be punished as such. Upon the whole I will dismiss the present application, and say nothing about the costs; the plaintiff to have liberty to renew the application if he finds that the defendants continue to use this mark, and it has the effect I have indicated.

With great respect, it is submitted that this decision cannot command unqualified assent. It is certainly an extreme case, and goes to the very verge of the law. While the authorities indicate the difficulty of framing a general principle applicable to a question of this kind, and each case is made to depend upon its own circumstances, the rule appears well settled that a manufacturer may describe his goods as made at a particular locality, provided he does not do so in a way to induce the belief that his goods are the goods of a manufacturer who has previously adopted the name of the locality as descriptive of his goods. In Thompson v. Montgomery, 41 Ch. D. 35; [1891] A. C. 217, the plaintiffs and their predecessors had for over a hundred years carried on a brewery at Stone, and their ale was described and was known as "Stone Ale," and their brewery was known as the "Stone Brewery." The defendant was a licensed victualler at Liverpool, and in 1888 built a brewery at Stone, over which he placed the words "Montgomery's Stone Brewery" and "Stone Ale." He also put up the words "Stone Ale" at his place of business at Liverpool. The plaintiffs brought action for an injunction to restrain the defendant from selling or advertising under the name "Stone Ale" any ale or beer not made by the plaintiffs, and from carrying on the business of a brewer under the title of "Stone Brewery," or "Montgomery's

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Stone Brewery." Mr. Justice Chitty granted an interim injunction order in the terms of the plaintiff's claim, which was confirmed on appeal, and on appeal to the House of Lords. In each of the Courts it was pointed out that though the plaintiffs were entitled to an injunction they were not entitled to a monopoly in the use of the word in every possible sense. In the House of Lords Lord Morris said: "The respondents have not the trade-mark 'Stone Ales,' and I cannot see how they can have acquired the right to the exclusive use of the words 'Stone Ale' against the world, and thus appropriate the name of a large town and of the commonest of drinks. It appears to me that every person has a right to the honest use of the words 'Stone Ale'; otherwise the respondents would derive the advantage of a trade-mark, though not entitled to it. When the respondents are safeguarded against any deception of their goods, they appear to me to be entitled to no more. I, therefore, doubt whether the appellant should be debarred from the use of the words 'Stone Ale' in any collocation or combination with other words. If he used the words in a fraudulent combination, so as to confound his goods with the respondents', and thus palm them off on the public, they would be met without the deprivation of the right to use the words at all. If circumstances give a good name to ales brewed at Stone, other brewers ought not to be deprived of the right so to describe them, taking care to distinguish them from the respondents'." And Lord Hannen said: "The appeal to this House is based on the contention that the word 'Stone' in connection with ale or beer is merely used by the appellant in a geographical sense, as indicating that the ale or beer is manufactured at that place, and that any one is entitled to use it in that sense, provided he does not use it so as to induce the belief that his goods are the goods of manufacturers previously established at Stone. The principle contended for by the appellant may be admitted as correct." With respect to the particular facts of the case, it was the view of each Court that the defendant intended to make use of the words in question in connection with ale of his own manufacture in order to create the belief that it was the ale manufactured by the plaintiffs. Chitty, J., said: "The plaintiffs say they have sold their ale as 'Stone Ale'; that the term 'Stone Ale' has become well known in the market, and is now accepted in the market in a secondary sense; and that it no longer denotes, as unquestionably originally it did, ale brewed at Stone, but it denotes ale of the plaintiffs' brewing so that the meaning of that term is the plaintiffs' ale. Consequently they say . . . that if the defendant sells his ale as 'Stone Ale,' he will necessarily lead people to believe that the defendant's ale is the plaintiffs' ale, and take away the benefit of the reputation which in the process of a hundred years or so has been acquired by the mode in which the plaintiffs and their predecessors in title have conducted their brewing business. . . . As the matter stands, I am satisfied that the intention of the defendant, was by tricks and devices to obtain the benefit of the reputation which the plaintiffs had acquired. . . . He is clearly entitled to set up his brewery at Stone, and he is clearly entitled to brew beer and ale at Stone, and to sell them in such a manner as is not calculated to deceive. He may mention on any ale that he makes that the ale is brewed at Stone; but that is not the question. Can he honestly use the term 'Stone Ale,' having regard to what the plaintiffs have shewn to be the present market meaning of that term? . . . I am unable to see how the term could be used by another brewer

without invading the plaintiffs' rights." The most recent authoritative and exhaustive exposition of the principles applicable to cases of this kind is to be found in Reddaway v. Banham, [1896] A. C. 199. The plaintiff had for some years made belting, and sold it as "Camel Hair Belting," a name which had come to mean in the trade the plaintiff's belting, as distinguished from belting made by other manufacturers. The defendant began the manufacture and sale of belting made of camel's hair, and stamped it "Camel Hair Belting," so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting. It was held that the plaintiff was entitled to an injunction restraining the defendant from using the words "Camel Hair" as descriptive of or in connection with belting made and sold by him without clearly distinguishing it from the plaintiff's belting. Lord Herschell in the course of his judgment, after referring to the rule laid down by Lord Kingsdown in Leather Cloth Co v. American Leather Cloth Co., 11 H. L. C. 538, that one man has no right to put off his goods as the goods of a rival trader by the use of names, marks, letters, or other indicia, as a fundamental rule, continued as follows: "The word 'property' has been sometimes applied to what has been termed a trade-mark at common law. I doubt myself whether it is accurate to speak of there being a property in such a trade-mark, though, no doubt some of the rights which are incident to property may attach to it. Where the trade-mark is a word or device, never in use before, and meaningless, except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufacture must be to deceive. In circumstances such as these the mere proof that the trade-mark of one manufacturer had been thus appropriated by another would be enough to bring the case within the rule as laid down by Lord Kingsdown, and to entitle the person aggrieved to an injunction to restrain its use. In the case of a trade-mark thus identified with a particular manufactory, the rights of a person whose trade-mark it was, would not, it may be, differ substantially from those which would exist if it were, strictly speaking, his property. But there are other cases which equally come within the rule that a man may not pass off his goods as those of his rival which are not of this simple character—cases where the mere use of the particular mark or device which had been employed by another manufacturer would not of itself necessarily indicate that the person who employed it was thereby inducing purchasers to believe that the goods he was selling were the goods of another manufacturer. The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A., when he was really getting the goods of B. In a case of this description, the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods, would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances, or in such a manner, as to put off his goods as the goods of the plaintiff." In the principal case the learned Judge concluded that the term "Greenhead Lime" had acquired in the trade a secondary signification as distinguished from its primary sense, and had come

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to mean lime manufactured by the plaintiffs, rather than lime manufactured at Greenhead. The statement by the defendants that their lime was manufactured at Greenhead does not represent or convey to an intending purchaser that the lime is the plaintiff's lime. Unless defendants were permitted to use the combination of words in question, it is difficult to see what expression could be devised in which they could safely state that their lime was manufactured at Greenhead. That they would have a right to make such a statement is clearly recognized by the English cases. The judgment in the principal case apparently prohibits the use of the word "Greenhead" by the defendants in any conceivable collocation, except under circumstances of exaggerated care to distinguish the lime from the plaintiff's.

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September 26.

BERTON v. THE MAYOR, ETC., OF THE CITY OF ST. JOHN.

City of St. John—Transfer of harbour—Consent of Common Council—Constitution of Harbour Board—Meaning of expression "Two-thirds of members of Common Council"—Acts, 38 Vict. c. 95 (N. B.) and 45 Vict. c. 51 (D.)—Practice—Form of Injunction order—C. 49, Form E, C. S. N. B.

The charter of the City of St. John grants the harbour of St. John within certain boundaries to the Mayor, Aldermen and Commonalty of the City, but any previous grant of the Crown in any part of the same is reserved and excepted. In addition to the wharves and water-lots owned by the city there are within the limits of the harbour wharves owned as private properties under grants from the Crown and reserved by the charter, and also wharves on lands leased from the city. By Act 38 Vict. c. 95 (N. B.), it was provided, *inter alia*, that the Mayor, Aldermen and Commonalty of the city might contract and agree for the transfer to commissioners, to be duly appointed to constitute and form a Board of Harbour Commissioners for the port and harbour of St. John, of all the right, title and interest of the Mayor, Aldermen and Commonalty of, in, and to the harbour of St. John, and of, in and to the land, water and the land covered with water, wharves, tenements and hereditaments within certain bounds of the harbour, provided that at least two-thirds of the members of the Common Council concurred in and agreed thereto. At a meeting of the Common Council held after the passing of the Act a report from the general committee of the Council was submitted recommending that application be made to the Dominion Parliament for legislation placing the harbour of St. John in commission in accordance, *inter alia*, with the terms of the said Act, and that the Board of Harbour Commissioners be composed of five members, three of whom should be appointed by the Governor-General in Council, and two by the Common Council. The report was adopted by the Council on a vote of twelve to four, the Mayor, who was present, abstaining from voting, though he was in favour of the report, and had signed it as one of the general committee. The Common Council was composed of nineteen members, including the Mayor. The Dominion Parliament in accordance with the terms of a request from a committee of the Common Council by Act

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45 Vict. c. 51, created a Board or Corporation of Harbour Commissioners, to consist of five members, three to be appointed by the Governor in Council, one by the Common Council, and one by the St. John Board of Trade. The Act gave the board large powers relating to the management and control of the harbour, including the mooring and placing of ships at wharves transferred to the board, or at private wharves, in their discretion, and the fixing and regulating of tolls and dues payable by ships at private wharves and slips. On an application to dissolve an *ex parte* injunction restraining the defendants from transferring the harbour and wharf property to the board:

Held, that the Act, 38 Vict. c. 95, should be strictly construed, and that the membership of the harbour board not having been constituted under Act 45 Vict. c. 51, in accordance with the terms consented to by the Common Council, the injunction was properly granted.

Quære, whether the consent required by the Act, 38 Vict. c. 95, was the consent of two-thirds of all the members of the Common Council, or of two-thirds of the members present at a meeting.

An *ex parte* injunction order absolute in its terms, by omitting to state that it was to continue until further order, as provided in form E of chapter 49, C. S., was ordered to be varied in this respect with costs of application.

The facts are sufficiently stated in the judgment of the Court.

Argument was heard September 1st, 1882.

G. G. Gilbert, Q.C., for the plaintiff.

W. H. Tuck, Q.C., for the defendants.

1882. September 26. PALMER, J.:—

This is an application to dissolve an *ex parte* injunction order made by Mr. Justice *Weldon*, by which he restrained the defendants from transferring to the Harbour Commissioners of St. John, or any other person or body of persons the harbour and wharf property and privileges owned by the city of St. John. The material facts of the case, as they now appear, are that by the charter of the said city the property in question, that is, all the wharf property in the harbour of St. John, all the land covered by water in the harbour of St. John, and over which the tide ebbs and flows, subject to the covenants that bind the city relating thereto, except some small pieces of land and also the fisheries, are vested in the inhabitants of the said city. Such charter creates such inhabitants, together with the mayor, recorder, aldermen and assistants,

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a body corporate by the name of the Mayor, Aldermen and Commonalty of the city of St. John, and declares such corporation capable to have, get, receive and enjoy lands, franchises, hereditaments, etc., and to do, etc., all things, etc., they shall think necessary, fit, or good for the benefit and advantage of the city and the inhabitants thereof. That they are also made conservators of the harbour of St. John, with full power of amending and improving it, and also to build wharves, etc., for landing goods, etc., and to receive anchorage and wharfage dues; the fisheries and common lands on the East side to be and remain for the benefit of the inhabitants of the East side, and those on the West for the inhabitants of the West side. That besides the lands, wharves and property belonging to the city there are within its bounds a number of other wharves and wharf properties, some held under grants from the Crown, and others leased from the city, the city giving the lessees the dock dues and wharfage, the amount of which is fixed and secured by several Acts of Assembly passed before Confederation, and the leases contain covenants of the corporation running with the land. The property remaining in the city was by several Acts of Assembly charged with the payment of several debenture debts due by the corporation. This, I think, shows that such property, franchises and privileges as are proposed to be transferred to the Harbour Commission as hereinafter stated, are held in trust for the benefit of the citizens, and that consequently all the inhabitants are interested in them, and this is important to be borne in mind in determining the questions which have been discussed before me. In 1875 the Legislature of this Province, by 38 Vict. c. 95, acting on the recommendation of the Common Council of St. John, recited in the Act, authorized the Mayor, Aldermen and Commonalty to contract and agree for the transfer of such property to a Board of Harbour Commissioners. The material parts of that Act are the first and second sections, which are as follows:

"1. Notwithstanding anything contained in an Act of the General Assembly of this Province, passed in the

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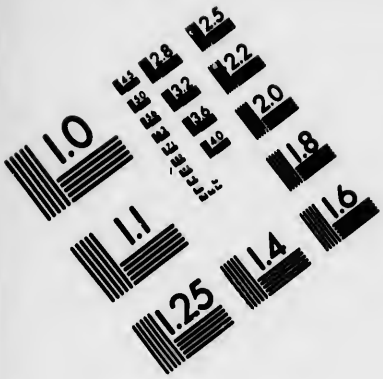
ninth year of the reign of Her present Majesty, intituled 'An Act relating to the public debt of the corporation of the City of St. John,' and notwithstanding anything contained in an Act of the General Assembly of this Province, passed in the sixteenth year of the reign of Her present Majesty, intituled 'An Act relating to the public debt of the City of St. John,' or in the [illegible]st deed referred to and mentioned in the eighth s[illegible] of said last mentioned Act; and notwithstanding anything contained in any other Act or Acts existing and in force relating to the public debt of the said city, the Mayor, Aldermen and Commonalty of the City of St. John may contract and agree for the transfer to commissioners, to be duly appointed to constitute and form a Board of Harbour Commissioners for the port and harbour of St. John, of all such property and privileges as the said Mayor, Aldermen and Commonalty of the City of St. John in Common Council may hereafter agree to transfer to such Harbour Commissioners, provided that at least two-thirds of the members of the Common Council do concur in and agree thereto.

"2. It shall and may be lawful for the Mayor, Aldermen and Commonalty of the City of St. John, and they are hereby authorized and empowered by deed under their common corporate seal, for the consideration to be expressed in the said deed, and to be paid and secured as they may agree, to grant, bargain, sell, convey, and assure to the Board of Commissioners to be duly appointed as the Corporation of the Harbour Commissioners of St. John, or by such corporate name as such Harbour Commission may be created, all the right, title and interest of the said Mayor, Aldermen and Commonalty of the City of St. John, as well by the charter of the city of St. John as by any Act and Acts of Assembly relating thereto and otherwise howsoever, of, in, and to the harbour of St. John within the city of St. John, and of, in and to the land, water, and the land covered with water, wharves, tenements and hereditaments, within the bounds to be particularly set forth by apt description and boundaries in the said deed; and upon the due execution and delivery of any and every such deed, all the



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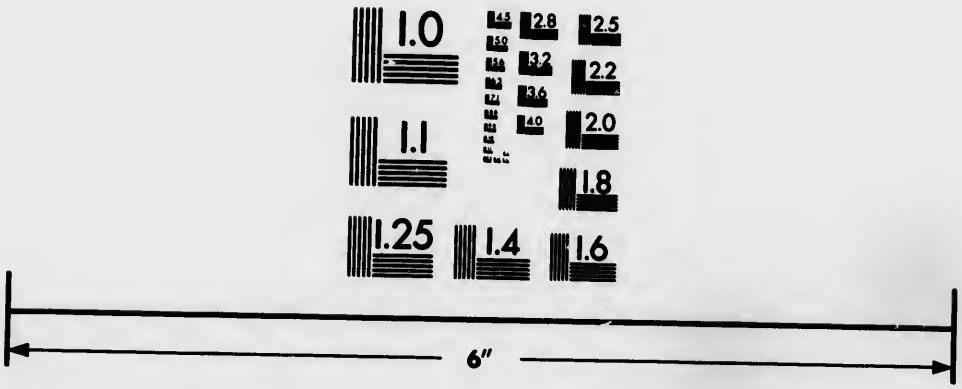

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real estate, rights, powers and privileges and hereditaments, corporeal and incorporeal, expressed to be conveyed thereby, shall absolutely vest in the Corporation of the Harbour Commissioners of St. John by such corporate name as the said Harbour Commissioners may be created, and they shall thereupon have, hold and enjoy the same and every part thereof absolutely, freed from any and every charge relating to the public debt of the city of St. John, and from the provisions of the said trust deed in the last section mentioned, and from all existing charges on the said property, premises and privileges, except as may be expressed and preserved in the said deed and deeds."

There are nineteen eligible members of the Common Council, nine aldermen, nine councillors and the mayor, or in his absence the recorder, so that it would require thirteen to make two-thirds of the whole. The Common Council had a meeting on the 6th of April last, the proceedings of which are stated in the bill as follows:

"'The general committee of the whole board reported that the committee to whom was referred the report of the harbour committee, presented at the then last meeting of council on the subject of the harbour commission, have considered the subject submitted, and approve of the recommendations of the harbour committee that efforts be renewed at the then present meeting of the Dominion Parliament with a view to placing the harbour of St. John in commission upon the basis of receiving for the property and privileges to be transferred the full sum of $500,000, to be divided between the East and West sides of the said city as therein mentioned.

"'That after making reference to the reservations to be made on the Eastern and Western sides of the harbour the said committee recommended that the city memorialize the Dominion Government asking that legislation be secured at the then present session of Parliament for placing the harbour of St. John in commission under the Act of the Provincial Legislature of 1875 relating thereto, upon the terms and reservations stated therein and as altered in that report, the commission to be constituted with five members, three of whom to

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be chosen by the Governor-General in Council, and two by the Common Council of the said city.

"'The committee further recommended that the said Common Council consent and agree to the conveyance to a Harbour Commission upon the said terms, under the provisions of the said Act of 1875, before referred to, and that the conveyance be perfected upon the basis above set forth, and that a committee be appointed with full authority to complete all arrangements necessary for placing the harbour in commission, as contemplated by the Act of 1875, and as altered in the said report, and to finally conclude the whole matter at as early a day as possible, and to affix the common seal to all documents necessary to perfect the transfer, as the committee in their discretion may determine.'"

"That the said report was adopted on the following division, twelve of the members of the said Common Council voting for it, and four of the members voting against it."

The mayor had signed the report of the general committee and presented it to the Common Council, and was chairman of the board when the resolution passed, and was, as he has stated in his affidavit, in favour of the resolution, intended to concur and agree thereto, but did not vote, as he thought it was unnecessary to do so, being chairman, and there being a majority without him. Afterwards, at the solicitation of a committee of the Common Council appointed by such resolution, the Dominion Parliament passed the Act 45 Vict. c. 51, which created a corporation of Harbour Commissioners of St. John and made it consist of five members—three to be appointed by the Governor in Council, one by the Common Council of the city, and one by the Board of Trade of St. John, a private corporation created by Act of General Assembly of New Brunswick. By this Act the Dominion Parliament authorized such Harbour Commissioners to receive the conveyances of the wharf property, as provided by the local Act above referred to (38 Vict. c. 95), and enacted that upon registering the deed all rights, rents, powers and privileges of the Mayor, Aldermen and Commonalty, etc., in or relating to the harbour of St.

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John, except only as reserved in the deed, should vest in such Harbour Commissioners, to be held by them in trust for the purposes for which the corporation was created. The Act further provides that the Governor in Council may from time to time authorize the commissioners to acquire any part of the remaining wharf and beach property in the city until the whole is acquired, but it does not compel them to do so, and by the 11th section it is declared that the rights of riparian or other proprietors of wharf or other property should not be altered or diminished, except by the purchase, etc.

Then comes what to my mind are the most important provisions of the Act, that is, empowering the Commissioners to make by-laws and, inter alia, to prescribe where all vessels entering the port shall from time to time be moored and placed, to alter and fix the tolls and dues payable to owners of wharves and slips in the city; thus, without the consent of the owners of the wharf property, and without giving them any compensation, seriously affecting, altering and interfering with their rights by putting it in the power of this corporation to injure or destroy their property when they choose. I say "seriously affecting," because I think property so held would not be of the same value as if the owner held it at his own will only, and at all events it is an alteration of the owner's rights, and that of itself is a deprivation of his rights. This Act not only authorizes the Harbour Commissioners to alter the wharfage dues now payable to the owners, but instead to collect from all vessels entering the port, dues in lieu of wharfage, without regard to what wharves they may lie at, and this, I think, well might, and probably would, render wharf property not held by them valueless; and they are also authorized to direct all vessels to moor and discharge at their own wharves, and not allow any to be loaded or unloaded at the wharf of any person as they may will.

I do not wish for one moment to be understood to state, or even insinuate that this would likely take place, or that these commissioners would be guilty of such injustice. All I mean is that by the law, as it stood before the passing of the Act, persons did not so hold

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their property, and by the law no person holds his right of any kind by the will of any person, power or authority in the land, except Parliament, and when so held, that is, at the will of any person except the owner, it ceases to be right or property at all.

It is said that the corporation of St. John has the same power over such property at present. To determine whether this is so or not would require much more material than is before me, for it would depend upon agreements, leases, covenants, etc., made by the corporation, and also a variety of Acts of Assembly, and the right of one man might be very different from that of another. But I do not consider it necessary to go into this, as in my opinion it would make no difference if this were so, for the owners might well be willing to rely for justice upon the will of the people of St. John and not upon the will of the Harbour Commissioners, and therefore changing it from one to the other without their consent or compensation would be just as much interfering and destroying their rights as if they were taken from them altogether. The difference is not in principle but in degree.

I have discussed this question, not because I consider it part of my duty to interfere with the action of the Legislature when acting within its powers, and much less to find fault with anything Parliament in its wisdom may have done within such powers. Parliament is the sole judge of what it ought to do. My duty is a humbler one—to obey and administer all laws that Parliament has properly made—but I am bound to ascertain from the language of its Acts what it has done, and whether the law authorizes it to do it, and for this purpose to construe the words of the statutes which it has passed. The rules of construction are different according to the different objects in view, for while the constitution gives Parliament, acting within its powers, the right to take away any person's property and rights without compensation, yet such legislation is so abhorrent to the sense of justice of all persons administering the law that they will not think that Parliament

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so intended, if by possibility the words used can have any other meaning.

With reference to Acts of this description, Alderson, B., in *Lee* v. *Milner* (1), remarks as follows: "These Acts have been called parliamentary bargains. Perhaps, more correctly, they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors. . . . Each landholder therefore has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and anyone else." If the words of the statute be ambiguous, every presumption, said Best, C.J., in *Schales* v. *Pickering* (2), is made against the company and in favour of private property; for if such a construction were not adopted, Acts would be framed ambiguously in order to lull parties into security; and in *Parker* v. *Great Western Railway Co.* (3), it is said that the language of these Acts of Parliament are to be treated as the language of the promoters of them. Therefore Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public.

Bearing these rules in mind let us look at what the rights of the parties are and what the plaintiff has obtained in this suit, of which the defendants complain. It is an injunction order restraining the defendants from conveying the harbour property, under the local Act above referred to, to the Harbour Commissioners created by the Act of the Dominion Parliament, and the defendants claim that they have the right to so transfer it, notwithstanding only one of the commissioners is appointed by the Common Council instead of two as named in their resolution, and without any further consent of two-thirds of the members of the Common Council than is contained in the report which they adopted as before referred to, and they admit that they intend so to transfer,

(1) 2 Y. & C. 618. (2) 4 Bing. 452.

(3) 7 Scott, N. R. 870.

if allowed to do so, without any further concurrence of two-thirds of such members. And here I may mention that one of the aldermen who voted for that resolution, Mr. Grant, has made affidavit that he would not have concurred in it at all, if it had not been a part of it that two of the commissioners were to be named by the Common Council. The plaintiff's first contention before me was that the mayor was a member of the Common Council, and that there were nine aldermen and nine councillors, making in all nineteen members capable of sitting. This was not seriously contested by Dr. Tuck, and I think is plainly right. It depends upon the clause in the charter, which will be found on page 994, Vol. 3, Local and Private Statutes. The words are "that the mayor or recorder with, etc., aldermen and assistants, be and shall be forever hereafter called the Common Council." The plaintiff's next contention was that the members could only concur and agree by vote in Common Council, which must appear by a written resolution in the minutes, and as only twelve so voted for it there was no concurrence of two-thirds of the members. This was answered by Dr. Tuck in two propositions:—1st, that the mayor did concur by signing, bringing in and submitting the report, and only refrained from voting because it was not called for, and it was shown by his affidavit that he did in his mind concur, which was shown at the time by what he did, and he would have voted if any question had been raised that the resolution had not been properly carried; 2nd, that as the Act 38 Vict. c. 95, provided that the agreement to transfer could only be made by the mayor, etc., in Common Council, the words "provided that two-thirds of the members of said Council should concur," could only mean two-thirds of the members of that particular council when the agreement was made, and not the whole members eligible to sit, and there is, I think, great force in the defendants' contention, although in the view I take of the case I do not think it necessary to decide these questions.

The defendants also contended that the plaintiff, having delayed so long after the resolutions were passed, before applying for an injunction to restrain action on

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them, must be taken to have acquiesced. I think there is great force in saying that he ought to be precluded from now objecting that such a resolution was not passed by the requisite number of the members, for it is quite apparent that had such objection been made at any time before it was acted on, the mayor would have voted for it and thus supplied the defect (if any), and I think if the case rested here I would have dissolved the injunction order.

The next ground taken by the plaintiff was that, admitting the resolution in question to have been properly passed and in full force, the defendants have not in the words of the Act made a contract, or agreement, for the transfer to the commissioners to be duly appointed to constitute and form a Board of Harbour Commissioners for the port and harbour of St. John, in and to which two-thirds of the members have concurred and agreed; or at all events they have not agreed to the transfer to a Corporation composed as the Canadian Act has constituted them, and I think the plaintiff is right in this. This must depend upon the resolutions themselves; and first, would a resolution merely, supposing it to contain words of an offer to agree with such corporation, be an agreement until it was accepted by the other side? In the words of the Act, have the Common Council contracted or agreed with the Harbour Commissioners merely because they have offered and expressed a wish to do so? I am inclined to think that no such agreement, whether executory or amounting to the transfer itself, would be binding on the corporation until the common seal was affixed, and it was agreed to on the other side, or at all events a distinct offer was made on the one side and accepted on the other, binding on both parties, and that act on the part of the defendants would require the concurrence and agreement of at least two-thirds of the Common Council. But if this were not so and the Common Council by a two-third vote had their common seal affixed to an agreement in the terms of the resolution and this had been assented to by the Harbour Commissioners so that the agreement was complete between them, I think this could only be carried out in its entirety, that

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is, by the property being conveyed to them when the commission was composed of two nominees of the Common Council; for two-thirds never agreed to have it conveyed to any other body, and by the plain words of the Act it ought not to be so conveyed without the agreement of at least two-thirds of such body. And it might well be, and we have a right to suppose it was, one of the guards that the Local Legislature intended the citizens of St. John and other persons whose rights were to be affected by the transfer should have and that such rights should be protected by anything that two-thirds of the Common Council might think advisable to throw around them. And it also might well be that the Common Council might think that a proper protection was that two out of five of the Commissioners should hold their office at the will of the city, whose rights were to be so seriously affected, rather than at the will of any other body, and consequently might not agree to anything else. In my view, as well as in many others, it might be that a nominee of the Board of Trade would be quite as good a protection, but with that the Judge has nothing to do. It is the Legislature and not I that is the judge of that. All I can say is that the Legislature has required the consent of two-thirds of the Common Council to the transfer, and left it in their power to give or withhold such consent—in other words, two-thirds of the Common Council are the parties to make the agreement on the one side and the commissioners on the other. Without such two-thirds making the agreement for the transfer, I do not think the defendants can or ought to make the transfer, nor do I think because two-thirds have agreed to transfer to a Harbour Commission composed of three nominees of the Government and two of the Council, that they have agreed to transfer it to a commission composed of only one nominee of the Council and one of the Board of Trade. It is elementary law that unless a party to a proposed agreement consents to its whole terms, he has consented and agreed to nothing. In other words, no one clause of an entire agreement can be enforced unless the whole is enforced. It follows if it be true as stated a per-

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son who has rights affected by virtue of an Act of Parliament has the right to have all the powers in it strictly and literally carried into effect, as regards his own property, which is to be prejudiced in the carrying into effect of the bargain between the undertakers and anyone else, that this must be done in this case, and, therefore, that the defendants be required before they make any transfer under the Act, to get two-thirds of the Common Council to agree to such transfer. But it is said that the resolution agrees to the transfer as a separate thing from the terms on which the transfer was to be made, and that those parts that agree upon the terms of only transferring to a commission composed as they wished, was only a recommendation, and I was much impressed by this view on the argument, owing to the form of the bill, but looking at the whole of the resolutions as set out in the sections of the bill above referred to, it will be seen that the word "recommend" occurs in the report of the committee of the Common Council and precedes every clause of the report, and as much qualifies the clause that is relied on as an agreement to transfer as it does that which provides what sort of a commission they were willing to transfer to, and what two-thirds of the Common Council did was to adopt the whole of that report and thus adopt and agree (if agreement it was) to all that was in it qualified as such report qualified it, so I can see no pretence for saying that they made any agreement unless such agreement contained the whole that such report contained and in either view there has been no agreement by two-thirds of the members as required by the Act. It follows that in my opinion the defendants have no right to make any transfer to the Harbour Commissioners without first obtaining the concurrence and agreement of two-thirds of the Common Council, and as they have avowed their intention so to transfer, and the plaintiff's rights would be affected thereby, I think he was entitled to have an injunction order to restrain the defendants from so transferring without such consent.

In my opinion the order as obtained from Mr. Justice *Weldon* is wrong in two particulars: first,

in absolutely restraining any transfer; second, it does not follow the form provided for such order in the 49th chapter of the Consolidated Statutes. The restraint according to the form shall only be "until further order;" particularly in an ex parte order, and consequently the defendants had a perfect right to take the proceedings they have to have it set aside or varied. I can see no objection to the defendants conveying the property to the Harbour Commission as created by the Dominion Act referred to, whenever they get the consent and agreement of two-thirds of the members of the Common Council thereto, but until then I do not think they should do so, and it does not appear that such consent has been gotten yet. My order, therefore, will be that the injunction order be varied as indicated in this judgment, if the plaintiff pay the defendants their costs of this application within ten days after taxation. If these costs are not paid within that time, then I will order the injunction order to be dissolved. I give the defendants their costs of this application, because I do not think the plaintiff ought to have taken, without notice to the other side, an absolute order restraining the defendants from transferring the property unconditionally, that not being their right, as I have shown.

As indicated in the principal case, property granted by the charter of the city of St. John to the Mayor, Aldermen and Commonalty of the City is trust property. As such the Corporation are fettered in their use and disposition of it. See Mayor of Colchester v. Lowten, 1 V. & B. 226; and Davis v. Corporation of Leicester, [1894] 2 Ch. 208, 227.

"It is clearly settled that a corporation will be restrained by injunction from misapplying its corporate property; and that a municipal corporation will be restrained from applying its borough fund to purposes not authorized by the Municipal Corporations Act, or by some other Act of Parliament: Attorney-General v. Aspinall, 2 My. & Cr. 613; Attorney-General v. Mayor of Norwich, 2 My. & Cr. 406," per Lindley, L.J., Attorney-General v. Mayor, etc., of Newcastle-Upon-Tyne, 23 Q. B. D. 493, 497. In Attorney-General v. Mayor of Liverpool, 1 My. & Cr. 201, Lord Langdale, M.R., said: "Cases were cited to show (what cases were not required to prove) that the Court has no jurisdiction over a corporation which has control over its own property. But, although a body having a corporate existence is capable of acquiring and possessing property, and therefore also of disposing of it; if property is held by a corporation as a trustee, if the corporation holds it clothed with public duties, the Court has always asserted its right to interfere."

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Under the English practice an *ex parte* injunction order is generally granted for a limited time, and an application to continue it is therefore necessary. See *Ex parte* Abrams, 50 L. T. 184; and Norris v. Ormond, [1883] W. N. 58. And this practice has been followed in New Brunswick in some instances by Mr. Justice Barker. See form of order, Seton (4th ed.) 173. Where an interim injunction is granted to extend over a certain day or until further order, it may be dissolved at an earlier date than the day named, but it cannot continue beyond such date: Bolton v. London School Board, 7 Ch. D. 766. See Carroll v. Provincial Natural Gas Co., 16 P. R. 518. A motion to discharge an injunction order on the day to which it is limited will be refused: Bolton v. London School Board, *supra*, unless the injunction was obtained by misrepresentation: Wimbledon Local Board v. Croyden Rural Sanitary Authority, 32 Ch. D. 421.

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October 7.

LLOYD v. GIRVAN ET AL.

Practice—Motion to take bill pro confesso—Answer after notice—Clerk's certificate—Section 28, c. 49, C. S. N. B.

Where plaintiff gave notice of motion under section 28 of c. 49, C. S. N. B., to take the bill *pro confesso* for want of a plea, answer, or demurrer, and at the motion did not produce a certificate of the clerk that an answer had not been filed, though it appeared from a certificate produced by the defendant that an answer had not been filed until after the notice, the motion was refused.

This was a motion to take the bill in this suit pro confesso against the defendant, James Broad, for want of a plea, answer or demurrer. The facts appear in the judgment of the Court.

C. H. Lugrin, for the plaintiff.

Geo. F. Gregory, for the defendant.

1882. October 7. PALMER, J.:—

This is an application to take the bill pro confesso against the defendant, James Broad, for want of a demurrer, plea or answer in time under the 28th section of chapter 49, C. S. The bill was filed, and a copy was served, with a copy of interrogatories, more than thirty days before the notice was given, but the answer was filed before the motion was made, and also before the Clerk had given any certificate that the answer was not

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on file. Mr. Gregory produced on the motion a certificate of the Clerk showing when the answer was filed, and that none was filed before, and the point of practice to be decided in this case is whether the bill can be taken pro confesso under these circumstances.

I have already decided that when a notice of this nature has been properly prepared and given, it cannot be defeated, as of course, by merely filing the answer before the motion comes on. That if the plaintiff waits the thirty days after filing his bill and interrogatories, and after serving copies thereof, and obtains the certificate of the Clerk mentioned in the 28th section of chapter 49, and then makes the proper affidavit, he is in a position to give the notice. The words of the Statute are that "if no demurrer, plea or answer be filed, and a copy thereof served on the plaintiff's solicitor within one month after such service, any Judge at any monthly sitting may, on affidavit of the facts and on production of the Clerk's certificate of the filing of the bill and interrogatories, and that no plea, answer or demurrer has been filed by such defendant, be moved that the said bill be taken pro confesso against such defendant," and the same may be ordered. The first thing I need notice under this Statute is that by its plain words there must be produced on the motion the Clerk's certificate that no plea, demurrer or answer is on file; and it is useless for me to think that such provision was entirely unnecessary, and that what is required by it to be done need not be done. I am not at liberty to disregard the Statute. I must obey it if the meaning of the words used is plain. My duty in this respect is well laid down by the Judges in *Warburton* v. *Loveland* (1), as follows: "Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences." It follows, if the Statute is to be obeyed, that the party moving must produce a certificate that no answer, plea or demurrer is on file, and it is equally apparent that no such certificate can be got after the answer is on file. It follows that the plaintiff can never

(1) 2 Dow. & Cl. 489.

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be safe to give a notice to move until he obtains that certificate from the Clerk, and I am not prepared to say that the fact that no certificate has been applied for might not be a good reason why the plaintiff should be compelled to give time to answer. The reason why I have held that a party could not file an answer as of right after a notice had been properly given was that I considered the notice the inception of the motion, and the motion when made relates back to the time of the notice, and when the Statute says that the plaintiff must have a certificate that no demurrer, plea or answer is on file, such certificate, if gotten after it should have been filed, certifying that no such paper is on file, is a literal compliance with the Statute, and I do not think I ought to require more, particularly if I did it would have the effect of doing wrong to the plaintiff by putting him to the expense of giving a notice which the laches of the defendant had rendered necessary. But it is a different thing when I am asked, as in this case, to allow the plaintiff to dispense with this provision of the Statute altogether. In England a party has a right to amend his bill at any time before answer under the General Orders by an ex parte order, but if such order is obtained, or even served, after notice of motion to dismiss, which is also allowed upon the plaintiff not filing his replication in time, such order is a nullity, and no answer to the motion to dismiss, which relates back to the time of the notice, if given as authorized by law. See *Price* v. *Webb* (2), and *Jones* v. *Lord Charlemont* (3). Just so here. If the plaintiff was in position to move this motion, and he had afterwards given the notice as directed by the 28th section, I would not allow the defendant, who was in default, to file his answer without submitting to such terms as would be right, but I regret that I am obliged to refuse this application on the technical ground that the plaintiff has not been able to produce the certificate of the Clerk required by the section.

(2) 2 Hare, 515.

(3) 12 Jur. 389.

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In all proceedings to take a bill *pro confesso*, the greatest care must be taken to comply with the requirements of the Act; and all formalities must be strictly observed. See Buttler v. Mathews, 19 Beav. 549. Therefore on a motion to take a bill *pro confesso* for want of an answer, the plaintiff must produce the record and writ clerk's certificate that the defendant has not put in an answer: Dan. Chan. Pr. (4th Am. ed.) 521. Where motion was made to dismiss the bill in a cause for want of prosecution, Vice-Chancellor Wood refused to allow it without the production of the Registrar's certificate of the filing of the answer: Freeston v. Clayton, 17 Jur. 435. The certificate of the Clerk of Records and Writs is conclusive as to the date of the filing of a pleading: Beavan v. Burgess, 10 Jur. 63. And see Dan. Chan. Pr. (4th Am. ed.) 1309. For the present practice in moving to take a bill *pro confesso*, either for want of an appearance, or a plea, answer or demurrer, see sections 32, 33, 38 and 39 of 53 Vict. c. 4. Where the bill is amended after answer, if the amended bill is not answered, the bill may be taken *pro confesso* generally: Jopling v. Stuart, 4 Ves. 619.

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November 12.

Statute of Limitations—Mortgage—Principal and surety—Chap. 84, C. S. N. B., ss. 29 and 30—Payment of interest by co-obligor of bond.

On September 27th, 1850, H. and W. gave their joint and several bond to C. to secure the payment of £1,000 on September 27th, 1855, with interest thereon quarterly in the meantime. As between H. and W. the latter was surety, though they were both principal debtors by the bond. On the same day H. and W. executed to C. separate mortgages on separate pieces of property owned by each to secure the payment on September 27th, 1855, of the amount of the bond, neither party executing or being a party to the mortgage of the other. The mortgage from W. was upon the condition that if he and H., or either of them, their or either of their heirs, etc., paid to C. £1,000 and interest, according to the condition of the bond by H. and W., it should be void. The mortgage given by H. contained a similar provision. The interest on the debt was paid regularly by H. up to the 27th March, 1879, after which his payments ceased. W. and his successors in title were never out of possession of the land mortgaged by him from the date of the mortgage, and never made any payment or gave any acknowledgment. On January 20th, 1881, C.'s representatives commenced this suit for foreclosure and sale of both mortgaged premises.

Held, that the mortgage given by W. was extinguished under the Statute of Limitations, c. 84, C. S. N. B., ss. 29 and 30.

On the 27th of September, 1850, John Howe and James White gave their joint and several bond to Margaret Cunningham to secure the payment of £1,000 to her on the 27th of September, 1855, with interest payable quarterly until payment of the principal. As between Howe and White, the latter was a surety, but

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they were both principal debtors by the bond to the obligee. On the same day Howe and White each mortgaged property of his own to the obligee to secure the bond debt. White's mortgage was made upon the express condition that if he and Howe or either of them, their or either of their heirs, executors or administrators should pay to Miss Cunningham, or her representatives, the sum of £1,000 on the 27th of September, 1855, with interest in the meantime according to the conditions of the bond of even date, given by Howe and White to Miss Cunningham, the mortgage would be void, otherwise to remain in full force and virtue. The mortgage from Howe and Mary E. Howe, his wife, was made upon the express condition that if Howe and his wife or White, or either of them, or their or either of their heirs, executors or administrators, should pay to Miss Cunningham, or her representatives, the sum of £1,000 on the 27th of September, 1855, with interest in the meantime according to the conditions of the bond of even date given by Howe and White to Miss Cunningham, the mortgage would be void, otherwise to remain in full force, virtue and effect. The bond and mortgages were assigned to the plaintiffs in 1870. James White died in 1858, leaving a will appointing Howe the executor thereof, and devising all his residuary real estate, including the lands and premises included in the mortgage to Miss Cunningham, to his daughter Georgina Wilson, the defendant, and his daughter, the above Mary E. Howe.

In 1880 a partition was made between the defendant and Mary E. Howe and her husband, by which Mary E. Howe and her husband released to the defendant their interest in the said land and premises. Howe concealed from the defendant that the property had been mortgaged, and that the mortgage was then in existence, and she took the property at full value. White, at the time of his death, was in possession of the mortgaged premises, and since his death the defendant, Georgina Wilson, has been in possession, except of a portion conveyed by her to William A. Lawton. Lawton and his assignee have always been in possession of the portion conveyed

to them. Neither White nor his successors in title ever paid interest on the bond or either of the mortgages or gave any acknowledgment. The interest on the debt of the bond was regularly paid by Howe up to the 27th of March, 1879, after which no further payment was made by him. On the 20th of January, 1881, the present suit was brought for foreclosure and sale of both mortgaged premises.

Argument was heard August 29th, 1882.

C. W. Weldon, Q.C., and *G. S. Smith*, for the plaintiffs.

T. Millidge, for the defendant, Georgina Wilson.

W. B. Wallace, for the defendant, Benjamin Lawton.

C. A. Palmer, for the defendant, James Harris.

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The material facts of this case that affect the only question involved, that was not disposed of on the argument, are as follows:

That on the 27th of September, 1850, John Howe borrowed of Margaret Cunningham $4,000, and he and his father-in-law, James White, gave her their joint bond, conditioned that one or other of them would repay the principal money on September 27th, 1855, and the interest thereon quarterly in the meantime.

To secure the payment of this bond, Howe and his wife gave Miss Cunningham a mortgage on some property of his own, and White and his wife gave a separate mortgage on some property of his for the same purpose. This bond and these mortgages were assigned to the plaintiffs in the year 1870. No part of the principal money was ever paid, but Howe paid the interest up to 1879. White died in 1858, and devised this mortgaged property, with other property, to his children, one of whom was Howe's wife; another was the defendant, Georgina Wilson. The devisees made a partition of the property. The part in dispute in this cause was

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allotted to the defendant, Georgina Wilson, at its full value, she having no knowledge that it was encumbered, and she and her tenants have had exclusive possession of it ever since, and neither White nor his personal representatives, heirs or devisees, nor any persons interested in his estate, have paid any principal or interest on the mortgage debt, or authorized any one to do so on their behalf.

Under these circumstances the plaintiffs have brought this suit for the foreclosure and sale of the properties included in the Howe and White mortgages, and claim that they are entitled to an order for the sale of the defendant Wilson's land included in the White mortgage to pay what is due on the bond debt.

Mrs. Wilson contends that such claim is barred against her land by the Statute of Limitations, and that her property should not have been included in the suit, and that she and her tenants should be dismissed out of this Court with costs.

And thus, for the first time in this Province, that I am aware of, has arisen a question of construction of the 29th and 30th sections of chapter 84 of the Consolidated Statutes, the most difficult that I have ever had before me. The solution of it must depend on what construction is given to these sections, and to do this it will be necessary to compare them with all the rest of the Consolidated Statutes that are in pari materia.

The words of these sections are as follows:

Section 29. "No action, or suit, or other proceedings, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding, shall be

brought but within twenty years after such payment or acknowledgment, or the last of such payment or acknowledgments, if more than one were given."

Section 30. "It shall and may be lawful for any person entitled to or claiming under any mortgage of land, to make an entry or bring an action at law, or suit in equity, to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, such payment being made within twenty years after the right of entry first accrued, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in this chapter to the contrary notwithstanding."

In considering what effect I am to give to this language it is important to bear in mind the language of other parts of the Consolidated Statutes; for, although they are divided into different chapters and placed under different heads, yet they were all passed at the same time, and it is the duty of a Judge attempting to construe any part of them to look at the whole, and if possible to give such a construction as will make the whole harmonize.

The rule is well laid down by Jervis, C.J., in *Abley* v. *Dale* (1), that words may be modified or varied when their import is doubtful or obscure; and if a too literal adherence to the words of an enactment appears to produce an absurdity (i.e., repugnancy) it will be the duty of the Court of construction to consider the state of the law at the time the Act was passed, with a view to ascertaining whether the language of the enactment is capable of any other fair interpretation, or whether it may not be desirable to put upon the language used a secondary meaning, or perhaps adopt a construction not quite strictly grammatical. Mr. Justice Willes, in *Christophersen* v. *Lotinga* (2), says that what is meant by absurdity must be repugnancy. And Pollock, C.B., in *Waugh* v. *Middleton* (3), still more clearly states

(1) 20 L. J. (C. P.) 235. (2) 34 L J. (C. P.) 123.
(3) 8 Exch. 356.

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the rule. After stating that when the grammatical construction is clear it ought to prevail, unless there is some clear and obvious reason to the contrary, he says: "But the rule is subject to this condition, that, however plain the grammatical construction of a sentence may be, if it be perfectly clear from the contents of the same document that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it."

Then what do the Consolidated Statutes say in their other chapters with regard to the subject under discussion?

Section 1, of chapter 85, enacts that no action or scire facias, upon any judgment, recognizance, bond, or other specialty, shall be brought but within twenty years after the cause of action; and section 5 says as follows:—

"No acknowledgment or promise shall be evidence of a new or continuing contract, or liability whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be in writing, signed by the party chargeable thereby, but a payment made on account of any such debt shall have the effect of such acknowledgment or promise."

Section 6 is as follows:—

"No person jointly contracting, or liable, or his representatives, shall be answerable for or by reason of any payment, acknowledgment, or promise of his co-contractor, or debtor, or his representatives."

And section 3 of chapter 84 enacts as follows:

"No person shall make an entry or bring an action to recover any land, but within twenty years next after the time at which the right to make such entry, or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry, or to bring such action shall have first accrued to the person making or bringing the same."

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Bear this in mind; then ask the question: Is this an action upon this land or upon this mortgage? If so it is clearly barred after twenty years if there has been no payment or acknowledgment by the party to be charged unless it is saved by these sections under discussion, and if it depended upon the 29th alone, and you could not reconcile the language of that section with the 1st and other sections of chapter 85 referred to, then the action would be barred; for as said by Keating, J., in *Wood* v. *Riley* (4): "If two sections are repugnant the known rule is that the last must prevail." And I think the same may apply to section 30, for the concluding part of that section, which says: "Anything in this chapter to the contrary notwithstanding," only applies to chapter 84, and does not apply to chapter 85. At all events, there can be no pretence that an action could be brought against the personal representative of White on the land, and by consequence the primary fund out of which it ought to be paid, if paid out of White's estate at all, has escaped by the delay of these plaintiffs or their assignee, and I think it unlikely to suppose that the Legislature intended such a result as to hold the secondary fund liable and allow the primary fund to be discharged, and to enact that while they would not allow a joint debtor to make a payment to fix his co-debtor, by a payment or acknowledgment, they would allow such joint debtor's, or even a stranger's land, who had acquired a right by possession, to be affected by such a payment or acknowledgment.

In the case of *Doe d. Fox* v. *Wright* (5), the payment was made by the mortgagor, and Chief Justice *Ritchie* points out that such payment would prevent the Statute barring the remedy for the debt. He says the mortgagee could sue on the bond within 20 years from the last payment of interest, and that it would be a curious state of things that the bond would be kept alive while the security would be barred by the Statute; showing that that great lawyer thought that the Legislature could not have

(4) L. R. 3 C. P. 27.

(5) 6 All. 241.

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intended to bar one without the other. And, I think, it can be said with greater force that it would be a curious state of things if the remedy on the bond, which is the principal thing, is barred by the Statute, and the security, which is only a secondary and additional remedy to recover the bond debt, should not be barred.

Taking all this together I have no difficulty in holding that when the 29th section enacts that "unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent," it must mean the person who is sought to be charged or his agent. The case of *Harlock* v. *Ashberry* (6), decided that the payment must be made by the mortgagor, or some person bound to pay principal or interest on his behalf, and that a payment to prevent the running of the Statute of Limitations must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made. If this is the law the payment made by Howe in this case does not answer this in two particulars. First, it was not made by the mortgagor, that is, the mortgagor of the mortgage that is sought to be set up against Mrs. Wilson, nor by any person that was bound to make the payment on his or her behalf. Howe was neither, for while he had to pay, he was not bound to pay either on White's or Mrs. Wilson's behalf. Secondly, he had no authority to make any acknowledgment to bind Mr. White or Mrs. Wilson with reference to their lands. To that he was a stranger, and with regard to Mrs. Wilson he was not even a joint debtor; and as she had 20 years' possession after the death of White, this would give her the absolute right, irrespective of White's possession. There does not appear to be any difficulty about the 29th section, as there are no enabling words in it, and the bar appears to be complete without it.

(6) 19 Ch. D. 539.

There is more difficulty about the 30th section, which, unlike the 29th, has an enabling clause, as it provides that an action at law or suit in equity for mortgaged lands may be brought within 20 years, when part of the principal or interest has been paid within 20 years. And that this is an action to recover the land was decided in *Wrixon* v. *Vize* (7), and *Heath* v. *Pugh* (8); and in view of the reasoning of Brett, L.J., in *Harlock* v. *Ashberry*, and the incongruity that any other construction would make in the Statutes relating to limitations, I think, I am constrained to decide that no payment made by any person, other than the mortgagor or his agent, or by some person having an interest in the property sought to be affected, or his agent, can have the effect of preventing the barring by the statute. That very able Judge says that a payment within the section must be made by the mortgagor or his agent, or at least by a person bound and entitled to make a payment for the mortgagor; and the reason is that before a payment is entitled to take the case out of the statute it must amount to an acknowledgment of liability and to an acknowledgment of right, and how can a joint debtor acknowledge a right in another person's land? He is in no way interested in the land. His acknowledgment amounts to nothing. And Holker, L.J., in the same case asks: "If the payment be such as could be enforced against the tenant, how could it be an acknowledgment by the mortgagor?" If we take the reasoning of the Lord Chancellor in *Bolding* v. *Lane* (9), who there says "that if the mortgagor, etc., who may not have any interest in the land whatever, shall be enabled to charge the estate anew with any amount of arrears of interest, as against the second or subsequent mortgagees, the Court is bound by every principle of judicial interpretation to find, if possible, a construction of the statute which does not involve consequences so inconsistent with natural justice. And that with great respect to the Vice-Chan-

(7) 3 D. & W. 104.

(8) 6 Q. B. D. 345.

(9) 1 DeG. J. & S. 122.

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cellor, the vice of the decision lies in the limited interpretation which is put upon the words 'by whom the same was payable.' These words do not merely denote the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears may be enforced by any action or suit; and who, therefore, as they have a right to pay such interest in the redemption of their land, interest may be properly said to be payable."

So in this case the interest due on this bond was payable with respect to the land in White's mortgage by all persons who held land by descent or devise from him; and so Mr. Howe was the person by whom it was payable in respect to his contract or his own land, and there does not appear to be any reason why White or his devisees could or should affect Howe's rights, or why Howe should affect the rights of White's devisees in lands included in a mortgage to which Howe was no party. And this, I think, is made clear by what the Lord Chancellor says in continuation in the same case. He says: "As a necessary consequence it was not the intention or effect of the section to give the mortgagor or other person who is by law compellable to pay the interest a statutory power to deprive by his acknowledgment given to a prior encumbrancer the subsequent encumbrancer of the benefit of the statute." I think this language more applicable to our statutes than it was to the enactment to which the Lord Chancellor applied it, for this harmonizes the whole statute, and also gives it the effect given by Jessel, Brett and Holker, that each paying can only affect his own interest in the property, and no person can have his right affected except by himself or his agent.

Upon the whole I think I am bound to adopt this view, and give the devisees of White the benefit of the Statute of Limitations, they having been in the exclusive possession of the property for over 20 years, and neither they, nor their agent, nor any person who is liable in respect of the mortgage under which the same was claimed, having paid any interest thereon or made any

acknowledgment. The case of *Chinery* v. *Evans* (10), was strongly relied on by the plaintiffs, and although some of the dicta of the Lords appear when applied generally adverse to the contention of Mrs. Wilson in this case, yet I think a careful consideration of the facts of that case, the most material of which is that the payment was made by the agent of the mortgagor of the mortgage sought to be barred, and viewed in the light of the exposition of the learned judges in the case of *Harlock* v. *Ashberry*, is really a decision in favour of Mrs. Wilson's contention. All this case decided is that a payment by a receiver appointed over an entire mortgaged estate is within the terms of the statute a payment by the agent of the mortgagor, and when a payment of the interest was made by him in respect to his liability under the mortgage it included a payment on all the land in it and prevented the statute running as against any part of it. Suppose instead of the payment he had made an acknowledgment in writing. That would keep alive the debt, and also the mortgagee's interest in the land; but what use would Howe's acknowledgment be as regards Mrs. Wilson's land? He had no right in it, nor any possession of it.

The other point was that the words of the 40th section of the Imperial Act of 1833 (7 Will. 4 & 1 Viet. c. 28), our 29th section, "by the person by whom the same shall be payable or his agent," apply equally to the making of the payment and the signing of the acknowledgment; and it is apparent that the same reason will make it applicable to the payment mentioned in the 30th section, and pre-supposes that the person making the payment could sign the acknowledgment, and thus evolving the principle that underlies all Statutes of Limitations, that a payment to prevent the barring by the statutes must be an admission of the title of the person to whom the payment is made.

Therefore the decree will be that all parties that have been made defendants in consequence of their interest in the lands included in White's mortgage, except

(10) 11 H. L. C. 115.

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what belongs to Howe's wife, must be dismissed, and as there is nothing in the case to disentitle them to their costs, they will be entitled to them. There will be the usual order for the sale of the property comprised in the Howe mortgage, and I assess the debt at $4,000 principal, and the interest due thereon—in all the sum of $4,800 up to September 27th last, the plaintiffs to have their costs of that part of the suit which relates to prosecuting that part of the claim on which they have recovered, and that it be referred to a barrister, to sell either in one piece or such pieces as he may deem advisable, all parties having leave to bid.

This decision was affirmed on appeal, 9 Can. S. C. R. 637; and reversed by the Judicial Committee of the Privy Council, 11 App. Cas. 639. In the Law Quarterly Review, Vol. 7, p. 43, Mr. Thos. Millidge contributes a learned article questioning the soundness of the decision in the case of the Judicial Committee of the Privy Council, and holding that it is in conflict with the decision of the Court of Appeal in Newbould v. Smith, 33 Ch. D. 127. For additional cases bearing on the question, see In re Frisby, 43 Ch. D. 106; Dibb v. Walker, [1893] 2 Ch. 429; and Kibble v. Fairthorne, [1895] 1 Ch. 219.

Where it appears by the bill that the plaintiff's claim is barred or extinguished by the Statute of Limitations it is demurrable. See Hoare v. Peck, 6 Sim. 51; Fyson v. Pole, 3 Y. & C. Ex. 266; Noyes v. Crawley, L. R. 10 Ch. 31; Prance v. Sympson, Kay, 678; Dawkins v. Lord Penryhn, 4 App. Cas. 51.

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1883. January 24.

Practice — Summons — Representative character of parties—Bill—Title—Cause of action—Pleading—Relief—Chapter 49, C. S. N. B. ss. 16 and 22.

Section 16 of chapter 49, C. S., provides that all causes in Equity shall be commenced by summons, which shall include the names of all the parties, and disclose in a brief form the cause of action for which the bill is to be filed.

Held, that where a plaintiff is claiming in a representative character it should be stated in the summons.

The title of the bill should be of the same parties and in the same character, and in accordance with the cause of action and relief stated in the summons, and the bill itself should be in accordance with the title.

Section 22 of chapter 49, C. S., provides that a bill shall conclude with a prayer for specific relief, under which, without a prayer for general relief, the plaintiff shall have any other relief to which the equities of his case may entitle him.

Held, (1) that the prayer for specific relief must be substantially the same as the cause of action stated in the summons.

(2) That relief to which the equities of a plaintiff's case entitle him under the above section must be consistent with the relief specifically prayed for.

The facts appear in the judgment of the Court, and in the report of the case on appeal, 23 N. B. 392.

Argument was heard December 18th, 1882.

J. Travis, for the plaintiff.

C. A. Palmer, for the defendant.

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The prayer of the bill in this cause is to have an award made between the parties by arbitrators, appointed by a written submission, amended, and the defendant decreed to pay the amount of the award, and that an order should be made that the award should stand good, except as amended, and the plaintiffs and each of them have all other relief to which they are entitled, and the defendant decreed to pay the costs.

Mr. Travis, the plaintiff's counsel, opened his case asking me to amend and enforce the award, and put in his evidence, it being understood that he could at any time before the case closed read any part of the defendant's answer. The defendant opened his case, put in

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his evidence, and closed his case. Mr. Travis then read the parts of the answer that he wished, and before my hearing the defendant's counsel on the whole case, he stated that failing in obtaining the decree, he asked, in the opening, to have the award set aside.

The defendant's counsel objected to this on two grounds:

1. That it was not only not prayed for by the bill, but was inconsistent with the prayer in the bill.

2. That if it had been open under the bill, he could not take it after defendant had closed his case.

3. That the only case that they were called upon to answer was the amending the award, and the plaintiff had made out no case authorizing me to do that.

I think it clear that the evidence in this case does not show any case to add to or amend the award. Whether the arbitrators did what they were authorized or not, it is clear they deliberately intended to do just what they did; and consequently the award is not the result of any mistake; that is, that it is not done differently than they intended, and I am clear that this Court could not make an award different from what the arbitrators intended. Whether, if the arbitrators had agreed to make an award, and in drawing it up had made a mistake and inserted a different sum or terms than they intended, this Court could interfere to rectify it, I am not called upon to decide. It is equally clear to my mind that I could neither make an award that they did not intend to make or compel them to do so; so that the case as made by the bill fails.

I think it very doubtful if the award is valid on its face, as not being authorized by the submission, and, if so, it is bad at law and requires no decree of this Court to make it so; and if so, it would be an additional reason why I could not grant the prayer of the plaintiff's bill to enforce it. Then arises the question whether I could without amending the bill, make a decree to set aside the award.

The first question to be considered is how far chapter 49 of the Consolidated Statutes has affected pleadings in suits in Equity in this country, compared

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with English procedure; and I now say, as I have often had occasion to say before, that in my opinion the practice of the Court is the practice of the Court of Chancery in force in England prior to the 23rd March, 1839, except where altered by Acts of Assembly, general rules or orders of the Court of Chancery of this Province in force on the 1st of May, 1854, and all general rules of the Supreme Court made since. This was made the practice by section 2 of 17 Vict. chap. 18, and continued by section 2 of chapter 49 of Consolidated Statutes. In England the first proceeding is the bill which discloses the cause of action. This is changed here by the 16th section of chapter 49, which enacts that the suit shall be commenced by summons and shall include the names of all the parties and disclose in a brief form the cause of action for which the bill is to be filed.

From which I think it is obvious that a party carrying on a suit in Equity could neither proceed against any other parties than those named in the summons, nor for any cause that was not expressed therein, without amending his summons. That is, the bill could not properly ask for any relief that was not in a brief form disclosed by the summons; and it would follow that if a party found it expedient to proceed for different relief than what was first included in the claim in his summons, he ought to have his summons amended before he filed his bill; and although I have nothing to do with the reason that caused the Legislature to alter the law, yet there might be a good reason why a party should know, before he is called upon to appear in Court, what is claimed against him, as if it is only what he thinks the plaintiff is entitled to, he need not go to the expense of appearing at all.

The next proceeding is the bill. What that is to contain is regulated by the 22nd section, which enacts that it shall be in the form given in the Act, beginning with the title of the cause, which I cannot help thinking, notwithstanding what is said by Chief Justice *Allen* in *Vassie* v. *Vassie* (1), requires to be correct—that is, not only

(1) 22 N. B. 76.

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pursue the summons and have the same parties and none other, and the same character; and the plaintiff would be, I think, entirely unwarranted in making the parties in different rights than was in the summons, without leave to amend; and in that respect, and some other respects, notwithstanding the sincere respect I have for the opinions of my learned brethren, I entirely disagree with what was said on the subject by the Chief Justice and Mr. Justice *King* in that case, and I do not consider myself bound by what is there said, as it is obiter dictum. The bill is to contain a brief narrative of the material facts on which the plaintiff relies, etc., and conclude with a prayer for specific relief, under which without a prayer for general relief he shall have any other relief that the equities of his case may entitle him to. I think, as I have said before, that this prayer of specific relief must be substantially the same as the cause of action stated in the summons. If, however, it departed from it, and was not objected to on that ground, it might be a waiver, and the plaintiff might, in that case, be entitled to relief according to his bill if it differed from his summons, but whether the bill pursues the summons or not, I think it is always a material question where the Court is to consider with what object allegatons are set out in the bill, and also where any question of amendment is considered.

As I have had occasion repeatedly to say before, this section renders unnecessary any prayer for general relief, and entitles the plaintiff to the same relief as if he had such a prayer; for that is the relief the equities of his case entitle him to, if the practice of the English Court of Chancery is in force now, as the Act had declared it to be. Pause a moment and ask, What is the meaning of stating the plaintiff's cause of action? This is what the Legislature has said the plaintiff must state in his summons. This, it appears to me, must be a short, intelligent statement of what is claimed, and the right in which it is claimed; in other words, if the claim is such as the plaintiff can only claim in some representative character other than his own right, his summons must say so, otherwise the statute is not complied with,

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for without this the summons would not show the cause of action and all the parties, both of which the Statute says it must contain; and this is really in accordance with common law, for all original writs that issued out of Chancery before any suit could be begun at common law required the same thing, and the title of suit followed all through in strict conformity with the original, and always appeared by such title; and all proceedings not so entitled, that is, in accordance with the original statement of the cause of action, were treated as a nullity and not allowed to be used, as they did not appear to be in the suit at all. If this is correct, it follows that in suits in Equity in this Province the title of the bill must follow the cause of action set out in the summons, and such title determined who are the parties to the suit, and whether, in their own right or in any representative character, and they state the cause of action; and so necessary is this that often the same person is a party in many different characters, that is, in his own right, as personal representative of different deceased persons; an assignee of an insolvent; and a committee of a lunatic; and it has occurred that one man in his different rights was the only party to the suit. If it be law, as intimated in *Vassie* v. *Vassie*, that a suit might be entitled only in a man's own right, how could such a suit be entitled? Such a proceeding, would, I think, be such a clear disregard of the plain words of the statute that nothing but the decision of a Court of Appeal will ever make me so hold; and where is there any necessity for scanning a bill to find out in what characters the parties to the suit are acting? There is nothing to prevent the plaintiff saying in the title, who are the parties. In other words, what are the characters of such parties. And if the title is not to govern, what is the use of it at all? Better to have adhered to the English form of bill, as if it is to be governed by what is in the body of the bill, and not by the title, and what the party is brought into Court to answer, then the title is worse than useless; its only use is to deceive. It appears to me the summons must show the cause of action in the title, and this cannot be done

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without it shows the right in which he sues, the parties to the suit; and the prayer what is claimed; and the facts stated in the body of the bill must be sufficient to support such a claim, and they can only be introduced for that purpose, and if they have no bearing on these subjects they are impertinent and ought to be expunged. The absurdity of any other rule is made apparent by the case of *Vassie* v. *Vassie*. In that case, before me, the defendant's counsel insisted that it was substantially a suit against the defendant as assignee and wrongly entitled, and therefore I had no jurisdiction, but the jurisdiction was in the County Court. The plaintiff's counsel on the other hand insisted that the plaintiff had brought the suit in his own right, and those allegations relating to the defendant's claiming to be assignee were only introduced to show the claim made by the defendant, so as to take the possession from the plaintiff; and what they wanted was that the defendant himself should be restrained in his own right, and this was the injunction order that Mr. Justice *Duff* granted. I then thought and still think, considering the title and the prayer of the bill, the plaintiff was right that far, and as was said by Lord Lyndhurst, in the case of *Stevens* v. *Guppy* (2), these allegations were introduced for the object that the plaintiff's counsel himself stated, and not to make out a case against the defendant, as assignee of Wetmores, and I accordingly so treated it; yet the Chief Justice and Mr. Justice *King* are clear, from what was alleged in the bill, that the defendant was intended to be sued in his character of assignee. No doubt my learned brethren are as likely to be right as myself, but I fail to see that they have pointed out any allegations which should have that meaning. It cannot be the allegation that the defendant was appointed assignee, or that he had taken the goods as assignee and accepted the office, for we have distinct authority that such allegations in pleadings have no such effect; that nothing short of the plaintiff's claiming as executor or assignee in the suit itself

(2) 3 Russ. 171.

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will support a claim in that character: *Lloyd* v. *Williams* (3); *Heushall* v. *Roberts* (4); *Anon.* (5). And I think the Court has no right to take from the plaintiff the right to determine for himself in what character he sues: *Ashworth* v. *Ryal* (6); *Marzetti* v. *Comte du Jouffroy* (7).

The rule of pleading at common law is, that if a plaintiff sues out process in a special character, he could not afterwards declare in his own right; which shows that the pleading determines what right a party sues in, and this at common law is determined by the commencement and conclusion of the declaration; if as assignee in bankruptcy the conclusion is that he claims as such assignee. See *Reynolds* v. *Welsh* (8). In *Bullen* and *Leake* (9), it is laid down that the declaration must not contradict the writ in describing the character in which the plaintiff sued. So in equity in England. If the plaintiff claims as assignee his prayer must say so. In this country his prayer and the title must not contradict one another and determines the character of the parties to the suit.

A mere description of a party as holding a representative character, without stating that he sues or the party is sued as such (viz.. . s assignee), does not prevent a claim therein, in the action, for a personal claim: *Lloyd* v. *Williams* (10), *Heushall* v. *Roberts* (11), *Anon.* (12).

It is said that the same rule applies to defendant as plaintiff. In *Clay* v. *Oxford* (13), it was decided that there was no power to amend by substituting one party for another; which was altogether wrong. Something is said about statements in the answer, but surely it is not intended that allegations in the answer can support the bill, for these are the defendant's statements and the plaintiff has nothing to do with them.

And yet I can think of nothing else, and I could say in that case as was said by Lord Lyndhurst in the

(3) 2 W. Bl. 722
(4) 5 East. 150.
(5) 1 Dowl. 97.
(6) 1 B. & Ad. 19.
(7) 1 Dowl. 41.
(8) 1 C. M. & R. 580.
(9) 3rd ed. 5.
(10) 2 W. Bl. 722.
(11) 5 East. 150.
(12) 1 Dowl. 97.
(13) L. R. 2 Ex. 54.

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case referred to. There are facts enough stated to enable the plaintiff to sustain a bill as assignee, but he did not introduce them for that purpose, but a different one, that is to support a claim of trespass against the defendant for which he could have proceeded against him personally, have him restrained from further trespassing, and his own right declared, and I should have said that it is plain that such suit was against the defendant personally, and not as assignee. Even if I was at liberty to disregard the title, for then the prayer would govern; but be that as it may, I do not think it desirable to leave such questions to be determined by the Court, for as the Legislature has made it imperative that the plaintiff shall disclose this in the summons and the title, and the plaintiff is not at liberty to say that there are any other parties to his bill, except what the title shows. Of course the Court can amend at any time, but the record must be made right before any binding judgment can be given upon it. The plaintiff must have his option to form his suit as he pleases, and in *Vassie* v. *Vassie*, although the plaintiff's bill alleged that the defendant claimed as assignee, it did not admit he was such assignee, and on the hearing he denied it, and forced the defendant to prove it; and after that to be told that the defendant was intended by the plaintiff to be sued as assignee is, to say the least, a little inconsistent.

Again I think when a claim is made against a party as executor or assignee the pleading should so state, so that he may know what right is to be affected, and I think the authorities are clear that in the absence of such claims no judgment can be given to affect such right.

The cases of *Pritchard* v. *Foulkes* (14), and *Hawes* v. *Bamford* (15), show that the practice of the Court of Chancery is strict that the proper title of the cause should be used. The cause of action set out in the summons in this case is to answer a suit brought by the plaintiff against the defendant to rectify the award in

(14) 2 Beav. 133.

(15) 9 Sim. 653.

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question and nothing else, from which it is apparent when we look at the summons, or the bill, or the hearing there was nothing to lead the defendant to believe that he was called upon to answer any such cause of action as the setting aside the award until after the evidence on both sides was all in; and the question is whether, under such circumstances he can be made to answer anything in this suit except the rectifying and enforcing the award or anything else that may have that end in view.

After a most anxious consideration of the case I have come to the conclusion that both by reason and authority he is not, and he, having shown that the plaintiff has no such cause of action against him he is entitled to have the bill dismissed.

If the plaintiff had asked to have the award set aside at first, the defendant might not have objected and there would have been no necessity to defend the suit. It is said he attempted to act upon it, but that would not show that he might not have been willing to abandon it as soon as the plaintiff insisted upon that. And I think I can say substantially in the same language that was used by Lord Lyndhurst in *Stevens* v. *Guppy* (16): It is true that this bill does not contain charges showing the award is void, but with what view, and with what object are those charges introduced? We have only to look at the summons, the bill, and the proceedings on the hearing, to see that they are introduced not with a view to have the award set aside, but in order to establish a case, to have such award rectified and enforced.

Under such circumstances it would be unjust to allow the plaintiff to abandon the case made by the bill, and ask at the hearing for a new remedy upon a record framed with an aspect altogether different.

My opinion, therefore, is that, as the case is shaped before me, the plaintiff is not entitled under the general words of the prayer to have the award set aside, but the bill should be dismissed, without prejudice to any suit

(16) 3 Russ. 171.

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or proceedings that the plaintiff may think fit to institute for the purpose of setting aside the award.

Another fatal objection to setting aside the award in this suit is, that as the suit was to set up and enforce the award, the setting it aside would be so inconsistent with the enforcing it, that I do not think the plaintiff could have prayed for the alternate relief. In 1 Daniell Chan. Prac. (4th Am. ed.) 378, it is laid down that any relief granted under the general prayer must be consistent with the relief specially prayed for. And it is evident that setting aside an award is not consistent with rectifying and enforcing it.

And on page 311 (note), it is stated that on a bill to rescind a contract, the Court could not, under the prayer for general relief, enforce a specific performance of it, and where a bill was filed for a specific performance of a contract of purchase, the plaintiff could not obtain compensation for improvements in that suit, although he had sufficient allegations in his bill, but they had been introduced for another purpose.

Then comes the question whether I should allow an amendment by altering the bill so as to be a bill to set aside the award only. This I would do if I could see that it would do any good; but it is clear that if I did this a great part of the present bill would be immaterial and impertinent, and should not be introduced into such a suit; the summons itself would have to be entirely changed, and the defendant would have to be allowed to disclaim, or not appear, if he chose, or answer, and the depositions now taken could not be used; so that the whole case would have to be gone over again, and the defendant would have to be pa'd the costs occasioned by such amendment, which would embrace all those discarded and useless proceedings—in fact, substantially all that he had done in the case—and I therefore do not think this course would do any good to either party, and I therefore think the best course for all parties is to do as Lord Lyndhurst did in *Stevens* v. *Guppy*—dismiss the bill without prejudice to the plaintiff's right to bring a suit to set aside the award; and as there does not appear

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to be anything in the case to take it out of the ordinary rule the costs must follow.

Mr. Travis cited a great number of cases showing that the plaintiff, under a prayer of general relief, can have the remedy his equities entitle him to; but all these cases when looked at are subject to this limitation that such relief must be consistent with the specific relief prayed for, and therefore have no bearing on this case.

This decision was affirmed, 23 N. B. 392; and reversed, 11 Can. S. C. R. 156. The case is here printed for the purpose of emphasizing the views of the learned Judge upon the necessity of practitioners describing the representative character of parties to suits in the summons and title of the bill, and which were left unconsidered by either of the decisions on appeal.

In Vassie v. Vassie, 22 N. B. 76, Allen, C.J., considered that if it appear from the allegations in a bill, and the admissions in the answer, that a defendant is sued in a representative character, the failure to describe him as such in the title of the bill is immaterial, and that if an amendment of the title is necessary it should be allowed without costs. The matter was discussed in Fitzpatrick v. Dryden, 30 N. B. 558, but it was unnecessary to give any decision upon it. Palmer, J., sitting in Equity, appeared to think the question was concluded by Vassie v. Vassie. He said: "The first objection raised against the proceedings in this suit is, that as the bill prays for administration of the estate, Mr. Lee, as administrator, should be a party; and that while he is a party in his own right, yet the title does not make him a party as administrator; and if it were not for the case of Vassie v. Vassie, I should have thought the estate was not represented, and that the title of the suit should have shown who were the parties, and that although Mr. Lee was a party in his own right, yet he was not in his capacity as administrator. But the bill in this case, as in Vassie v. Vassie, alleges and shows that he is an administrator, and he is before the Court, and according to the decision in that case is sufficient." The language of Tuck, J., indicates that in the opinion of that learned Judge an amendment to a bill to charge a defendant in a representative capacity would be allowed. In Hynes v. Fisher, 4 O. R. 78, the plaintiffs individually were members of the Master Plasterers' Association, and the defendants individually were members of the Operative Plasterers' Association. The plaintiffs did not by their writ state in what character they sued; but by their affidavits professed to represent their association, and obtained an injunction to restrain the defendants from inducing the workmen of the plaintiffs to leave their employ. Two members of the defendants' association having induced a workman employed by the Master Plasterers' Association to quit work the plaintiffs moved to commit them for contempt. In refusing the motion on the ground that it did not sufficiently appear that the Master Plasterers' Association were parties to the suit, Wilson C.J., said: "It is a rule that a creditor may sue on behalf of himself and all other creditors. Until decree the suit is in the sole control of the plaintiff creditor, and during that time any other creditor may commence his suit without regard to the

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pending suit of the first creditor. When a plaintiff sues on behalf of himself and of others of a similar class he should so state his case in that part of the bill which sets out the names and addresses of the plaintiffs. The omission of such a statement will in many cases render a bill liable to objection for want of parties: Dan. Chan. Pr. (5th ed.) 216, and the cases there cited; and in other cases will deprive the plaintiff of his right to the whole relief which he seeks to obtain. Then, it is said, a creditor suing for satisfaction of his debt out of the real and personal estate of his debtor, and not stating that he sues 'on behalf of himself and the other creditors,' can only have a decree for satisfaction out of the personal estate in a due course of administration, and not for satisfaction out of the real estate: 1 Dan. Chan. Pr. (5th ed.), 302. An amendment, however, may be made in that respect: *ib.*, or the bill may after decree be taken to be a bill on behalf of all other creditors in order to reach the real estate: Woods v. Sowerby, 14 W. R. 9. . . . The writ of summons, under the practice before the Judicature Act, was not required to describe any special character in which the plaintiffs sued; it was sufficient to describe them in their special character in the declaration. The writ could not be enlarged in that respect, but could be restricted. Since the Judicature Act, by Rule 98 of that Act, 'where there are numerous parties having the same interest in one action, one or more of such parties may sue, or be sued, or may be authorized by the Court to defend in such action, on behalf of or for the benefit of all parties so interested.' Then, by Rule 13, it is provided that, 'if the plaintiff sues in a representative capacity, or if the defendant or any of the defendants, is sued in a representative capacity, the indorsement shall show, in manner appearing by the statement in Appendix A hereto, part 2, sec. 5, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues, or is sued.' If the statement of claim show the plaintiff is suing on behalf of himself and other creditors it is not necessary to amend the writ by the insertion of those words: Eyre v. Cox, 24 W. R. 317. In the case in hand the claim indorsed on the writ does not show the plaintiffs sue in any other character than in their own personal right; and in the injunction granted the plaintiffs are described in the like manner as litigants in their individual capacity. There is an express allegation in the plaintiffs' affidavits that the plaintiffs do represent, and are representing, the Masters' Association, but that is not sufficiently formal to constitute the action one of that nature. I do not see, therefore, how it can possibly be maintained that McCord and Jenkins have done any act against the plaintiffs personally by their interference, nor how it can be said they are guilty of contempt by interfering with the Master Plasterers' Association, when that body is not a party to these proceedings by representation or otherwise. The case of Lund v. Blanshard, 4 Hare, 290, shows an amendment of the writ of summons, or at any rate of the claim endorsed upon it, would require to be made to enable the plaintiffs to proceed against the defendants, or any others, for acts of interference with the Masters' Association; and the injunction would, of course, have to be amended in like manner." In In re Tottenham, [1896] 1 Ch. 628, it was held that if the writ in a creditor's action for the administration of real and personal estate does not show that the plaintiff is suing on behalf of all the other creditors of the deceased, this fact ought to appear in the title of the statement of claim, and not merely in the body thereof; and Eyre v. Cox, *supra*, was explained. Where a

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bill was filed by A., B. and C., for and on behalf of themselves and all the other partners or shareholders in the company called, etc.; but there was no distinct allegation in the bill that A., B. and C., were partners or shareholders, it was held that there ought to have been an allegation of the parties filling the character in which they professed to sue: Banks v. Carter, 12 Jur. 366. In Lee v. Head, 1 K. & J. 625, Wood, V.C., held that where a creditor who had filed a bill in an administration suit was named as plaintiff in a special case, the record should not be entitled, "Between such creditor on behalf of himself and all other creditors of the deceased, plaintiffs, and the defendants," such creditors not being before the Court, and therefore not bound by the proceedings. Where plaintiffs sued "on behalf of themselves and all other the holders of the mortgage debentures issued by the defendant company and its predecessors in title," Kekewich, J. said: "That seems to me to be about as wrong a title as well can be. I enter an emphatic protest against such a description as 'predecessors in title' of a company or person as a foundation of a title to relief. The plaintiffs must specify the class on behalf of whom they sue, and anything so vague as this description will not be allowed, as far as I am concerned. The class on whose behalf the plaintiffs really sue is the holders of debentures issued by the limited company in its full description. If they like to add 'now dissolved' they can, but I must have the records amended so as to give the proper description of the plaintiffs before I can get any further. For the present purpose I treat that as done. Possibly it may be right to amend the statement of claim also, not only as regards the title, but also in other respects": Marshall v. South Staffordshire Tramways Co., [1895] 2 Ch. 36.

LAWTON v. HOWE ET AL.

1883.

July 11.

Mortgage—Assignment—Payment of mortgage debt to original mortgagee—Absence of notice of assignment—Registry Act, c. 74, C. S. N. B.

A. gave B. a mortgage on land to secure payment of A.'s bond held by B. Subsequently A. sold the equity of redemption to C., and B. assigned the bond and mortgage to the plaintiff by a registered transfer. Afterwards C. obtained an advance of money from D. by a mortgage of the equity of redemption, the money being applied by D to paying B. the amount of the original mortgage, and B. discharged the mortgage on the records. Neither C. nor D. had notice of the assignment of the bond and mortgage to the plaintiff. In a suit by the plaintiff for the foreclosure and sale of the mortgaged premises:—

Held, that payment by A. or his assigns to B. of the indebtedness owing upon the bond without notice of the assignment of the bond and mortgage to the plaintiff entitled A. or his assigns to a reconveyance of the mortgaged premises, and that the registration of the assignment of the mortgage did not affect A. or his assigns with notice.

The facts are sufficiently stated in the judgment of the Court.

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LAWTON v. HOWE *et al*

Palmer, J.

Argument was heard June 7th, 1883.

I. Allen Jack, for the plaintiff.

C. W. Weldon, Q.C., and *A. H. DeMill*, for the defendants.

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Thomas Maher gave a bond to the defendant Howe, and as security gave a mortgage on land in St. John; afterwards Thomas Maher conveyed his equity of redemption in the mortgaged premises to Daniel Maher. Howe afterwards assigned the bond and mortgage to the plaintiff, which assignment was duly registered; afterwards Daniel Maher mortgaged the equity of redemption to the Building Society to pay off the Howe mortgage, and the Society paid the money to Howe, neither party having any actual notice of the assignment to the plaintiff. Howe discharged the mortgage on the records, and afterwards the mortgaged premises were conveyed to the defendant Nelson, and this bill was filed for foreclosure and sale of the premises.

The first question is whether a mortgagor is obliged to pay the mortgage to the assignee, the plaintiff. It is clear law that what the mortgagor agreed to do was to pay the bond debt, and this, and this alone, is his legal obligation and this he has strictly performed, and nothing is clearer than that such payment would be a good discharge in law. When, however, the debt was assigned, if he had had notice of it, equity would compel him to pay the assignee; and consequently, any payment afterwards to the mortgagee would not be good.

The effect of a mortgage or conveyance of real estate as security for the payment of money is to vest in the mortgagee such estate until the debt is paid, and in equity as soon as the debt is discharged, the estate must be reconveyed. These considerations show that the debt is the principal thing in a mortgage. There can be no pretence that the mortgagor had the requisite notice

to make his payment to the mortgagee's assignee, unless the registry of the assignment was such notice. The case is reduced to the question whether such registry is any notice of the assignment of the mortgage debt to the assignee.

I think it is not. In order to make it so, it would, I think, require a statutory enactment to that effect. The whole policy, as well as the provisions of the Registry Act, c. 74, C. S. N. B., is confined to the interest in the real estate itself; no doubt the registry of any interest is notice to all parties, so far as it affects any estate in any real estate; and therefore any person acquiring any interest in any real estate, which was affected by an instrument registered, may properly be said to have notice of it; but it is of no consequence to a mortgagor what the mortgagee may have done with the interest in the land conveyed by the mortgage; for no matter who has it, as soon as the mortgage debt is paid he is entitled to get it back; it is the bond that he has to pay, and he is bound to pay that to have it discharged at law; and so in equity, until he has notice that it has been assigned. If a Court of Equity laid down the rule that the debtor is a trustee of the assignee of the debt, without having any notice of the assignment, it would be impossible for a debtor safely to pay his creditor. At law the payment to the assignor discharges the debt, and if sued for it must be sued in the assignor's name; and how can this be done if he has been paid? This point was decided in *Williams* v. *Sorrell* (1); which decision, I think, is right and in no way affected by the subsequent decisions.

It was argued that inasmuch as Daniel Maher, the assignee of the equity of redemption, mortgaged his estate to the Building Society to pay off the mortgage, and they paid the mortgagee instead of the assignee of the mortgage, the registry was notice to them; and, therefore, their payment would not avail; but I think that the Building Society had nothing to do with the matter.

(1) 4 Ves. 389.

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They paid this money to Howe for Daniel Maher, and whether they had his authority or not, he ratified this act by repaying them, and I think it must be treated as though Daniel Maher paid it himself, and there is no pretence that he had any notice of the assignment other than the registry, or that it affected the title in the land when he acquired the equity himself.

The bill, therefore, I think, must be dismissed as against all but Howe, and with the usual result of costs.

Payments by the mortgagor to the original mortgagee after the assignment of the mortgage, but without notice of it, are binding on the assignee: Coote (4th ed.), 658, citing Williams v. Sorrell, 4 Ves. 389. In Fisher (3rd ed.), 541, it is laid down that it is not necessary in order to complete the title of an assignee of a mortgage, or of a sub-mortgagee, to give notice to the mortgagor of the assignment of the mortgage debt; because the debt is incident to the property which forms the security, and which cannot be taken from the assignee without payment. In a foot note the learned author adds that so long as the mortgagor has no notice, his payments on account of the debt to the original mortgagee will discharge him. See also Engerson v. Smith, 9 Gr. 16; McDonough v. Dougherty, 10 Gr. 42; Wilson v. Kyle, 28 Gr. 104. The recording of the assignment is not notice to the mortgagor: Williams v. Sorrell, *supra*; Reed v. Marble, 10 Paige (N. Y.) 409; James v. Johnson, 6 Johns. Ch. (N. Y.) 417; James v. Morey, 2 Cow. (N.Y.) 246; New York Life Insurance Co. v. Smith, 2 Barb. Ch. (N.Y.) 82; Trustees of Union College v. Wheeler, 61 N. Y. 88. And see Pierce v. Canada Permanent Loan Co., 25 O. R. 671; 23 A. R. 516. The onus of showing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal, is upon the mortgagor, and unless this onus is clearly discharged, the mortgagor must bear the loss arising from the solicitor's misappropriation of the funds. In re Tracy, 21 A. R. 454. And see Withington v. Tate, L. R. 4 Ch. 288. The duty of an assignee of a mortgage to ascertain the state of accounts between the mortgagor and mortgagee is described in Bickerton v. Walker, 31 Ch. D. 151. Fry, L.J., there says: "It is said, and said truly, that in the ordinary course of business a prudent assignee of a mortgage, before paying his money, requires either the concurrence of the mortgagor in the assignment, or some information from him as to the state of accounts between mortgagor and mortgagee. The reason of this course of conduct is to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor"

NICHOLSON v. BAIRD.

1884. January 15.

English Bankruptcy Act, 1869 (32 and 33 Vict. c. 71)—Person residing and domiciled in Canada member of English firm—Title of trustee under Act to real estate situate in Canada and personalty of such a person—Jurisdiction of English Bankruptcy Court.

In 1873 Gilbert, James, Gorham, and Walter Steeves carried on business as partners under the firm name of Steeves Bros. at St. John, New Brunswick. Each of them was born, and had always resided in New Brunswick. In or about 1874 Gilbert Steeves removed to Liverpool, G. B., and commenced a shipping business under the name of Steeves Bros. & Co., the firm being composed of the same members as the St. John house. Prior to 1882 Walter retired from both firms. Gorham and James never resided in England, or ceased to retain their New Brunswick domicile. In 1882 the firm at Liverpool became insolvent, and Gorham and James cabled from St. John to Gilbert to file a bankruptcy petition of the firm under the English Bankruptcy Act, 1869. The petition was filed July 4th, 1882, and the partners were adjudged bankrupts, and the plaintiff was appointed trustee. On June 27th, 1882, James and Gorham executed at St. John an assignment of all their property, both real and personal, in New Brunswick to the defendant for the benefit of their New Brunswick creditors. This assignment not being recorded, a new assignment was executed and recorded on July 15th. On August 15th the plaintiff recorded in the registry office at St. John a certificate of his appointment. In a suit by the plaintiff for a declaration of histitle to the real and personal property in New Brunswick of James and Gorham Steeves:

Held (1), that the English Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), does not apply to Canada so as to vest in a trustee appointed by the English Bankruptcy Court either the real estate situate in Canada or the personal property of a person residing and domiciled in Canada, though he is a member of an English firm which has traded and contracted debts in England, and has authorized that he be joined in a bankruptcy petition to the Court with the other members of the firm.

(2) That the English Bankruptcy Court has no jurisdiction under the Act to make an adjudication of bankruptcy against such a person.

The facts of the case are fully stated in the judgment of the Court. Argument was heard September 13th and 15th, 1883.

J. J. Kaye, Q.C., and *F. E. Barker*, Q.C., for the plaintiff.

W. B. Chandler, and *G. W. Allen*, for the defendant.

1884. January 15. PALMER, J.:—

The material facts of this case are as follows: In 1873 Gilbert, James, Gorham, and Walter Steeves car-

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ried on a general mercantile business in St. John under the name of Steeves Brothers. They were all born and had always resided in New Brunswick. In 1874 or 1875 Gilbert removed to Liverpool, and carried on a shipping business there under the name of Steeves Bros. & Co., in which Gorham and Walter were partners, but whether James became a partner in that firm is disputed. The business was continued in St. John. This Liverpool house became insolvent in 1882, before which time Walter had retired from both firms; and although this was disputed, I think the effect of what took place is that both Gorham and James by cable authorized Gilbert to file a petition under the English Bankruptcy Act of 1869 for liquidation by arrangement. This petition was filed on the 4th day of July, 1882, and an order was made adjudging them bankrupts; neither James nor Gorham going to England, nor being there at the time that any liability was incurred on their behalf, they both being continuously in Canada from 1880 down to the present time. The St. John firm of Steeves Brothers were indebted to a number of creditors in St. John, and on the 27th day of June, 1882, James and Gorham executed an assignment of their property, real and personal, in New Brunswick, to the defendant, as trustee, for such creditors, which was not recorded, and on the 15th day of July they executed another to the same effect, only describing the property more particularly, and this the defendant recorded on the same day. The plaintiff on the 15th day of August recorded in the registry office, St. John, a certificate of his appointment as trustee under the 8th subsection of section 83 of the English Bankruptcy Act, 1869.

The plaintiff claims the property in Canada, both real and personal, so attempted to be assigned, and asks me to make a declaration of his right thereto. The defendant denies the plaintiff's right, and asks for a declaration that he is entitled to the property under the assignment. Among the great number of points taken and discussed before me, is the following most important one, and for the first time, as far as I know, raised in Canada: That the adjudication in bankruptcy in England, as

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against Gorham and James, is of no force in Canada, and the Bankruptcy Court in England had no jurisdiction over them, and therefore the plaintiff's title fails, and that the only right he would have in Canada would be the share of Gilbert Steeves in the property of the St. John firm, after the payment of its debts. So at the threshold this question is presented: Can a Canadian who was born and has always been domiciled in Canada, and is indebted and has property there, on becoming indebted in England by an agent, without himself being present in England, file a petition in liquidation under the English Bankruptcy Act of 1869 and thereby withdraw out of Canada and have his property in Canada transferred to a person in England, and sent there to be administered? This is what is claimed in this case. If James and Gorham authorized the filing of the petition, as the plaintiff contends; and if the plaintiff can succeed, it is open for any Canadian born and who has done business here all his life and has all his property here, and owing debts to any extent here, to incur a debt through an agent in England and then authorize such agent to file a petition in liquidation, and in this way withdraw the whole of his assets from Canada, and compel his creditors to seek their rights in foreign Courts three thousand miles away. These considerations, while they may not determine the question, show at all events its great importance to Canadians; for if the law is so all Canadians will agree that some effort ought to be made to have it altered. Before discussing the question itself, it will be convenient to state some well-settled principles of law that may help in the discussion. The first is, that an act of bankruptcy must be a personal act or default on the part of the person who is to be made a bankrupt, and a firm as such cannot commit an act of bankruptcy or be made bankrupts; and a partner being adjudicated a bankrupt has the effect of dissolving the partnership and transferring the rights of the bankrupt partner to the trustee. See *Hogg* v. *Bridges* (1); *Bowker* v. *Burdekin* (2); *Ingliss* v. *Grant* (3); *Ex parte Blain* (4). It follows that on the

(1) 8 Taun. 200.
(2) 11 M. & W. 128.
(3) 5 T. R. 530.
(4) 12 Ch. D. 522.

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question whether James and Gorham Steeves were bankrupts it is of no importance whether they were partners in the business carried on in England by Gilbert, and that Gilbert was properly adjudicated a bankrupt. They are each legally in the same position as if they had not been in partnership, and had carried on business in England and had incurred debts there and had never been there themselves. The act of bankruptcy of Gilbert cannot affect the question. Second. The act of bankruptcy to render any person liable to be adjudged a bankrupt, unless otherwise provided by the statute, must have occurred in England or Wales. See *Ingliss* v. *Grant* (5). Third. That bankruptcy is in the nature of an execution, and that issued by a Court in England ought not by its own force affect property in Canada. The proper course in such a case is to have ancillary proceedings taken in Canada where the assets are, and to have them dealt with by the laws of Canada. If this is not done, and the assignee under an English Bankruptcy Act can have the same rights in Canada as in England, it will lead to an unfair race, stimulated by official greed, as to which country shall dispossess the other. Fourth. The procedure being in its nature criminal ought to have no extra-territorial effect. Fifth. That in England the process and proceedings in bankruptcy are not limited by the fact of domicile, but are applicable to foreigners, both alien and colonial, casually doing business in England. See *Ex parte Blain* (6). It is, I think, unreasonable that a bankruptcy decree in England, in such a case, should transfer property out of England where the process of the Court does not run, and consequently where neither the property nor the person of the bankrupt can be made amenable to the jurisdiction of the Court.

It was admitted on the argument that the Act could only have the effect contended for by the plaintiff by giving it intra-territorial force in Canada. In my opinion, if this were so we would have the Imperial Parliament legislating in relation to bankruptcy and insolvency, and civil rights, in Canada by an Act passed two

(5) 5 T. R. 530.

(6) 12 Ch. D. 522.

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years after the B. N. A. Act, and violating our constitution, as expressed in that Act. For it, after reciting that the provinces were desirous of confederating, and that the union would conduce to the welfare of the provinces and promote the interests of the British Empire, and that it was expedient to provide for them a constitution, by section 91 enacts that, notwithstanding anything in the Act, the exclusive authority of the Parliament of Canada should extend to all matters coming within the class of subjects thereinafter next enumerated; of which bankruptcy is one; and the 92nd section enacts that the Legislature of each Province may exclusively make laws in relation to property and civil rights in Canada; and the question is, Can Great Britain, after the grant of this constitution to Canada, herself make laws having force in Canada on the same subject in relation to which the exclusive power to legislate is given to the parliaments in Canada?* This, I think, must be determined by the question what the Parliament of Great Britain meant thereby. What is said in the Act referred to is, that in reference to those matters the Canadian Parliaments created by the Act shall alone make those laws when they relate to the peace, order and good government of Canada, and do not relate to any general Imperial interest, such as might be considered excepted. In considering this question it is important to bear in mind that before the passing of the Act, by the constitution of the provinces their local affairs were to be regulated according to the well-understood wishes of the people thereof, as expressed by their representatives in the legislatures; and that the people were unwilling that laws should be passed affecting their rights only in a Parliament in which they were not represented. What more natural under those circumstances, when they were

* It is submitted that the language of the B. N. A. Act here referred to was in no sense intended to derogate from the powers of the Imperial Parliament; and that its only object was to define, with what precision it affords, the sphere of legislation allotted to each of the legislatures in Canada. See *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348. The view, however, presented by the learned Judge was urged by the late Sir John S. D. Thompson, upon the Imperial Government, in support of the competency of the Canadian Parliament to pass the Copyright Act, 52 Vict. c. 29.

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asked by the British Government, as well for the interest of the whole empire as their own, to confederate, to insist upon such terms as would secure to them as far as the Parliament of Great Britain could do so, that they alone should thereafter make laws on these subjects to be enforced in Canada, and that the Imperial Parliament should not thereafter do so except as aforesaid; and when the Act granting these powers says that they are to exercise them exclusively, I think the proper grammatical construction is that it was intended that no other power should make laws on those subjects to be in force in Canada. If this was not secured, look at the consequences. There might be laws on the same subject entirely different and contradictory, and all emanating primarily from the same source, the Imperial Parliament; for as long as the B. N. A. Act is in force the Parliament of Canada derives its powers to make laws on the subject of bankruptcy in Canada for all time from the Imperial Parliament; and in fact, Canada has a bankruptcy Act which is still in force for some purposes. I therefore think that after the B. N. A. Act was passed it would be a violation of the constitution granted to us by it if the Imperial Parliament passed laws on the subject either of bankruptcy, insolvency, or civil rights to be in force in Canada. The late Chief Justice Draper, in delivering judgment in the Court of Queen's Bench in Ontario in *Regina* v. *Taylor* (7), says (8): "For greater certainty it is declared that (notwithstanding this Act), the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of enumerated subjects thereinafter set forth. Exclusive of what? Surely not of the subordinate Provincial Legislatures, whose powers are yet to be conferred, and who would have no absolute powers until they were in some form defined and granted. Would not this declaration seem rather intended as a more extended or definite renunciation on the part of the Parliament of Great Britain of its powers over the internal affairs of

(7) 36 U. C. Q. B. 183.

(8) At p. 220.

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the new Dominion than was contained in the Imperial Statute 18 Geo. III. cap. 12, and the 28-29 Viet. cap. 63, ss. 3, 4, 5?" And I am not aware of any authority to the contrary; but, although this is my view, it must not be supposed that I deny to the Imperial Parliament the power to pass an Act in violation of our constitution; on the contrary, I think they have the legal power to do so; and if they have done so, we would be bound by such law. It would be no more than a repeal pro tanto of the conflicting exclusive powers granted to Canada by the B. N. A. Act, the abstract power to do which it was not competent for the Imperial Parliament to part with, however much they might pledge the nation that they would not exercise such powers. All I say is that such a law would be unconstitutional—that is, a law opposed to the rights of the people of Canada, granted to them by the B. N. A. Act, which gave us our constitution. All that will follow from these considerations is that no Canadian Court, and I trust no British Court, that is called upon to construe an Act of the Imperial Parliament for which it is claimed that it was intended to have the effect of such violation, will conclude that it has done so if it is possible to put any other construction upon the words used in it; for surely no Court ought to be called upon to believe that the Imperial Parliament intended to violate our constitution and repeal any part of the B. N. A. Act, if the words used are capable of any other construction. It follows that we have a rule for the construction of the English Bankruptcy Act of 1869, in its relation to Canada, that is very important. There is another rule for the construction of Imperial Acts in relation to their extension to colonies. It is, that they do not so extend unless the colonies are mentioned in the Act by special or general description, or the Act in its

* "The curious idea suggested by Draper, C.J., that the words 'exclusive legislative authority,' which occur in the British North America Act, s. 91, exclude the legislative power of the Imperial Parliament, could never have obtained the currency which it certainly has acquired if even learned lawyers had not occasionally failed to realize that the Parliament at Westminster is a sovereign legislature," *per* A. V. Dicey, in Vol. XIV., Law Quarterly Review, at p. 199.

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nature is such as is clearly intended to affect all the British possessions.* Bearing these rules in mind, the question is, what is the proper construction to be put upon the Bankruptcy Act of 1869 in relation to its effect on persons resident and domiciled in Canada, and their property there situate? Is it intended to affect these things, and if so, to what extent? To begin with, it is clear beyond all controversy that any adjudication in bankruptcy in England must be treated in Canada as a foreign judgment; and consequently before it can have any force given to it by the Courts in Canada, all the facts must be proven that are necessary to give the Court power to pronounce upon it—in other words, that the Court had jurisdiction. We have a right to suppose that the people of Canada, or the Territory of Canada, is no more intended to be included in an Imperial statute by any general words than any foreign or British subject in a foreign state. Then, looking at the Act itself, it will be seen that some sections of it apply territorially outside of Great Britain, and these, of course, would include Canada as well as other British Colonies. I refer to sections 76 and 77, which enact that Courts in any of Her Majesty's dominions shall have certain jurisdiction to issue warrants in aid, and it may be also of the 74th section, as that professes to give jurisdiction to any British Court having jurisdiction in bankruptcy on an order of the Court seeking aid, together with a request, although I am inclined to think that this section does not apply to Canada, for it is confined to British Courts, and although Canadian Courts are British in one sense, the word is more appropriately applied to Courts that are the creation of the British Parliament, and, when the Act intended to include Courts in all the dominions, as in the 76th section, it does not use the word British at all, but Courts elsewhere in Her Majesty's dominions, and there is the rule against the Imperial Parliament extending its provisions to Canada that I have alluded to. Besides it is a well-known canon of construction of Acts of Parliament that

* See Colonial Laws Validity Act, 28 & 29 Vict c. 63.

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jurisdiction cannot be given by doubtful words; statutes giving new jurisdictions are to be construed strictly. Besides this there is sub-section 8 of section 83, which provides for the registration of the certificate of the appointment of the trustee. These, and possibly some others, I think, it is pretty clear might have some force in Canada, and if they have I don't think it can be said that this would be an interference with our constitution, or its legislation on the subject of bankruptcy, or civil rights, in Canada. The 8th sub-section, if it is intended by that that the movable property and real estate in Canada should be passed in the way therein mentioned, would be such interference, but it does not say that it shall pass, and it can have a construction even extending it to the colonies, Canada included, without giving it that effect. It does not profess to pass or affect property in its terms. The only words in the Act that do that are general words which I will discuss hereafter, and I think they only pass movable property in Canada when the owner is domiciled in England, and has been properly adjudicated a bankrupt there, and even then, it is to conform with the local law requiring registration in order that the title may pass, as in the case of our Bills of Sale Act. This section provides a mode of registration which otherwise would defeat the operation of the law of domicile upon movable property. In Burge's Commentaries on Colonial and Foreign Laws, Vol. III. (9), it is said: "There is an entire concurrence amongst jurists in considering that the title to movables is not governed by the laws of their actual situs." This, which may be regarded as a general rule, is subject to this qualification, that the law of the country in which the movables may be actually situated has not prescribed some particular mode by which alone the movables may be transferred; thus property in the public funds, or stocks, shares in companies, joint stocks, etc., is a species of personal property, which as it is created, so it is regulated by the laws of the country in

(9) Part 2, page 751.

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which it exists. See Story's Conflict of Laws (10); *Robinson* v. *Bland* (11); *Scott* v. *Almutt* (12). There are other portions of the Act which, beyond controversy, have no territorial force in Canada, such as the administrative parts of it, with reference to which the word British possession is not used, and that relate to pleading, procedure, the orders on officers of the law, such as sheriffs, etc. See *Gilbert* v. *Raymond* (13): *Clark* v. *Mullick* (14); *Mayor, etc., of St. John* v. *Lockwood* (15); *Ex parte Crispin* (16).

According to the case of *Jouett* v. *Lockwood* (17), that part of Act 5 & 6 Vict. c. 122, that related to the discharge of the bankrupt as well as the part that related to the transfer of his property, was decided to be in force in New Brunswick; but this was decided on the ground that that statute expressly named the bankrupt's property in the colonies, and it must be remembered that the B. N. A. Act was not then in force; and in *Ellis* v. *McHenry* (18), it was decided that a discharge under the English Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), was a discharge in Canada. But looking at that statute, it will be seen that it contains very different words from the Act of 1869, and it does not appear by the report whether or not such bankrupt was domiciled in England, but I am satisfied he was; so, whether the same rule will apply to a discharge under the Act of 1869, it is not necessary to decide, for it may well be that if a person resides and is domiciled in England, and so properly subject to the laws of Engand, he should be adjudged a bankrupt there and all his property taken from him, and that it would not be legislating on bankruptcy in Canada to discharge him everywhere in the British dominions; but, I think, a different construction should be put on the Act of 1869, for the words that were principally relied on to extend their operation into

(10) 8th ed. 511.
(11) 2 Burr. 1079.
(12) 2 Dow & Clark, 404.
(13) 3 P. & B. 315.
(14) 3 Moo. P. C. 252.
(15) 2 Kerr, 9.
(16) 8 L. R. Ch. 374.
(17) 2 Kerr, 676.
(18) Law Rep. 6 C. P. 228.

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the colonies in the former Acts are left out of this, and instead, general words are used, and there is no reason why the Imperial Legislature should not make such laws if they are only made applicable to their own people, for it is a clear rule of international law that movable property is governed by the law of the domicile of its owner. Wharton, in his work on private international law, section 32, says: "In several important relations, as is well shown by Savigny, domicile determines the particular territorial jurisprudence to which every individual is subject," and if we keep in mind the rule of construction that the words of an English Act of Parliament have force only within the territory of Great Britain unless the contrary is plainly expressed, and the rule of international law referred to, that the title to the movable property passes everywhere if it passes by the law of such domicile, if an English Act of Parliament declared that the movable property should pass, the meaning would be that it would so pass in England; and inasmuch as the movable property of all persons domiciled in England is supposed to be with the person, it would pass, no matter where it was, and would be so adjudged by the law of its situs. Such law would equally apply to a foreign country as to a colony; so that in either case, if such property was brought into England, the assignee could recover it there; yet there would be still this distinction, that inasmuch as such a law would have no force in the territory of a foreign country except by comity, in a British colony it would be the law by force of the Act itself. It is clearly on this principle that the case of *Sill* v. *Worswick* (19) was decided.

Lord Loughborough, in delivering the judgment, says: "It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that

(19) 1 H. Bl. 665.

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law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. . . . Personal property, then, being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property . . . in his assignee." In stating the case his Lordship says: "The defendant resident in England and a creditor of the bankrupt in England has received money which was due to the bankrupt in St. Christopher;" and in commenting on the case of *Waring* v. *Knight*, he says (20), "Whether the person was resident at Gibraltar prior to the bankruptcy, whether the debt was contracted at Gibraltar . . . none of these circumstances are stated. But the decision would undoubtedly be very materially varied by those circumstances;" and that this was the reason for the construction is made still more plain by his Lordship adjudging that personal property out of England passed when the bankrupt was domiciled in England, while real estate did not under general words, and for this there can be no other reason than the one I have suggested. I am not now discussing any Bankruptcy Act which expressly enacted that real estate in the colonies should vest in the assignee, but only such as used general words applicable to property, both real and personal, without mentioning such as is outside the territory of England, and which is the case with the Act of 1869. All this shows that even if an Act of Parliament declared that all the property wheresoever situated of a person domiciled in England should pass to another, what would pass would be the movable property everywhere, and the real estate in England, and if such an Act declared the same thing of a person not so domiciled the most that would pass would be such a person's movable property in England as well as his real estate there; for such an Act would have no extra-territorial force in either case, but in the one case

(20) At p. 693.

the movable property would be constructively within the territory of England, and the other not. And admitting that it was intended that persons not domiciled in England, aliens as well as colonials, should be adjudicated bankrupt in England, which the authorities clearly show was intended, for if a foreigner, whether Canadian or alien, goes to England and contracts debts and commits an act of bankruptcy there, he thereby gives the Court of Bankruptcy there jurisdiction over him, but this does not make a domiciled Englishman of him, so that the law would constructively carry his movables to England within the jurisdiction of laws in force there, and it would follow that his movable property not in England, as well as his real not there, would not be affected. On no other principle can, I think, the cases be reconciled, and it appears to me that some such principle must follow from allowing foreigners and non-residents to become bankrupts.

Take the case of a Canadian and an Englishman; they may be both made bankrupts both in Canada and in England. The rule of administration on this principle would be plain. The real estate in each country would be administered by the Court of the country of its situs, and the movables in the Courts of the country of the domicile of the bankrupt—at all events, with reference to property not within the jurisdiction of the other Court. But allow a contrary rule and you at once enable a Canadian bankrupt to transfer the administration of his whole estate to England, simply by committing an act of bankruptcy there, or if this would not be the effect I confess myself entirely unable to solve the conflicting claims of the two Courts.

This is an entirely different question from the effect of the discharge under the English Bankruptcy Act and which I do not propose to discuss. So construing the Act, it is no violation of our constitution; for, except so far as the colonies are named, it does not extend to Canada at all, and while persons domiciled in Canada as well as in foreign territories can, if they commit an act of bankruptcy in England, properly become subject to the

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English Bankruptcy Act, yet when they do so their property not in England is not affected thereby, but remains subject to the law of its situs, if real, of their domicile, if movable. I say nothing as to how far the law of the situs would recognize the right of the assignee by comity, where no rights of third parties intervene. That inquiry would be interesting; but the questions I must decide are broad enough to absorb all the time at my disposal to solve them without introducing others. Let me examine some of the decisions to see if they are consistent with this view. Pollock, C.B., in *Armani* v. *Castrique* (21), says: "Inasmuch as the goods of a bankrupt all over the world are vested in his assignees, he is discharged by his certificate." It is evident he is here speaking of a bankrupt domiciled in England; for unless that were the case, it is clear that his goods in foreign countries would not be vested in his assignee. He is speaking of its vesting not by any extra-territorial force of the English Bankruptcy Act, but by the law of nations which would recognize the English transfer of the goods of any person domiciled in England, and that that is the way, and the only way property of any kind out of England passes under the Bankruptcy Act of 1869 is proven by what is said by Jessel, M.R., in *Ex parte Rogers* (22), than whom there never was any higher authority on such a question. When the counsel in argument said the Bankruptcy Act is an Imperial statute and is binding in the colonies, His Lordship said it only passed immovable property in the colonies according to the law of the colonies. How is it possible for this to be said, if the word property, which is the only word used in the Act and includes unquestionably both real and personal, means property in the colonies.

Let us look at the words of the Act themselves; they are to be found in the 17th section, and they are simply, that the property of the bankrupt shall vest in the trustee; and it is perfectly clear the word property would include both real and personal, and that both would be

(21) 14 L. J. (N. S.) Ex. 36.

(22) 16 Ch. D. 665.

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vested in the trustee if within the territory over which the Act has force; and therefore if the Act is to have intra-territorial force in Canada, it could not be denied but that both real and personal property here would so vest; but if it is to have the construction that the parliament in passing it only intended to deal with what was the proper subject of English legislation, then it would only apply to real estate in England and the movable property everywhere of persons domiciled in England. I say, as was said by Lord Justice James in *Ex parte Blain* (23), it is a proper thing for an English Legislature to make laws with reference to persons resident or domiciled in England; but it is impossible to imagine that they intended to legislate in reference to the property of persons domiciled in Canada. If they did, the words and reason of the Act would equally apply to real and movable property. That the Act never was intended to apply to any property, but such as could be considered constructively to be within the territory of England by reason of the owner being domiciled there, is apparent by reading sub-section 8 of section 83, which is as follows: " The certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment or recording of conveyances or assignments of property, be deemed a conveyance or assignment of property, and may be registered, enrolled and recorded accordingly." Now, in this Province there happen to be laws requiring the registration of the conveyances of real property, and also of bills of sale of personal chattels against certain persons. Now, if the local law in both these respects is not to govern, and the property of the bankrupt out of England was intended to pass by force of the word property, this enactment would be entirely useless, because the Imperial statute would override the local law; but if it only passed the personal property in Canada of domiciled Englishmen, as being constructively in England, this, as I have shown, would be subject to the local

(23) 12 Ch. D. 522.

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laws affecting it and render such a provision necessary to effectuate such transfer. The result is that, in my opinion, the true construction of the English Bankruptcy Act of 1869 is, that when a person domiciled in England is declared a bankrupt there, his trustee is entitled to all his real property in England and his movable property everywhere, subject, of course, to any local laws of its situs affecting it. In the British colonies, by virtue of the Act itself, as I think, such property is fairly within the words used, and in foreign countries by the law of nations, subject to such rights as have attached to it by the law of its actual situs.

With reference to the movable property of a bankrupt not domiciled in England, but properly so adjudged there, whether alien or Canadian, I think his trustee is entitled to his real estate in England, and also his movables there, except so far as the rights of persons acquired in the country of his domicile may be recognized by the English courts. It follows that even if James and Gorham Steeves were properly adjudicated bankrupts, the plaintiff would have no right to the property in dispute in this case. The only other question I propose to discuss is whether they, not being in England and not domiciled there, could by an agent file a petition of liquidation under the Act, and thus give the English Court jurisdiction to adjudicate them bankrupts. This question is not so important to Canadians, if I am right that no matter what is done in England, it only affects property of persons that may properly be considered the subject of English legislation. If I should be wrong, it would then become a question of paramount importance, in the view I have taken that the English parliament has not only given power, but exclusive power, to legislatures in Canada to make laws in relation to Canada on these subjects; and that as was said by Lord Justice James in *Ex parte Blain*, the broad, general and universal principle is that English legislation, until the contrary is expressly established, is only applicable to English subjects or to foreigners who going into England have made themselves subject to English jurisdiction. Mark, he says, English subjects, and a Canadian is not in any

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sense an English subject—that is, subject to the laws of England; nobody is that unless he is domiciled in England. That this is what he means is perfectly clear, because he afterwards says he has to consider a matter not of British but peculiarly of English legislation, because the Bankruptcy Act is confined to England and is not in force in Scotland or Ireland; but if that were not so, I think that after the British Parliament had given exclusive power to legislate on this subject to Canada, the broad, general, and universal principle of construction must be that English legislation on that subject is not applicable to Canada unless the contrary is expressly established. The 6th section of the Act says that the persons liable to be adjudged bankrupts are debtors. It is apparent that if one person is in deb to another he is a debtor, no matter where he is or to what country he belongs; therefore a person in Canada or any foreign country, although he never was in England, and even although his creditor has never been in England, would come literally within the words of the statute; yet it is clear that this is not intended, and there must be some limitation to this meaning. The Act says that if a debtor allows his goods to be taken in execution it is an act of bankruptcy, and when he is adjudged a bankrupt the title of his trustee relates back to the act of bankruptcy, if not more than a year before the adjudication. Is all this to relate to Canada, and enable a Canadian, who never was in England, and without even going there, to file a petition in liquidation and thus defeat transfers of his property for a year before? It is perfectly clear that precisely the same debtor that can file a petition for liquidation can commit any other act of bankruptcy, that person being simply a debtor in both cases, whatever that may mean. See the 125th section. As Cotton, L.J., in *Ex parte Blain*, says, I say, in effect; unless I put some limit on the word debtor, it will come to this, that a Canadian, subject to the laws of Canada, who has never been in England, and although not an alien, yet subject to foreign law, for the law of Canada is foreign as regards England, can be made a bankrupt in England because he has done a certain act

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in Canada, if the word debtor includes a domiciled Canadian, who was not present in England when the debt was incurred. Then the Act is clear that the act of bankruptcy can be done in Canada, for the statute expressly says that any assignment in England or elsewhere shall be an act of bankruptcy. The authorities are clear that such is not the case. This shows the meaning of the word debtor must be limited, as I have stated. I think I am authorized in saying, as was substantially said by that learned Judge; I am not dealing with a question that might arise, if an English Act of Parliament had expressly said as against a Canadian, the Court should, on certain facts being proved, entertain a petition and make an adjudication. In such a case it might be my duty, acting in the execution of an English Act of Parliament, whatever the consequences might be, and however Canadians might complain of the violation of their constitution, to say, this is an Imperial statute, and the question which you Canadians raise, I am bound to disregard; but this is not so. All I have to do is to interpret an Act of the Imperial Parliament which has used a general word, debtor; and I have to say how that word is to be limited, when of necessity there must be some limitation. I think the limitation is this, that all Acts of such Parliament must be territorial in this sense, that they apply to, and bind only subjects of the Crown that come within the fair interpretation of them, and also aliens that come to the British Isles. If they be British subjects, not residents in the British Isles, it may be a question of the construction of the Act, and whether though if they had been resident in England they would have been brought within the Act, would the Act have that effect when they were not so resident; and even admitting that prima facie it might apply to the colonies, yet when another Act of the same Parliament remains in force granting exclusive powers to legislate on such a subject to another body, and by consequence declaring the Imperial Parliament would not legislate on that subject, I think I would be doing violation to every principle of construction if I did not limit the meaning of this word so as to say that it was not intended to apply to persons

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domiciled and being in Canada, and who never were in England. Thus limited it will preserve the rights of the people of Canada, and the good faith of the Parliament of England.

It appears to me that the reasonong of L. J. Mellish in *Ex parte Crispin* (24), applies with equal force to this case as to that. He says: "It is obvious that some limitation must be put on the general words 'creditor' and 'debtor,'" and I think it is the usual one applied to general words in Acts of Parliament that they only apply to such matters as are the proper subject for the legislation of the body that passed the Act; in other words, properly subject to the laws of that country, and they are only understood to apply to anything else when the contrary is expressly stated, or plainly implied, and that this is so with reference to the Bankruptcy Act. Therefore the word debtor in it must be construed to mean, debtor properly subject to the laws of England, and I therefore think that the Imperial Parliament did not thereby intend that if a debtor domiciled in Canada and who has not been in England, and consequently whose status, governed by the laws of Canada and not by the laws of England, did something that might be perfectly lawful in Canada, the effect should be that his property should be vested in a trustee in England. Yet this would be the clear effect if the word debtor is made to apply to such a domiciled Canadian who has never been in England. The moment you concede that, you must concede that the act of bankruptcy may be committed in Canada also, for the very first sub-section of section 6 enacts that if the debtor has in England or elsewhere made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally, he may be adjudged a bankrupt. It follows that if this word debtor does mean a domiciled Canadian who never was in England, and who may have in Canada assigned his property for the benefit of his creditors, it would authorize any person in England to whom he might be indebted to have him

(24) L. R. 8 Ch. 374.

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adjudged a bankrupt; indeed I do not see how we can stop here, for if the word debtor means a domiciled Canadian, then the corresponding word creditor should have the same meaning, and it would follow that a Canadian who had never been in England and had no transactions there, could be by another Canadian, his creditor, made a bankrupt in England merely because he had made an assignment in Canada for the benefit of his creditors; and the result of that is, as was contended by the plaintiff, that his whole property, real and personal, is immediately transferred to the trustee in England, and must go there to be administered, a result which to me I confess appears startling. I, for one, give my voice against such a construction. I think on principle that the English Bankruptcy Act, like any other English statute, in its general words has no force whatever out of Great Britain, except what is accorded to it by the law of nations as resulting from the alteration of the status of persons domiciled in England, or where the matter may be fairly included as being a proper subject of English legislation, or where it is otherwise expressly stated in plain words; and I think this is the general result of all the cases, although it is difficult to reconcile some of them with any principle; and consequently the whole of the English Bankruptcy Act of 1869, that relate to evidence, pleading, procedure, and applications for the bankrupt's assets, directions to the sheriffs on seizures, have no force outside the territory of England except where otherwise expressly stated. See the *Mayor, etc., of St. John* v. *Lockwood* (25); *Clark* v. *Mullick* (26). And any right of trustees under the English Bankruptcy Act in Canada must be enforced according to the ordinary mode of legal procedure in the Canadian Courts. And that when the Act says that the property of the bankrupt shall vest in the trustee, it means the same as if such a word was used in any other English statute relating to property; property subject to such legislation—that is, property in England or movable property elsewhere of a

(25) 2 Kerr, 9.

(26) 3 Moo. P. C. 252.

person domiciled in England: Story Con. of Laws (8th ed.) 537; *In re Ewin* (27), and does not extend to property of a bankrupt not domiciled in England, either real or personal, situate in Canada. The real estate so situate is governed by Canadian law. See per Jessel, M.R., in *Ex parte Rogers* (28), that the general words used in the Act, debtor and property, mean such property and such debtors as are properly the subject for the English Parliament to legislate upon, and ought not to be applied to foreign debtors who are not present in England, whether Canadian or alien, nor to property that is neither actually nor constructively in the territory of England. See *Ex parte Crispin* (29); *Ex parte Blain* (30); *Selkrig* v. *Davies* (31); Wharton on Private International Law, 388 and 799. It follows that as the domicile of both James and Gorham Steeves and of the firm of Steeves Brothers was in Canada, and they were not in England when their petition was presented to the Bankruptcy Court, such Court had no jurisdiction to entertain it, and its adjudication is null, and, therefore, the plaintiff's title fails; and even if I am wrong in this and they were properly adjudged bankrupts in England, as their domicile was in Canada and they were not in England, their property in Canada would not pass by virtue of the Bankruptcy Act to their trustee in England; such property could only be affected and administered by the law of its situs with reference to the title of the real estate, as the right to that unquestionably is governed by the laws of New Brunswick. I cannot see the slightest claim the plaintiff can have to it; it is true that he did in August register the certificate of his appointment, and the 8th sub-section of section 83 declares that such shall be an assignment of the property, but this I do not think applies to real estate in the colonies at all, but if it did the defendant's assignment was recorded before it.

The result is that I will declare that the defendant is entitled to all the property mentioned in the trust deed, for the benefit of the cestuis que trustent therein

(27) 1 Cr. & J. 151.
(28) 16 Ch. D. 665.
(29) Law Rep. 8 Ch. 374.
(30) 12 Ch. D. 422.
(31) 2 Dow. 230.

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mentioned; and as this bill appears to have been properly filed, for it would not have been safe for the defendant to have distributed this property without some such declaration, and no unnecessary cost has been incurred, I think it right the costs of all parties should be paid by the defendant out of the funds benefited by the suit. Although I have expended a great deal of thought and research in this case, and I am quite convinced that the conclusion I have come to is correct, yet the questions involved are of so much importance, I wish the plaintiff would appeal to the Supreme Court of Canada from my decision, so that these questions should be authoritatively settled.

Beside the authorities I have referred to I have in connection with the matter looked at the following authorities: Story's Conflict of Laws, secs. 405, 409 and 327; *Bunny* v. *Hart* (32); *Godard* v. *Gray* (33); *Schibsby* v. *Westenholz* (34); *Castrique* v. *Imri* (35); *Rousillon* v. *Rousillon* (36); *Gilbert* v. *Lewis* (37); *Hallows* v. *Fernie* (38); *Munday* v. *Knight* (39); Wharton, secs. 793 to 806; *Potter* v. *Brown* (40); *Sidaway* v. *Hay* (41); *McDonald* v. *Georgian Bay Lumber Co.* (42); *In re Davidson* (44); *In re Blithman* (44); *Ferguson* v. *Spencer* (45); *Ex parte Pascal* (46); *Bartley* v. *Hodges* (47); *Edwards* v. *Ronald* (48); *Brickwood* v. *Miller* (49); *Ex parte Philps* (50); *Ebbs* v. *Boulnois* (51).

The question as to whether the English Bankruptcy Act, 1869, applied to New Brunswick arose in Ex parte Gliddon: In re The Maritime Bank v. Carvill, 24 N. B. 250, but was left undetermined.

The difficulties of concurrent and conflicting bankruptcies were discussed in In re Artola Hermanos, 24 Q. B. D. 640, and

(32) 11 Moo. P. C. 189.
(33) L. R. 6 Q. B. 139.
(34) L. R. 6 Q. B. 155.
(35) L. R. 4 H. L. 414.
(36) 14 Ch. D. 351.
(37) 1 DeG. J. & S. 38.
(38) Law Rep. 3 Ch. 467.
(39) 3 Hare, 497.
(40) 5 East, 124.
(41) 3 B. & C. 12.
(42) 2 Can. S. C. R. 364.
(43) L. R. 15 Eq. 383.
(44) L. R. 2 Eq. 23.
(45) 1 M. & G. 987.
(46) 1 Ch. D. 509.
(47) 30 L. J. (Q. B.) 352.
(48) 1 Knapp, 259.
(49) 3 Mer. 279.
(50) L. R. 19 Eq. 256.
(51) 10 Ch. 488.

the rule was approved of by Coleridge, C.J., and Fry, L.J., that the movable assets of a bankrupt wherever situate should be administered by the forum of the bankrupt's domicil. Fry, L.J., said: "Turning to the second portion of the application, namely, that all proceedings in the English bankruptcy may be stayed, I will confess the difficulty which this class of case appears to me to create. Three views with regard to what was the proper procedure of the Court seem to me to have come out during the course of the discussion of the cases. One of those views is this, that where there are concurrent bankruptcies each forum is to administer the assets locally situated within its jurisdiction, each forum of course allowing all the creditors, wherever resident, to prove, but applying the doctrine of hotchpot so as to produce, so far as may be, equality between the proofs of the various creditors. Now, no doubt, in that mode of procedure there are several inconveniences, especially the possibility of double or triple proofs, but it may be that those inconveniences are less than the inconveniences of any other course. It certainly seems to me that the decision of the House of Lords in the case of Ewing v. Orr-Ewing, 9 App. Cas. 34, tends to establish a similar principle with regard to the assets to be administered in administration actions, because in that case they asserted, if I understand the decision rightly, the jurisdiction of the forum in which the assets might be locally situate to administer those assets, although it may be that the law of the domicil may govern the mode of distribution. Another rule which has been suggested is this, that every other forum shall yield to the forum of the domicil, that the forum of every foreign country, every country not of the domicil, shall act only as accessory and in aid of the forum of the domicil. That, it is said, is the forum concursus, to which all persons who are interested in the administration of the estate are bound to have recourse. No doubt there is a great deal in point of law and principle to be said in favour of that view, and there are certainly some conveniences in it. Then there is a third view, and it is this, that the forum of the country in which the debtor has assets and which first adjudicates him bankrupt, although it be not the forum of the domicil, is entitled to claim the assets from the tribunals of other countries in which he has assets. That doctrine appears to me to be an entirely unreasonable one. There is this broad difference between yielding to the forum of the domicil and yielding to the forum of the first country which happens to pronounce a man bankrupt—personal property is said to follow the person, and from that it follows that the forum of domicil has, by what has been sometimes called a fiction of law, a right by judgment against a bankrupt to divest him of all personal property and vest it in his assignees, and by the fiction to which I have reference that judgment, pronounced by the forum of the domicil, is said to have universal validity, and to be capable of transferring personal property locally situate beyond the jurisdiction of that forum. The forum, not of the domicil, but of the country in which the debtor may have assets, has no such right to claim universal obedience to its judgment; it has no right to pronounce a judgment which will extend beyond the personal assets locally situate within its jurisdiction."

By the English Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, s.-s. 1, "A debtor commits an act of bankruptcy in each of the following cases: (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; (b) If in England or

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elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof; (c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this, or any other Act, be void as a fraudulent preference if he were adjudged bankrupt; (g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off or cross demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." By s. 6, s.-s. 1, "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless: (d) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

Upon the construction of these sections it was held in In re Pearson, Ex parte Pearson, [1892] 2 Q. B. 263, following Ex parte Blain, 12 Ch. D. 552, cited by Mr. Justice Palmer in the principal case, that the Court had no jurisdiction to allow the service abroad of a bankruptcy notice upon an American citizen residing out of the jurisdiction. Fry, L.J., in the course of his judgment in this case said: "The question turns primarily on the construction of s.-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, which provides that certain specified acts committed by a 'debtor' shall be 'acts of bankruptcy.' The argument for the appellant is that 'a debtor' there does not mean a debtor all the world over, but that it means only a debtor who is subject to the law of England, and that you must find such a debtor before an act of bankruptcy can be committed. In my opinion the argument is well founded, and I agree that the point was decided in Ex parte Blain, because that decision was based not on the particular words of the bankruptcy statute then in force, but upon general principles applicable to the construction of all statutes. James, L.J., said (at p. 526): 'It appears to me that the whole question is governed by the broad, general, universal principle, that English legislation, unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects, or to foreigners who by coming into this country, whether for a long or short time, have made themselves during that time subject to English jurisdiction.' On that general principle I can entertain no doubt that section 4 of the Act of 1883 relates only to debtors who are subject, either by birth and natural allegiance or by temporary residence, to the English law. Is there anything in the Act which raises a necessary implication of an intention on the part of the legislature to extend their legislation to the subjects of foreign countries, to persons who owe no allegiance to the law of England, either temporarily or permanently? Our attention has been properly called to those words in sub-section 1 (g), which have, no doubt, been introduced into this statute for the first time, and which provide for the service of a bankruptcy notice upon a

debtor 'in England, or by leave of the Court elsewhere.' But these words really create no difficulty, because a debtor who is permanently a subject of the English Crown, and who owes allegiance to all its Courts of law, may be out of England, and in such a case the service of a bankruptcy notice upon him abroad could only be made by leave of the Court."

A domiciled Frenchman went to England for the purposes of an action which he had commenced in the English Courts, and took furnished rooms in London. He occupied the rooms exclusively for three months, from March to June, living in them with his wife and servants. During the three months he paid frequent visits to France, and at the end of the three months returned there. In September of the same year a bankruptcy petition was presented against him in the London Bankruptcy Court. It was held that he had had a dwelling house in England "within a year before the date of the presentation of the petition," within the meaning of the Act, and that the petition was properly presented against him: In re Hecquard, Ex parte Hecquard, 24 Q. B. D. 71. In In re Clark, Ex parte Beyer, Peacock & Co., [1896] 2 Q. B. 476, a bankruptcy notice was issued under the Bankruptcy Act, 1883, s. 4, s.-s. 1 (g), against a foreigner who had not ordinarily resided or had a dwelling house or place of business in England, within the preceding year, and was then abroad. The debtor subsequently going to England temporarily, he was served with the bankruptcy notice there. It was held that the issue and service of the notice were valid.

By the Bankruptcy Act, 1883, s. 168, "'Property' includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere." Referring to this section, Rattigan, Private International Law, says, p. 93: "An English bankruptcy would appear to carry all the real or immovable (as well as the personal or movable) property of the bankrupt in any part, at least, of the British dominions": Westlake, s. 137. In Callender v. Colonial Secretary of Lagos, [1891] A. C. 460, it was held by the Judicial Committee of the Privy Council, on appeal from the Supreme Court of Lagos, that the English Bankruptcy Act of 1869 applies to all Her Majesty's dominions, and that an adjudication under that Act operated to vest in the trustee in bankruptcy the bankrupt's title to real estate situated in Lagos, subject to any requirements prescribed by local law as to the conditions necessary to effect a transfer of real estate there situated. Lord Hobhouse, in delivering the judgment of the Judicial Committee, said: "Section 4 of [the Bankruptcy Act, 1869] defines property in very general terms—'land, and every description of property, whether real or personal.' This is the subject matter which by section 14 is divisible among the bankrupt's creditors; by section 15 the divisible property is again described as 'all such property as may belong to, or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance; by section 17 it is made to vest in the registrar first, and, when a trustee is appointed, in the trustee; by section 19 the bankrupt is to aid in its realization to the utmost of his power; and by section 48, if he makes default in giving it up, his discharge may be withheld. There are other sections in the Act, such as 73, 74, and 76, which show that it is to have operation in the whole of the British Empire. But the sections relating to property do not in express terms specify property in the colonies, and those which expressly extend beyond England do not in express terms specify land.

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"The Supreme Court lay down the principle that an Imperial Act does not apply to a colony unless it be expressly so stated or necessarily implied; they point out that there is no case deciding that land in a colony passes under section 17; and they dwell on the inconvenience which would arise from conflicts of law if an English statute were to transfer land beyond the limits of the United Kingdom. On these grounds, they hold that under the word 'property' land in Lagos does not pass. Upon this reasoning their Lordships first have to remark that there is no question here of any conflict between English and foreign law. Lagos was not in the year 1869, and is not, a foreign country. How far the Imperial Parliament should pass laws framed to operate directly in the colonies is a question of policy, more or less delicate, according to circumstances. No doubt has been suggested that if such laws are passed they must be held valid in Colonial Courts of Law. It is true that the laws of every country must prevail with respect to the land situated there. If the laws of a colony are such as would not admit of a transfer of land by mere vesting order, or mere appointment of a trustee, questions may arise which must be settled according to the circumstances of each case. Such questions are specially likely to arise in those colonies to which the Imperial Legislature has delegated the power of making laws for themselves, and in which laws have been made with reference to bankruptcy. The contrivance of statutory transfer has grown out of the older plans of conveyance by or on behalf of the bankrupt; and probably none of the Bankruptcy Acts would be held to pass land more completely than the bankrupt himself could pass it by conveyance. But the general law of Lagos is English law, and it does not appear that in 1877 there had been, or indeed that there ever had been, any local legislation which would prevent land being transferred in Lagos as freely as it may be in England. The only question that has been argued in this case with respect to the transfer of title is the question whether the Act of 1869 is calculated to transfer title to colonial land; and with that question conflicts between British and foreign law have nothing to do. Nor do the learned Judges take notice that, if there is any difficulty in effecting a transfer of land not in England, it must arise and be dealt with under those Bankruptcy Acts which indisputably purport to transfer land elsewhere.

If a consideration of the scope and object of a statute leads to the conclusion that the legislature intended to affect a colony and the words used are calculated to have that effect, they should be so construed. It has been pointed out above that some sections of the statute clearly bind the colonies in words which do not necessarily, but which may, apply to land. But the policy of the legislature is clearly shown by reference to other statutes. By the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106), s. 142, all lands of the bankrupt 'in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to Her Majesty, are to vest in his assignees.' By the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), s. 168, the property which is passed to the trustee includes 'land, whether situate in England or elsewhere.' The Scotch Act of Bankruptcy, passed in 1856 (19 & 20 Vict. c. 72), s. 102, vests in the trustee the bankrupt's 'real estate situate in England, Ireland, or in any of Her Majesty's dominions.' The Irish Act of Bankruptcy, passed in 1857 (20 & 21 Vict. c. 60), s. 268, vests in the bankrupt's assignees all his land 'wheresoever situate.' No reason can be assigned why the English Act of 1869 should be governed by a different policy from that which was directly expressed in the Scotch and Irish Acts, and in the English Acts immediately preceding and immediately

succeeding. It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law wherever the Imperial Parliament had power to apply it; and their Lordships hold that there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony.

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"It is true that no judicial decision to this effect can be found. But it has been the prevailing opinion among lawyers. This may be illustrated by a dictum of Sir George Jessel in the case of Ex parte Rogers, 16 Ch. D. 666. It was pointed out that the law of Ceylon required registration to pass land, and the learned judge observed, speaking of the Act of 1869, 'It only passes immovable property in the colonies, according to the law of the colonies.' This is not a decision, but it shows the impression of a very learned and accurate lawyer, that the Act of 1869 did affect land in the colonies. The same opinion is given in Mr. Justice Vaughan Williams's Treatise on Bankruptcy. In the last edition (5th) p. 134, it is said: 'The Act of 1869 contained no express provision as to [the locality of] real property, but did not seem to be intended to alter the law.' No opinion to the contrary has been brought to their Lordships' attention except the decision under appeal."

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June 8.

Act of incorporation—Construction—Compliance with requirements of Act—Suit in corporate name—Failure to prove incorporation.

By Act 22 Vict. c. 6, entitled, *An Act for incorporating the Synod of the Church known as the Presbyterian Church of New Brunswick and the several congregations connected therewith*, it is recited that the Presbyterian Church of New Brunswick, constituted of several congregations of Christians holding the Westminster Confession of Faith, is under the ecclesiastical control of a governing body composed of ministers and elders of the church, and known as the Synod of the Presbyterian Church of New Brunswick, and that the said church desire an Act of Incorporation to enable the said Synod to hold and manage lands and property for ecclesiastical purposes, and also to enable the respective congregations in connection with the said church to hold lands for grave yards, the erection of churches, and other congregational purposes. Section 1 enacts the incorporation of the Synod, and s. 2 enacts that the first meeting of the Synod shall be held at a certain date, when it shall be deemed organized as a corporation. Section 3 enacts that the trustees of the several and respective congregations so in connection with the said Synod, and their successors, shall be for ever a body politic and corporate in deed and name, and shall have succession for ever, by the name of the said several respective churches; and by that name shall be entitled to sue and be sued, implead and be impleaded, answer and be answered unto, in all courts, and shall have full power and capacity to purchase, receive, take, hold and enjoy goods and chattels, lands, tenements and hereditaments, and improve, sell, assign, and dispose thereof, and to have a common seal, with power to break, alter or renew the same at pleasure. By s. 4 it is directed that on the first Wednesday in July in each year a meeting of the congregation

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shall be held in each of the churches for the purpose of electing trustees. Section 5 enacts that when any congregation in connection with the Synod shall elect trustees under the provisions of the Act, the trustees as a corporation shall be known and recognized by the name of the trustees of such named church owned by said congregation, and that the name by which the church is known, and by which the corporation is recognized, shall be enrolled in a book in which the proceedings of the congregation and of the trustees shall be recorded; and that the trustees of the respective churches, when so named and enrolled, shall, when elected, chosen and appointed in manner and form as in the Act directed, be bodies politic and corporate in deed and name, and shall have succession for ever, by the name of the trustees of the so named church by which they are respectively elected. The Synod held a meeting in pursuance of s. 2, at which and subsequent meetings the minister and elder of Calvin church, in the city of St. John, were present, but no meeting of the congregation of Calvin church under ss. 4 and 5, and complying with their provisions, was held. In a suit by the trustees of Calvin church they alleged their incorporation under the above Act.

Held, that s. 3 was to be read with ss. 4 and 5, and that the plaintiffs were not incorporated in the absence of compliance with the requirements of ss. 4 and 5, and that the suit should be dismissed.

The facts fully appear in the judgment of the Court.

J. Travis, for the plaintiffs.

C. N. Skinner, Q.C., for the defendants.

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The bill in this case was filed for the purpose of declaring void two deeds. The first, a deed of conveyance in trust from the defendants Logan and Bowes to the other defendants Stewart, Finley, Tufts, and McLaughlin, dated the 1st August, 1873; and the other, a deed of mortgage of the same date from the defendants Stewart, Finley, Tufts, and McLaughlin to the defendant Logan, to secure the payment of $6,000 with interest in five years from date. Also, for an injunction to restrain the defendant Logan from proceeding in a suit brought to foreclose the said mortgage. The bill states that previous to April, 1871, the defendants had in hands a sum of money belonging to a congregation of Christians in St. John called Calvin Church, and on the 25th April in that year they purchased, by direction of the said congregation, a lot of land in St. John to build a church upon for the sum of $4,000, and paid for it out of money in their hands belonging to the congregation; that the conveyance of the land was made

to the defendants Logan and Bowes, and that they held it as trustees for the said congregation, and not otherwise. That they built a church thereon, which was completed in the year 1873, and has since been occupied by the congregation as a place of worship. That the congregation borrowed the sum of $4,000 from one James Taylor, the payment of which was secured by a mortgage on the land given by the defendants Logan and Bowes, dated the 1st January, 1873, and payable with interest in five years; and that afterwards, the congregation being indebted to one Wm. Causey in the sum of $2,976, the defendants Logan and Bowes on the 1st May, 1873, gave him a mortgage upon the same land to secure the payment of that sum in three years from that date.

That in or about the month of April, 1871, before the purchase of the lot of land before mentioned, and after the burning of a church belonging to the congregation which had stood upon another lot of land, at a meeting of the congregation held to consider the rebuilding of the church, the defendants opposed the building of it on the site where the church had been burnt, and in order to induce the congregation to build a church on another lot of land which was proposed to be purchased, the defendants represented that the church would not cost more than $15,000, and when completed would not be in debt more than the old church was, viz., about $4,400, and by these representations and pledges induced the congregation to consent to build the church on the new site. That the defendants, as the building committee for the congregation, proceeded to build the church on the land so purchased, with the money in their hands belonging to the congregation, and with money subscribed by the members of the congregation and others; and when the church was completed, in 1873, the defendants claimed that they had expended in building it considerably more than they had received for the purpose, and more than the sum of $15,000.

That on the 1st August, 1873, the defendants Logan and Bowes conveyed to the other defendants, Stewart, Finley, Tufts and McLaughlin, the land on which the

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church was built, to hold on certain trusts, the deed reciting that Logan, Stewart, Finley, Tufts and McLaughlin were the building committee for the erection of the church, and that they had expended of their own funds $6,000 over and above the amount they had received, which sum it had been agreed should be secured to them upon the land on which the church was built; that Calvin Church had elected the defendants Stewart, Finley, Tufts and McLaughlin to be trustees of the church for the purpose of executing and delivering to the defendant Logan a mortgage of the said land for his own benefit, and for the benefit of other persons who had advanced money towards building the church, to secure the payment of $6,000 and interest in seven years from the date; and on payment of that sum, to hold the property, subject to the previous mortgages to Taylor and Causey, for the use and benefit of Calvin Church. That the defendants Stewart, Finley, Tufts and McLaughlin immediately reconveyed the property to the defendant Logan, by way of mortgage, to secure the payment of the sum of $6,000 and interest in seven years from that date. That Logan had commenced a suit against the other defendants Stewart, Finley, Tufts and McLaughlin, to foreclose the said mortgage. That the parties to that suit were all acting together with a design to have the property sold, and to deprive the plaintiffs, as trustees of Calvin Church, of all interest therein. That the conveyance by the defendants Logan and Bowes to the other defendants was in violation of the rights of the congregation of Calvin Church, and without their knowledge and consent; that the statement in such deed that Calvin Church had elected the defendants Stewart, Finley, etc., to be the trustees of the church for the purposes therein set forth was wholly untrue; that the said parties were not authorized by Calvin Church or the congregation to expend any of their private funds, unless it was given as a donation; that several of the defendants subscribed sums of money and promised to give the same towards building the church, which was part of the amount of the $6,000 stated in the

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deed to have been expended thereon; and that the execution of the said deed was a gross violation of trust by the defendants Logan and Bowes. Also, that the deed of mortgage by the defendants Stewart, Finley, Tufts and McLaughlin to Logan was a breach of trust by the parties thereto, and in violation of the rights of Calvin church and the members thereof. That in June, 1875, the defendants issued a circular in which they claimed that the church had cost $30,000, and when finished was in debt $15,000, which was reduced by subsequent subscriptions of between $6,000 and $8,000, including a subscription by the defendant Logan of $2,000, of Stewart $1,000, of Tufts $500, of Finley $100, and of McLaughlin $100, which said sums subscribed were wholly unpaid.

That the congregation of Calvin Church organized itself into a church, and became incorporated under the Act 22 Vict. c. 6, "An Act for incorporating the Synod of the Church known as the Presbyterian Church of New Brunswick, and the several congregations connected therewith"; and that after the passing of the Act 38 Vict. c. 99, respecting the union of certain Presbyterian Churches, the congregation of Calvin Church elected trustees from the said church pursuant to the provisions of the said Act, and that the plaintiffs were duly elected such trustees.

The bill prayed that the deed from the defendants Logan and Bowes to the other defendants dated the 1st August, 1872, and the mortgage from the defendants Stewart and others to the defendant Logan of the same date, should be declared fraudulent and void, and the rights of all parties be declared; and that the defendant Logan should be restrained by injunction from proceeding with the suit brought by him against the other defendants to foreclose the said mortgage.

The bill was taken *pro confesso* against the defendant Bowes; the answer of the other defendants denied, *inter alia*, that previous to April, 1871, they had in their hands any money belonging to Calvin Church, except about $50; that previous to that time the congregation erected a church on a lot of land on Hazen street,

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in St. John, which church was burnt on the 2nd April in that year; that it was insured to the amount of $4,400 for the benefit of one John Taylor, who held a mortgage on the property for the amount; that the insurance was paid to Taylor in satisfaction of his mortgage, and that he afterwards gave it over to the finance committee of the congregation for the purpose of being used in the erection of a new church for the congregation, or to procure a site therefor—the amount to be secured to him (Taylor) by a new mortgage on the property; and that this money was expended by the defendants Logan and Bowes in purchasing the lot of land on Wellington Row, on which the new church was built, and the repayment thereof secured to Taylor by a mortgage dated 1st January, 1873, as stated in the plaintiff's bill; that they did not, or any of them, in order to induce the members of the congregation to assent to building the church on the new site, make any such representation as was alleged about the cost of the new church, or that it would not, when completed, be more in debt than the old church; that the deeds from the defendants Logan and Bowes to the other defendants, dated the 1st August, 1873, and the mortgage from the defendant Stewart and others to Logan, were not given without the consent of the congregation of Calvin Church, or were a breach of trust, and in violation of the rights of the congregation, alleging that such deeds were given solely for the purpose of obtaining money to complete the church, and in carrying out the defendants' duties as trustees of the church and congregation; and that the borrowing of the sum of $6,000 for the completion of the church was approved of by the congregation; that they had not issued the circular in June, 1875, in which it was stated that the church had cost $30,000 (as alleged in the 14th paragraph of the bill), but admitted that such circular was signed by T. Maclise, the pastor of the church at the time, and by the defendant Logan as an elder of the church. They also stated that the several amounts stated to have been subscribed by them were promised on the understanding that a sufficient sum should be subscribed to pay off the entire debt of the

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church. That Calvin Church was organized on the 24th September, 1855, and that after that trustees, or a finance committee, were elected by the congregation from time to time. That before the passing of the Act 22 Vict. c. 6, the governing body of the Presbyterian Church in New Brunswick was composed of the ministers and elders of the several Presbyterian churches, and that such governing body was known as the Synod of the Presbyterian Church of New Brunswick, and that such synod was organized as a corporation in June, 1859, under the said Act 22 Vict. c. 6; and that Calvin Church was one of the churches or congregations of Christians mentioned in that Act as not being in connection with the Presbyterian bodies in Great Britain and Ireland; and that it sent representatives from time to time to the synod, and was one of the churches or congregations holding the Westminster Confession of Faith which formed the Presbyterian Church in New Brunswick. That before and since the passing of that Act, when the said synod held its session, it was usually attended by the minister and one of the elders of Calvin Church, and that since the passing of the Act Calvin Church had been represented at the synod by its successive ministers and elders, down to the last session of the synod; that Calvin Church, or its congregation, was not one of the churches and congregations which was organized into a church under the jurisdiction of the Presbyterian Church of New Brunswick, or that it became incorporated under the name of the Trustees of Calvin Church under the Act 22 Vict c. 6, or under the Act 38 Vict. c. 99, or otherwise; and they claimed and alleged that the plaintiffs were not a corporation and had no right to bring this suit.

The plaintiffs having filed a replication, a large amount of evidence was taken before a barrister, extending over a period of eighteen months, in which the conduct of the defendants, the correctness of their accounts, and their statements as to the amount of the debt due on the church, were impugned. I have carefully examined this evidence, but I do not consider it

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necessary to refer to it particularly for the decision of the questions on which, I think, this suit must depend.

One of the questions argued before me was, whether Calvin Church was incorporated under the Act 22 Vict. c. 6, or the Act 38 Vict. c. 99.

The first of these Acts recites that, "Whereas several congregations of Christians in New Brunswick, holding the Westminster Confession of Faith as their rule of doctrine, as the same was sanctioned by the General Assembly of the Church of Scotland in 1647, . . . which said congregations are not in connection with the Presbyterian bodies in Great Britain and Ireland, or elsewhere, have united together and organized themselves into a church, under the designation of 'The Presbyterian Church of New Brunswick,' under the ecclesiastical control of a governing body composed of ministers and elders of the said church, and known as the Synod of the Presbyterian Church of New Brunswick; and it is the desire of the said church to obtain an Act of incorporation to enable the said synod to hold and manage lands and property for ecclesiastical and educational purposes, and also to enable the respective congregations, in connection with the said church, to hold land for graveyards, the erection of churches, and other congregational purposes," enacts that a number of persons named, then constituting the synod of the church known as the Presbyterian Church of New Brunswick, their associates and successors, should by that name be a body politic and corporate, and have succession forever, with all the general powers incident to corporations by the laws of this Province.

The second section fixes the time for holding the first meeting of the synod, and declares that the synod shall then be deemed organized as a corporation.

The third section declares that "the trustees of the several and respective congregations so in connection with the synod aforesaid, and their successors to be chosen and appointed in manner hereinafter mentioned, shall be forever a body politic and corporate in deed and name, and shall have succession forever, by the name of the said several respective churches to be specially

named as hereafter directed." It then gives such corporations the usual powers to sue and be sued, to hold and sell property, real and personal, with various other powers not material in the present case. I will refer to the fourth and fifth sections presently.

The object of the Act 22 Vict. c. 6 was twofold: First, to incorporate the Synod of the Presbyterian Church; and, second, to enable the congregations of the several churches in connection with the synod to become incorporated, in order that each of the said churches might hold and manage the property belonging to them respectively. The incorporation of the synod under the second section of the Act would not in any way operate as an incorporation of any of the congregations in connection with the synod, under the subsequent sections of the Act.

If the congregation of Calvin Church was incorporated under the Act, it must have been so *ipso facto* by virtue of the third section. If that was the only section bearing on the question, I would probably conclude that the trustees of the church in connection with the synod at the time the Act passed might exercise the corporate powers stated in the section, before any election of successors, if it was shown that they had accepted the charter; but I think the fourth and fifth sections of the Act show that the Legislature did not intend to incorporate any of the congregations mentioned in section 3 until they had elected trustees, and complied with the other directions of the Act.

The Act was passed on the 21st March, 1859, and directed in section 2 that the first meeting for the purpose of organizing the synod as a corporation should be held on the third Wednesday in June, then next. This meeting was held, and the synod thereby became incorporated. But the incorporation of the several congregations in connection with the synod was to be a distinct proceeding, independent of the incorporation of the synod; and for the purpose of incorporating these several congregations, the fourth section of the Act directed that an annual meeting should be held on the first Wednesday in July for the purpose of electing trustees (i.e.,

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the "successors" of the trustees mentioned in the beginning of section 3), who, as well as the electors, were to be possessed of certain specified qualifications.

The fifth section enacts, *inter alia*, that when any congregation in connection with the synod shall elect trustees under the provisions of the Act (i.e., in the manner directed by section 4), the trustees, as a corporation, shall be known and recognized by the name of the trustees of such named church owned by such congregation; and that the name by which the church is known, and by which the corporation is recognized, shall be enrolled in a book in which the proceedings of the congregation and of the trustees shall be recorded; and that the trustees of the churches, when so named, and properly enrolled as directed, "shall, when elected, chosen, and appointed in manner and form as in this Act directed, be bodies politic and corporate in deed and name as aforesaid respectively, and shall have succession forever by the name of the trustees of the so named church by which they are respectively elected."

It will be observed that this section does not contain the usual words used in Acts of incorporation, viz.: that the corporation shall have a common seal, and be enabled to sue and be sued, and to purchase and hold property, etc.; but the reason for this, I think, is obvious, the third section had already given those powers to the corporation when it was created "in the manner thereinafter mentioned."

Looking at all the sections of the Act, I think it was not the intention of the Legislature to incorporate any of the congregations in connection with the Presbyterian Church in this Province, unless they complied with the directions in the fourth and fifth sections of the Act. The words of the latter section are very distinct, that when trustees are elected and appointed in the manner and form directed by the Act, they shall be corporate bodies; in other words, that those formalities were necessary to show that the congregations of any of the churches mentioned in the preamble of the Act intended to accept the charter.

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The mere grant of a charter is not sufficient to create a corporation; it is necessary that it should be accepted in order to give it full force and effect; for persons cannot be incorporated without their consent. See *Angell* and *Ames'* Corp. 67.

Now, there is no evidence that any meeting of the qualified members of the congregation of Calvin Church was ever held for the purposes declared in the fourth section of the Act, or that any enrolment of the corporate name was made in a book as directed by the fifth section, or that the congregation ever met to consult and deliberate together on the question of incorporation.

No doubt Calvin Church formed part of the Presbytery of St. John, and was represented at the meetings of the synod both before and after the incorporation of the synod; but that does not prove that the congregation of the church itself was incorporated under the Act. Neither do I see that the Act 38 Vict. c. 99, respecting the union of certain Presbyterian Churches, shows that Calvin Church was incorporated under the Act 22 Vict. c. 6, by the name of the plaintiffs in this suit; and even if there was anything in the Act 38 Vict. c. 99, which would admit of such a construction, there is no evidence of the union of the churches under that Act, such as the eighth section requires.

In addition to these difficulties in the way of holding that the church was incorporated, the Act 35 Vict. c. 70, passed in April, 1872, authorizing Robert Finley, Thomas Rankine and Alexander Stewart, the surviving grantees of the lot of land on Hazen street, on which the first Calvin Church stood, to sell the same and pay the proceeds to the trustees for the time being of the present church, shows that the congregation of the church at that time did not consider that they had been incorporated under the 22 Vict. c. 6, for if they had been so incorporated, the title to the Hazen street lot would have been vested in the corporation by the express words of the fifth section of the 22nd Vict. c. 6, which declares that "all lands, etc., owned by, or which may hereafter be conveyed to and for the benefit of any of the said several congregations, shall be and they are hereby declared to

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be vested fully and absolutely for the uses and purposes of such congregations aforesaid, in their said several and respective congregations."

It appears by the recital of the Hazen street lot, as stated in the preamble of the Act 35 Vict. c. 70, that the grantees in that deed held the lot in trust for the benefit of Calvin Church, so that if the congregation of that church had become incorporated under the Act 22 Vict. c. 6, the title to that land would have vested in such corporation, and they would have had the right, in their corporate capacity, to sell it, under the powers given by the third section of the 22nd Vict. c. 6, and the Act 35 Vict. c. 70, would have been unnecessary. For these reasons, I have come to the conclusion that there is nothing to show that the congregation of Calvin Church was incorporated under the Act 22 Vict. c. 6, or otherwise.

It was contended, however, that even if the church was not incorporated, the defendants were not entitled to avail themselves of the objection on the hearing of this case; and that the plaintiffs are, at all events, trustees *de facto*. As to the first of these objections, it seems to me that as the bill alleges that the congregation of Calvin Church was incorporated by the name used as the plaintiffs in this suit, and defendants have been interrogated as to such incorporation, and have denied it by their answer, there is a distinct issue on that point, the affirmative of which is in the plaintiffs, and unless they prove it, the action cannot be sustained. As to the second objection, that the plaintiffs are at all events trustees *de facto*, I do not see how that principle is applicable where a suit is brought in the name of a corporation, which either does, or does not, exist. If the suit was brought in the names of several persons, claiming to be the trustees of the church, the principle of *de facto* trustees might apply. My view is, therefore, adverse to the right to maintain this suit.

But whether there is such a corporation as "The Trustees of Calvin Church" or not, if the defendants, acting as trustees for the congregation, have misapplied the funds which came into their hands, and are attempting by means of conveyances wrongfully to alienate or

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encumber the property belonging to the congregation, any member of that congregation complaining of the defendants' conduct in that respect would have a right, on behalf of themselves and others, to institute a suit for the protection of the property, and to have the trusts declared. This suit, however, is not so brought, and probably it ought to stand or fall by the title of the plaintiffs. It would be a misfortune, however, after all the expense that has been incurred in this suit, that it should turn on such a point as that, and leave the substantial matter in dispute undetermined, and I think it is for the interest of all parties that it should not do so.

The substantial question in dispute is the right of defendants Stewart, Finley, Tufts and McLaughlin, to convey the church and the land on which it stands to the other defendant Logan, to secure a debt of $6,000 due William Logan for money lent by him to the defendants from time to time, and expended in building the church, as is alleged; and in this is involved several other questions upon which a great deal of evidence was given before the barristers, namely, 1st. Whether the defendants wilfully misrepresented the cost of building the new church, and thereby induced the other members of the congregation to agree to the site on Wellington Row. 2nd. Whether the defendants had collected money for the purposes of the church, which they had not accounted for. 3rd. Whether they had made false entries in the books of receipts and payments of account of the church. 4th. Whether the amounts promised to be paid by the defendants respectively at the meeting on the 31st July, 1874, were made conditionally on the amount subscribed being sufficient to pay off the whole debt of the church.

As to the first of these questions. There certainly is evidence that, at a meeting of the congregation held soon after the church on Hazen street was burnt, when the question of changing the site was discussed, some of the defendants stated that whatever the difference of cost would be between building on the old and on the new site, the finance committee of the church (of which the defendants were members) would undertake to raise

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outside of the congregation. The estimated cost of the church was said to have been stated to be $14,000 or $15,000. One witness stated that the defendant Tufts said at the meeting, that if the congregation would raise $6,000, the finance committee would undertake to raise the balance necessary to build the church; but another witness says that what was said by Tufts was that if the congregation would raise a certain amount (the witness could not recollect how much) he (Tufts) would try to raise the balance outside of the congregation. These statements are denied by several of the defendants, some of whom say that no representation as to what the church would cost was made in their hearing, and that no such inducements as the witnesses stated were held out by them in favour of the change of site. It appeared that at a meeting of the congregation held on the 17th April, 1871, to reconsider a resolution passed on the 6th of the month selecting the site on Wellington Row, the secretary laid before the meeting a comparative estimate of actual difference in cost of constructing the church on the old and the new site, by which it appeared that to build on the latter would require $1,650 more than to build on the former; and this difference, he was instructed by the finance committee to say, would not be collected from the congregation, as they (the finance committee) would devise means outside the church for its liquidation. This was probably the foundation of the alleged representation by the defendants as to the relative cost of building on the different sites. The statements were made more than eight years before the witnesses gave their evidence, and they may easily have been mistaken, or have forgotten what was said by the defendants.

It does not appear that there was much difference of opinion among the members of the congregation whether the new church should be of wood or brick; it was determined the day after the fire that it should be of brick; and the principal discussion was whether they should rebuild on the old site, or purchase a lot elsewhere for the purpose, and the decision was that the

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site should be changed; and on the 17th April, the congregation, by a large majority, affirmed that decision.

Previous to the meeting on the 17th April, a committee had been appointed to procure estimates of the probable cost of building the church on the site selected, and they reported several estimates varying from $8,450 (which, however, did not include the whole cost) to $18,000. These estimates were evidently somewhat vague and were unreliable, for one of them stated the probable cost to be from $12,000 to $18,000—a reasonably wide margin. If, therefore, any of the defendants stated at the meeting that the church would not cost over $15,000, it must have been a mere matter of opinion—scarcely more than guess work—because, at that time, they had no such reliable estimate of the cost as would justify them in limiting the amount to $15,000; and, at all events, their statements were too vague and indefinite to be binding on anybody, and were incapable of being enforced, and could not properly amount to what some of the witnesses called a guarantee that the church should not cost over $15,000.

I do not think the evidence shows that the defendants, or any of them, wilfully misrepresented the cost of building the church; but I think they were to blame in not calling a meeting of the congregation when they received the tenders for the building, and submitting them, with a statement of the finances of the church for the consideration of the congregation before entering into the contract. It probably would have saved trouble if they had done so. Though I cannot suppose that the members of the congregation were ignorant of the price for which the committee had agreed, many of them, doubtless, were ignorant of the state of the finances at the time, and what the prospect was of raising money by subscription.

With respect to the statement made by the secretary at the meeting of the 17th April, that it would cost $1,650 more to build the church on the new site than on the old one, this difference was probably caused by the fact that the new site being a corner lot, the church would require more expensive work and ornamentation

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than a church on the old site, where only the end would be seen from the street. But whatever may have been the reason for the increased cost, I think the evidence shows that the committee did raise outside of the congregation funds sufficient to meet the estimated increased expense of $1,650.

I do not think it necessary for the purpose of deciding as to the validity of the mortgage to the defendant Logan, that I should go into an examination of the evidence of the amount of money received by the defendants, or the state of their books. Some of the evidence on these matters does not appear to be very satisfactory, and it may at a future time be necessary to examine it. I will, therefore, pass on to the other question, viz., whether the amounts which the defendants respectively promised at the meeting in July, 1874, to give towards paying off the debt on the church, were promised on condition that a sufficient amount should be subscribed to extinguish the debt on the church.

Whatever the defendants, or any of them, may have intended, there is no evidence that at the time they respectively stated, in answer to the question what amount they would give, they attached any condition whatever to their promises, or that anything of the kind was said during the meeting. If they intended their promises to be conditional, I think it was due to the other persons present who offered to contribute, and many (perhaps most) of whom were called upon by some of the defendants to pay, and did pay their contributions in full, that they should have been told the conditions on which the defendants had promised to contribute, so that those persons might also exercise their judgment as to whether they would pay or not, when the defendants had objected to pay their subscriptions. Many of the persons present were doubtless influenced in the amounts of their subscriptions by the liberal sums promised by the defendants; but if the promises of the latter are to be treated as conditional only, while those of the former were to be absolute, it is evident that they would not be fairly dealt with in the matter. The cards which were circulated among the people at the meeting for their signa-

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tures, in order to create binding obligations to pay the amount, as was, no doubt, expected, show that it was not intended to be generally known that any of the subscriptions were to be conditional only, and not to be binding unless the whole amount of the debt was subscribed. They are in the form of promissory notes, thus,

"St. John, N.B., 1st August, 1874.

"..... months after date I promise to pay to the order of the treasurer of Calvin Church ..... dollars towards the liquidation of its debt."

It does not appear that either of the defendants signed one of these notes; but if they did not, it seems to me they did not act quite fairly towards those who did sign them, when they intended to hold them bound to pay the amounts stated in their notes, while they themselves claimed the right to refuse payment of the amounts which they had promised, because a sufficient sum was not subscribed to pay the whole debt.

No doubt there is no legal obligation to pay money subscribed under the circumstances referred to; but there is a moral obligation on those whose conduct may have induced others to subscribe and pay their money, that they should not avail themselves of any secret reservation, and thereby put themselves in a more advantageous position with regard to their payments than other persons; and it may be advisable for them to consider whether they should still claim that right.

I will now consider the question directly involved in this suit, viz., Whether the defendants, John Logan and Archibald G. Bowes had a right to convey the land on which the church stands to the other defendants, Alexander Stewart, James Tufts, William Finley and Robert McLaughlin, by the deed dated 1st August, 1873, and whether the said Stewart, Tufts, Finley and McLaughlin had a right to re-convey the same property by way of mortgage to the defendant Logan to secure the payment to him of $6,000? Both deeds are in reality one transaction—a mortgage of the trust property.

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Though the deed from Mrs. Smith to the defendants Logan and Bowes, dated 25th April, 1871, of the land on which the church stands, does not state that they held it in trust for the church, they did so in fact, and it is so expressly stated in their deed to the defendants Stewart and others, dated the 1st August, 1873. This last mentioned deed also recites, *inter alia*, that the defendants (except Bowes), with others, were the building committee of Calvin Church, and had expended of their private funds in building the church the sum of $6,000, over and above the moneys supplied to them on account of the church, which sum, it had been agreed, should be secured to them upon this property; that Calvin Church had elected the defendants Stewart, Tufts, Finley and McLaughlin to be trustees of the church for the purpose of executing and delivering to the defendant Logan a mortgage of the church and land for his own benefit, and for the benefit of other persons who had advanced money towards building the church, to secure the payment of $6,000, with interest, in seven years from the date of the deed.

Now, there is not a particle of evidence that the members of the congregation of Calvin Church—the real owners of the property—ever agreed that any such security should be given to the defendants, or that they were ever elected to be trustees for the congregation for any such purpose; or that the congregation ever authorized the defendants to borrow any money to be used in the erection of the church.

The congregation appointed a building committee on the 6th April, 1871, of which the defendants were members, and a committee to solicit subscriptions towards the erection of the new church; but, with the exception of the meeting on the 17th April, when the site for the church was decided on, the congregation does not appear to have been consulted about anything. The building committee seem to have thought that they had unlimited power to manage everything as they thought fit; and it was not until the 28th May, 1873, upwards of nine months after the church was dedicated, that any other meeting of the congregation was held, so

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far as the minutes show. That meeting was called to rescind the report of the building committee, who reported the total cost of the church and land; the mortgages to Taylor and Causey; that $6,000 had been borrowed from William Logan, for which the finance committee had given their note; that about $1,000 had been borrowed from the defendant McLaughlin, and that there were a few other outstanding debts, amounting probably to $1,000. The building committee was then discharged and their report ordered to be filed. No action was taken upon it, and no intimation given of any intention to mortgage the property to pay off this $6,000, nor any request that the congregation should authorize such a security to be given. The recital in the deed that Calvin Church had elected the defendants Stewart, Finley, Tufts and McLaughlin to be trustees for the purpose of executing the mortgage to the defendant Logan to secure the payment of the $6,000 is, therefore, entirely untrue.

The effect of the two deeds of August, 1873, is to convey the trust property to the defendant Logan to pay a debt for which he and the other defendants were personally liable, and which they had contracted without any authority from the congregation of the church for whose use the defendants Logan and Bowes held the property in trust—a mode of dealing with trust property which ought not to be sanctioned.

It was not disputed that the defendants had expended the $6,000 in building the church; but it was contended that if they had paid the amounts which they respectively promised to pay, and had faithfully accounted for all the moneys which they had received on account of the church, they would have had sufficient funds without borrowing that amount. But, admitting that it was necessary for the defendants to borrow the money, the question still remains, What right had they to mortgage the trust property without the consent of the members of the congregation for whom they held it?

It is quite probable that if they had not borrowed the money, the church would not have been finished as soon as it was. But, I think, when the subscriptions fell

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short, their duty was to have called a meeting of the congregation of the church, and placed a true statement of the finances before them, and let them decide how the deficiency was to be made up, and its payment provided for. The mistake which, I think, the defendants made from the time of their appointment, in April, 1871, until their discharge in May, 1873, was in supposing that they had absolute and uncontrolled power over the property, and in not informing the congregation from time to time of the state of the funds.

It was contended on behalf of the defendants that the congregation recognized their right to mortgage the property; and that as the congregation took the church knowing that this debt was upon it, they were bound in equity to pay it. The mere fact of them taking possession of the church—their own property—ought not to prejudice the congregation, even though they knew it had not been entirely paid for. But there is no evidence that at the time the church was dedicated, and the congregation may be said to have taken possession of it—(the first Sunday in August, 1872)—they knew that there was any debt against it. The first knowledge they appear to have had of the $6,000 debt was on the 28th May, 1873, when the building committee reported that amount as part of the cost of the church, and as loaned to the finance committee by Wm. Logan. The other point, that the congregation had recognized the right of the defendants to mortgage the property, has more weight in it; for they certainly knew by the report of the building committee in May, 1873, above referred to, that the defendants had given the mortgages on the property to Taylor and Causey, without, so far as it appears, any more authority to do so than they had for giving the mortgage to the defendant Logan; and at a meeting of the congregation held on the 29th January, 1878, a report of the auditors appointed to examine the finance committee's accounts was read, in which this mortgage of $6,000 is stated as one of the debts against the church. The congregation then, at all events, had notice of the mortgage, and there may, perhaps, be some

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ground for saying that they have lost their right to object to it by acquiescing for more than a year after they had notice of it—this suit having been commenced in March or April, 1879.

I have some doubt on this point; but considering the unsatisfactory manner in which the defendants' accounts have been kept (see audit committee's report, 29th January, 1878); and the contradictory statements made from time to time about the cost of the church; the entire absence of any express authority to mortgage the property; and other matters which have been referred to, I have come to the conclusion that the transaction which resulted in the deeds of the 1st August, 1873, was a breach of duty on the part of the defendants, and that those deeds ought to be set aside, and the suit to foreclose the mortgage stayed.

But, though I feel bound to come to this conclusion, I think it right to add, that if the defendants honestly expended all the church funds which came to their hands, and necessarily borrowed money to complete the church, and executed the mortgage in good faith, believing that they had a right to do so, the other members of the congregation ought to do what is equitable and just in the matter, without regard to their strict legal rights, bearing in mind that unless the defendants had borrowed the money, and made themselves personally liable for the payment of it, the church would probably not have been completed at the time it was, and the congregation would not have had the benefit of it.

The setting aside the deeds, and restraining the defendant Logan from proceeding to recover the $6,000, will not tend to heal the unfortunate divisions in the church, and may result in serious loss to persons who innocently lent their money to the defendants. I would, therefore, urge upon all parties, that they should meet in a Christian spirit, with feelings of brotherly kindness, and in that spirit of charity which thinketh no evil, and endeavour amicably to settle this unhappy, and, per-

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haps, to some of the parties, almost ruinously expensive dispute.

I will not suppose that the members of this congregation, at whose instance this suit was brought, would willingly do a wrong to any of the defendants if they were satisfied that the $6,000, or any part of it, was an honest debt, for which, in justice, the defendants ought to be made whole, though they might have no legal right to recover it.

In order to afford an opportunity for an amicable settlement of this matter, if possible, I shall make no decree in the case at present. I have stated my opinion on the several questions raised, so far as it was necessary to do so. If, after a reasonable time, the parties are unable to agree upon a settlement, I will then pronounce judgment in the case.

KENNEDY v. CASE ET AL.

Practice—Infant defendant—Order for appearance—C. 49, C. S. N. B., s. 29.

An order for appearance of infant defendant will be granted at expiration of time for appearance mentioned in the summons where the bill is on file, though it has not been on file for the time referred to in section 29, c. 49, C. S

This was a motion for an order for the appearance of Francis H. Dickie, an infant defendant, who had been served with the summons in the cause. The time mentioned in the summons for appearance had expired and the bill was on file. The only question was whether the application could be made before the expiration of one month after the filing of the bill. By section 29 of c. 49, C. S., a defendant has one month in which to appear after the bill has been filed before it can be taken *pro confesso* against him.

R. C. Skinner, in support of motion.

Per Palmer, J.:—Order granted.

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For the present practice see The Supreme Court in Equity Act, 1890 (53 Vict. c. 4) s. 33.

An infant defendant ought to be personally served with summons. See Dan. Ch. Pr. (4th Am. ed.) 444, n. Where a suit was revived against infant heirs, a copy of the order to revive was directed to be served on each of them and on their father: Collins v. Carmichael, Stev. Dig. (3rd ed.) 646. In Christie v. Cameron, 2 Jur. (N. S.), 635, service of a copy of the bill, and notice of an application to appoint a guardian *ad litem* to an infant defendant, upon the principal of the college at which the infant was an undergraduate was held sufficient, the plaintiff being unable to discover the residence of the infant's parents. And see cases cited Chitty's Eq. Index (4th ed.) Vol. 5, p. 5304, where service of subpœna, corresponding with summons under our practice, was held to be good where made upon infant's father or mother. In Thompson v. Jones, 8 Ves. 141, service of subpœna upon the father-in-law of an infant was allowed.

HUMPHREY ET AL. v. BANFIL.

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March 31.

Injunction—Injury to reversion—Devise to Executors—Title of suit—Joinder of reversioner and tenant.

Quære, as to whether executors who are seised in fee under a devise of land and building to them in trust can bring a suit in their character as executors to restrain an injury to the reversion, or whether the suit should not be brought in their character as devisees and legal owners of the property.

Quære, as to whether a tenant and landlord can be joined in a suit to restrain an act amounting to a nuisance to the tenant and causing injury to the reversioner.

The facts sufficiently appear in the judgment of the Court.

G. G. Gilbert, Q. C., for the plaintiffs.

A. A. Wilson, for the defendant.

1884. March 31. PALMER, J.:—

The bill in this case was filed by three of the plaintiffs as executors of Otis Small, and also by one of them in his own right. It appears that the plaintiffs, the executors, are seized in fee of a building on Dock street by virtue of a devise to them in Small's will, and they are by that will appointed executors; that they let a part of such building to the defendant, who carries on what is called a machine shop therein, that is, manufacturing

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and repairing machinery. The executors have let rooms in other parts of the building to different tenants, and the plaintiff, Humphrey, occupies one room partly as an office to do the business of the estate and partly to do his own business.

The bill alleges that the defendant from time to time creates a nuisance in the office so occupied, and also to the tenants by the escape of gas and making noises by running the machinery in the machine shop, and that the machinery shakes the building so as to permanently injure it. The suit is, therefore, an attempt to join in one suit the claim of the tenants with reference to the property leased to them and the plaintiff, Humphrey's, claim to the office in his own right as tenant, and of the executors as devisees and occupiers, for injuries by the gas and the noise, and to the executors as owners of the reversion in the demised premises. It is very doubtful how far executors, as such, have any claim at all. It would appear that such a claim, if it existed, would not be in their character as executors, but as devisees and legal owners of the property. It is clear that they cannot complain of occasional noises to their tenants. It is equally clear that they cannot complain as landlord, except for injury to the reversion, and while they would have, in my opinion, as owners or occupiers of the office or any property they had that was not demised, a right to complain of any injury, and Mr. Humphrey would have a right to the same thing, as he has a present right in the office, if a nuisance has been created there, it is difficult to see how these claims can all be joined in one suit, or what claim the executors have as such. My views on this will be found in *Vernon* v. *Oliver* (1); and *Vassie* v. *Vassie* (2); but I do not think I am called upon to decide any of these questions now, as I think I ought not, on the affidavits before me, grant any injunction order until the hearing.

As to the permanent injury; that, I think, was, as I said on the hearing, sufficiently answered as to make it

(1) Ante, p. 179. (2) 12 N. B. 73.

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so doubtful that I would not be justified in acting until the case was established by *viva voce* evidence, or found by a jury.

As to the gas and noise; while the law on this subject is pretty clear, yet when a Judge attempts to apply evidence furnished on affidavits to find out whether the law has been infringed, he finds the task a most difficult one; as regards the noise, it was admitted on both sides that the parties knew when the premises were leased that the defendant intended to occupy them as a machine shop; although one of the plaintiffs, Mr. Humphrey, swears that the defendant promised him there should be no injurious noise made; yet, I gather from the affidavits on both sides, and my own knowledge has taught me, that to carry on such an establishment there must be more or less noise; to that state of things the language of Lord Selborne in *Gaunt* v. *Fynney* (3), appears most appropriate. He says: "A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbour builds a house against a party-wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery, or his music-room, it does not follow (even if I am nervously sensitive, or in infirm health) that I can bring an action to obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable. I am far from saying that there may not be a case in which the owner of a house very near a mill in a manufacturing town may be entitled to protection against noises resulting from the introduction into the mill of new machinery or of new modes and processes of working. But in every case of this kind it ought to be clearly made out that the mill-owner has exceeded his rights."

All I say at present in this case is that I have carefully read over all the affidavits, and considering how unsatisfactory the mode of trial by *ex parte* affidavits is, I do not think it safe to make an order that might do

(3) L. R. 8 Ch. 12.

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almost irreparable damage to the defendant, until the parties have an opportunity of having a more satisfactory trial. With reference to the nuisance of gas the same observation will apply. The rule laid down by Mr. Joyce in his work on the Principles of Injunctions, page 102, is: "Where a manufactory is lawful in itself, but requires the greatest caution to prevent the escape therefrom of injurious gases, the Court will not restrain a defendant from carrying on his manufactory because occasionally, through the occurrence of accidents in the manufactory, the plaintiff is injured, and the Court will only interfere where the injury is grave or frequent."

In this case, it appears that a gas engine was put in to run the machinery at the request of the plaintiff, Humphrey, and it would require the greatest caution to prevent the escape of gas therefrom; and gas is liable to escape at any time by accident; and whether more than this occurred in this case I think is so doubtful that I do not think I ought to decide it on the materials I have, but it should be decided in a more formal manner. At the same time, I wish the parties to understand that the plaintiffs' right to have their property protected from injury cannot be affected by the fact that the running of the engine used is a process of great delicacy. The defendant has no right to make noises or create gases, and let them escape into the plaintiffs' premises so as to interfere with their occupying their property with comfort, according to the ordinary habit of such occupation in the part of St. John in which it is situated, and if it is shown at the hearing that they have been so interfered with, they will undoubtedly, in my opinion, be entitled to the injunction order asked for if their bill is sufficient, although I do not see my way clear to grant it now. The result is that I must decline to make the order now, and will reserve the question of costs until the hearing.

In Kerr on Injunctions (3rd ed.), 171, it is laid down that though an action in restraint of a nuisance to a tenement is usually brought by the occupier or by the lessee in possession, the owner may sue on the ground of injury to his property, either alone or conjointly with the occupier, citing Jackson v. Duke of Newcastle, 3 DeG. J. & S. 275; Broder v. Saillard, 2 Ch. D. 692. In the first case the propriety of the frame of the suit

was not questioned. The second case, decided since the Judicature Act, is a clear authority for the proposition. In Shelfer v. City of London Electric Lighting Co.; Meux's Brewery Co. v. Same, [1895] 1 Ch. 287, the lessee and reversioner brought separate actions, but Lindley, L.J., observed that they could have joined in one action. In Hudson v. Maddison, 12 Sim. 416, a bill was filed by five persons occupying separate houses to restrain a nuisance common to all of them. Upon an objection of misjoinder being taken, Shadwell, V.C., held the objection fatal. "As each has a separate nuisance to complain of, that which is an answer to one may not be an answer to the other; and if a decree were to be pronounced, it must be a decree which would provide for five different cases; and I do not think that such a decree could be made." In Appleton v. Chapel Town Paper Co., 45 L. J. Ch. 276, where two owners of distinct properties joined as plaintiffs in a suit to restrain a nuisance, it was held a misjoinder; but by consent the Court heard the suit as if separate bills had been filed. Vice-Chancellor Bacon, however, in Umfreville v. Johnson, Law Rep. 10 Ch. 580, overruled an objection of misjoinder under similar circumstances. In Murray v. Hay, 1 Barb. Ch. 59, decided in 1845, the question was quite fully considered by Chancellor Walworth. The learned Chancellor said: "The particular question which arises in this suit, whether two or more persons having separate and distinct tenements which are injured or rendered uninhabitable by a common nuisance, or which are rendered less valuable by a private nuisance which is a common injury to the respective tenements of each of the complainants, may join in a suit to restrain such nuisance, does not appear to have been raised in England until recently; and then in a single case only, which was not very fully considered. In the case of Spencer v. London & Birmingham Railway Co., 1 Rail Ca. 159 (8 Sim. 193; 7 L. J. N. S. Ch. 281), which came before the Vice-Chancellor of England in 1836, the bill was filed by the landlord and his tenant, for a nuisance which was supposed to be an injury to the interests of each in the property; and an injunction was granted without raising the question of misjoinder of parties. The same thing occurred in the case of Sutton and others v. Montfort, 4 Sim. 559, which came before the same Equity Judge five years previous; where two tenants of different buildings, having no joint interest, joined with the landlord of both in filing the bill to restrain the nuisance. But in the more recent case of Hudson v. Maddison, 12 Sim. 416, which came before him in December, 1841, where five different owners of separate houses had joined in a bill to restrain a nuisance which was a common injury to all their houses, he seems to have taken it for granted that the objection of misjoinder of complainants would be fatal at the hearing; and he discharged the injunction upon that ground alone. Even if that case may be considered as finally settling the question in England, which I presume it does not, as it does not appear to have received the sanction of the Lord Chancellor, upon appeal or otherwise, I do not consider myself at liberty to follow that decision here; as the question was settled by this Court directly the other way: Reed v. Gifford, Hopk. Rep. 416."

In Viscount Gort and others v. Rowney, 17 Q. B. D. 625, Gort was the owner, and the co-plaintiff Neuff was the tenant of a dwelling-house, and the defendant was the occupier of adjoining premises. The defendant in consideration of being allowed to pull down and rebuild his premises agreed to shore up the neighbouring property and to indemnify Neuff from all damage. Gort and Neuff claimed that these agreements were

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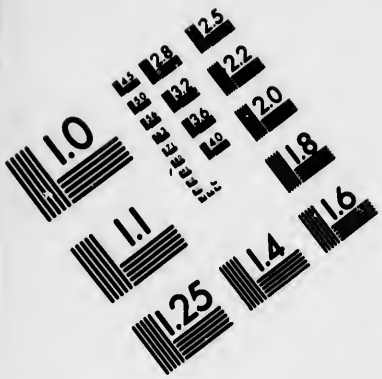

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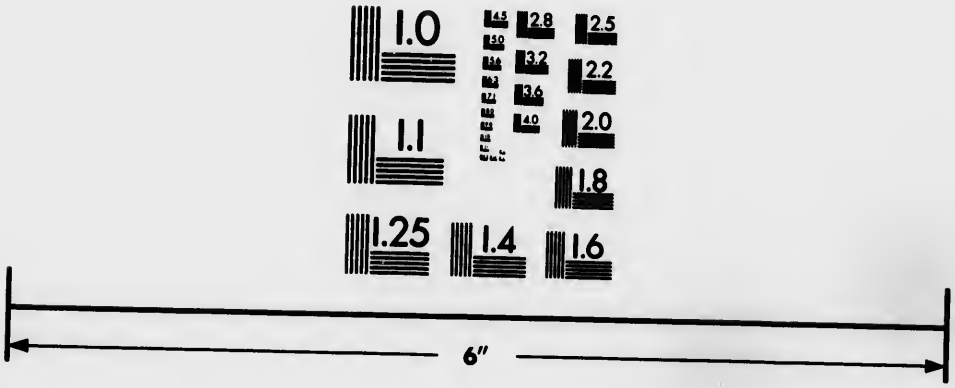

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broken and joined their separate causes of action in one suit. By Order XVI., r. 1, of Rules 1883, "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." The case was referred to an arbitrator with power to enter judgment, and he found in favour of the plaintiff Neuff, and against the plaintiff Gort. A question having arisen as to the apportionment of costs, the case came before Lord Coleridge, C.J., and Fry, L.J., sitting as a Divisional Court, and from their decision was appealed to the Court of Appeal. In the course of his judgment Lord Coleridge, C.J., said: "The statement of claim is remarkable inasmuch as it contains no statement of any joint or alternative claim by the plaintiffs, but alleges certain claims of Lord Gort against the defendants, and certain other and separate and independent claims of the plaintiff Neuff against the same defendants. In short, the statement of claim relies on separate causes of action of the two plaintiffs against the defendants, the only common elements being that the claims arise in part out of the same transactions, and that the defendants are alleged to be alike liable to both plaintiffs. Whether such a union of separate causes of action was contemplated by the Judicature Acts, and whether it was convenient that they should be so united, are questions which we are not called upon to decide." On appeal counsel for the plaintiffs stated that before the Judicature Acts the plaintiffs could not have been joined, and Lord Esher, M.R., and Bowen, L.J., intimated that it was disputable whether the joinder of the plaintiffs was authorized by the Rule.

The authorities are quite clear that in a suit by a tenant his landlord need not be made a party: Semple v. London & Birmingham Rail. Co., 9 Sim. 209; Thorpe v. Brumfitt, 8 Ch. 650. A reversioner may enjoin a nuisance or bring an action for damages, or in a suit for an injunction obtain damages in addition to or in substitution for such injunction (53 Vict. c. 4, s. 25), where the injury occasioned by the nuisance is of a permanent character affecting the reversion: Mayfair Property Co. v. Johnston, [1894] 1 Ch. 508; Shelfer v. City of London Electric Lighting Co., [1895] 1 Ch. 287.

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1884.

October 4.

Account—Jurisdiction of Court of Equity.

A Court of Equity has jurisdiction in accounts where there are various interests involved, and accounts between different parties to be taken, so that the matter cannot be completely dealt with by a Court of Law in one action.

The facts sufficiently appear in the judgment of the Court.

Argument was heard August 2nd, 1884.

W. B. Chandler, and *C. A. Palmer*, for the plaintiff.

C. W. Weldon, Q.C., for the defendants, Guy and Bevan.

C. N. Skinner, Q.C., for the defendant Robertson.

1884. October 4. PALMER, J.:—

The first thing to be determined in this case is: What is the legal effect of the two agreements set out in the bill, and how far they are binding on the defendant Bevan.

The first was made by the plaintiff with the defendant Robertson, alien, by which the plaintiff was to cut for Robertson two million of logs before 1st January, 1881; two million before 1st March, 1881, and three million before 1st June, 1881, and to be surveyed by a surveyor mutually agreed upon. In case of dispute, the defendants, Guy and Bevan, were to appoint a qualified surveyor, whose decision should be final.

Each was to pay equally the costs of clearing the river and building two driving dams. Robertson was to pay as fast as the same were delivered on the beach at St. Martin's Head, and he was to allow sufficient supplies to enable plaintiff to carry out the contract, not to exceed 80 per cent., which were to be allowed at the settlement of account, which was to be on the right delivery of two million feet, four million feet, and, finally, on the delivery of the whole, the advances to be deducted from the price of the logs.

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The second agreement, which was between all the parties to this suit, was as follows:—

"St. John, N.B., 11th Sept., 1880.

"With reference to a memorandum of agreement made on the third day of September, in the year of our Lord one thousand eight hundred and eighty, between John Armstrong and Hugh R. Robertson, whereby the said John Armstrong agreed to procure logs for the said Hugh R. Robertson off certain lands at St. Martin's Head, N.B. It is this day further agreed that the supplies shall be invoiced to John Armstrong at the following prices:—

American pork, per bbl. (19.25), nineteen dollars and twenty-five cents;
P. E. I. pork (18.25), eighteen dollars and twenty-five cents;
Mess beef (11.50), eleven dollars and fifty cents;
Flour (5.90), five dollars and ninety cents;
Cornmeal (3.00), three dollars;
Codfish, per quintal (3.60), three dollars and sixty cents;
Pollock (2.20), two dollars and [illegible] cents;
Tea, per lb. (33 cents), thirty-[illegible] cents;
Beans, per bush. (1.75), one dollar and seventy-five cents;
Butter, per lb. (17 cents), seventeen cents;
and other supplies as may be from time to time agreed upon.

And to all the above prices shall be added as agreed to in the aforesaid memorandum to cover cost of delivery fifty per cent. less twenty per cent. (50% less 20%).

It is also agreed that a settlement of accounts shall be made monthly by draft upon Guy, Bevan & Co. in favour of John Armstrong, for any balance due to him on account of the quantity of lumber surveyed by the said Guy, Bevan & Co.'s surveyor, which the said Guy, Bevan & Co. hereby agree to pay; and in the event of the said H. R. Robertson not making settlements as herein stated, Messrs. Guy, Bevan & Co. agree to pay to the said John Armstrong the balance due to him on

account of all such lumber as may be surveyed to that time.

(Signed) H. R. Robertson,
John Armstrong,
Guy, Bevan & Co."

It is difficult to say precisely what the defendants, Guy and Bevan, have bound themselves to do by the second agreement. I agree with their counsel that Robertson alone agreed to make the monthly settlements with plaintiff, and give him the drafts on Guy, Bevan & Co. for the balance due the plaintiff on account of the lumber surveyed by Guy, Bevan & Co.'s surveyor; but I think Guy, Bevan & Co. bound themselves to furnish the surveyor to survey the logs, and in case that Robertson did not settle and give the drafts, as before stated, to pay to the plaintiff the balance due him on account of all lumber surveyed to that time, i.e., month by month. If this be correct, it will be observed that what they are to pay is not for the lumber surveyed, as was contended before me by their counsel, but only the balance due by Robertson on it.

The next question is, how is that balance to be arrived at? I think the balance due by Robertson on the lumber must mean the balance due on a settlement of their whole accounts under both agreements. On the one side the plaintiff would be entitled to charge one-half of what he properly expended in clearing the river and building the driving dams, and the price of all logs surveyed, and perhaps all that were got out and should have been surveyed. On the other side, he would have to be charged with half of what Robertson expended or paid in clearing the river or building the dams, and also any advances or other payments that Robertson had made under the agreements; so that before the balance could be recovered in any Court, it would have to be ascertained what, if anything, was due to either party, on what was a joint work of clearing the river and building dams, as well as the state of accounts, including supplies and payments by Robertson on this transaction;

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and, if it be true, as stated in the bill, that the plaintiff got over eight million of logs, this at contract price of three dollars per thousand, would amount to $24,000; and if he expended, besides $3,000 on the river and dams, and there is only due him, as he claims, $6,780, Robertson must have advanced him upwards of $18,000; and this would have to be shown, if tried at law, without Robertson being a party, and consequently not bound by the proceedings, before any recovery could be had against Guy and Bevan; for it is clear that if any action could be brought at law against Guy and Bevan for this, Robertson could not be joined, for these promises in the agreement made by Guy and Bevan are not joint with Robertson.

Plaintiff complains in his bill that he got out the seven million; seven hundred thousand of deal saw-logs, and 357,538 batten saw-logs, and expended $3,000 in clearing the stream and building the dams.

That the defendant, Robertson, with McKean and Murray, prevented the plaintiff from delivering the logs on the beach or to drive them, by procuring his right in the land to be sold.

That the logs have been all surveyed by Guy, Bevan & Co's. surveyor.

That the plaintiff claims that there is due him a balance of $6,780.

That Robertson has refused to make the settlements or give the drafts, of which Guy and Bevan had notice, yet they refused to pay, and he asks for the accounts to be taken, and the balance ascertained and the amount paid.

And the question is whether this Court will entertain this suit for such a purpose or leave the parties to take their remedy at law, if they have any.

In deciding this question, it will be convenient to have as clear a view as possible of the rules Courts of Equity act on in suits involving accounts.

Lord Chancellor Cottenham, in the *North-Eastern Railway Co.* v. *Martin* (1), says: "The jurisdiction in

(1) 2 Phil. 762.

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matters of account is concurrent with that of Courts of law, and is adopted because, in certain cases, it has better means of ascertaining the rights of parties. It is, therefore, impossible with precision to lay down rules or establish definitions as to the cases in which it may be proper for this Court to exercise its jurisdiction. The infinitely varied transactions of mankind would be found continually to baffle such rules, and to escape such definitions. It is, therefore, necessary for this Court to reserve to itself a large discretion, in the exercise of which due regard must be had, not only to the nature of the case, but to the conduct of the parties."

There are a great many cases in which applications have been made to Courts of Equity to restrain proceedings at law where accounts had to be settled, and I do not think I am called upon to decide whether this is such a case or not. I say as Lord Truro said in the case of the *South-Eastern Railway Co.* v. *Brogden* (2): "There are many cases in which it seems to me, looking through the whole of the decisions, that this Court would properly entertain jurisdiction on the matter where, if the party making the claim proceeded at law, the Court would not, as a consequence because it would itself exercise jurisdiction if appealed to, withdraw it from the jurisdiction of a Court of Law."

In the case of the *Taff Vale Railway Co.* v. *Nixon* (3), which involved settlement of accounts, a bill was filed for an account. The House of Lords decided that, although the matters in dispute were cognizable at law, yet as the suit involved the settlement of accounts with other parties, a Court of Equity was more competent to take them than Courts of Law; and the concurrent jurisdiction of Courts of Equity with Courts of Common Law in cases involving costs of motion to other parties was finally established.

It follows that whether this Court is to exercise its jurisdiction is a matter of discretion, and although it is, I think, a difficult question to decide under what circumstances a Court of Equity ought to exercise its con-

(2) 3 McN. & G. 23.

(3) 1 H. L. C. 111.

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current jurisdiction where, before a plaintiff can obtain redress, an account between other parties has to be taken; yet, as I think a consideration of the end sought by all litigation is, if possible, to take that mode that will make only one investigation necessary and to have the decision, if possible, uniform and binding on all parties to be affected, and that in this case, if the plaintiff had brought his action at law, before he could have recovered he would have to have shown how the accounts stood between himself and Robertson, I have decided to entertain the suit. With reference to the clearing the river and building the dams, if such right to construct them is given by the agreement, and even if not, at all events with reference to the logs and supplies, the ascertaining of this would not be binding on Robertson, who might litigate all these matters both with Guy and Bevan, and with the plaintiff over again. In this Court all parties can be made to disclose, before the hearing, what they know on the subject, and the account is taken once for all and is binding on all and an end is put to all disputes. I think I ought not to refuse to entertain the suit.

Defendants' counsel argued before me that as the plaintiff in his bill had alleged an amount due, no account was necessary; but this is a misapprehension. I think the mere allegation of a party that a certain sum is due him is not a statement that the amount is settled; but merely that when it is taken so much will be found to be due; and so far from it having the meaning attributed to it, the bill alleges that Robertson had not and would not settle the accounts; and the plaintiff cannot, I think, make out his case until he proves how the account stands between him and Robertson.

The case of the *Southampton Dock Co.* v. *Southampton Harbour and Pier Board* (4), has several elements that this case has. If I am right in the construction I have given to this agreement, the amount to be paid depended upon what was the balance due after taking accounts, and I think that in this case both parties

(4) L. R. 11 Eq. 254.

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ought to have kept accounts of what they expended in clearing the river and building the dams, and each is entitled to a discovery as to that, and an enquiry whether what each has charged, as such expense, was fairly incurred; and if it be true, as alleged, that the plaintiff was prevented by Robertson from performing any of the terms of his contract, it may be a fair matter of enquiry whether that should stand in the way of the plaintiff having the settlement he is entitled to by the agreement; and in any view, as I think, before Guy and Bevan should be compelled to pay, or the plaintiff have an adjudication as to what the balance due him is, it ought to be done in such a way as would bind all parties to the agreement, and it is manifest that only a Court of Equity can do so. Suppose a Court of Law has jurisdiction and could try the plaintiff's case and give him his remedy, as I presume it could. See what it has to do. The plaintiff would have to give particulars of his claim; that would be a statement of all his claims against Robertson, and all Robertson's supplies to him; then all the expenses of clearing the river and building the dams, both by himself and Robertson, and then show the balance due by Robertson, as this is what the suit would be for; then, at the trial, these same accounts would have to be proved and determined; for, without this, it could not be ascertained what the balance was, and involved in that would be the fact that Robertson had prevented the plaintiff from performing some part of his agreement, and what allowance, if any, was to be made for that; also, whether both parties had fairly and properly incurred all the expenses of clearing the river and building the dams; and, when an end was reached, if the plaintiff could not get his money from Guy and Bevan, whom he should sue alone, he would have to bring another action and try the whole thing over again in an action against Robertson; or if Guy and Bevan paid, when they came to charge the same against Robertson, as paid him, they would have to try it all over again with him.

Knowing that this Court can avoid all this, and can protect all parties, and has machinery not only to com-

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pel discovery, but also to better try such matters, I think I would be doing wrong to all parties if I refused to entertain the suit in the exercise of the discretion vested in me, and told the plaintiff that he had shown a wrong which this Court has undoubted jurisdiction to redress, but that he must go to another Court. The defendants also objected that the bill was multifarious; but on this point I have no doubt; this point I determined in *McGrath* v. *Franke* (5), on the authority of Sir John Wickens, Vice-Chancellor, in Pointon v. Pointon (6). Under the agreements set out in the bill in this case, Guy and Bevan have agreed to pay the balance due by Robertson, and it is manifest that before any Court can adjudicate what they are to pay, it must be ascertained what that balance is, and that can only be done by taking the accounts of the transaction between the plaintiff and Robertson. It is quite clear if these accounts were to be taken in a separate suit between the plaintiff and Robertson, the decision of this suit would have to await the decision of that, and in which suit the accounts between them would have to be taken; and which, when taken, I do not think would be binding on Guy and Bevan. At all events, I am unable to discover why they should not be taken in this suit.

(5) 22 N. B. 456.

(6) L. R. 2 Eq. 547.

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1884.

September 12.

Administration suit—Insufficiency of personalty to pay debts of intestate—Sale of real estate—Within what time sale may be ordered—Parties to suit—C. 49, s. 58, and c. 52, ss. 36, 39, C. S. N. B.

The Court of Equity will not under s. 58, chap. 49, C. S., direct a sale of the real estate of an intestate for the payment of his debts, if the personal estate that the deceased died possessed of was sufficient for the purpose, had it not been wasted or misapplied by the administrator.

Semble, that an application under s. 58, chap. 49, C. S., for the sale of real estate to pay the debts of an intestate, on account of the insufficiency of the personal estate must be made within ten years from the grant of letters of administration.

Semble, that in an administration suit for the sale of real estate of an intestate for the payment of his debts the purchaser of the real estate from the heir is a necessary party to the suit.

The facts sufficiently appear in the judgment of the Court.

Argument was heard September 4th, 1884.

E. L. Wetmore, Q.C., for the plaintiff.

H. B. Rainsford, *A. O. Earle*, and *James Van Wart*, for the defendants.

1884. September 12. PALMER, J.:—

In this case the first question to be considered is, whether an unsatisfied creditor of an intestate has a right to maintain a suit in this Court for the payment of his debt, or to have the estate administered here in default of payment. I think this question must be answered in the affirmative. In Haynes' Outlines of Equity, page 117, it is said that it is not easy to trace when the right of the creditor to the bill in Equity was first clearly established. At a later time, though when, it is difficult exactly to determine, the right of the creditor to file his bill in Equity (even though the assets to be administered might be legal assets only, and the right to sue at law clear), became firmly established, and so remains at the present day. That the Court of Chancery, at an early date, would entertain a suit against an

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executor for discovering assets, is shown in Comyn's Dig. Chan. 2, G. 3, and 3 B. 1 and 2. And I think in such a suit, the only necessary parties are the creditor and the personal representative. The next question is, if the personal estate of an intestate is sufficient to pay all his debts at the time it came into the hands of his administrator, who wasted it, so that, when a creditor obtains judgment against him, there is no personal estate, and the heirs have sold and conveyed the real estate, and such creditor files a bill to administer the estate, and for a decree and sale of the real estate so sold, is the person to whom the heir has so sold a necessary party? Without deciding whether this Court would entertain such a suit—if it would, I think it is abundantly clear that such person would be a necessary party. It is obvious that the object of such a suit would be to displace such person's title to such real estate. The fundamental principle laid down by Lord Redesdale in his work on Equity Pleading is, that all persons interested in the matter of the suit should be parties. Courts of Equity adopted two leading principles in determining the proper parties to a suit: 1. That the right of no man shall be decided in a Court of justice unless he is present. 2. That Courts of Equity will provide for the rights of all persons whose interests are immediately connected with the object of the suit. For this purpose all persons materially interested in such object ought generally to be parties. Calvert states the rule thus: "All persons having an interest in both the subject and object of the suit, and all persons against whom relief must be obtained in order to accomplish the object of the suit, should be made parties." It is obvious, that if a suit could be maintained to sell the land conveyed by the heirs to a purchaser, the object of such suit would be to transfer the purchaser's right, and he would be directly interested in the question whether that ought to be done or not, and, before any Court could reach such a decision he would have a right to be heard. I wish to guard myself against expressing any opinion as to the proper frame of a bill for such a purpose. All I say is that no such suit could be maintained without the person

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having the legal title being a party. The next question is, whether, under the state of facts above stated, this Court in a suit, brought more than ten years after the grant of letters of administration, and after the heirs had within that time conveyed the real estate to a bona fide purchaser for value, will order it to be sold for the payment of the intestate's debts, under the 58th section of chapter 49 of the Consolidated Statutes. I think it would not, and that there are two sufficient answers to such a claim: First, because the real estate of an intestate cannot be sold for the payment of his debts unless the personal estate that came into the hands of the administrator was not sufficient for that purpose; and, secondly, if it could, the law only authorizes application to be made by the administrator, or the creditors, for such sale, within ten years after the grant of the letters of administration. The right of this Court to order a sale by the section referred to, or the Probate Court to license such a sale on the application either of the administrator or the creditor, under sections 36 and 39 of chapter 52, Consolidated Statutes, is made to depend upon whether or not the personal estate of the deceased was sufficient to pay his debts. If sufficient, there is no power of sale given by any of these sections. Chief Justice Saunders, in *Doe d. Hare* v. *McCall* (2), says that the mode pointed out by the statute is the only possible way of proceeding. Both of the sections of the Probate Act referred to make it a condition to the power of the Court to grant a license that there should be a deficiency of the personal estate to pay the debts. If the meaning of the words "personal estate" is such as the intestate died possessed of, then there is no deficiency; and, I am clear that this is the proper grammatical meaning of the words as used in this statute, for no person can have any estate or property after his death. Therefore, when you speak of a dead person's estate or property you mean what he had before and at the time of his death. This statute provides that an inventory shall be made showing the amount of the real and personal estate and it

(2) Chip. 90.

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would be absurd if it should not include all the property that came into the hands of the administrator, merely because he had made away with some of it, and it would be equally absurd for such administrator to be allowed to obtain a license to sell the real estate to pay the debts, but because he had not so applied it, and it would be against all rule to give one meaning to the phrase "deficiency of personal estate," as used in the 36th section of chapter 52, and another to similar words when used in the 39th of the same chapter, or the 58th section of chapter 49. Again, the proper order in administration suits would be for the administrator to pay the debt out of the personal estate, as far as it remained unadministered. This would have to be ascertained, and it would be rather inconsistent for the Court to order the administrator to pay because he had sufficient personal estate, and, by the same decree, to order the land sold because the personal estate was not sufficient. I also think that if the personal estate had been insufficient to pay the debts, the real estate could not be sold for that purpose after ten years from the granting of probate or letters of administration. This must be so, if what was said by Chief Justice Saunders in *Doe d. Hare* v. *McCall* is true, that the only mode of proceeding to take the real estate of a deceased person for the payment of his debts is that provided by the statute. The case of *Doe d. Bowen* v. *Robertson* (3), decides that the sale of the real estate by the heirs to a bona fide purchaser without notice of the debts, does not prevent such estate being taken by a sale under a license from the Probate Court, so that during the time allowed for obtaining a license a creditor can wait without losing his claim on the real estate, but after that time such claim is gone; and I cannot see that it will serve any useful purpose to allow it to exist longer. It might make the titles of heirs and devisees uncertain longer than would be sound policy. It is in the power of creditors to compel personal representatives to account and pay their claims, and if necessary to invoke the aid of

(3) 5 All. 134.

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the Courts to prevent the assets being wasted, and, if they fail to do so, there does not appear to be any good reason to put the burden on the heirs or devisees any further than the terms of the statutes have done. I think that at common law the real estate was not liable for simple contract debts in the hands of the heirs or devisees; and, consequently, the whole remedy for such creditors are those provided by the statutes, which are the 36th and 39th sections of the Probate Act, and the 58th section of chapter 49 of the Consolidated Statutes. It was contended, on the argument, that such debts were made a charge upon the real estate in all the colonies by the Imperial Statute, 5 Geo. II. c. 7, which enacts that lands in the colonies shall be liable for the payment of debts in like manner as in England, but it is difficult to see how the fact that lands are liable as in England can enable this Court to order them to be sold for the payment of the debts of a deceased person, unless it could be shown that this could be done by some process with regard to lands in England; but, there, a simple contract creditor had no claim on the real estate after the debtor's death, and, even during his lifetime, all the creditor could do was, after obtaining judgment, by elegit to take one-half the profits. The provisions of 5 Geo. II. c. 7, do not appear to apply to the estate of deceased persons; its sole object appears to have been to afford a remedy against the real estate of living persons and enable creditors, who had obtained judgment, to seize the real estate to the extent of one-half of the profits, and this our Provincial Statute, 26 Geo. III. c. 12, extended, and allowed the whole lands to be sold. All that remains to be considered is whether the 58th section of chapter 49 gives the right to the creditors to have the real estate sold at any time. It is not necessary to decide this, as even if it did so beyond the time fixed for obtaining a license and extended to real estate conveyed to a bona fide purchaser the conditions on which alone the right to exercise that power is given does not exist except upon a deficiency of the personal estate; yet as I have formed an opinion on the

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point, I think it right to state it. The words of the statute are: "Whenever a decree, etc., for the administration of the estate of a deceased person, etc., the Court may direct a sale of the real estate." This provision was first enacted in this Province by 26th Vict. c. 16, and, if I am right in what I have before said, the sale of the lands could at that time only be made by virtue of a license from the Probate Court, which could only be obtained within ten years after probate or grant of letters of administration; and the question is whether this section was intended to alter that and instead make the real estate liable to be sold for all time, or was it merely to enable this Court, in an administration suit, to sell the real estate without putting the suitors to the trouble and expense of obtaining a license from the Probate Court without altering the rights of the parties. If the first, the rights of the parties were altered most materially. If the latter, all that was done was an improved procedure, and no rights were altered. I think the latter is all that was intended. The whole statute in which this section first appeared, dealt with procedure, and not with rights; and, I think, that if the object of the Legislature had been to take away or affect the rights of the heir or devisee it would not naturally do so in a statute dealing with procedure only, but would use words expressing such intention, or, at least imperative words directing such a result. The word used is may, which is sometimes construed to mean must in an Act of Parliament; and as was said by Coleridge, J., in *Regina* v. *Tithe Commissioners* (4), words directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of justice. This is not the grammatical or natural meaning of the word, and this statute does not come within the rules so laid down, and I think it must have its proper grammatical meaning. It follows that the making of the order is discretionary; for as was said by the Court in *Bell* v. *Crane* (5), the use of a phrase is sometimes intended to give discretion; by

(4) 14 Q. B. 459.

(5) L. R. 8 Q. B. 481.

this I do not mean arbitrary discretion, but a discretion to be exercised, as was said by Willes, J., in *Lee* v. *Bude Railway Co.* (6), as a judicial discretion, regulated according to the known rules of law. Applied to this case, independently of the statute, the respective rights of the creditors and the heirs and devisees were that the land could be sold if legal proceedings were taken to effect such sale within ten years after the probate or granting of letters of administration, and not after. This Court is given discretionary powers to make such a sale without the rights of the parties being altered, and, I think, it would be exercising such discretion soundly by ordering the sale while the right existed and denying it when it did not exist. It follows, that while I think the defendant, Clowes, and the other unsatisfied creditors of Morrow may obtain a decree in a Court of Equity for the administration of the estate, they are not entitled to claim a decree for the sale of all the real estate of the said Morrow in priority of the mortgagees and judgment creditors of his heirs, under the circumstances set out in the case. It is not necessary to decide what are the rights of the judgment creditors as distinguished from the purchasers and mortgagees. The plaintiffs' costs must be paid by the defendants, and if paid by the defendant Clowes, he is to be repaid out of the estate of Morrow.

Under 2 N. Y. Rev. Stat. 100, s. 1, providing that a sale of lands by an administrator for the payment of an intestate's debts must be had, or the proceedings therefor commenced, within three years after the granting of letters of administration, it was held that where there was a change of administrators the time commenced to run from the appointment of the first administrator: Slocum v. English, 62 N. Y. 494. See also United States L. Ins. Co. v. Jordan, 5 Redf. (N. Y.) 207; Mead v. Jenkins, 4 Redf. (N. Y.) 369.

Where a statute of Massachusetts provided that upon the insufficiency of the personal estate of a deceased person to pay his debts, the Supreme Judicial Court, or the Court of Common Pleas, might license the executor or administrator to sell so much of the real estate of the deceased as should be necessary to satisfy the debts which the deceased owed at the time of his death, it was held that the real estate could only be sold to pay debts due from an intestate at the time of his death, and could not be sold to reimburse an administrator the expenses of administration: Dean v. Dean, 3 Mass. 258.

(6) L. R. 6 C. P. 576.

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In Massachusetts it has been repeatedly held that an executor or administrator cannot maintain a petition for license to sell real estate for the payment of the debts of the deceased, if there are no debts due from the estate which can be enforced at law; as if all the debts are barred by the statute limiting the time within which an action can be brought against the executor or administrator in his representative character: Lamson v. Schutt, 4 Allen, 359; Scott v. Hancock, 13 Mass. 162; Ex parte Allen, 15 Mass. 57; Tarbell v. Parker, 106 Mass. 347; Robinson v. Hodge, 117 Mass. 222. The right of an executor to pay a debt barred by the Statute of Limitations was considered recently in England, in Midgley v. Midgley, [1893] 3 Ch. 282. The general rule was said to be established that he might pay such a debt without being guilty of a *devastavit*, but not where it had been judicially declared by a Court of competent jurisdiction to be barred by the statute. An executor cannot pay a creditor whose claim is unenforceable by reason of the Statute of Frauds: In re Rownson, 29 Ch. D. 358.

Land belonging to the estate of a testator cannot by the law of this Province be taken in execution under a judgment recovered against his executor on a debt due by the testator, and the only method by which such property may be made available is under the provisions of c. 52, C. S., and amending Acts. See Doe d. Hare v. McCall, Chip. MS. 90, and notes. On an issue of *plene administravit*, real estate of an intestate is not assets in the hands of the administrator, for payment of debts owing by the intestate: Crawford v. Willox, 1 All. 634. Chipman, C.J., said: "The plaintiff claimed a right to recover his ratable proportion of the value of the real estate of the intestate included in the inventory, but which remained unsold, and could not be sold and made available to the payment of the debts without an order from the Surrogate, which order had not been obtained at the time of bringing this action, but was afterwards procured, a few days before the trial. As a general rule, we think it impossible to consider the real estate of an intestate to be assets in the hands of an administrator, to be administered, before the sale, or certainly not before he has authority to sell. We do not say but there may possibly be cases in which, under a different issue, or different state of circumstances, an administrator might be made liable for the value of real estate which he has neglected to make available; but, under the issue and circumstances of this case, we see nothing to take it out of the general rule."

The authority of an administrator to sell real estate under license cannot be defeated by any alienation of the heir, and exists whether the lands are in the possession of the heir, his alienee or disseizor: Drinkwater v. Drinkwater, 4 Mass. 354; 4 Kent's Com. (12th ed.) 439. And see Doe d. Hare v. McCall, Chip. MS. 90; Doe d. Bowen v. Robertson, 5 All. 134. In Ontario it was held in the absence of legislation charging the executor with the real estate of the deceased for the payment of his debts, the heir or devisee might convey a valid title of the land of the deceased to a bona fide purchaser for value, at any time before execution in the hands of the sheriff upon a judgment by a creditor against the personal representatives of the deceased: Reid v. Miller, 24 U. C. Q. B. 610. See now R. S. O. 1887, c. 108; and Acts 54 Vict. c. 18, and 56 Vict. c. 20.

The validity of a license for the sale of land cannot be attacked in a collateral proceeding, the only remedy being by appeal. In Doe d. Bowen v. Robertson, 5 All. 134, it was held that where a petition to the Probate Court for a license to sell land for payment of debts contains

the statements required by the statute, and due notice has been given to the parties interested, the Court has jurisdiction over the matter, and the title of a purchaser at a sale by virtue of a license cannot be impugned in an action of ejectment by evidence that no debts were due by the estate at the time the license was applied for. See also Harrison v. Morehouse, 2 Kerr, 584; Coy v. Coy, 1 Han. 177; Chisholm v. McDonald, 2 Thom. (N. S.) 367; Phinney v. Clark, 27 N. S. 384; 25 Can. S. C. R. 633. In Doe d. Sullivan v. Currey, 1 Pugs. 175, the lessors of the plaintiff claimed as devisees under the will of H. P.; the defendant claimed under a deed from H. P.'s executors, under a license from the Probate Court. The plaintiff contended that the license was void on the grounds, *inter alia*, that there was sufficient personal property to pay the debts of the deceased, and that the executor had expended large sums in costs in the Probate Court in proceedings which he had no right to take. Ritchie, C.J., said: "We think the Probate Court had jurisdiction to make the order for a sale in this case. We have no power to investigate the accounts passed before the Probate Court and adjudicated on by that tribunal. If the decree then arrived at was unsatisfactory, the party dissatisfied should have appealed." In Massachusetts it has been repeatedly held, though not without an occasional note of dissent, that if the Probate Court has acted without jurisdiction its decree is void, and may be declared to be such not merely by appeal, but in collateral proceedings: Thayer v. Winchester, 133 Mass. 447. Devens, J., there said: "The executor petitioned the Probate Court for a license to sell the whole of the real estate of the testatrix for the payment of debts and charges of administration. Such a license was granted, and, acting thereunder, the executor sold the whole of the real estate. It is to be considered whether the license was not wholly void for want of jurisdiction in the Probate Court. If so, no title passed to the purchaser. The Court of Probate is one of special and limited jurisdiction. If it exceeds its powers, its decree may be avoided, not merely by appeal, but in collateral proceedings. The erroneous exercise of a power granted, or its indiscreet use, is to be remedied by appeal, but an act, for which no power is given to do it, is simply a nullity: Smith v. Rice, 11 Mass. 507, 512; Jenks v. Howland, 3 Gray, 536; Jochumsen v. Suffolk Savings Bank, 3 Allen, 87; Boston v. Robbins, 126 Mass. 384, 388; Pierce v. Prescott, 128 Mass. 140, 143. It is said by Chief Justice Shaw, in speaking of the Probate Court in Peters v. Peters, 8 Cush. 529, 543, 'even where it has jurisdiction over the general subject,' if it 'exceeds its powers, or acts in a manner prohibited by law, its decrees . . . are held entirely and absolutely void and of no effect, and may be set aside in any collateral proceeding by plea and proof.'" This view is not in accord with the decisions of the United States Supreme Court: Grignon's Lessee v. Astor, 2 How. 338; Comstock v. Crawford, 3 Wall. 396; Hall v. Law, 102 U. S. 464.

1883. December 24.

GILBERT v. UNION MUTUAL LIFE INSURANCE COMPANY.

Practice—Insufficiency of answer—Exceptions.

Where a defendant has answered, though he might have demurred or pleaded, he cannot excuse himself from answering fully on the ground that the bill does not disclose a case against him upon the matters interrogated upon.

The facts appear in the judgment, and in the judgments on appeal, 25 N.B. 221.

Argument was heard November 23rd, 1883.

G. G. Gilbert, Q.C., and *C. A. Palmer*, for the plaintiff.

W. B. Chandler, for the defendants.

1883. December 24. PALMER, J.:—

The case made by the bill is shortly as follows: The plaintiff's testator, was a partner in the defendants' business, which entitled him under an insurance policy to have his executor paid $4,000 at his death, if the policy was continued so long, and to be paid yearly a share of the surplus earnings of the business during the continuance of the policy, on payment by him of certain annual premiums. The testator paid premiums for a number of years, and then agreed with the company to surrender the policy, they agreeing to pay him the value; the defendants induced him to agree to continue, and agreed to accept certain payments as the premium until the time for the payment of annual premium, according to the policy, was passed; and they then repudiated such agreement, insisting upon new terms, which the testator refused to accede to; the testator then paid no new premiums, the last being paid in 1877, and he died on the 7th February, 1882.

The bill claims that the defendants should pay the plaintiff the surplus earned while the policy was in force, and the $4,000 on testator's death, and failing in that the agreed value and such surpluses.

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The defendants have refused to disclose what these surpluses are, or to give an account of their business, and their counsel claim before me that the bill did not disclose a case to be paid such surpluses. I think it may be very doubtful how far the bill can be maintained in its present shape for some of the matters claimed, but I do not think that I am called upon to decide such a question on exceptions to the answers. The defendants have submitted to answer, and I think they must answer fully all matters relating to the case made. If they had wished to say that there is no case against them on which they are interrogated, they should have demurred to the whole or such part of the bill, or if they wished to deny any of the facts stated in it on which any part of the plaintiff's case rests, or wished to state new facts which would show that the plaintiff was not entitled to the relief he has claimed, they should have done so by pleas. If they are unable or decline to take this course, they must answer categorically every statement of the bill upon which they are interrogated, which can assist the plaintiff in making out his title to the relief he has claimed.

I think it is a mistake to suppose that this Court can, upon exceptions to answers, decide whether or not the bill is such that the defendants must answer; for, as was said by Sir Wm. Grant in *Taylor* v. *Milner* (1), it makes no difference whether the Court has determined that the bill is such that the defendant must answer, or whether the defendant has, by his own conduct (submitting to answer), precluded himself from raising the question.

Sir John Leach, in *Mazarredo* v. *Maitland* (2), says that a defendant cannot by his answer deny the plaintiff's title, and refuse to answer as to the facts which may be useful evidence in support of that title. He cannot answer in part; if he answers he must answer the whole of the bill.

This principle has nothing to do with the rule that there are certain matters that parties are protected from

(1) 11 Ves. 42.

(2) 3 Madd. 70.

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disclosing at all, such as confidential communications between solicitor and client, or that of matters tending to criminate the party.

In the late case of *Chichester* v. *Marquis of Donegal* (3), Lord Justice Selwyn says: "Now, in a case where the defendant has neither demurred nor pleaded, the general rule universally established is, that he must answer fully unless he can bring himself within some exception to that general rule"; as where the Court will protect parties from answering so fully as to become burthensome, such as setting out long accounts, etc. If the plaintiff's case made by the bill is good, then I think it is clear that the time when and the object for which the defendants were incorporated, and the amount of the surpluses that the company earned every year after the making of the policy and during the lifetime of the testator may be useful evidence to support plaintiff's case; and consequently by the rule thus stated he is entitled to have all questions relating thereto answered, and as there is no categorical answer to the part of the first interrogatory, which asks when and for what purpose the company was incorporated, nor whether the officers are elected, the first exception must be allowed, and for the reason I have given, the 2nd and 3rd exceptions must be allowed. The 4th exception must be allowed also, for without discussing anything else, I find nothing in the answer stating when Benn, the defendants' agent, communicated the matters enquired about as alleged to the company. If I am right in what I have said, the plaintiff has a right to know what premiums the testator has paid, as well as all the other information asked for by the 11th interrogatory, except the calculations which he can make himself, and therefore the 5th exception must be allowed also.

My order, therefore, will be that the plaintiff's exceptions to the answer will be allowed with costs.*

(3) L. R. 4 Ch. 416.

* Affirmed on appeal, 25 N. B. 221.

In re ISABELLA BROOKS' ESTATE.

1885.
January 17.

Practice—Chap. 49, C. S. N. B., s. 130—Application by executor for advice—Petition—Affidavit of truth—Hearing.

On an application by an executor under section 130 of chapter 49, C. S., all of the facts upon which the advice of the Court is sought must appear in the petition itself. If the facts are not stated correctly the advice given will be no protection to the petitioner.

The facts in the petition must be sworn to by an accompanying affidavit of the petitioner, or his agent having a knowledge of them.

The definite question to be asked should be propounded in the petition, and not a general reference made to the Court for its opinion.

The petition should be presented to the Court *ex parte*, when direction will be given who is to be represented or have notice of the hearing.

The order of the Court should recite the petition.

The facts sufficiently appear in the judgment of the Court.

E. L. Wetmore, Q. C., for the petitioners.

1885. January 17. PALMER, J.:—

This is an application to me by petition under section 130, chapter 49, of the Consolidated Statutes, for my opinion with reference to certain matters relating to the duties of the petitioners as executors of the late Isabella Brooks.

The petition does not set out all the facts on which such opinion is asked, but a statement of some of them is made in affidavits used on the application. I do not think this is a correct or even safe practice, and I will decline to give the opinion asked for until the petition is amended; and, as the profession do not appear to understand the practice in these applications, I will now endeavour to lay down some rules by which I will hereafter be governed in this regard.

1st. The application should be made as the section directs; that is, the Judge ought not to receive any evidence or affidavits to prove the truth of the statements

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contained therein, the Court looking no further than to the statements in the petition. This is in accordance with the rule laid down by Wood, V.C., in *Re Muggeridge's Settlement* (1), and in *Re Barrington's Settlement* (2). The effect of this rule will be that the applicant states the facts correctly or the opinion obtained will be no protection.

2nd. Although the facts contained in the petition will require no proof, yet the petition should be accompanied by an affidavit of petitioner, or his agent having knowledge of the matters, that he believes the statements contained in the petition to be true. The sole object of this is to convince the Court that the case is not a fictitious one, for the Court will not give an opinion upon a fictitious case: *Re Box*, 11 W. R. 945; Godefroi on Trusts, 109.

3rd. The definite question to be asked should be propounded in the petition, and not a general reference made to the Court for its opinion. See *Re Lorenz's Settlement* (3).

4th. The order that the Court is called upon to make should recite the petition, so that all the facts presented for the consideration of the Court and on which its opinion is founded, are made to appear in the order. This must be so from what Wood, V.C., said in *Re Muggeridge's Settlement*.

5th. The petition should be presented to the Court in the first instance ex parte, when the Court will direct who is to be represented, or have notice of the hearing, in accordance with what is said in *Re Muggeridge's Settlement*.

Section 130, chapter 49, is reproduced in section 212 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), and is taken from Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 30. The application should be by petition, and not by summons: Re Dennis, 5 Jur. N. S. 1388. No affidavits, therefore, ought to be filed, and the costs of them will be disallowed: Re Muggeridge's Trust, Johns. 625; 6 Jur. N. S. 479; Re Mockett's Will, Johns. 628; Re Barrington's Settlement, 1 J. & H. 142. What parties are to be served is in the discretion of the Judge. In Re Muggeridge's Trust, Johns. 625, Wood, V.-C., was of opinion that

(1) 29 L. J. Ch. 288. (2) 1 J. & H. 142.
(3) 1 Dr. & Sm. 401; 7 Jur. N. S. 402.

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the proper course was not to serve the petition on any one in the first instance, but to apply at Chambers for a direction as to the persons to be served; and Malins, V.-C., thought the question of service ought to be dealt with at the hearing of the petition: Re Cook's Trust, W. N. (1873) 49. V.-C. Kindersley, however, in Re Green's Trust, 6 Jur. N. S. 530, laid down the rule that the petitioner should serve such persons as he thought proper, before bringing on the petition. He said he wished it to be understood that he would never permit a petition under Lord St. Leonards' Act to be brought on merely for the purpose of ascertaining who were to be served; the petitioners must serve such persons as they thought proper. Any other course was so manifestly inconvenient that he and the other Judges had agreed to pursue the course he now spoke of. It is not in every case necessary to serve the persons interested: In re French's Trusts, L. R. 15 Eq. 68, where the question was as to the power of trustees to make certain investments. And in re Larken's Trust, W. N (1872) 85, the Court dispensed with service on cestuis que trust to whom the trustees proposed to make an advancement, if proper. And see Re Tuck, W. N. (1869) 15, where it was held unnecessary to serve children absolutely entitled to the property in question.

The section is intended to enable the Court to advise executors and trustees in matters of discretion vested in them, and not to determine nice questions of law, or questions of construction: In re Foxwell's Estate, 1 N. B. Eq. 195. In In re Williams, 22 A. R 196, Osler, J.A., quoted the following statement of the object of the Act from Walker & Elgood's Law of Executors (2nd ed.), 289: "'The object of the enactment is to assist trustees in the execution of their trust as to little matters of discretion; a petition under the Act should relate only to the management and investments of trust property. Therefore the Court will not, upon such a petition, construe an instrument, or make any order affecting the rights of parties to property. Neither will the Court give an opinion upon matters of detail, which cannot be properly dealt with without the superintendence of the Court and the assistance of affidavits.'" "The object of the Act was to procure for trustees at a small expense the assistance of the Court upon points of minor importance arising in the management of the trust. Thus the Court, upon the petition of the trustees of a fund for the separate use of a married woman, a lunatic, has sanctioned the payment of the annual produce to the husband, whose income from property did not exceed £20, he undertaking to apply the same for the benefit of his wife and family: Re Spiller, 6 Jur. N. S. 386. So the Court will advise trustees as to investment of trust funds, payment of debts, or legacies, etc.: Re Lorenz's Settlement, 1 Dr. & Sm. 401; Re Knowles' Settlement Trust, W. N. (1868) 233; Re Murray's Trusts, W. N. (1868) 195; Re Tuck's Trusts, W. N. (1869) 15; and whether trustees of a remainder can with propriety concur with the owner of the particular estate in the sale of the fee simple: Earl Poulett v. Hood, L. R. 5 Eq. 116; and whether trustees can properly grant a lease upon certain terms: In re Lees' Trusts, W. N. (1875) 61; exercise a power of sale: In re Stone's Settlement, W. N. (1874) 4; or a power of maintenance or advancement under the circumstances stated: Re Kershaw's Trusts, L. R. 6 Eq. 322; In re Breeds' Will, 1 Ch. D. 226; and whether calls on shares in companies should be borne by the testator's general estate or the legatees: Re Box, 1 H. & M. 552. But the Court will not give an opinion upon matters of detail which cannot be properly dealt with without the superintendence of the Court and the

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assistance of affidavits, such as the laying out a particular sum on improvements: Re Barrington's Settlement, 1 J. & H. 142; nor will the Court adjudicate upon doubtful points, the decision of which would materially affect the rights of the parties interested: Re Lorenz's Settlement, 1 Dr. & Sm. 401; Re Hooper's Will, 29 Beav. 656; Re Evans, 30 Beav. 232; Re Bunnett, 10 Jur. N. S. 1098;" Lewin on Trusts (7th ed.) 535. Questions as to construction and validity of bequests have been determined under the section: Re Michel's Trust, 28 Beav. 39; Re Green's Trusts, 6 Jur. N. S. 530; Re Elmore's Will, 6 Jur. N. S. 1325; Re Davies' Will, 7 Jur. N. S. 118; but these decisions seem to be overruled by the cases cited in the concluding paragraph from Lewin, *supra*. And see In re Foxwell's Estate, *supra*; and in re Cæsar's Will, 13 Gr. 210. In Marsh v. Attorney-General, 3 L. T. N. S. the Court thinking the question raised too difficult to be decided on petition, directed a bill to be filed. The opinion of the Court is not subject to appeal, and a bill may subsequently be filed: Re Mockett's Will, Johns. 628. For a form of petition see Re Miles' Will, 27 Beav. 579; 29 L. J. Ch. 47; 5 Jur. N. S. 1236; and cf. Re Pitt's Will, 5 Jur. N. S. 1235; and Leggo's Ch. Forms, 471. For forms of order, see Seton (4th ed.), 491. "The costs of the application are in the discretion of the Judge, and will in general be directed to be paid out of the *corpus* of the trust estate: Re Leslie, 2 Ch. D. 185; Re McVeagh, Seton, 491; Re Elwes, *ibid*; unless the application relates to the income of the property, in which case the costs may be ordered to be paid out of income: Re T., 15 Ch. D. 78; Re Spiller, 6 Jur. N. S. 386." Dan. Chan. Pr. 2233.

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March 23.

ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK v. THE HONOURABLE JOHN HENRY POPE, ACTING MINISTER OF RAILWAYS AND CANALS, THE MINISTER OF JUSTICE FOR CANADA, AND JABEZ B. SNOWBALL.

Government Railways Act, 44 Vict. c. 25 (D.), s. 5, ss. 7 and 8, and s. 49—Construction—Public Nuisance—Injunction.

The Court of Equity has jurisdiction to interfere by injunction in cases of nuisance to the public.

Circumstances considered under which the Court of Equity will interfere by injunction to restrain a nuisance to the public.

By section 5, sub-section 7 of The Government Railways Act, 44 Vict. c. 25 (D.), the Minister of Railways has full power and authority . . . "to make or construct in, upon, across, under or over any land, streets, hills, valleys, roads, railways or tramroads, canals, rivers, brooks, streams, lakes or other waters, such temporary or permanent inclined planes, embankments, cuttings, aqueducts, bridges, roads, sidings, ways, passages, conduits, drains, piers, arches or other works as he may think proper. And by sub-

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section 8 "To alter the course of any river, canal, brook, stream or water course, and to divert or alter as well temporarily as permanently the course of any such rivers, streams of water, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the side of, the railway, as he may think proper; but before discontinuing or altering any public road he shall substitute another convenient road in lieu thereof; and the land theretofore used for any road, or part of a road, so discontinued, may be transferred by the Minister to, and shall thereafter become the property of the owner of the land of which it originally formed a part."

Section 49 of the Act provides that "The railway shall not be carried along an existing highway, but merely cross the same in the line of the railway, unless leave has been obtained from the proper municipal or local authority therefor: and no obstruction of such highway with the works shall be made without turning the highway so as to leave an open and good passage for carriages, and on the completion of the works, replacing the highway; but in either case, the rail itself, provided it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction: Provided always, that this section shall not limit or interfere with the powers of the Minister to divert or alter any road, street or way, where another convenient road is substituted in lieu thereof, as provided in the eighth sub-section of section five."

Held, that by section 5, sub-sections 7 and 8, power is given to construct a railroad on, along, and over a highway to the extent of occupying the whole of it, and not merely alongside of it, and that section 49 does not limit this power.

The facts of the suit are fully stated in the judgment of the Court.

Attorney-General for New Brunswick, in person.

L. R. Harrison, for the acting Minister of Railways and Canals, and the Minister of Justice.

The defendant, Jabez B. Snowball, did not appear.

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This was an information and bill of complaint by the Attorney-General of New Brunswick, praying that the defendant, Snowball, and the defendant, the acting Minister of Railways and Canals, might be restrained by injunction from interfering with, disturbing, obstructing or destroying the highway in the information described, being the highway of the parish of Derby, in the county of Northumberland, leading from Newcastle to Fredericton, between the property occupied

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by J. & J. Miller & Co., as a bark extract factory, and the property of one Edward Murphy, in the information mentioned, until authority therefor be had and obtained from the Government of the Province of New Brunswick, or such other local authority as might have power in the premises, and until another highway be made, so as to allow of good and safe passage of persons and carriages, and from carrying the railway as a branch of the Intercolonial Railway from Derby station to Indiantown, a distance of fourteen miles, as described in the information, along the existing highway in the said parish of Derby without leave first obtained from the proper local authority, and until another convenient road should be substituted in lieu thereof.

The application for this injunction was made to me, and after reading the information and affidavits then produced, although not without some hesitation, and only upon the urgency of the case as stated by the Attorney-General, I concluded to grant an interim order with leave to move for an injunction, and so informed the Attorney-General, and requested him, as I was about leaving Fredericton for a short time, to apply to Mr. Justice *Wetmore*, to whom I had spoken on the subject, for the interim order. The interim order was obtained from Mr. Justice *Wetmore*, with a direction that the hearing of the motion for the injunction should take place before me at Woodstock, as I would, at the time appointed for the making of the motion, be there on circuit.

The motion for the injunction was *pro forma* made to me at Woodstock, and on the application of counsel for the defendants, the acting Minister of Railways and the Minister of Justice, I postponed the hearing until the 9th December last, then to take place before me at Bathurst, where I would then be on circuit.

The hearing was commenced before me at Bathurst at the time appointed, and some preliminary objections being taken, the further hearing was postponed until the 16th December last, then to be had before me at Fredericton.

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At the hearing at Fredericton, which took place on the 16th and 17th December last, the preliminary objections were first argued.

The ground of complaint in the information and bill is that the defendant Snowball was the contractor, with the defendant, the acting Minister of Railways, for the building of the road bed and the laying of the sleepers and rails for the proposed line of railway to be built by the Government of Canada as a branch of the Intercolonial Railway from Derby station to Indiantown, a distance of fourteen miles, and that, as such contractor, he had interfered with the grade of the highway road from Newcastle to Fredericton; in some places lowering the level or road bed of the said highway as much as three feet, and materially interfering with the use of the same as a highway and rendering the use of same inconvenient and dangerous, narrowing it in width and otherwise obstructing and rendering dangerous its use for highway purposes. The information also alleged that both the highway and the proposed railroad, between the points alleged, ran along the bank of the southwest branch of the Miramichi river, and so close to the said river that there was not room for both the said highway and the said railroad to run between the river bank and the houses of the inhabitants without encroaching upon each other, and that the defendant Snowball had declared his intention of proceeding to completion with the said railroad notwithstanding that by so doing he would encroach upon, obstruct, encumber and make dangerous, and even destroy the said highway. The information further alleged that neither the defendant Snowball, nor the defendant the acting Minister of Railways and Canals, nor the Government of Canada, have sought or obtained for what has been done in the obstructing or disturbing of the said highway, any consent or authority from the Government of this Province, or the municipality of Northumberland, or any other local authority having power to give such consent or authority; nor have they made any other highway between the points aforesaid in lieu or place of the said

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highway so being encumbered and destroyed as aforesaid; nor made any provision whatever for the safe passage of persons and carriages between the points aforesaid, and that the defendant Snowball openly declared that he is neither bound to make any such other highway or provision for the safe passage of persons and carriages between the points aforesaid, nor had he any intention of making such highway or provision for the safe passage of persons and carriages between the points aforesaid. The information further alleged that the said railway could with equal facility, usefulness and at no increased cost, be built in the rear of the dwellings of the inhabitants, and the said building of it would be of much less damage and much greater convenience and advantage to the inhabitants than where it is projected and laid down to be built.

Affidavits were produced in support of the information which clearly showed that the works of the defendant Snowball, as contractor of the Dominion Government for the construction of the railway in question, did interfere with the highway road from Newcastle to Fredericton, between the points mentioned in the information, by lowering its grade in certain portions of it, and by removing in certain places portions of the highway over which the public usually travelled, and rendering it less convenient, and, in some respects, dangerous for public travel.

The defendant Snowball, the contractor, did not appear before me at the argument by counsel, nor were any affidavits read on his behalf. The affidavits produced in answer to the application were produced by counsel who appeared on behalf of the defendant the acting Minister of Railways, and who also appeared on behalf of the defendant, the Minister of Justice, taking the objection on behalf of the latter, that he ought not to have been made a party to the information, and on behalf of both the acting Minister of Railways and the Minister of Justice that as ministers and officers of the Crown they are not subject to an injunction when performing the duties of their office.

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The affidavits produced in answer to the application were produced by the counsel who appeared on behalf of the defendant, the acting Minister of Railways.

These affidavits went to show that although there had been obstructions of the highway road by the defendant, Snowball, the obstructions had not been such as to endanger travel thereon or impair the usefulness or convenience of the highway for the purposes of public travel in the slightest possible way, and that in any place where the carriage-way had been interfered with or diverted, another way quite equal to it, or better, had been substituted in place of it.

The affidavits of Peter S. Archibald, the chief engineer of the Intercolonial Railway, and of Zaccheus J. Fowler, the engineer in charge of the Indiantown Branch Railway, state that in the contract between the acting Minister of Railways and Snowball, road diversions were provided for, and that if Snowball carried out his contract according to its terms, the highway would not be so obstructed as in any way to interfere with the public traffic thereon.

The 10th paragraph of Fowler's affidavit is as follows: "In answer to the 9th paragraph of the affidavit of Francis P. Henderson, I say that the statements therein contained are incorrect, and that a highway suitable for all purposes of public travel and convenience can be obtained without either running it in the rear of a number of dwellings or removing any of them"; and the 11th paragraph of the same affidavit is as follows: "That, as engineer in charge of the work, I gave such orders and directions to the foreman of the defendant, Jabez B. Snowball, as would, if carried out, leave at all times a properly graded and constructed carriage-way of not less than twenty-five feet in width, wherever the said highway has been in any way interfered with by the said branch line; which orders and directions have been substantially complied with."

The affidavits produced in reply by the Attorney-General state in effect that to construct the railway in question in its present location, would practically destroy the usefulness of the highway for public travel,

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and that to provide the requisite highway would necessitate the removal of several of the buildings of the inhabitants fronting adjacent to the road; or, if such buildings were not removed, would necessitate the construction of an entirely new highway in the rear of the residences of the inhabitants.

Attached to one of the affidavits in reply are copies of the memorials of several of the inhabitants of Northumberland to both the Dominion and Provincial Governments, from which it appears that the petitioners sought at the hands of the Dominion Government a change of the line of railway to a line in the rear of the houses of the inhabitants, which they called the "Fowler" line, a line about half a mile back from the river; and at the hands of the Provincial Government their aid to induce the Dominion Government to construct the railway on the "Fowler line," and while in these memorials it is no doubt alleged that the building of the branch road upon the line located by the Dominion Government would cause changes in and interfere with the highway and cause a great deal of expense and inconvenience, as the space between the houses of the residents was not sufficient to admit of the construction of the railway, and the keeping of the highway in its present location, and that the railway could be constructed on the "Fowler line" at much less expense to the Dominion Government, yet it is apparent that the principal object the memorialists were aiming at was procuring a change of location and the construction of this portion of the branch railway on the "Fowler line."

The affidavits in reply also state that the interference with the highway, by the construction of the proposed branch railway, would seriously encroach upon the highway so as to impair its usefulness for the purpose of public travel; and the affidavits of the Chief Commissioner of Public Works, and of Mr. Beckwith, the engineer of the Public Works Department, show that at some points the railway would encroach upon and appropriate somewhere about 25 or 26 feet in width of the highway road, and these last mentioned affidavits further allege a personal inspection by both deponents

of the *locus in quo*, and a positive denial of the statements in the affidavits produced on the part of the defendants,—that where the carriage-way had been interfered with another quite equal to it, or better, had been substituted in place thereof; and Mr. Beckwith in his affidavit further states that there was no trace of any new work or new road whatever; that there was no room for any such change of the roadway between the railway track and the fence of the highway; and that the only thing done had been to fill up the ditch of the highway on the fence side at two places for about two rods at each place, and not more; and that the filling up of the ditch at these points was a serious injury to the road, as it interfered with the drainage, and was of no advantage to the public whatever.

Several of the affidavits in reply, while setting forth encroachments upon the highway, and the impracticability of having a sufficient highway between the houses of the inhabitants and the railway, set forth that there is no difficulty whatever in finding an easy and practicable route for the railway in the rear on the "Fowler line."

In the view I take of this case, it is not necessary to determine the preliminary objections taken that affidavits sworn to before the bill was sworn to could not be read in support of the application for the injunction, nor to consider any other of the objections taken to the affidavits on both sides, as well as the affidavits in reply.

The injunction applied for is sought by the Attorney-General upon the ground that the road in the information and bill mentioned, which is one of the great roads of the Province, has, in several places between Miller's bark factory and Edward Murphy's, in the parish of Derby (the distance between such points being about one and a quarter miles), been encroached upon, its grade level reduced, and the space for public travel lessened in width some 15 to 20 feet, and, generally, that travel upon it between these points has been rendered dangerous; and that this has been caused by the works and operations carried on in the building and construction of the Indiantown branch of the Intercolonial rail-

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way, being a branch line from Derby station, on the Intercolonial railway, to Indiantown.

It was claimed by the Attorney-General that sections 49 and sub-sections 7 and 8 of section 5 of The Government Railways Act, 1881, Act of the Parliament of Canada, 44 Vict. c. 25, are ultra vires of the Parliament of Canada, and that that Parliament had no power to authorize the appropriation of any part of a highway for railway purposes; that if they could authorize the appropriation and use of a highway for railway purposes, they must first provide a new highway, and it was shown that no such new highway had been provided; that no consent of the municipal or local authority had been obtained; and even if obtained, that it would not be of any avail as the municipal or local authority in New Brunswick had no power to give any consent to interfere with any great road in the Province.

In answer to the grounds taken for the injunction, in addition to the preliminary objection, it was urged by counsel for defendants that the Minister of Justice was improperly made a defendant; that the Court had no power to grant an injunction against the Minister of Railways or the Minister of Justice, as they were officers of the Crown, and not subject to an injunction when performing the duties of their office; and that even if the Crown had entered wrongfully into the possession of lands, that a petition of right, and not an injunction, was the proper remedy; and even admitting that the highway had been encroached upon, and to an extent to amount to a nuisance; and while in some cases an injunction might be a remedy, the granting of an injunction was a matter of discretion and rested upon the balance of convenience or inconvenience, and that the facts of this case did not show that the interests of the public required an injunction, or show any sufficient reasons for granting an injunction.

The Indiantown Branch Railway is a public work of Canada, and is being constructed by the Government of Canada as a branch of the Intercolonial Railway, the defendant being the contractor with the Government of Canada for the doing of a portion of the work.

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I do not think that there is anything in the objection taken by the Attorney-General that the sections to which he refers in The Government Railways Act, 1881, are ultra vires of the Parliament of Canada.

Then what are the powers given and the rights conferred by these sections? By the 49th section it is enacted that the railway shall not be carried along an existing railway, but merely cross the same in the line of the railway, unless leave has been obtained from the proper municipal or local authority therefor; and no obstruction of such highway with the works shall be made without turning the highway so as to leave an open and good passage for carriages, and on the completion of the works, replacing the highway; but in either case the rail itself, provided it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction; provided always that this section shall not limit or interfere with the power of the Minister to divert or alter any road, street or way where another convenient road is substituted in lieu thereof, as provided in the 8th sub-section of section 5.

It was urged by the Attorney-General that the words "the railway shall not be carried along an existing highway," used in this section, meant and were intended to mean alongside of the highway. I cannot think that such is the meaning of the word "along." I think that word, as used in the section, means over and along the surface of the highway, and not alongside of it.

Sub-section 7 of section 5 is as follows: "To make or construct in, upon, across, under or over any land, streets, hills, valleys, roads, railways or tramroads, canals, rivers, brooks, streams, lakes or other waters, such temporary or permanent inclined planes, embankments, cuttings, aqueducts, bridges, roads, sidings, ways, passages, conduits, drains, piers, arches, or other works as he may think proper."

And sub-section 8 of section 5 is as follows: "To alter the course of any river, canal, brook, stream or watercourse, and to divert or alter as well temporarily as permanently the course of any such rivers, streams

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of water, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the side of, the railway, as he may think proper; but before discontinuing or altering any public road he shall substitute another convenient road in lieu thereof; and the land heretofore used for any road, or part of a road, so discontinued may be transferred by the Minister to, and shall thereafter become the property of the owner of the land of which it originally formed a part."

Reading section 49 and the sub-sections 7 and 8 of section 5 together, I think it clear that under section 49, if it is desired that the railway shall be carried on and over, that is along the surface of a highway, which highway it is not intended shall be thereby rendered wholly useless as a highway, but which may be used as such, notwithstanding the railway running over it in part, that then the Minister of Railways and Canals shall first obtain from the proper municipal or local authority leave to carry the railway along such highway; if, however, it was necessary to do more than carry the road on, along or over the highway as just mentioned, then by the 7th sub-section the Minister of Railways and Canals may absolutely make and construct such temporary or permanent inclined planes, embankments, cuttings, aqueducts, bridges, roads, sidings, ways, passages, conduits, drains, piers, arches or other works as he may think proper; in effect (inter alia) construct the railway over and along the surface of the highway; and by the 8th sub-section he may divert or alter, as well temporarily as permanently, the course of any rivers, streams of water, roads in, upon, across, under, or over any land, streets, hills, valleys, roads, * * * in order to carry them over or under on the level of or by the side of the railway as he may think proper; but before discontinuing or altering any public road, he shall substitute another convenient road in lieu thereof.

I think the reasonable construction of the 49th section and the 7th and 8th sub-sections of section 5 read together to be this; the provisions of section 49 (without

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the proviso) limit and restrict the powers given by sub-section 7 as to constructing a railway on and along and over the surface of a highway, unless leave has been obtained from the proper municipal or local authority therefor; but the proviso in this same section declares that the section shall not limit or interfere with the powers of the minister to divert or alter any road or way where another convenient road is substituted in lieu thereof, as provided in the 8th sub-section of section 5, that is, under sub-section 8, the whole highway may be taken for the railway by the Minister, and thus be diverted; but, before diverting it, the Minister shall substitute another convenient road in lieu thereof.

Had I to determine who, in this Province, would be the proper municipal or local authority from whom the leave mentioned in the 49th section should be obtained; or whether any municipal or local authority had the power to give such leave, I might find it difficult to do so; but, I do not, in the view I take of the case, consider it necessary that I should express any opinion in respect to it, nor consider what would be the construction of the 49th section if there were no proper municipal or local authority from whom leave could be asked, and, consequently, by whom it could be refused, or from whom it might be obtained.

It seems clear that under The Government Railways Act, 1881, the Minister of Railways, in the construction of any railway, being constructed as a public work by the Government of Canada, has the power, within the limitations I have mentioned, to appropriate for the purposes of such construction not only a part, but the whole of any highway, and what the Legislature has authorized cannot be a nuisance in law.

No doubt the acts complained of by the information and bill, as done under the contract between the defendant Snowball, and the Minister of Railways, that is, the placing of portions of the railway upon the highway, and thus narrowing it in its width, the lowering the grade and cutting down of portions of the highway, are all acts which would, without legislative authority for them at common law, be nuisances; but where full and

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ample powers are given by the Legislature to the Minister of Railways to use and take highways, or any part of them, for the construction of a railway, even though the provisions of the statute authorizing it may not have been strictly followed, and the acts for that reason, perhaps, not strictly legal, the acts are to be looked at in a different light from acts which would of themselves be nuisances at common law, where the Court is called upon to exercise its discretion in the granting or refusing of an injunction for the doing of those acts.

If the power to take and use for railway construction the whole or any part of the highway, if it were found necessary to do so, is given to the Minister of Railways, and, as I have already stated, I have no doubt that such power is given to him in the terms mentioned in the Railway Act, then the contractor Snowball in going upon and taking the portions of the highway shown to have been taken for construction purposes, would only be doing an act for which there would be full legislative sanction and authority.

It is, however, claimed by the Attorney-General, that if the section 49 and the sub-sections 7 and 8 of section 5 be intra vires of the Parliament of Canada, that the right of the Minister of Railways or his contractors to enter, is only given, and can only be exercised after another highway has been provided, and until the new highway is provided any entry is unlawful.

The information and the affidavits used in its support, state that no consent or authority for using the highway for railway construction had been sought for or obtained from the Government of the Province or the municipality of Northumberland county, or any other local authority having power to give such consent or authority, nor had the defendants made any other highway in lieu or place of the highway encumbered and destroyed, nor made any provision whatever, for the safe passage of persons and carriages between the points described in the information.

The affidavits in answer state that the highway between Miller's bark extract factory and the Murphy

property had not in effect been seriously or permanently obstructed or interfered with, or obstructed or interfered with so as to endanger travel thereon, or impair its usefulness or convenience for the purpose of public travel in the slightest possible way, and in any place where the carriage-way had been interfered with or diverted, another road quite equal to it or better had been substituted in place thereof; in other words, that another convenient road had been substituted in lieu of the highway interfered with.

The affidavits produced by the Attorney-General in reply, as I have already stated, expressly contradict these statements of the affidavits in answer, and also set forth that no new highway had been provided, but only something done in the filling up of the ditch of the highway on the fence side at two places, for about two rods at each place, and not more.

The affidavits on the part of the information show that the defendant Snowball, the contractor, had stated that he would not make the necessary road diversions, and was not bound by his contract to do so; while in the affidavits produced on the part of the defendants, it is claimed that the necessary road diversions are provided for in the contract, and are necessary work to be done by the contractor Snowball by the terms of his contract.

The question then arises under these circumstances, and on this state of the case and of the facts, ought I to grant the injunction as prayed for by the information and bill, and restrain the defendants from interfering with the highway between the points named, being the Miller bark factory and Murphy property, until authority is obtained from the Government of the Province of New Brunswick, or other proper local authority, and until another highway and convenient road be substituted in lieu of the highway interfered with.

Without determining the questions raised by defendants' counsel, whether the Minister of Justice is properly a party to the suit, and whether ministers of the Crown are or are not subject to an injunction when performing the duties of their office, and whether a petition of right, and not an injunction, is the proper remedy

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for the alleged grievances, in regard to all which grounds I refrain from expressing any opinion, I think the application can be disposed of on other grounds.

There seems to be no doubt that a Court of Equity may take jurisdiction of public nuisances by an information filed by the Attorney-General. In *Attorney-General* v. *Forbes* (1), Lord Cottenham said (2): "With respect to the question of jurisdiction, it was broadly asserted that an application to this Court to prevent a nuisance to a public road was never heard of. A little research, however, would have found many such instances. Many cases might have been produced in which the Court has interfered to prevent nuisances to public rivers and to public harbours; and the Court of Exchequer, as well as this Court, acting as a court of equity, has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harborrs and public roads; and, in short, generally to prevent public nuisances."

The cases to be found in the books in which applications of this kind have been entertained are very numerous, but I will only mention three, as I intend hereafter to refer to these three, viz.: *Attorney-General* v. *Sheffield Gas Consumers' Co.* (3); *Attorney-General* v. *Cambridge Consumers' Gas Co.* (4), and *Attorney-General* v. *Ely, Haddenham and Sutton Railway Co.* (5), and these all support the position that this Court will take jurisdiction of public nuisances and restrain them. It is very manifest, I think, from what is set forth in the information, and from what is stated in the affidavits and the memorials to the governments, of which copies are attached to the affidavits in reply, that the present proceedings have originated from dissatisfaction with the location of the branch line of railway, that is, the running of the road between the houses of the inhabitants and the bank of the river, instead of at the distance back of about half a mile on what is called the

(1) 2 M. & C. 123.
(2) At p. 133.
(3) 3 DeG. M. & G. 304
(4) L. R. 4 Ch. 71.
(5) L. R. 6 Eq. 106.

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"Fowler line." The memorial to the Provincial Government is dated the 8th October, 1884, and states that the memorial to the Dominion Government had been sent forward the same day, and no doubt the petitioners, finding that their application was not likely to be acceded to, sought, by means of the present information of the Attorney-General, to secure a compliance with their wishes, for I find that the information is sworn to on the 5th November last, and in the memorial to the Provincial Government it is stated that the contractor, Mr. Snowball, had already commenced work, and that the memorialists had made up their minds, if he began work in their section, to prohibit him from working if possible, and therefore asked if they could legally do so; at the same time adding that they had that day forwarded a petition to the Dominion Government requesting them to place this railway on a line about half a mile back, known as the Fowler line, and on which line the memorialists had already right of way.

It is abundantly clear that the Government of Canada had the power to locate the road between the houses and the river, where it is located, even though there might not be sufficient space for both highway and railway between the houses and the bank of the river—in such case, if necessary, to make a convenient highway in lieu of the one appropriated; the houses might have to be moved, or a new highway might have to be made in rear of the houses. This latter alternative the memorialists did not desire, for in their memorial to the Provincial Government, they state that to do so would place their back doors, barns and outhouses where their front doors should be, and would otherwise injure their property; and in some of the affidavits in reply it is stated that all the people in the locality were desirous, if the railway location remained as it was, that the highway should not be carried in rear of their dwellings, as this would be to them an irreparable injury.

From these statements I infer, and not unreasonably so, that while one object of putting the Attorney-General in motion by means of the present information

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was to restrain what might be considered in law to be a public nuisance, the main and principal object of the parties who caused the Attorney-General to act, was to force the Government of Canada to change the location of the railway from the river front to the rear, that is, to the Fowler line.

Although this may have been the object of the parties who by their representations caused the present proceedings to be instituted, what I have to determine is not that, but whether, on the facts submitted, such a case is made out as would warrant me in coming to the conclusion that the acts done amounted to a public nuisance; and in the next place, if I did come to that conclusion, then whether the nuisance caused such injury to the public and so seriously affected or endangered the public interest that the strong arm of the Court should be invoked and an injunction be granted.

It must be determined from the facts in each particular case whether what is sought to be established as a nuisance is, or is not, a nuisance, and each case must be determined by its particular circumstances.

In *Attorney-General* v. *Sheffield Gas Consumers' Co.* (6), already referred to, the disturbance of a pavement in a town by an incorporated gas company, for the purpose of laying down gas pipes, was held not to be such a nuisance as to be a sufficient ground for an injunction.

Lord Cranworth, at page 313, says: "I agree that there is no necessity for the intervention of a jury, to teach us that digging up a public highway is a public offence, . . . or a public nuisance."

And after referring to the dispute between the relators in that suit and the defendants, and to the fact that, in his opinion, such a case was not made out by the plaintiff company as to render it discreet for the Court to interfere by injunction, before the fact of private injury was established one way or the other by trial, he deals with the alleged injury to the public. In regard to that, on page 314, he says: "The grievance

(6) 3 D. M. & G. 304.

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complained of is, that in the progress of their works the defendants must do that which would constitute in point of law a nuisance. I dissent from Mr. Rolt's proposition in point of law, that if it be once established that there is a public nuisance, there must be an injunction to restrain it."

At p. 336 the same learned Judge says: "It appears to me that both the Lords Justices concur substantially on this point, that it is a question of degree whether the Court will interfere or not. If that be the right view of the case, then the question is, whether or not such a probability of substantial injury to the rights of the public passing along the streets of Sheffield, or the inhabitants using those streets, has been made out as to make it a reasonable exercise of jurisdiction for this Court to interfere by granting an injunction. I confess that in the course of the argument a doubt did pass through my mind whether the Lords Justices had rightly decided in August, but I have come to the conclusion, not only that that doubt was not well founded, but to a still stronger conclusion upon the hearing, that there is no case for enabling us to act otherwise than as we then acted.

"Is the evil of such a nature as to justify the Court in interfering? It is said that the defendants are about to tear up the streets to an extent, on one side represented as 70 miles, on the other as 100 miles. Take it that 100 miles of the streets are to be torn up. It may be that before the defendants complete their works they will have taken up the pavement over 100 miles, but they will never have up above 20 yards at the same time, and they will never have even that length up, they say, for above two days. That agrees with one's experience from what one observes when similar works are going on in the metropolis. They are no sooner begun than ended. The circumstance of the works being performed in this case in a vast number of places in the course of the next two or three years, or the next year, during which time the process of laying down the pipes will be going on, does not appear to me at all to vary the case.

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One must look at the quantum of evil at each particular place, and at each particular moment of time, to determine whether this injunction ought to be granted."

This case establishes this principle in respect to injunctions of this description, that the mere fact that the act done is a nuisance is not of itself sufficient a ground for an injunction; in short, that it is not every public nuisance that will be restrained by injunction, simply because it is a public nuisance, but the extent of the mischief must be looked at to justify the interference of the Court, and in considering the judgment in the Sheffield gas case it must be borne in mind that the defendants had no legislative authority to do the acts they did, that is, to open up the streets and lay down the gas pipes.

In *Broadbent* v. *Imperial Gas Co.* (7), Lord Chancellor Cranworth, while granting an injunction, adhered to the decision given by himself and Lord Justice Turner in *Attorney-General* v. *Sheffield Gas Consumers' Co.*, to which I have just referred, but added on page 462: "Now, attending to the principles laid down in that case (the Sheffield gas case), I cannot come to the conclusion that there was anything there decided to warrant this Court in withholding the relief of an injunction to a person seriously and constantly injured by unlawful acts."

Vice-Chancellor Malins, in the case of *Attorney-General* v. *Cambridge Consumers' Gas Co.* (8), disregarded the case of *Attorney-General* v. *Sheffield Gas Consumers' Co.* (9), and, on an almost similar state of facts, granted an injunction, but his decision was reversed on appeal and the Sheffield gas case followed (10).

In *Attorney-General* v. *Ely, Haddenham and Sutton Railway Co.* (11), it was held that where a railway company have diverted a road *ultra vires*, but with a *bona fide* view to the convenience of the public, a Court of Equity will not compel them to replace the road so as

(7) 7 DeG. M. & G. 486.
(8) L. R. 6 Eq. 282.
(9) 3 D. M. & G. 304.
(10) L. R. 4 Ch. 71.
(11) L. R. 6 Eq. 106.

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to make their work *intra vires*, if the result will be to cause greater inconvenience to the public or the complaining section of the public.

This was an information by the Attorney-General at the relation of ten inhabitants of Thetford owning or occupying land at Grunty Fen, praying for an injunction to restrain the company from obstructing the public road from Thetford to Grunty Fen, and permitting it to remain obstructed, and from rendering it unfit or less convenient than it had theretofore been for the passage of foot passengers, horses, cattle, carts, and carriages, or at any rate so to restrain them until they should have made another sufficient road equally convenient, and if necessary, that they might be ordered to construct all bridges and other works necessary to prevent the road from remaining obstructed, or unfit, or less convenient than it had theretofore been. The contention on the part of the informants was that the acts of the defendants were in excess of their powers, and that they had done illegal acts by which they had obstructed the public road, and that if the defendants had done an illegal act, or illegal acts, the Attorney-General, as *parens patriæ*, is entitled to call upon the Court to put a stop to it, and had a right for that purpose to sue in any Court. The defendants contended that while they had obstructed the road, what they had done was most convenient to the greatest number of the public who use the roads. During the course of the argument, the Master of the Rolls, Lord Romilly, said: "Assuming that the defendants have unlawfully obstructed the road, I am disposed to think that the injury to the public and to the relators is too small to justify the interference of this Court." And in delivering his judgment in the case, after referring to the facts, he said: "It is not, in my opinion, the province of a Court of Equity to interfere to compel defendants, who have done something *ultra vires*, but *bona fide*, with the view of accommodating the public, to do something other than they have done, which would be *intra vires*, and therefore legal, but would be more inconvenient to the public or the persons complaining than that which exists. It is said, and,

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as I have already said, I think it probable that another plan for a level crossing might be better, but I have no power to compel this directly, for if what is now done is *ultra vires*, so would the substituted level crossing, which would still be a diversion of the road, and it is not the province of a Court of Equity, under the threat of compelling defendants to do a very expensive work, which would be regular and according to their powers, to drive them into a compromise to meet the views of the persons who have set the Attorney-General in motion."

This case is important, as establishing the principle that, although the defendants had unlawfully obstructed the road, the injury was not thought sufficient to justify the interference of the Court by way of injunction. This case was affirmed on appeal: *Attorney-General* v. *Ely, Haddenham and Sutton Railway Co.* (12). Applying the principles of the decision to the present case, and assuming which I will assume, that the Attorney-General has shown acts done on and to the highway in question which at common law would amount to a public nuisance, and for the purpose of my present judgment, going further and conceding that leave of the proper municipal or local authority for the carrying of the railway on the highway was necessary and was not obtained, and that if the acts done were alleged to be done under the authority of the 49th section, the defendant Snowball had not brought himself within the provisions of that section, and that what he did had no legal justification, and would amount to a public nuisance, what is there then to distinguish the acts of the defendant Snowball from those in the cases of the Sheffield gas case and the Cambridge Gas Company's case?

For the acts done in those cases there was no authority of law; they were per se illegal acts, and yet in both of those cases injunctions were refused upon the ground that the mischief was only of a temporary character, and was not so serious and permanent as to justify the interference of the Court by way of injunction.

(12) L. R. 4 Ch. 191.

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It may be said that the present case is distinguishable from those cases in this particular, that while in the cases just referred to the streets would be only temporarily interfered with for a few days at a time, and for only short distances in any street at a time, in the present case the encroachments upon the highway by lowering its grade and taking a portion of its width for the railway were permanent appropriations to that extent of the highway. No doubt the acts done would amount to a permanent appropriation of the highway, but the defendants say, We have a legislative right to take this highway and appropriate it permanently, and although in taking it we have not followed the provisions of the Act, yet your complaint must be based, not upon our taking it illegally, as you say, but upon this, that by our acts the public use of the highway is so interfered with and rendered so inconvenient and dangerous, and will so continue, that the further doing of the acts complained of should be restrained by this Court.

While the portions of the highway taken and appropriated are taken and appropriated permanently it was claimed by the defendants that any interruption to public travel or to the public uses of the highway would be only temporary, and in the carrying on of railway works where highways or a portion of highways is taken for the railway, there must be more or less of interruption to such a free and uninterrupted user of the highway as existed before such works began, and yet, while these interruptions might, in some instances, amount in law to a nuisance, this Court would not interfere to stop such a public work as a railway by granting an injunction, if it could be shown that the nuisance was only of a temporary character, and would not produce any lasting injury, and here what is claimed as making the interruption only temporary while the occupation would be permanent is this, that due provision, as I shall hereafter state, was made for the giving to the public another convenient road. Then, what is the evidence here as regards the character and extent of the interruptions to public travel. The affidavits on the part of the Attorney-General allege that the grade of the highway has

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been at some points lowered, and at other points the highway has been lessened in width, and that it is less convenient for the passage over it of carriages, and that it is, in fact, dangerous, and that collisions and accidents have already occurred by reason of the railway works on the highway, and, on the other hand, the affidavits on the part of the defendants set forth that the public travel is not interfered with, and that where portions of the highway have been taken, a substituted road has been provided, and the affidavits of several persons doing business in the neighbourhood, and some of them a large and extensive business, and to whom it was, as they state, of the greatest importance that the highway should be kept open, and in such a state as not to endanger or obstruct the travel thereon, all set forth, that the highway was not obstructed or interfered with so as to endanger travel thereon, or impair its usefulness or convenience for the purposes of public travel in the slightest possible way, and the stage driver who passed daily (except Sundays) over the road, in his affidavit states, "nor has it (the road) been less safe, open and convenient for purposes of public travel, since the construction of said railway was commenced, than it was before the construction of said railway was commenced." The affidavits in reply state no new road has been provided, but that, as I have already stated, in two places the ditch on the side of the highway has been filled in for a short distance. I do not think the granting or refusing of an injunction depends upon whether there has or has not been some inconvenience to the public in their use of the highway by the acts done, but whether such acts have occasioned such serious and permanent, not temporary, injury to the public, as to justify the interposition of the Court by injunction. The defendants say, while there may be some inconvenience, the inconvenience is only temporary, for by the contract with the Minister of Railways made with the defendant Snowball provision was made for the making road diversions (and by road diversions I understand the making of another convenient road in lieu of the road taken and appropriated) where the highway or any part of it might be

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taken for the railway. James Carter in his affidavit used in support of the application, states that he had a conversation with the defendant Snowball, and that he informed him that he intended to go right on with the building of the branch railway, and would take up the whole highway if required, and that he would not provide another highway, as that was not part of his contract; and that he would continue the work unless he was stopped by legal measures. We have on the part of the defendants a copy of the contract between the Minister of Railways and the defendant Snowball for the construction of this branch railway, and also a copy of the specifications which are made a part of the contract, in which provision is made for road diversions as follows: "Diversions of the Fredericton Post Road shall be made at the places indicated on plan. The road must not be left less than 25 feet wide, properly graded and side-ditched, gravelled and made satisfactory to the road commissioner or supervisor"; and the affidavit of Mr. Archibald, the chief engineer of the Intercolonial Railway, and of Mr. Fowler, the engineer in charge of the construction of this Indiantown branch railway, show that on the plan referred to on the specifications, due provision is made for the construction by the contractor of a good, proper and convenient highway for the public, whenever, in the construction of said railway, it is found necessary to divert the carriage-way. Is a contest or dispute, then, between the Minister of Railways and Snowball, the contractor, as to whether the making of these road diversions was within the terms of the contract or not, a sufficient ground for asking the interference of this Court by injunction? I think not, and here I may observe that there is not the slightest evidence before me that Snowball is not bound to make these road diversions, but the very contrary appears. All we have in regard to his not being obliged to do so is the statement in Mr. Carter's affidavit that Snowball in November last, in a conversation, told him (Carter) that he would not provide another highway, as that was not part of his contract, but Mr.

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Snowball has carefully abstained from making any affidavit that it was not part of his contract, either on the original application, or when the affidavits in reply were procured, when he could have made such an affidavit; while by the copy of the contract and specifications before me, it appears that Snowball is bound to make the road diversions, and both Mr. Archibald and Mr. Fowler, in their affidavits, state that the defendant (Snowball) is bound under his contract to make these road diversions. That being so, we then have the further fact that in the contract for the construction of this branch railway it was contemplated that portions of the highway would be taken, and permanently taken, for construction purposes, and due provision was made for the providing of the necessary substituted convenient road.

Several of the affidavits on the part of the defendants allege that where the highway had been in any way interfered with or diverted, another quite equal to it or better had been substituted, while the affidavits on the part of the plaintiff deny this.

Can I then, or ought I, where there is assertion on the one side and denial on the other, not only on this point, but as to whether, in fact, there was any real serious interference with public travel over the road in question, although there might possibly be some inconvenience, to grant the injunction as prayed for? I do not think, considering all the facts before me, that I would be justified, for the reasons urged, in stopping by injunction a public work like the one in question—a branch of the Intercolonial Railway, and a work being constructed out of the general revenues of the Dominion, and in the interests of the general public, and not for the benefit of private advantage or gain. I am further inclined to this opinion from the conclusion I have drawn, from the memorials to the Dominion and Provincial Governments, the frame of the injunction and the affidavits, that the machinery in this case was put in motion, not because there was, or was likely to be, any serious or permanent injury to the travelling public by reason of the obstructions to which the affidavits refer, but for the purpose of serving the private ends of

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a section of the public, and of driving the Government of Canada into a compromise to meet the views of the persons who had set the Attorney-General in motion.

The result I have, therefore, reached in the case is this, that whether a convenient road has or has not been substituted where, by reason of the railway works, the highway has been interfered with (and to determine this owing to the conflicting statements in the affidavits, I might, had my decision to rest upon this ground, have found it necessary to seek further information in some of the ways open to the Court), and even, although no convenient road had been substituted, and the acts done were a public nuisance, I am not satisfied that the injury done thereby to the public, or likely to be done to them (in fact none is likely to be done to them if the contractor carry out the terms of his contract) is of a serious nature, and I have already intimated that the injury cannot be looked upon as of a permanent character, and, therefore, in my opinion, there is not that extent of mischief that would justify the interference of the Court by injunction.

The order, therefore, I make is, that the interim order granted by Mr. Justice *Wetmore*, and subsequently from time to time extended by me, be discharged, and the injunction applied for refused.

As to the costs of the application, I have not come to any conclusion, and should I think the case is one in which costs ought to be given, there would then come up the question whether I can award costs to be paid by the Attorney-General where he files an informal bill without relators. This question of costs I reserve.

So far as I have been able to consider the question, I do not think that under our practice, where an injunction is applied for before information and bill is filed that I could direct the information to be dismissed, and I do not make any order in that respect, but reserve it with the question of costs for further order.

If it be necessary, I do not say it is, and the Attorney-General desires it, I would direct that the refusal of the injunction be without prejudice to his taking such

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steps at law as he may see fit, by way of indictment or otherwise, to abate any obstruction or nuisance which he may consider to exist on the highway in question.

It is to be regretted that the learned Judge did not find it necessary to examine the merits of the objection taken by the Minister of Railways and Canals, that the only remedy available to the public for any grievance sustained by them from his acts was by petition of right. The question was also raised but left undecided in Felkin v. Lord Herbert, 30 L. J. Ch. 604. A local board of health filed a bill for an injunction against Lord Herbert as Secretary of State for the War Department, to restrain him from stopping up a ditch, the War Office having nearly filled the ditch with soil. The defendant appeared under protest to argue the question of jurisdiction, and submitted that the plaintiff should proceed by petition of right, and not by bill. Kindersley, V.-C., declined to decide the question, holding that it should have been raised by demurrer or otherwise after appearance. When the case came again before the Court, 9 W. R. 496, the defendant did not appear. The Vice-Chancellor, however, refused the injunction on the ground that there had not been such an injury or invasion by the defendant of the public rights as to require an injunction against him. In Raleigh v. Goschen, [1898] 1 Ch. 73, the plaintiffs commenced an action against the Lords of the Admiralty in their official capacity for certain alleged acts of trespass and an injunction to restrain further trespass. It was held that though the defendants could be sued individually for trespasses committed or threatened by them, they could not be sued as an official body, and that as the action was a claim against the defendants in their official capacity it was misconceived. In Ellis v. Earl Grey, 6 Sim. 214, the principle was accepted that the Court had no jurisdiction to interfere with the public duties of the Lords of the Treasury performed in the exercise of their discretion as distinguished from merely ministerial acts. In the principal case, of course, it was complained that an avoidable nuisance was being committed for which there was no statutory authority, and which was in reality in violation of the statute. From the frame and title of the suit it is not apparent whether it was against the Crown or against the ministers in their private capacity. If the suit was against the Crown, either by name or title, or in substance, the Court would have no jurisdiction to entertain it: Palmer v. Hutchinson, 6 App. Cas. 619; Raleigh v. Goschen, *supra*. In Viscount Canterbury v. Attorney-General, 1 Ph. 306, compensation was claimed from the Crown for damage alleged to have been done in the preceding reign to property of the petitioner, whilst Speaker of the House of Commons, by the fire, which, in 1834, destroyed the Houses of Parliament; and the question was, whether, assuming that the persons whose negligence caused the fire were the servants of the Crown, the Sovereign was responsible for the consequences of their negligence. The Crown was held not to be responsible. "It is admitted," said Lord Lyndhurst, L.C., "that for the personal negligence of the Sovereign, neither this nor any other proceedings can be maintained. Upon what ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle *qui facit per alium, facit per se*, this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be said

that the master is answerable for the negligence of his servant because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy." But though the Crown could not be made liable in the principal case, the minister could be held personally responsible for his wrongful acts, and their commission could be enjoined. In Feather v. The Queen, 6 B. & S. 258, Cockburn, C.J., said, at p. 296: "Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a Minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. In our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow-subject, though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other." And see Muskoka Mill Co. v. The Queen, 28 Gr. 563. At common law the remedy by petition of right was not available in respect of tortious acts of officers or servants of the Crown: Viscount Canterbury v. Attorney-General, 1 Ph. 306, 324, where Lord Lyndhurst says: "Staundford speaks of this procedure as applicable to the illegal seizure by the King of the lands or goods of a subject; he does not say that it would be applicable for enforcing a claim for damage caused by the negligence of the Crown or its servants, nor does it appear that any sufficient authority, or any valid precedent in favor of such positon is forthcoming." See Tobin v. The Queen, 16 C. B. N. S. 310. In Feather v. The Queen, 6 B. & S. 291, Cockburn, C.J., said: "The only cases in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown, or to the public service. No case has been adduced, after all the industry and learning that have been brought to bear on the subject, both in this case and in that of Tobin v. The Queen, in which a petition of right has been brought in respect of a wrong, properly so called." In Windsor and Annapolis Railway Co. v. The Queen, 11 App. Cas. 607, their Lordships of the Judicial Committee of the Privy Council refer to this statement as an accurate exposition of the law. The law of Canada was not altered in this respect by the Petitions of Right Act, 39 Vict. c. 27 (D.): The Queen v. McFarlane, 7 Can. S. C. R. 216; The Queen v. McLeod, 8 Can. S. C. R. 1. However suited such a limited remedy between the subject and the Crown may be in England, it is manifest that it is inadequate in a country where the Crown is engaged in railway and other undertakings, carried on in England by private enterprise, and in connection with which it is fair the Crown should accept the responsibility attaching to the same undertakings in the hands of individuals for the torts of themselves or servants. See Farnell v. Bowman, 12 App. Cas. 649; Attorney-General of the Straits Settlement v. Wemyss, 13 App. Cas. 197; Leprohon v. The Queen, 4 Ex. C. R. 110. To ameliorate the limitations of the remedy in accordance with this view the Dominion Parliament recognized the liability of the

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Crown for the negligence of its officers and servants in the construction and maintenance of its public works by Act 33 Vict. c. 23, and by 44 Vict. c. 25 (R. S. C. c. 38), it is said the Crown was made liable for damages caused by the negligence of its servants operating government railways. See The Queen v. Martin, 20 Can. S. C. R. 240, per Patterson, J. This view, however, is not uniformly accepted. See Lavoie v. The Queen, 3 Ex. C. R. 101. By Act 50 & 51 Vict. c. 16, the following extensive jurisdiction in suits between the subject and the Crown was conferred upon the Exchequer Court: Section 15. "The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown." Section 16: "The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters: (*a*) Every claim against the Crown for property taken for any public purpose; (*b*) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work; (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment; (*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council; (*e*) Every set-off, counter-claim, claim for damages, whether liquidated or unliquidated, or other demand whatsoever, on the part of the Crown against any person making claim against the Crown." Section 17: "The Exchequer Court shall have and possess concurrent original jurisdiction in Canada: (*c*) In all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer." This last clause probably refers to an action against the officer personally. Several cases have already arisen as to the construction of section 16 of the last named Act, too numerous to be here reviewed. That the Act does not relate to procedure merely, but confers substantive rights, was very fully discussed and laid down in The City of Quebec v. The Queen, 24 Can. S. C. R. 420. As to nuisance committed in the performance of authorized acts, see Pollock on Torts (4th ed.), 115.

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August 29.

Mortgage—Foreclosure—Assets in the hands of mortgagee—Account—Cross-bill—Representative of estate of deceased mortgagor—C. 49, C. S. N. B. s. 47.

An executor *de son tort* cannot foreclose a mortgage given to him by the intestate if he has in his hands sufficient assets of the deceased to pay the mortgage debt.

Where, in a suit by an executor *de son tort* for foreclosure of a mortgage to himself by the intestate, it appeared that no administrator had been appointed, and by the answer of the heirs it was alleged that the plaintiff had assets in his hands belonging to the deceased sufficient to pay the mortgage, the Court under c. 49, C. S., s. 47, appointed a barrister of the Court to represent in the suit the estate of the deceased, and ordered the heirs to file a cross-bill against the plaintiff for an account.

The facts sufficiently appear in the judgment of the Court.

Argument was heard August 24th, 1885.

A. O. Earle, for the plaintiff.

W. W[illegible]den, for the defendants.

1885. August 29. PALMER, J.:—

This is a suit for the foreclosure of a mortgage given by an intestate to the plaintiff. The defendants are the heirs of the mortgagor, of whose estate there has been no administrator appointed. One of the defendants by his answer sets up that the plaintiff, after the death of the mortgagor (who left personal estate), took possession of such estate and sold it, and that he should have applied the proceeds to the payment of this mortgage debt; the plaintiff's counsel contended before me that the plaintiff was entitled to the usual decree for sale, even if it should turn out that he has assets in his hands to pay the mortgage. I have no doubt that this is not the plaintiff's right, for if he has sufficient assets in his hands it is his duty to pay off this mortgage debt, and it would be most inequitable for him to compel these defendants to pay it. It is a fundamental principle of equity that whenever the Court can see that it is the

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duty of any person to do an act, as against him it will treat the matter as though it were done; thus if a debt is due a person, and afterwards, for any cause, it becomes the duty of such person to pay it, if the duty is a legal one the debt is extinguished at law; for the right to pay and to receive is in the same person, and therefore is merged. If such is only enforceable in equity, a Court of Equity whenever it is brought in question will treat it as if it were done. Thus, if a person dies and appoints his creditor his executor, who receives sufficient assets to pay all the testator's debts, his own included, it is the duty of such executor to pay all such debts including his own, and he ought not to ask any person who was a mere surety for the testator to pay him, and it would be inequitable to allow him to compel a mere surety to pay what he himself should have paid; and this result is avoided by treating the payment that he should have made as actually made; and if this is the rule as regards a rightful executor, it would be strange, indeed, if an executor *de son tort* should be in a better position. I think he is not. It follows that the plaintiff is not entitled to a decree that his mortgage should be paid out of the property of these heirs if he should have paid it himself; and whether he should have done so or not, must I think depend upon whether he has assets of the estate in his hands which should be applied to that purpose. The plaintiff denies that he has any assets that ought to be applied to pay the mortgage debt; and in order to make a right decree it must be ascertained whether this is so or not, and the doing so will involve taking the whole accounts of the estate; and in effect this involves all enquiries that would be necessary in a suit to administer the estate. Without deciding whether I would be compelled to have this inquiry in this suit as it now stands without any other personal representative of the intestate before the Court, except an executor *de son tort*, I am inclined to think that it is best to have some other person before the Court to represent the estate before I should make a decree against these defendants; and to that end it is desirable to appoint some person as such representative,

and this I will do under the authority of c. 49 C. S., s. 47 (1). I therefore appoint Charles A. Palmer to represent the estate of John Kenny in this suit; and as I think it right to make such a decree as will protect the plaintiff when he shall have accounted for all the assets in his hands, I will direct that the defendant who has answered, do file a cross-bill to compel the plaintiff to account for and administer any assets that are in his hands, within ten days from this date. This appears to be the proper course. See 2 Daniell Chan. Pr. (4th Am. ed.), 1550.

A trustee of real estate became mortgagee of the trust estate, partly by taking an assignment of a prior mortgage, partly by taking an assignment of a mortgage created by his co-trustee and himself under the trust, and partly for money which he had lent to the *cestui que trust*. Having filed a bill for foreclosure, the *cestui que trust* filed a bill for an account of the trust and of the mortgages, and that the mortgage securities might stand only for the balance due on both accounts. It was held that the Court might make one decree in both causes, so as to give the mortgagor any set-off he might be entitled to, or make a decree of foreclosure in the former suit, and a separate decree for an account against the trustee personally in the latter, according to the circumstances and justice of the case: Dodd v. Lydall, 1 Hare, 333. Wigram, V.C., there said: "If the result of the account were now ascertained, and it thereby appeared that the estate which the plaintiff in the first suit represents was debtor to the plaintiff in the second suit, I see no reason why the Court should not give the plaintiff in the second suit the benefit of the set-off which he claims: Clark v. Cort, 1 Cr. & Pr. 154; and, further, as the two causes have been ordered to come on together, I do not doubt that, according to the practice of the Court, I may treat the two causes as one, if the justice of the case requires it: Day v. Newman, 2 Cox, 77. But the points which I have had to consider are, whether the practice of the Court obliges me to suspend the decree of foreclosure in the first cause until the trust accounts are taken; and, if the practice of the Court do not make this imperative upon me, whether the merits

(1) S. 47. "If in any proceeding it shall appear to a Judge that any deceased person who was interested in the matters in question has no legal personal representative, he may either proceed without appointing any person to represent the estate of such deceased person, or he may appoint some person to represent such estate for all the purposes of the proceeding, on such notice to such person as the Judge shall think fit, either specially or generally, by advertisement in the Royal Gazette, and the order so made by the said Judge, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect, as if there had been a duly constituted legal personal representative of such deceased person, and such representative had been a party to the proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court."

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of the whole case do not require that I should make separate decrees in the two causes; or impose such terms upon the plaintiff in the second cause as will prevent any possible inconvenience occurring to the plaintiff in the first cause by the decree of foreclosure being suspended. Upon the mere point of form, I entertain no doubt. The order that both causes come on together is made by the Court in ignorance of the merits of either of them, and only upon a representation that the justice of the whole case requires that they should be so heard. But if, upon hearing the two causes, the Court is of opinion that separate decrees should be made, the Court may take that course. Upon the law of the case, my opinion is equally clear. The mere existence of cross-demands does not of necessity give a right of equitable set-off; and certainly the mere pendency of an account out of which a cross-demand may arise will not confer such a right. I had occasion, when at the bar, to give great attention to the question of equitable set-off in the case of Rawson v. Samuel, 1 Cr. & Ph. 161; and the judgment of Lord Cottenham in that case, on appeal, will be found fully to justify the opinion which I now express. It was there decided that, in the case of cross-demands arising out of the transactions not necessarily connected with each other, a Court of Equity is bound to look into all the circumstances of the case, and see whether an equity is made out for blending the two matters together at the expense of possible delay in concluding one of those matters. The only question, therefore, is, whether, upon the whole case, I ought to suspend the decree of foreclosure until the trust account is taken, for the purpose of pleading the two accounts together, or whether I should at once make the decree of foreclosure, and leave the plaintiff to his remedies against the estate of the deceased trustee." In Jones on Mortgages (3rd. ed.), s. 992, it is laid down that if the mortgagee be appointed administrator of the estate of the original debtor, the mortgage is extinguished if assets come into his hand which can be applied in payment of the debt, citing Remis v. Call, 10 All. 512.

Section 47, c. 49, C. S. N. B., is reproduced in section 89 of The Supreme Court in Equity Act, 1890 (53 Vict. c. 4). The section is taken from the Equity Improvement Act, 15 and 16 Vict. c. 86, s. 44 (Imp.). A similar provision is contained in Order XVI., Rule 46 of the English Supreme Court Rules, 1883; and in Rule 310 of the Ontario Supreme Court Rules. For the practice and cases under the section, see Dan. Ch. Pr. (4th Am. ed.), 201; Morgan Ch. Ord. (3rd ed.) 198; Snow's Annual Pr.; and Holmestead & Langton, 304. In Barnaby v. Munroe, 1 N. B. Eq. 94; Mr. Justice Barker held that as a general rule the administrator of a deceased mortgagor of real estate should not be made a party to a foreclosure suit. Where the defendant in an action to foreclose leasehold mortgages died insolvent before foreclosure absolute; and an order was made in Chambers appointing one of his next of kin to represent his estate for the purposes of the action, the Court refused to make the foreclosure absolute in the absence of a properly constituted representative: Aylward v. Lewis, [1891] 2 Ch. 81. See also Scott v. Streatham Estates Co., W. N. [1891] 153.

WOOD ET AL. v. AKERLEY ET AL.

1885.

August 31.

Practice—Partition suit—Assignment of dower—Joinder of widow.

A suit may be brought for partition of land and assignment of dower, and the dowress should be made a party to the suit.

The facts sufficiently appear in the judgment of the Court.

Argument was heard August 22nd, 1885.

A. H. Hannington, and *A. A. Wilson*, for the plaintiffs.

W. B. Chandler, for the defendant Harriet Akerley.

1885. August 31. PALMER, J.:—

This is a case in which a bill was filed by some of the heirs of Winthrop Akerley against the others for a partition of the real estate of which the said Akerley died seised, and to have his widow's dower assigned; and the widow is joined in the suit. The widow has demurred on the ground that she ought not to have been made a party; and thus for the first time in this Province, as far as I know, the question whether the practice that has hitherto prevailed in this Court of joining the widow in such a suit is correct. It will assist to decide it to have a clear understanding of the principles on which the Court acts with reference to competent and necessary parties. One is, that the Court will not proceed to determine any suit without bringing before it all parties interested, either directly or collaterally, in both the subject and object of the suit, and all persons against whom relief must be obtained to accomplish the object of the suit, in order that the decision may provide for the rights of all parties interested. There is a distinction between a necessary or proper party, and an indispensable party; a necessary or proper party is one who has an interest in the matter in controversy, and should be a party to enable the

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Court to decide all the rights involved, and should be made a party if within reach of the process of the Court; still, if his interest is separate from those before the Court, he is not an indispensable party; an indispensable party is one where a decree cannot be made without affecting his interest. Bearing these rules in mind, let us see how these plaintiffs stood when they brought this suit; and what is the subject and object of it. They were tenants in common with the other heirs of the estate, in the whole of which the widow has a right of dower, and their right was to have it divided and the dower assigned. Both these rights this Court had original jurisdiction to decree in a proper suit brought for that purpose; and one question is, could they, without their co-heirs, assign such dower without a suit? and, if they could not, could they compel such assignment by a suit so that all the heirs should join in such assignment; and, if so, can this be done in a suit in which one of the objects is to partition the estate among the heirs after the dower is assigned? As to the first question, I think this can only be done by some person having the freehold by right or wrong. Coke upon Littleton, 35a, says: "No assignment can be made but by such as have a freehold"; from which it follows that it can be done by one joint tenant. The same authority (35a) lays down the law as follows: "If two or more be joint-tenants of lands, one of them may assign dower to the wife of a third part in certainty, and this shall bind his companions"; and the reason appears to be that each joint tenant is seised of the whole freehold, that is, seised per my et per tout, and they all have one and the same freehold; but tenants in common have several freeholds, and co-partners the same, and, therefore, one cannot assign dower to bind their co-tenants' estate, for he has not the freehold of that: Bacon's Abr., Tit., Joint-Tenants and Tenants in Common. From this I think it is clear that the heirs collectively have the right, and it is their duty to assign the dower without suit; but the plaintiffs could not do this alone, but all must join in order to make it good against all. Consequently, if any refuse, or do not join in making such assignment, it is

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the right of any other to compel it by a suit in this Court, and in which it is obvious the widow would be a necessary party; and it is equally clear that it is his right to maintain a suit against his co-heirs for partition, in which the widow would have no interest after her dower had been assigned; and the question is whether she may not be made a party to a suit brought for the double object of having the dower assigned and the estate partitioned. In Tyler's Ed. of Mitford's Pleading it is laid down, page 18, that courts of equity exercise a judicial discretion in the matter of parties to a suit, and that it is a question of policy as well as of jurisdiction; and, if so, it appears to me that it would be a sound exercise of such discretion to allow the widow to be made a party to such a suit, rather than compel two suits to be brought, when her right is admitted and she has a full opportunity of being heard and showing what her claim is. She is interested in the subject-matter of the partition suit, and although the decree could not affect her rights, yet if the suit can be brought for the two objects the widow is a necessary party. The real question in the case is whether a suit can be maintained for these two objects. The only objection that can be urged against it is what is called multifariousness, that is, the Court will not allow a plaintiff to join in one record several matters of different natures against several defendants, with some of which some of them have no connection; but, on the other hand, it will not permit a bill to be brought for part of a matter only, but will, as far as possible, prevent the splitting of causes, and consequent multiplicity of suits. The cases on the subject are extremely difficult to reconcile; for the Court, in deciding them, appears to have considered what was convenient in each particular case, and to have refrained from laying down any absolute rule. Story, in his work on Equity Pleading, s. 284, says that "a bill is not to be treated as multifarious, because it joins two good causes of complaint, growing out of the same transaction, where all the defendants are interested in the same claim of right, and where the relief asked for in relation to each is of the same

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general character"; and Lord Cottenham, in *Campbell* v. *MacKay* (1), decided that when the plaintiffs have a common interest against all the defendants in a suit as to one or more of the questions raised by the case so as to make them necessary parties for the purpose of enforcing that common interest (which is the case here with reference to the claim for the assignment of the dower), the circumstance of some of the defendants being subject to liabilities in respect to different branches of the subject involved (which is the case here with reference to the partition), will not render the suit multifarious; and Lord Langdale in *Attorney-General* v. *Corporation of Poole* (2), decided that if a case against one is so entire as to be incapable of being prosecuted in several suits, and yet some one of the defendants may be a necessary party to some portion of the case stated, such other party cannot maintain an objection of multifariousness. All that is stated, and all that is prayed for in this bill arises out of one subject-matter, and the position of all the parties in relation thereto, and there does not appear to be any way to settle their respective rights by a suit in any other form, and I can see no inconvenience either to the Court or any of the parties that will arise by allowing such a suit to be maintained, and for that purpose to join them all in one record; and, therefore, I think I ought to so exercise the discretion that the law has given me, and overrule the demurrer. I think I should give the defendant demurring twenty days to answer, and make the plaintiffs' costs occasioned by the demurrer costs in the cause instead of allowing them to follow the result, as I have maintained the suit by an exercise of discretion, and the point is new.

This decision does not accord with the views of Freeman, but, as that learned author himself indicates, the American decisions are not uniform. At section 432 (2nd ed.), Freeman says: "A widow entitled to dower is not regarded as a co-tenant. Where her inchoate right of dower attached anterior to the existence of the co-tenancy, it cannot, in the absence of statutory provisions to the contrary, be affected by proceedings in partition.

(1) 1 M. & C. 603.

(2) 4 M. & C. 31.

Her interest is not that of a co-tenant, nor is it in any respect dependent on the interest of a co-tenant. It is paramount to the co-tenancy, and she may have it assigned irrespective of any voluntary or compulsory division made among the co-tenants. In an early case in New York, the heirs of one Bradshaw instituted proceedings for partition, to which they made his widow a defendant. She was summoned to appear, but disregarded the summons, and allowed judgment to go against her by default. Afterwards, she brought an action of dower, wherein it was held that the 'proceedings under the partition act were null and void, as respects the claim of the demandant for dower. She was not bound to appear and plead; and her not appearing cannot prejudice her present claim. The judgment in partition could only affect her rights, if any she had, as a joint-tenant, tenant in common, or in coparcenary': Bradshaw v. Callaghan, 5 Johns. 80; affirmed, 8 Johns. 558, and approved, Coles v. Coles, 15 Johns. 321. The same reason which, before the assignment of her dower, exempts a widow from the operation of the law of compulsory partition, operates with equal force after such assignment has been made. Notwithstanding the assignment vests in her a present estate, it does not make her a co-tenant with the heirs of her husband." At section 472, the same learned author says: "Where the husband, being a tenant in severalty, dies, and his estate descends to several heirs, his widow is not a tenant in common with the heirs. She is not therefore a proper party defendant in a suit brought by one of the heirs for partition. Any partition which they may procure must be subordinate to her rights as dowress. They need not—in fact, they cannot—make her a party defendant, for she does not hold with them in common and undivided. On the other hand, it has been insisted that the widow is a proper and necessary party to an action among the heirs for partition, and that it is erroneous to make a partition in her absence. Thus, in Virginia, where a partition was granted, as prayed for, subject to the widow's right of dower, the Court of Appeals reversed the decree, saying: 'The widow and her husband should have been made parties, and her dower assigned, and partition should have been made of the residue. And it was error to have directed or confirmed a partition until such dower had been assigned.' The case was therefore remanded, with instructions to require the applicant to make the widow a party."

At section 476 he says: "When a widow is entitled to dower by virtue of her late husband having had a sole seizin in the premises, her right, as we have before stated, is generally regarded as paramount to right of the heirs to compel a partition. This is equally true whether a division or a sale be sought. Courts have no authority, unless it be expressly conferred by statute, to compel a widow to accept a certain sum of money in lieu of her dower. She cannot be divested of her dower except by her own act. But in some of the States the statutes in reference to partition authorize the widow to be made a party defendant, and empower the Court, in case a partition cannot be made, to decree a sale, and to award the widow a part of the proceeds, which she must accept in satisfaction of her dower."

It will be noticed that Freeman appears to negative the jurisdiction of the Court on the ground that the widow is not a co-tenant with the heirs, and apparently his contention is that the jurisdiction of the Court is confined to cases of co-ownership. Spence, Equitable Jurisdiction of the Court of Chancery, 655, after describing the origin and growth of the jurisdiction of the Court in partition speaks of it being established

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in all cases of co-ownership. Story, section 646, uses language implying the same limitation, or that it is only in cases of real estate held by joint-tenants, tenants in common, and coparceners. In Miller v. Warmington, 1 Jac. & W. 493, Sir Thomas Plumer, M.R., says: "Partition can only be between joint-tenants, tenants in common, or coparceners; originally it was confined to coparceners, who derived that name from being able to compel partition. By the Statute 31 H. VIII., it is extended to tenants in common and joint-tenants, but the principle is the unity and entirety of possession, that each party has an undivided interest in, and a right over the whole, and hence the plea of *non tenet insimul* is a good plea to a writ of partition, and hence also it is necessary for them to make conveyances to each other, and their portions are set out. The same rules that prevail at law are adopted in equity, and it is only on the same grounds that you can apply to this Court."

By The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), ss. 196, *et seq.*, jurisdiction in partition appears to be only provided for in cases of coparcenary, joint-tenancy, and tenancy in common. The sections of the same Act, sections 237, *et seq.*, relating to proceedings for the admeasurement of dower do not favour the notion that the rights of a dowress were to be adjusted in a partition suit. A widow entitled to dower has not at common law any estate in the lands until assignment. Her right is a mere chose in action. She is not entitled to joint possession with the heirs, and consequently is not a tenant in common: Washburn (4th ed.), 251; Torrens v. Currie, 22 N. B. 342.

One would be very reluctant to impugn the decision in the principal case, without a closer examination of the authorities than is here possible, but it certainly would appear to be unwise to regard the decision with unquestioning confidence. It is to be observed, however, that the question of the Court's jurisdiction in no way depends upon the powers of the Court to adequately protect and adjust the interest of the widow: see Shields v. Quigley, 1 N. B. Eq. 154; Hannaghan v. Hannaghan, 1 N. B. Eq. 302; Fram v. Fram, 12 P. R. 185. Attention is called to Rule 4 E. T. 46 Vict. (N. B.). By c. 104, s. 5, R. S. O. 1887, "All joint-tenants, tenants in common, and coparceners, all dowresses and parties entitled to dower, tenants by the curtesy, mortgagees, or other creditors, having liens, and all parties whosoever interested in, to or out of any lands in Ontario, may be compelled to make or suffer partition or sale of the said lands, or any part or parts thereof, as hereinafter mentioned and provided, and the partition may be had whether the estate is legal or equitable, or equitable only."

HORN ET AL v. KENNEDY ET AL.

1887.
July 7.

Practice—Foreclosure—Parties—Judgment creditor—Disclaimer—Costs.

A judgment creditor, who has registered a memorial of judgment, is a necessary party to a suit to foreclose a mortgage on land belonging to the wife of the judgment debtor.

A judgment creditor made a party to a foreclosure suit under the above circumstances, upon disclaiming, will not be liable nor entitled to costs, though continued in the suit after disclaimer.

The facts need not be stated.

Argument was heard July 4th, 1887.

J. R. Armstrong, for the plaintiffs.

F. E. Barker, Q.C., for the defendants.

1887. July 7. PALMER, J.:—

There are two points involved in this case which are really of importance to the profession. First, whether a judgment having been obtained against the husband, and a memorial of the judgment having been registered, and the mortgage sought to be foreclosed being on the wife's property, is it necessary or proper to make the judgment creditor a party to the suit? I have come to the conclusion that it is; that in reality it is not only proper, but I think I would not entertain the suit without he was made a party. In my opinion such judgment would create a cloud on the title for all time; for it might be that the wife would die prior to the husband, when, by the curtesy, the property would fall into the husband, and the memorial would be a charge upon the property and could be levied upon, and everybody taking the property would be liable to its effects.

The other question is, whether a party is entitled to costs, who, upon the records, has an efficient title, either for an unsatisfied judgment or other claim, and who has not taken the trouble to have it discharged. If it is not one's own fault that he is made a party and he

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disclaims, then, he gets clear of costs; but under the authority of *Buchanan* v. *Greenway* (1), the judgment creditor here is not entitled to any costs; and, therefore, though he still remains a party to the suit, he does so without costs.

By sub-section 4 of section 4 of the New Brunswick Married Women's Property Act (58 Vict. c. 24), nothing contained in the Act shall prejudice the husband's tenancy or right to tenancy by the curtesy in any real estate of the wife. The interpretation of these words cannot be said to be free of difficulty, and their meaning will probably not be agreed upon in the absence of authoritative decision. The Act has made a plainly defined distinction between a woman married before and a woman married after its commencement. By section 4 (1), "Every married woman who shall have married before the commencement of this Act, shall and may, without prejudice and subject to the trusts and provisions of any settlement affecting the same, notwithstanding her coverture, have, hold, enjoy and dispose of all her real estate, whether belonging to her before marriage or in any way acquired by her after marriage, otherwise than from her husband, free from his debts and obligations and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried"; and by section 4 (2), "The real estate of any woman married after the commencement of this Act, whether owned by her at the time of her marriage or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively shall, without prejudice and subject to the trusts and provisions of any settlement affecting the same, notwithstanding her coverture, be held and enjoyed by her for her separate use, free from any estate therein of her husband, during her lifetime, and from his debts or obligations, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried, and her receipts alone shall be a discharge for any rents, issues and profits of the same."

In the case of a woman married before the commencement of the Act her real estate is not declared to be her separate property, or to "be held and enjoyed by her for her separate use," nor is it declared to be "free from any estate therein of her husband during her lifetime," as is provided in the case of a woman married after the commencement of the Act. The dissimilarity in the two clauses in these respects, supports the inference that a woman married before the commencement of the Act was not intended to have a power of disposition over her real estate to the exclusion of the curtesy of her husband. See Royal Canadian Bank v. Mitchell, 14 Gr. 415. In this view section 4, sub-section 4, is a consistent and intelligent provision. In conflict with this opinion it is to be observed that section 3 (1) enacts that, "a married woman shall be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee." The contention, however, that these words have the effect of making the real estate of a woman married before the commencement of the Act her separate property is not warranted if the dis-

(1) 11 Beav. 58.—See *Earl of Cork* v. *Russell*, L. R. 13 Eq. 210.

similarity between sub-sections 1 and 2 of section 4 is to be preserved. As pointed out in In re Cuno, Mansfield v. Mansfield, 43 Ch. D. 12, section 3 (1) is only a general section, and must be read with and limited by the other portions of the Act. In the case of a woman married after the commencement of the Act there would appear to be no question that she may dispose of her real estate either by deed or will without her husband's concurrence, and that his curtesy will be barred. The language of sub-section 2 of section 4, is too plain to be overriden by sub-section 4. It would be incredible to suppose that the Legislature intended, after clothing a married woman with the powers and impressing her real estate with the character so clearly marked out in sub-section 2, to qualify its language, and render it in a sense nugatory by the reservation contained in sub-section 4: See Furners v. Mitchell, 3 A. R. (Ont.) 510, at p. 516; In re Drummond & Davie's Contract, [1891] 1 Ch. 534. Such a perversion of terms involves the anomalous result that sub-section 2 would confer upon a married woman a narrower power than she enjoyed in equity with respect to property settled to her separate use, unrestrained from alienation. Her capacity in equity to dispose of her property as a *feme sole* was thus authoritatively summed up by Lord Westbury in Taylor v. Meads, 4 DeG. J. & S. 597. "When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be indepeadent of and free from the control and interference of her husband. With respect to separate property, the *feme covert* is by the form of the trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning, until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole lies between the married woman and her trustees; and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest; and when the trust thus created is clothed by the trustees with the legal estate the alienation is complete, both at law and in equity." And see Fitzpatrick v. Dryden, 30 N. B. 558; Kent v. Kent, 19 A. R. (Ont.), 352. In Cooper v. Macdonald, 7 Ch. D. 288, it was held that her power of alienation being that of a single woman, her husband's curtesy only attached to her undisposed of real estate. It can hardly be successfully contended that section 4, sub-sections 2 and 4, have adopted a less liberal rule than prevailed at equity. In so far as sub-section 4 relates to sub-section 2 it seems reasonable to assume that its purpose was to remove the doubt contained in the English Act and settled in Hope v. Hope, [1892] 2 Ch. 336, that the husband is entitled on the death of his wife to an estate by the curtesy in her undisposed of real estate.

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BLISS v. THE RECTOR, CHURCHWARDENS AND VESTRY OF CHRIST CHURCH, IN THE PARISH OF FREDERICTON.

Grant—Church—Corporation—Construction.

In 1810 the Crown granted to the rector, church wardens and vestry of Christ Church, in the parish of Fredericton, and their successors, a lot of land "for the use and benefit of the said church forever, and to and for none other use, interest or purpose whatever." The church was organized on the formation of the Province of New Brunswick under authority from the parent Church of England, in England, to certain persons in New Brunswick to establish churches in New Brunswick in connection with and to be a part of the Church of England in England, and under its ecclesiastical authority.

Held, that the grant was to Christ Church as it existed at the time of the grant, and while it remained in connection with the Church of England and adhered to its faith, creed, doctrines, forms of worship and discipline as then established.

The facts fully appear in the judgment of the Court.

C. H. Lugrin, for the plaintiff.

H. B. Rainsford, for the defendants.

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The bill in this case, in effect, alleges that the plaintiff was and is a member of Christ Church, Fredericton, and a resident of the parish of Fredericton; that the church was in existence at the time of the erection of this Province; that on the first day of December, 1810, the Crown granted to the defendants and their successors a lot of land set out in the bill, in the words of the grant, "for the use and benefit of the said church forever and to and for none other use, interest or purpose whatever." It further alleges that the annual income from the said land is about $500; that the defendants had used the same to support the said church; that the church from its formation, and at the time of the grant, was a church in connection with the Church of England as established by law in England, and in which the services thereof were performed and the doctrines thereof preached and taught, and so continued until some time after the present rector, George Goodrich

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Roberts, was inducted therein in 1873, and who some time afterward ceased to conduct the services or teach the doctrines of the Church of England in the said parish church; and, on the contrary, performed religious services in a manner not allowed by the liturgy of the said Church of England in the following particulars, namely: He stands directly in front of the communion table, and not at the north end, when saying the Lord's prayer, with his back to the congregation, and in that position says the said prayer, first kneeling and saying a prayer privately, that he, in or about 1873, placed or caused to be placed on the communion table in said church a cross, and kept it there all the time, and the defendants have permitted it to remain there; that about the same time and from thence hitherto, he advised and procured the people of the congregation to chant or sing the responses to the Ten Commandments, when the said commandments were by him rehearsed during the communion service when the communion was administered; that he began about the same time and continued hitherto to officiate as priest and to stand with his back to the congregation, and his face towards the communion table, when saying the creed during the morning and evening prayer, and had procured, advised and encouraged the choir to turn their backs towards the congregation and to face the communion table; that he, instead of standing at the north end of the communion table when saying the prayers for the Queen, in the communion service and the collect for the day, stands facing the front of the communion table with his back to the congregation; that the defendants have allowed the communion table to remain uncovered during public worship; that the rector in conducting public worship, and when officiating as priest in the said church, wears vestments not permitted by the established usage of the Church of England, that is to say, a scarf or stole other than black; that in administering the Holy Communion he has used and does use what is known as a mixed chalice, that is to say, wine mixed with water. And that he preached and taught the following doctrine opposed to the doctrine of the Church of England,

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namely: That there was no salvation for any outside the pale of the Church of England; that this has been done with the knowledge of the officers of the church corporation, and has been from time to time protested against by the plaintiff, and continued in spite of such protest, notwithstanding which the income from the said land has been used by the defendants in maintaining the said church in the promoting of such doctrines and performing the said illegal services; and the bill prays for an injunction order to restrain the defendants from applying the income of said land to the use of said church, until the services therein are carried on and the doctrine taught therein is in conformity with the usages and doctrines of the said Church of England; and the plaintiff having himself sworn to the truth of the allegations in the bill, after due notice, his counsel has asked me for an interim injunction order to restrain the use of said income other than as aforesaid until the hearing.

No answer as yet has been put in, but the defendants' counsel has produced before me an affidavit of the rector denying that he has taught the doctrine attributed to him; not denying most of the practices attributed to him, but in effect denying they are contrary to the practice of the Church in connection with the Church of England in this Province, and that he has the sanction of the Bishop for them. Also the affidavit of the Chief Justice, one of the church wardens, that he never heard the rector preach the doctrine attributed to him, and adducing certain orders or canons of the synod, to which I will hereafter allude; and the sole question I have to decide is, whether I ought now to grant the order asked for. To do this it will be necessary to determine whether there is a trust created by the grant, or whether it was a gift to the corporation to deal with it as their own property, and if a trust was created, what were its terms? Was it to use it for the support of a church in which the faith, doctrine and discipline of any of the Christian religions were to be observed and taught, be it Methodist, Presbyterian, Baptist, Roman Catholic, or any other except those that were then prescribed in the Church of England—at the discretion of

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the grantees? If so, it is apparent that these defendants would be acting within their right in using the funds to support any church no matter how much its faith, doctrines and discipline, might be opposed to that of the Church of England; but if the true intent and meaning of the said trust is that this property could only be used by Christ Church in carrying on such church in accordance with the faith, doctrine and discipline of the Church of England, it is evident that it must be so applied; and it would be a breach of trust to apply it to a church that was otherwise conducted. The gift is not to the defendants for their own use, unless the corporation, that is the rector, church wardens and vestry of the church are the same as the church itself; for the gift is to the corporation for the use of the church, and it is, I think, clear that such a corporation and the church itself are different things. The word "church" signifies either a place of Christian worship or a collective body of Christian people having a common faith and doctrine, associated together for worship under a creed and discipline. The latter is the meaning of the word as used in this grant, and it is clear, I think, that this land was thereby given to the corporation for the use of a collective body of Christians whose place of worship was then in Christ Church (the building), in the parish of Fredericton, and that such a gift is in no way different from a gift to a living person for the use of such a church, except that a corporation never dies. I therefore think that the defendants are only trustees, and they hold this property for the use of the body of Christians I have named, and who are the cestuis que trust. Then what is this trust or use? To determine this we have only the declaration in the grant, and it is all contained in the words "for the use of Christ Church in the parish of Fredericton." Neither the faith, doctrine nor discipline of the Church of England is mentioned. So all must depend upon what those words meant under the circumstances then existing. Those circumstances are that there was a church established by law in England, of which the Sovereign was the recognized head, both legal and ecclesiastical, that had existed for a great many

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years, called the Church of England, which had a certain particular faith, doctrine, form of worship and discipline well settled and defined by law; that at the first formation of this Province the proper authorities in that church, as far as they could, conferred upon certain persons in this Province power and authority to establish churches therein in connection with such church in England, and Christ Church, Fredericton, was organized as such a church under the ecclesiastical authority thereof, with its creed, form of worship and discipline the same; in fact, ecclesiastically, it was part of the Church of England, and we find the Legislature in this Province recognizing the fact that such churches were organized and established in this Province by various Acts of the Legislature before the making of the grant in question, all of which will be found referred to in the case of *Doe d. St. George's Church* v. *Mayes* (1), by which it will be seen that the Legislature recognized that there was a church in this Province connected with the Church of England, by which the doctrine, discipline and form of worship by law established in that church ought to be observed; and several of such Acts clearly recognize the rites and ceremonies of the Church of England in electing church wardens and vestrymen, and in many other ways; and the first of these Acts directs any person having any ecclesiastical benefice to read the prayers, etc., prescribed by the liturgy of the Church of England at least once a month in the church belonging to his benefice; and at the time of this grant this land was part of the territory of the Crown, the revenues of which had not then been surrendered to the people of this Province, and in which the Sovereign had the absolute property. Such Sovereign was then the ecclesiastical head of Christ Church, and when he made the gift of property as an endowment for the use of that church, no one could doubt but that it was intended that the benefit of it was to be enjoyed by that church, as it then existed, in connection with the Church of England, and adhering to its faith, creed, doctrine and discipline. And I may

(1) 2 Han. 96.

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as well say now, if this suit reaches its final hearing, I will feel it my duty to make a declaration to that effect, unless I alter my mind. It is not to be supposed, however, from what I have said, that I think this church or any other church in connection with the Church of England, has any legal status in this country superior or different in point of law, or more amenable to the law, than the churches of other denominations. Its position in that respect has been well defined by the judgment of the Judicial Committee in *Long* v. *Bishop of Cape Town* (2), in which they said:—

"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly or by implication have assented to them."

This is because the Crown had no power out of England to confer any jurisdiction, or coercive legal authority, upon any church or officer thereof; but the Sovereign, as the head of the church in England, could confer on the churches to be organized in this Province in connection with the Church of England, and promulgating its faith, doctrine, and adopting its form of worship and discipline, an ecclesiastical status to the church in connection with the church in England, and upon the officers and members the like status, with all the Christian privileges, virtues and benefits, both temporal and spiritual, if any, that would accrue therefrom, and the law will protect the churches in connection with the Church of England, and its members, as it will all other lawful churches and their members in their lawful rights. It follows that this is a settlement of property for the use of a church which had certain specified doctrines, and, consequently, only such members as hold such doctrines and submit to its discipline have any

(2) 1 Moo. P. C. C. 411.

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interest in it; and consequently in case of a division, the Court called upon to decide to whom it belongs, must ascertain from proof which party holds those doctrines and submits to such discipline; for while the law looks upon all Christian religions alike, and does not attempt to interfere with the freest exercise of all, except so far as forbidding blasphemy and profanity, may be said to favour Christianity; but they are all lawful and entitled to hold property, and the Courts will protect them in those rights; and any church holding property must comply with the conditions expressed or implied in the settlement of it upon them. And, as both form and doctrine are essential to the existence of a church in enforcing such a trust, it is indispensable to inquire what are the doctrines and form of worship of the church when the trust was stamped upon the property; and what are the accepted forms of worship and doctrines of those enjoying the use of it, and if there are any material departures from the well settled form of worship, doctrine and discipline binding at the time the endowment was made; those who have so departed are no longer entitled to any of the benefits from such endowment, and it is a breach of trust for the trustees to apply it to such purposes. This Court must compel them to apply it for the use of those who adhere to the proper standard, and, if all have departed, the property will revert to the donor—the Crown in this case.

It has been said that to hold that no church or Christian body to which such a gift has been made can change a material part of its doctrine or practice without forfeiting its property, will be to impose a law upon all churches that will prevent growth, and interfere with freedom of thought in religion; but freedom has nothing to do with property. As I said before, the law allows the largest latitude to freedom of religious thought and worship to all, compelling no one to observe any other than as his own conscience dictates, only forbidding it to be performed indecently, or so as to violate the law of the land; it does not, however, guarantee to any body the right to violate the law by bigamy—although a Mormon may think he has the moral right

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to do so—nor to violate the law of contract, nor to steal anything (even a church), the property of others, or accept a gift of property and defeat the will of the giver. As was said by the Court in a celebrated case reported in 67 Pennsylvania Reps. 147: "It secures to individuals the right of withdrawing from the church and forming a new society with such a creed and government as they choose to adopt, raising from their own means any funds to build another church; but doth not confer on them the right to take property consecrated to other uses by those who may be asleep in their graves." I think it clear that in all suits in which the right to church property is involved, when the instrument by which it has been acquired shows that it was intended that a church having a particular creed, government, connection, form of worship, shall receive the benefit of it, this Court must make all the enquiries necessary to ascertain who are the beneficiaries intended, and prevent the property from being applied to any other use, and for that purpose, if necessary, to enquire into the doctrines taught, the forms of worship and discipline of the church claiming the property; not for the purpose of passing upon their usefulness, morality or scriptural soundness, but solely to be able to determine who are the persons who were intended to have the benefit of the property; and I think it is the clear legal right of the Episcopalian churches in this Province to dissolve their ecclesiastical connection with the Church of England as by law established there, and refuse any longer to be bound by their creed, faith or form of worship, or any one church of that denomination of Christians may not only do this, but may dissolve its connection with all its associated churches, and the law will not interfere. Anything that would work such a disconnection it is not easy to define; but I am safe in saying that when it allows and practices any forms of worship, which the other forbids and condemns, as being material and essential this would work a disconnection, and I cannot better describe its effect upon its endowments than by repeating in effect the

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judgment of the Privy Council in the case of *Merriman* v. *Williams* (3). It is perfectly competent to Christ Church, in the parish of Fredericton, to take up its own independent position with reference to the decisions of the tribunals of the Church of England (i.e., in England), but having chosen that independence it cannot claim the benefit of the endowments settled to its use in connection with the Church of England as by law established. I have thought myself bound to give my opinion thus far on the main question involved in this suit, although I think I cannot accede to this motion; for I think it is my duty to hold the same over till the hearing, for the reason I will give hereafter; yet if I could have gone the length of the defendants' counsel's contentions, I would have to dismiss the application with costs. As the granting of the extreme order asked for is within my legal discretion, I do not think even did it turn out on the hearing that the plaintiff is entitled to it, that any great injury can accrue by delaying for a few months longer, when, by the plaintiff's own showing, what he has now complained of has been going on for some ten years.

It was objected that the Attorney-General should have been made a party. It will not be necessary to decide this now as I will not grant the order, and there may be an amendment before the hearing if considered necessary; but this is an important question for the consideration of the plaintiff's counsel. It is not free from difficulty on the one hand, as this trust may be considered a charity. It would appear that the Queen, as parens patriae, may have an interest in what is declared the terms of the trust, and the case may be considered within the class of cases of which *Wellbeloved* v. *Jones* (4), is an example; or it may be this is a case between trustee and cestuis que trust purely, and within the principle of cases of which *Carter* v. *Cropley* (5), is an example. All the cases on the subject are collected in Kerr on Injunctions, 465.

(3) 7 App. Cas. 511.

(4) 1 S. & S. 10.

(5) 8 DeG. & G. M. 680.

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It is said by the defendants that the Bishop has sanctioned the practices complained of; but I cannot see how that can affect the case, except it may have some bearing on the point whether they are in accordance with the former worship of the Church of England; but if it is proved or admitted that they are not allowed, but are contrary to the form of worship of that Church, it may shift the blame from the rector to the Bishop, for it cannot authorize the violation of the trust. In other words the law would no more allow the Bishop to apply this property in violation of the expressed or implied intention of the donor than it would the rector.

Again, it is said that the synod created by the Legislature in this Province has power to try the rector for the offences charged in this bill, and this Court ought to leave the party to that remedy; but it must be borne in mind that this is not an attempt to discipline the rector, but it is a denial of the right of the synod, the Bishop, or anybody else to have this property applied to any other purpose than according to the intention of the donor; and in order to authorize any other use of it, it would require the clearest Act of the Legislature, not only authorizing the clergy in connection with the Church of England in this Province to alter their form of worship and sever their connection with the Church of England as established by law in England, but, in addition, before they could continue to hold their endowment under such altered circumstances, it would require an Act distinctly giving it to them, and thereby annulling and altering the trust created by the donor.

I have already said that the changes to effect this must be material, to decide which may be difficult. Of course the synod may decide, as the Judicial Committee of the Privy Council have decided; but that is not the question now, before any decision has been reached. The question is now: Has Christ Church, in the parish of Fredericton, the same standard of faith and form of worship as the Church of England had when this gift was made, and, if so, have the persons who have the use of this property carried on the work of such church on these principles? If they have, they have a right to this

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property; if not, they are taking what does not belong to them.

By the views I have expressed, both parties will see the difficulties in the way of the law correcting the wrongs complained of, if they exist, and the hurtfulness of these legal proceedings to the welfare of the church. I earnestly recommend all parties concerned to settle the dispute by some means within the church itself, and if my advice, who wish them well, will be of any use, I give it as follows:—

This church is fortunate in having among its members the Chief Justice of the Supreme Court, who has a more intimate knowledge of the law governing the case than I can pretend to, and, besides, is one who has taken a deep interest in the welfare of his parish church, as well as in the Church of England generally, and if no other scheme of settlement can be come to, let the rector of this church name a man, and the plaintiff another, and they, with the Chief Justice, be a committee to report to the church what the rights of the plaintiff are in respect of the matter he has complained of, and whether they have been impugned, and if they report that they have not, let him submit, and if they report that they have been, let them be restored to him.

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June 4.

MERRITT v. CHESLEY ET AL.

Municipal corporation—Suit against Mayor—Ratepayer—Information by Attorney-General—Ex parte injunction—Bill demurrable—Ground for dissolving injunction—C. 49, C. S. N. B. s. 24.

The Incorporation Act of the Town of Portland, 34 Vict. c. 11, s. 9, provides that no person shall be qualified to be elected to serve in the office of chairman or councillor, or being elected shall serve in either of the said offices, so long as he shall hold the office of police magistrate or sitting magistrate of the said town, or any office or place of profit in the gift or disposal of the Council. By Act 45 Vict. c. 61, the name of the town of Portland was changed to "the City of Portland," and it was provided that instead of a chairman, annually elected by the councillors, there should be a mayor. By Act 51 Vict. c. 52, provision was made for the appointment of a commission of three persons to prepare a scheme for the union of the city of St. John and

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the city of Portland. The Act provided that one of the commissioners should be appointed by the council of the city of Portland, that each commissioner should be paid a specified sum for his services, besides expenses, and that the cost of the commission should be borne by both cities. The council of the city of Portland appointed the defendant C., who was then mayor of the city, its commissioner. At a meeting of the council held shortly after, presided over by C., as mayor, certain accounts were ordered to be paid, and estimates for the year were approved, and an assessment ordered therefor. The plaintiff, a ratepayer, brought this suit on behalf of himself and all other ratepayers who should come in and contribute to the expense of the suit, to restrain C. from signing orders for the payment of the accounts ordered to be paid by the council, and the defendant W., the chamberlain of the city, from paying them on orders signed by the defendant C., and for a declaration that C. was incapacitated from acting as mayor.

Held, that the suit should be by information by the Attorney-General on the relation of all or some of the ratepayers, the plaintiff not having sustained, or likely to sustain, any injury not common to all the ratepayers.

Where a bill is demurrable the objection may be taken as a ground to dissolve an *ex parte* injunction.

By Act 51 Vict. c. 52, intituled "An Act to provide for a commission to enquire and report with a view to the union of the cities of St. John and Portland," it was, inter alia, provided, that the commission should be composed of three persons, one of whom should be appointed by the Governor in Council, one by the Common Council of the City of St. John, and one by the City Council of the City of Portland, and that each commissioner should be paid $300 for his services, besides reasonable travelling expenses, and an additional sum of $50 if the scheme submitted by them for the union of the cities was approved of by a majority of the voters of each city. Section 15 of the Act provides as follows: "The commissioners shall make up their statement of costs and expenses of the commission at the close of the work, and shall transmit the same to the office of the Provincial Secretary at Fredericton, where the same shall be audited by the Auditor-General, and the sum total thereof, together with the sum of twenty-five dollars, the cost of auditing the same, to be paid to the said Auditor-General, shall be a charge upon the said cities of St. John and Portland in the following manner: The city of St. John to pay two-thirds of the costs and expenses, and the city of Portland one-third of said costs and expenses. The Provincial Secretary shall notify to

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each of the councils of the said cities the amount to be borne and paid by each council, and it shall be the duty of each council to order payment and to pay the same to the commissioners from the revenue of the city; and the amount so paid shall be levied and assessed at the then next general assessment for city rates, in addition to other assessments for civic purposes, to repay and restore to the revenues of the city the amount so paid out."

By Act 34 Vict. c. 11, intituled "An Act to incorporate the Town of Portland," it was provided by section 9 as follows: "No person shall be qualified to be elected to serve in the office of chairman or councillor, or, being elected, shall serve in either of the said offices, so long as he shall hold the office of police magistrate or sitting magistrate of the said town, or any office or place of profit in the gift or disposal of the council."

By Act 45 Vict. c. 61, it was enacted, inter alia, "that the name 'The Town of Portland' shall, from and after the coming into force of this Act, be known by the name of 'The City of Portland,' and that instead of a chairman annually elected by the councillors, shall have a mayor for said city, to be styled 'The Mayor of the City of Portland.'"

The defendant, John A. Chesley, is mayor of the city of Portland, and the defendant, Robert Wisely, is chamberlain. At a meeting of the council of the city of Portland, held on the 7th of May, 1888, the defendant John A. Chesley was appointed a commissioner under the Act 51 Vict. c. 52, and accepted the appointment. On the 14th of May following, a meeting of the council was held, presided over by the defendant Chesley as mayor, and accounts amounting to about $1,900 were ordered to be paid, and estimates of the current year, amounting to $57,000, were submitted and approved, and an assessment therefor was ordered. The plaintiff is a ratepayer of the city of Portland, and brought this suit on behalf of himself and all other ratepayers of the city who would come in and contribute to the expenses of the suit. The plaintiff, by his bill of complaint,

charged that the defendant John A. Chesley, by reason of his holding the position of commissioner, had vacated the office of mayor, and was incompetent to act as mayor; that he (the plaintiff) was apprehensive that the defendant Chesley would attempt to act as mayor and sign the orders of the city council authorizing the chamberlain to pay the accounts passed at the meeting held on the 14th of May; and that he was also apprehensive that the assessment ordered at such meeting was invalid by reason of the defendant Chesley presiding at the meeting as mayor. He therefore prayed that the said John A. Chesley might be restrained by injunction order from signing the order for payment of the moneys ordered to be paid by the city council, and from signing any order or orders directing, authorizing or empowering the chamberlain to pay any moneys for or on behalf of the city, and from otherwise in any way acting as mayor of the city of Portland; and also that the defendant Robert Wisely might be restrained by injunction order from paying out moneys on orders signed by Chesley; and that it might be declared and decreed that the defendant John A. Chesley was incapacitated to act as mayor of the city of Portland by reason of his holding the said office of commissioner.

An injunction order having been granted by Mr. Justice *King*, this was an application by the defendants before him to dissolve it. Argument was heard May 27th and 28th, 1888.

W. B. Wallace, and *L. A. Currey*, for the defendants.

F. E. Barker, Q.C., and *A. O. Earle*, for the plaintiff.

1888. June 4. KING, J.:—

The ground of equity put forward in this case is that the mayor and chamberlain occupy a position of trust. In arguing the case the defendants' counsel contended that the Attorney-General should be a party to the suit, since no special damage has been sustained or was likely to be sustained by one ratepayer over the

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ratepayers in general. In *Evan* v. *Corporation of Avon* (1), a case fully sustaining this position, the rule is clearly laid down that a suit against a corporation to compel the performance of a public trust should be by information of the Attorney-General, at the instance of all or some of the persons interested. If there was a particular trust in favour of particular persons, and they were too numerous for all to be made parties, one or two might then sue on behalf of themselves and the other cestuis que trust for the performance of the trust. This statement is supported by several authorities, and is recognized as expressing the principle upon which the Court acts. The force of this objection rendered the other objections which had been advanced needless. *Goodacre* v. *Ranney* (2), cited by the plaintiff's counsel on behalf of their contention that an injunction can be dissolved only upon new matter disclosed by the defendants' affidavits, was a case where the Judge in Equity dissolved an injunction granted by Mr. Justice *Weldon*, without any new relevant facts being adduced. The Chief Justice decided that if the application had been made to the Judge who granted the injunction, and had been for a rehearing, it would have been proper for the same Judge on rehearing to discharge the order. In the present case the defendants have produced affidavits showing that the question of the mayor's incompetency to serve in his dual capacity was never raised before the town council, and the defendants contend that it should be shown that the council refused to decide the question. While our statutes, as well as those of England, point out that the application to dissolve an injunction must be supported by evidence contrary to that on the strength of which the injunction was obtained, the defendant is allowed to use any technical objection which would be allowed on demurrer. Section 24 of c. 49 C. S., does not direct that the injunction can only be dissolved on sufficient new grounds disclosed

(1) 29 Beav. 144.

(2) 26 N. B. 62.

by affidavit. An application to dissolve is not an application to discharge an injunction. In *Goodacre* v. *Ramney*, the Chief Justice and *Wetmore*, J., seemed to think that there ought to be an application for a rehearing, as distinct from an application to dissolve, to the Judge who had granted the injunction. Upon the authority of the case just cited, I doubt if this application should not have been of such a kind; but treating the matter before the Court as an application for a rehearing, as well as for a dissolution, I will order that the injunction be dissolved and discharged without costs.

The plaintiff in the above case subsequently applied for a rule nisi for an information in the nature of a quo warranto calling upon the defendant John A. Chesley to show by what authority he continued and claimed to exercise the office of mayor of the city of Portland. On the return of the rule it was discharged on the attention of the Court being called to section 11 of the Incorporation Act of the town of Portland, 34 Vict. c. 11: "If any question shall arise to the qualification for office of any such chairman (mayor) or councillor, the same shall be determined by the Town Council, and the person whose qualification shall be in dispute shall be excluded from vote on such question affecting himself; and the decision of the Town Council so constituted, or of a majority of those present at their meeting, shall be final and conclusive to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removable into any Court of Law, or restrainable by the injunction of any Court of Equity." In order to make the remedy by quo warranto applicable in the case of a non-corporate office, there must be something more than mere acceptance of the office: The Queen v. Tidy, [1892] 2 Q. B. 179; it is otherwise in the case of a municipal office: *Ex parte* Gallagher, 26 N. B. 73.

Though the main question decided in the principal case has given rise to many decisions in England, Canada, and the United States, not always in harmony, the weight of authority in England, where a municipal corporation, or a body with public duties, is committing a breach of trust or exceeding the limits of its powers, and the wrong is one affecting the public generally, and not any person or class of persons in particular, is that proceedings in equity to prevent or redress the same should be in the name of the Attorney-General; and this is the uniform and settled mode of proceeding in England: Attorney-General v. Aspinall, 2 M. & C. 613; Attorney-General v. Mayor of Liverpool, 1 M. & C. 171; Attorney-General v. Mayor of Dublin, 1 Bli. N. R. 312; Attorney-General v. Corporation of Poole, 4 M. & C. 17; Attorney-General v. Wilson, 9 Sim. 30; Attorney-General v. Compton, 1 Y. & C. C. C. 416; Parr v. Attorney-General, 8 Cl. & F. 409; Attorney-General v. Lichfield, 13 Sim. 547; Attorney-General v. Norwich, 16 Sim. 225; Attorney-General v. Mayor of Wigan, 5 DeG. M. G. 52; Attorney-General v. Corporation of Birmingham, L. R. 3 Eq. 552; Attorney-General v. Cockermouth Local Board, L. R. 18 Eq. 172; Attorney-General v. Mayor, etc., of Newcastle-Upon-Tyne, 23 Q. B. D. 492; Withington Local Board

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of Health v. Corporation of Manchester, [1893] 2 Ch. 19, 27. And see Prestney v. Mayor, etc., of Colchester, 21 Ch. D. 111. The decision by Mr. Justice King in the principal case has been followed in New Brunswick by Mr. Justice Barker in Rogers v. Trustees of Bathurst School District, 1 N. B. Eq. 266. It certainly must be said that the doctrine is not recommended by considerations of convenience, and it is satisfactory to find that it is not acted upon in Ontario. In that Province the instructive case of Paterson v. Bowes, 4 Gr. 170, arose in 1853, initiating a clear departure from the preponderating English decisions, but based upon the authority of Bromley v. Smith, 1 Sim. 8.

The suit was brought by a number of residents of the City of Toronto "on behalf of themselves and all other inhabitants of the City of Toronto," to have restored to the corporation certain funds belonging to it which it was alleged had been misappropriated by the defendant, who was mayor of the city. On demurrer to the bill on the ground, *inter alia*, that the matter was only cognizable in equity on an information by the Attorney-General, Esten, V.-C., said: "The question is, whether the remedy should not have been sought by means of an information at the suit of the Attorney-General. The solution of this question has been attended with much difficulty. We have consulted all the cases cited in the course of the argument, and it cannot be denied that no case can be found in which proceedings have been had against a public corporation without the intervention of the Attorney-General; and it must equally be admitted that it would have been perfectly competent and proper for the Attorney-General to have proceeded in the present instance. The only case that has occurred which appears to afford any authority for the suit being in its present form is the case of Bromley v. Smith, 1 Sim. 8. This case was decided so long ago as 1826. It was, however, cited as a binding authority in the recent case of Winch v. The Birkenhead Railway Co., 16 Jur. 1035, and it was decided by a very distinguished Judge. In that case the inhabitants of St. Mary's parish in the borough of Stafford had had rights of common over certain waste lands within the parish. An Act of Parliament had been passed authorizing the enclosure and cultivation of these wastes, and by it the householders being parishioners within the borough, occupying houses of the yearly value of £5, or any seven of them, were empowered to make rules and regulations for the management and cultivation of the allotments, and to impose a rate on the householders in order to carry such rules and regulations into effect. A sum of £107 or thereabouts, produced by a rate imposed under the Act, had been applied by the treasurer to a purpose, which, although sanctioned by a majority of the householders, was not authorized by the Act, and the suit was instituted by some of the householders on behalf of themselves and the others in order to reclaim this sum and to prevent the misapplication of the rates in the future. The suit was founded on precisely the same principle as the present. The money, when repaid, would be applicable to the use of the householders, and would relieve them *pro tanto* from future rates. Sir John Leach decided that although the Act complained of was approved by the majority their sanction could not deprive the minority of their right to complain of it, because it was contrary to the provisions of the Act of Parliament, and that consequently some of the householders could proceed on behalf of themselves and all the others, for whose benefit the suit must be deemed to be; and that, although the Attorney-General could proceed in such a case on account of the public nature of the right, yet his presence was

not absolutely necessary for that purpose unless the whole body concurred in the abuse. After the best consideration which I have been able to give to this question, I have arrived at the conclusion that the case of Bromley v. Smith is an authority for this suit in its present shape. The only respect in which the learned counsel for the defendant attempted to distinguish the two cases was, that in Bromley v. Smith the householders were not a corporate body. But it appears to me that the only effect of this distinction is to render it necessary for the corporate body to proceed in the present case, if it were practicable. The circumstance of a corporation being concerned does not make the presence of the Attorney-General more necessary than it otherwise would be. The corporation could itself proceed without the Attorney-General; then why not the inhabitants when the corporation refuses to proceed? I think, therefore, on the authority of the case of Bromley v. Smith, though with some doubt, that the bill can be sustained in its present shape. The principle seems to be that, where a specific portion of the public as distinguished from the whole public is concerned, the proceeding may be in this form. Where the whole public is concerned, it must be represented by the Attorney-General." Spragge, V.C., said: "Upon the question whether the remedy ought not to have been sought by information at the suit of the Attorney-General, it is not denied, I believe, that the wrong complained of is so far of a public nature that the redress might have been sought in that form. In the different cases cited, arising out of the passing of the Municipal Reform Bill in England, the wrong complained of was similar in character to that alleged here, and the suits were by information. Several of the cases cited were charity cases, which clearly could be brought in no other shape. The Crown, as *parens patriæ*, having the peculiar care of charities, sues by the Crown prosecutor, the Attorney-General; and the Crown occupies the same character in regard to rights of a public nature, as of public corporate bodies, as is established by the case of the Attorney-General against the Corporation of Dublin, 1 Bli. N. R. 337. I think, therefore, that an information by the Attorney-General would lie in respect of the matters complained of in this suit; but the question still remains whether this bill is not sustainable. I think the case of Bromley v. Smith is an authority for the bill filed in this cause." This decision was prior to Evan v. Corporation of Avon, 29 Beav. 144, but when the question again came before the same Ontario Court, in Armstrong v. The Church Society, 13 Gr. 552, Mowat, V.-C., affirmed the views laid down in Paterson v. Bowes. He said "It was held fourteen years ago, in Paterson v. Bowes, that a suit would lie by any of the members of a municipal corporation to remedy an illegal application of the funds of the corporation. The judgment was by the two Vice-Chancellors, and I recollect that Chancellor Blake, who was absent from illness when the argument took place, was present when judgment was given, and intimated his concurrence therein. The judgment was acquiesced in by the defendant; and there have since been several cases of like bills, in which the decision in Paterson v. Bowes was either unquestioned at the bar, or if questioned was upheld by the Court. Its propriety was disputed before the present Chancellor in Brogdin v. The Bank of Upper Canada (13 Gr. 544), on the authority of a subsequent case of Evan v. Corporation of Avon, before the Master of the Rolls, but was maintained by the Chancellor; and his decree was affirmed by all the Judges on a re-hearing. The suit was by a ratepayer, on behalf of himself and all other ratepayers of the municipality of Port Hope; and, independently of the cases in Canada, seems fully supported by the English case of Bromley v.

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Smith, which was relied on by the Court in Paterson v. Bowes, but was not cited to the Master of the Rolls in Evan v. Corporation of Avon, and by the opinion of Lord Westbury, in the late case of the Stockport District Water Works Co. v. Mayor, etc., of Manchester, 9 Jur. N. S. 266." A glance through the Ontario cases shows that the practice, sanctioned by the decisions here quoted, has been followed and is quite uniform. See Wilkie v. Corporation of Clinton, 18 Gr. 557; Young v. Corporation of Ridgetown, 18 O. R. 140; Fleming v. City of Toronto, 20 O. R. 547; Foster v. Village of Hintonburg, 28 O. R. 221. The question has frequently arisen in the Courts of the United States, and the decisions exhibit remarkable disagreement. They are fully reviewed in Dillon Mun. Corp. (4th ed.), s. 906 *et seq.*; and at s. 922 their preponderating weight is summed up by the learned author in a number of general conclusions, agreeing essentially with the rules adopted by the Ontario cases.

On a motion to dissolve an injunction, a defendant may rely on the same objections to the bill, as would have formed ground for demurring to it: Hudson v. Maddison, 12 Sim. 416; Barnsley Canal Co. v. Twibell, 7 Beav. 31. Where the order for an injunction is irregularly obtained, a motion should be made to discharge the order, not to dissolve the injunction; as by moving to dissolve the injunction the irregularity is waived: Vipan v. Mortlock, 2 Mer. 476.

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September 1.

McCORMICK v. McCOSKERY.

Trade Name—Fraudulent use of name—Intention to deceive the public—Injunction.

A right to the use of a name to denote a place of business carried on by a particular person will be protected where it would be a fraud upon that person and the public for another person to make use of it in such a way as to deceive the public into believing that they were dealing with the person who originally used it.

The facts are fully stated in the judgment of the Court.

Argument was heard July 31 and August 1, 1888.

C. N. Skinner, Q.C., for the plaintiff.

R. J. Ritchie, S.G., for the defendant.

1888. September 1. PALMER, J.:—

This was an application for an interim injunction order to restrain the defendant from advertising his hotel by the name of the "New Victoria Hotel." The

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material facts of the case are: That Elizabeth McCoskery, the mother of the defendant, is the owner of a building on Prince William street, in the city of St. John, which has been used and occupied as an hotel ever since the time of its erection in 1878; that it was called the "Globe Hotel" until May 1st, 1883, when it was changed as hereinafter stated. In the spring of 1878, one Fowler opened an hotel on Princess street under the name of the "New Victoria Hotel," which he carried on till the December following, when he sold it out to the plaintiff, who continued the business there until May, 1883, under the name of the "New Victoria," when he leased from Mrs. McCoskery the said "Globe Hotel" premises for five years, and took possession, changed its name to the "New Victoria," and carried on business until the 16th June, 1887, when he shut it up and moved to another hotel on King street, formerly known as the "Waverley," and has carried on his hotel business there ever since under the name of the "Victoria Hotel." When the plaintiff's lease of the former premises expired he gave up possession to the owner, who put in the defendant, and he commenced the business of hotel-keeping there in May, 1888, and advertised his hotel under the name of the "New Victoria Hotel," in which advertisements, however, he gave the proper number of the house and the name of the street, and added that it was carried on under the management of himself. He also continued the name "New Victoria" in large letters on the building itself.

The plaintiff alleges that persons arriving in St. John are liable, when asking to be taken to the "Victoria Hotel" (intending to go to the hotel of the plaintiff), to be taken to the hotel of the defendant, and persons are liable to and will go to the defendant's hotel, believing it to be the plaintiff's, if the defendant is allowed to use the name of "New Victoria" for his hotel.

There is no allegation or proof of any person having been actually deceived in this respect. The question in this case is: Whether I should, under the circumstances, restrain the defendant, by an interim injunction order, from using the name "New Victoria Hotel," as

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he has done? To solve this question the first thing is to see what are the respective rights of the parties, and on this point I may say, generally, that the general idea of property or right in a word or name in the sense in which it would be applied to goods, has no existence in law. All persons have the right to use any word in the English or any other language, or to make or coin any word or combination of letters, just as they may think fit, in the same manner that they can exercise any other physical liberty or make any other matter or thing. The only limit to this is that they must not, in so doing, injure or defraud any other person or persons of their legal rights.

It has long been settled law that there is no property whatever in trademark, or the using of a particular word or mark for articles or things which a person may manufacture or sell, or make useful to the public. But a person may acquire a right to such use so that he may be able to prevent any other person from using the same, because it denotes that the articles so marked or named were manufactured by certain persons, or that the business was carried on by certain persons, and no one else can have the right to put the same mark or use the same name on his goods or in his business, and thus represent them to have been manufactured by the person who originally manufactured them; or that the business was carried on by the person who originally used that particular mark or name. That would be fraud upon the particular person who had first used the particular mark or name where his goods were sold or his business carried on. The simplest case is where a man puts his name and address on goods which he manufactures. It would be wrong for another manufacturer to put that name and address on his goods, for to do so would be to make all the world believe they were manufactured by the person whose name and address they bore. The simple question in such a case is, has the plaintiff by the appropriation of a particular mark or name, fixed in the market where his goods are sold, or his business carried on, a conviction that the goods so sold were manufactured by him or the business carried on under a

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particular name was carried on by him; and if so, and if no one else has been in the habit of using that mark or name, any other person has not the right to use that mark or name, so as to commit a fraudulent act of palming off his own goods or his business as the goods or business of the person known to have been in the habit of using it.

As long ago as the time of Lord Hardwicke, in the case of *Blanchard* v. *Hill* (1), where that learned Judge refused an injunction to prevent the defendant from making use of the Great Mogul as a stamp upon his playing cards to the prejudice of the plaintiff, upon the suggestion that the plaintiff had appropriated it to himself conformably to the charter granted to the Card Makers' Co. by King Charles I., Lord Hardwicke, in giving judgment, said: "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it. Mr. Attorney-General has mentioned a case where an action at law was brought by a cloth-worker against another of the same trade for using the same mark, and a judgment was given that the action would lie (Poph. 151). But it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design to put off bad cloths by this means, or to draw away customers from the other clothier."

This, I think, is the true foundation of the decision of the Court in all such cases. If a man has been in the habit of using a particular mark for his goods or business for a long time, during which no one else has used a similar mark, and then another person begins to use the same mark or name for his business, then it can only be with a fraudulent intent; and any fraud may be redressed in this Court whatever may be its nature, so long as it interferes with the lawful rights of the person who complains. This principle is clearly affirmed in *M'Andrew* v. *Bassett* (2).

(1) 2 Atk. 484.

(2) 33 L. J. Ch. 562.

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This is the clear law with reference to trade marks, and I think the rule of law is the same whatever subject it may be applied to, and that a person will be protected in the use of a name which he has appropriated, and by his skill rendered valuable, whether the same be personal property which may be manufactured, or is an hotel where he has built up a prosperous business. It follows that the controlling question in this case is: Was the name "New Victoria" originally intended and used to designate a building, or was it intended and used to designate an hotel business carried on by the plaintiff without reference to where it was carried on, and in which of these two ways would it be understood by the public? If the first is apparent, the use of the name by another on the same premises would be true and not calculated to deceive; if the latter, such use by the defendant was untrue and calculated to deceive.

The rights of the parties in this case may be stated thus: The defendant has the right to represent that his hotel is the same building that has been known as the New Victoria hotel, and he is carrying on hotel business therein himself. He has no right to represent or do anything whatever to make any reasonable person believe that such hotel is conducted by the plaintiff, and thereby secure customers by such deception. On the other hand, the plaintiff has a perfect right to represent that he is the same person who carried on the New Victoria hotel in the defendant's building, and that he is now carrying on the same description of business at another place, because all this is strictly true and in no way calculated to deceive any reasonable person. But he has no right to represent or do anything calculated to make a reasonable person believe that he is still carrying on the business in the same hotel building; for that would be calculated to deceive and improperly take away customers from that building which it would be properly entitled to have.

All that is proved on either side in either of these directions is, that the defendant has, in person, used the name "New Victoria"; at the same time stating that he is the manager of it himself, and also has continued the

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sign "New Victoria" on the building. It appears to me that would not justify me in drawing the conclusion that this is so conclusively proved that this would have the effect of deceiving, as suggested, as would justify me in applying the extreme remedy of granting an interim injunction order before this point can be more satisfactorily determined and decided at the hearing, when all the proof on both sides can be heard and considered. Therefore, I must decline to do so.

This will not prevent the plaintiff from proceeding with the case, and if he can make out a case at the hearing, coming up to the standard which I have endeavoured to lay down, it will then be the duty of this Court to afford him redress.

I will also reserve the question of costs until then, because I cannot before tell who may ultimately turn out to be right.

From what I have said the case will ultimately turn upon what is the effect of the use that the defendant is making of the words objected to, and which can only be arrived at by inference deducible from the facts when they are given in evidence; and therefore both parties, I think, will see that justice will be best done by both altering the connection of the use of the words, or adding other words to them in such a manner as will prevent any of the public from mistaking the one for the other.

Both parties appear to be doing a right and useful business, and both are entitled to the protection of the law to enable them to carry it on honestly, and I can see no difficulty in their so arranging it as to act honestly and fairly towards each other, without any further expense or litigation, which can only result in a great deal of expense and vexation. I, therefore, hope that the matter may be amicably arranged.

See notes to Armstrong v. Raynes, ante, p. 144.

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September 12.

THE WESTERN UNION TELEGRAPH COMPANY v. THE NEW BRUNSWICK RAILWAY COMPANY, THE CANADIAN PACIFIC RAILWAY COMPANY, AND THE ST. JOHN AND MAINE RAILWAY COMPANY.

Telegraph company—Exclusive right to construct line—Restraint of trade—Notice of agreement—Acquiescence—Unfair preference—51 Vict. c. 29, s. 240 (D.)—B. N. A. Act, s. 92, s.-s. 10 (a)—Suit by foreign corporation.

The E. & N. A. Ry. Co. were incorporated in 1864, under the laws of the Province of New Brunswick, and in 1869 owned a line of railroad from Fairville, N. B., to Vanceboro, on the boundary of the State of Maine. In that year they entered into an agreement with the plaintiffs, a company incorporated in the State of New York, giving the latter the exclusive right to erect and maintain upon the land of the railroad, lines of telegraph which should be the exclusive property of the plaintiffs. The E. & N. A. Ry. Co. agreed to transport gratis employees of the plaintiffs, and materials used by the plaintiffs in erecting and maintaining the lines, and not to transport the employees and materials of any other telegraph company at less than the usual rates. The plaintiffs were to maintain one wire for the use of the railroad, and to furnish telegraphic facilities and supplies at a number of stations on the road. The plaintiffs constructed lines of telegraph, and connected them with their system in the State of Maine. In 1878 the E. & N. A. Ry. Co.'s road was sold under a decree of the Supreme Court in Equity to the St. J. & M. Ry. Co., by whom it was run until 1883, when it was leased to the N. B. Ry. Co. for 999 years. Both of these companies had notice of the agreement, and acted upon it. In 1888 the C. P. Ry. Co. obtained running powers from the N. B. Ry. Co. over the line, and permission to construct a line of telegraph along the railroad. To prevent the construction of the line of telegraph, as being in breach of the agreement of the E. & N. A. Ry. Co. with them the plaintiffs obtained an *ex parte* injunction order, which it was now sought to dissolve.

Held, (1) that the agreement of the E. & N. A. Ry. Co. with the plaintiffs was not void as an agreement in restraint of trade, or as creating a monopoly, and being contrary to public policy.

(2) That the agreement in respect to the transportation of employees and materials was not invalid under section 240 of 51 Vict. c. 29 (D).

(3) That the plaintiffs, though incorporated in the State of New York, could validly contract with the E. & N. A. Ry. Co., and enforce the agreement by a suit brought in this country.

(4) That the agreement was not invalid under section 92, sub-section 1 *a*), of the B. N. A. Act, 1867.

(5) That the N. B. Ry. Co., having leased the road with notice of the agreement, and having acquiesced in it, were bound by it.*

* Affirmed on appeal by the Supreme Court of Canada, 17 S. C. R. 152.

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The facts in this suit are fully stated in the judgment of the Court. Argument was heard August 31 and September 1, 1888.

F. E. Barker, Q.C., for the plaintiffs.

H. H. McLean, for the defendants.

1888. September 12. TUCK, J. :—

This is an application on behalf of the New Brunswick Railway Company and the Canada Pacific Railway Company to dissolve an injunction order made by me on the 31st July last.

In the bill of complaint upon which the order was granted, it is set forth that the plaintiffs were incorporated by the laws of the State of New York; and the European and North American Railway Company for extension from St. John westward, were incorporated by the laws of the Province of New Brunswick in the year 1864. This company built a line of railway from Fairville to Vanceboro at the boundary line of the State of Maine, which line was opened for traffic in 1869.

At this time the plaintiffs were operating different lines of telegraph from St. John to different points, and the European and North American Railway Company, finding it necessary or desirable in the construction of their line of railway, and its operation and maintenance after its construction, that there should be telegraphic communication along its line, from point to point, entered into an agreement for that purpose with the plaintiffs, dated the 23rd February, 1869, whereby the railway company did grant, convey, and set over to the telegraph company, their successors and assigns, the exclusive right to erect and maintain along their line of railway, and upon the lands of the railway company, one or more lines of telegraph, and to enter upon the lands from time to time, and to erect and repair, for and during the full term of ninety-nine years. That the lines, when erected, should be the exclusive property of the telegraph company, who covenanted to maintain one telegraph wire for the use of the railway company; to

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furnish telegraph facilities in thirteen station houses, and to supply necessary message blanks and battery supplies.

The railway company on their part were to furnish light and fuel at the stations; to transmit commercial messages at usual rates; to give railway passes to employees of the telegraph company free of charge; to transport free of charge all poles and wires required in repairing, erecting, or maintaining the lines; and not to transport men and materials of any other telegraph company at less than usual local rates, nor stop its trains for any such other telegraph company at other than regular stations. That the wires to be erected should be connected with those in the city of St. John, and that St. John business should be done at the costs of the telegraph company.

If the plaintiffs should refuse to perform their covenants the indenture should cease, the railway company having given ninety days' previous notice.

This agreement was registered in the counties of St. John, Kings, Queens, Sunbury, and York.

The St. John and Maine Railway Company were incorporated by an Act of the General Assembly of New Brunswick, 41 Vict. c. 92, for the purpose of purchasing this line of railway from Fairville to Vanceboro, and did purchase it on the 31st August, 1878.

The St. John and Maine entered into possession and operated this line of road until they leased it to the defendants, the New Brunswick Railway Company, on the 21st May, 1883. This lease is for nine hundred and ninety-nine years, and was confirmed by the Parliament of Canada by 47 Vict. c. 75. The New Brunswick Railway Company, incorporated by Act of Assembly, 33 Vict. c. 49, entered into possession of this line of railway after the lease, and are still in possession. This company built a line of railway from Gibson, in the county of York, to Edmundston, in the county of Madawaska.

On the 11th August, 1875, the New Brunswick Railway Company made an agreement with the telegraph company similar in its provisions to the former agreement, to construct telegraph lines along their railway

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and its branches. This agreement is registered in the counties of York, Carleton, Victoria, and Madawaska.

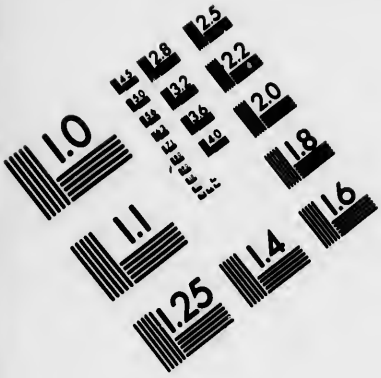
Before the 25th June, 1884, the defendants, the New Brunswick Railway Company, had acquired possession of the line of railway in New Brunswick originally owned by the New Brunswick and Canada Railway Company, intersecting the St. [illegible] and Maine at McAdam, and also the line of [illegible] Fredericton Railway Company. And, previous to this date, the plaintiffs had entered into similar agreements with these railway companies, and had used the wires erected by them under the terms of such agreements.

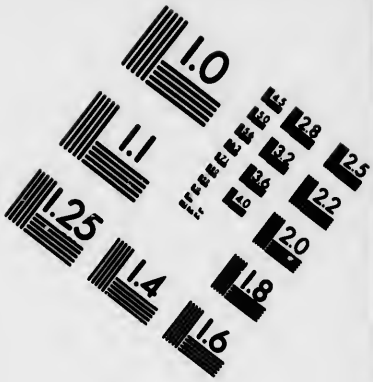
In August, 1876, when the foreclosure proceedings mentioned in the preamble of the Act incorporating the St. John and Maine railway were commenced, Egerton R. Burpee and J. Murray Kaye were appointed receivers of the railway from Fairville to Vanceboro, and operated the road until it was sold and transferred to the St. John and Maine. After the sale, and until the lease to the St. John and Maine, the road was operated under J. Murray Kaye, as manager. It is alleged that Egerton R. Burpee is a corporator of the European and North American Railway and was one of its directors, and also a director of the New Brunswick Railway.

Whilst operating the road all of the parties named kept and acted upon the agreement so made with the plaintiffs; and it was understood and agreed between the plaintiffs and the St. John and Maine, that the telegraph service should be the same as under the first named agreement.

On the 25th June, 1884, the plaintiffs and the New Brunswick Railway Company made another agreement which recognizes the contract with the St. John and Maine, and gives further facilities to the railway company to send messages beyond their lines of road to an amount not exceeding two thousand six hundred and fifty-eight dollars a year for four hundred and forty-three miles of their road, and six dollars per annum additional for each additional mile.

This agreement also provides for the transporting of poles and other telegraph materials free of charge,





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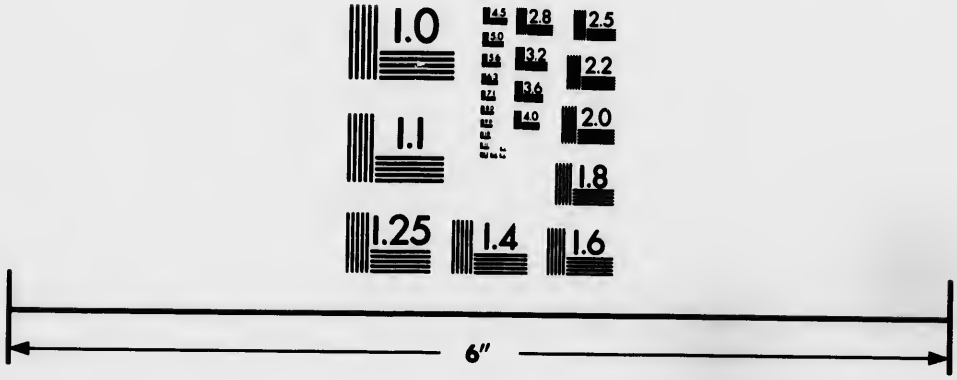

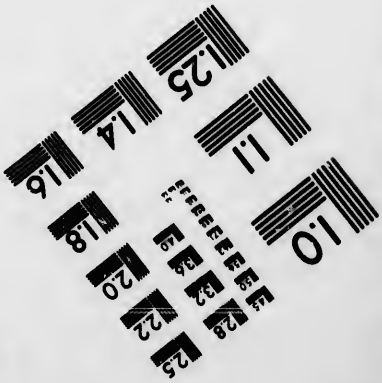

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and that the agreement of 10th August, 1875, between the telegraph company and the New Brunswick Railway, and the provisions of the agreement between the Telegraph Company and the New Brunswick and Canada, the St. John and Maine, and the Fredericton Railway companies shall be continued in force between the parties thereto respectively, during the respective terms thereof; that, among other agreements, so referred to, is that with the St. John and Maine railway, before mentioned, which confirmed the original agreement with the European and North American Railway Company for extension from St. John westward.

Since the New Brunswick Railway Company have operated the road they have enjoyed the privileges of and acted upon the original agreement, and the plaintiffs have performed their part of it.

The defendants, the Canada Pacific Railway Company, are incorporated by 35 Vict. c. 73 (D.). Under their Act they have built a railway to the Pacific, and are now constructing a line of railway, known as the Short Line, to tap the Maine Central at Mattawamkeag, and when finished they will have complete connection from St. John to Montreal.

The same persons who own a controlling interest in the Canada Pacific Railway own a controlling interest in the New Brunswick Railway, and this has been so for a period prior to the 25th June, 1884; and it is alleged that the terms of the agreement first named have for a long time been well known to the Canadian Pacific Railway Company. Sir Donald Smith is president of the New Brunswick Railway Company, and Sir George Stephen and E. R. Burpee are members of the board of directors. Sir George Stephen is president of the Canada Pacific Railway Company, and Sir Donald Smith is one of the directors.

It is also alleged in the bill of complaint that it is the intention of the Canada Pacific Railway Company or the New Brunswick Railway Company, or the two acting or co-operating together, to erect telegraph poles along and on the track of the said line of railway between Vanceboro and Fairville.

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The plaintiffs allege that under the agreement they claim exclusive right to erect and maintain along the line of the railway between Fairville and Vanceboro lines of telegraph, with as many wires as they may see fit, and that unless they are protected in the enjoyment of their rights, and the defendants are prevented and restrained from interfering with their rights, they will suffer injury and damage, for which they will be without any adequate remedy; and the damage will be entirely irreparable.

The prayer of the bill is, that the defendants may be restrained from erecting or maintaining on the said railway property between Vanceboro and Fairville, and along the line of the railway between those points, any line or lines of telegraph or telegraph wires, either on telegraph poles now erected or otherwise; and from transporting men or materials for any other telegraph company at less than usual rates, or from stopping at other than usual stations.

Affidavits of J. Percy Browne, John J. Robinson, and Robert T. Clinch, superintendent of the plaintiffs' company for New Brunswick and Nova Scotia, were also produced.

Upon the motion to dissolve the injunction, an affidavit made by Howard D. McLeod, a superintendent of the New Brunswick Railway Company, was read. He says that the New Brunswick Railway Company never made any claim on the plaintiffs' company that they were entitled to enjoy all the privileges claimed under the first named agreement; that the facts were these: When the railway company took possession of the road they continued to enjoy the telegraph service of the plaintiffs' company, the same as it had been enjoyed by the St. John and Maine Company. He says, also, that the building of telegraph lines by the Canada Pacific Railway Company will not interfere with the plaintiffs' lines, except only in so far as it interferes with the exclusive privileges claimed by the plaintiffs, and that the Canada Pacific Railway will place their telegraph lines on the opposite side of the road; that no written agreement was ever, to his knowledge, made between the

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plaintiffs and the St. John and Maine Railway Company; that he was manager of the European and North American Railway, and E. R. Burpee was never a director of that company.

A copy of the deed, dated the 31st August, 1878, from Ezekiel McLeod, barrister-at-law, made under a decretal order of the Supreme Court in Equity to the St. John and Maine Railway, was also produced.

An affidavit in reply, made by Robert T. Clinch, was read. He says that the telegraph company and the St. John and Maine continued to work on the original agreement, which was always understood to be in force between them, and adopted as the agreement between them, and was always acted on between them.

From the epitome I have given of the bill of complaint and affidavits, it appears that there is no substantial dispute as to the principal facts in the case. Mr. Howard D. McLeod, in his affidavit, denies that E. R. Burpee was ever a director of the European and North American Railway, and says that he has no knowledge of any written agreement between the plaintiffs and the St. John and Maine Railway Company. He states, also, that the [illegible]mpany never made any claim on the plaintiffs' co[illegible]ay that they were entitled to enjoy the privileges secured by the agreement with the European and North American Railway Company, but that they went on and enjoyed them without making any claim.

It is not necessary to remark upon this difference in statement because it matters not in respect to the result which statement is correct.

At the argument a number of grounds were submitted why the injunction order should be dissolved. The first, and perhaps the most important one, seeing that it has never before been put forward in this Court, is, that the agreement set out in the plaintiffs' bill of complaint, is invalid, because it is a covenant in restraint of trade, detrimental to public interest, and therefore void, on grounds of public policy. When this proposition was stated it seemed to me that the principle, that covenants in restraint of trade are bad, was not applicable to

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this case. The covenant here is, that the plaintiffs shall have the exclusive right to erect and maintain their telegraph lines over the company's railway from Fairville to Vanceboro, a distance of eighty miles in length by about sixty-six feet in width. There is nothing in the covenant to prevent another company or another individual from erecting poles and placing telegraph wires in the neighbourhood of the land at present owned and occupied by the New Brunswick Railway Company for railway purposes. Such agreement is not in general restraint of trade, for it is partial in its operation. If a covenant gave to a company the exclusive right to erect and maintain telegraph lines throughout Canada, or even the Province of New Brunswick, it would be a complete monopoly, and against the policy of law. If a trader, in good faith, enter into an agreement not to exercise his trade for a limited period of time, and at particular places or premises, such an agreement is good. But if he covenant that he will not again work at his trade or business in Canada, that agreement is bad, because it is in restraint of trade, and against public policy. In short, the principle is that when the restraint is general it is bad; when it is partial, it is good. In the present case the exclusive right to erect and maintain telegraph lines is confined to one road, over which the European and North American Railway Company had complete control.

At the time this agreement was made the European and North American Railway Company had the right to construct a telegraph line over their own railway for the purposes of their road, and to the exclusion of other people. If this is correct, then they had the power to grant the exclusive privilege to another company to build telegraph lines on this railway, which was their own property. The Canada Pacific Railway Company would not to-day have the right to erect poles and stretch telegraph wires over the railway from Fairville to Vanceboro without the leave of the New Brunswick Railway Company. This covenant is also made for a sufficient consideration, and is a reasonable one.

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The whole question of promises made in restraint of trade is most elaborately considered in *Mitchel* v. *Reynolds* (1).

In *Leather Cloth Co.* v. *Lorsont* (2), Vice-Chancellor James thus states the law: "All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and, therefore, enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the Court, is not unreasonable, having regard to the subject matter of the contract."

Now, in this case, the covenant, at the time it was made, was clearly in furtherance of public policy, and not against it. It was mutually advantageous to the contracting parties, and most beneficial to the general public. When the telegraph company placed their poles and wires along the railway track larger facilities were afforded them in the transaction of their business, and the railway company could manage their road more expeditiously and economically, and with greater safety to passengers. The plaintiffs were in a position to do the necessary work, and to offer the railway company

(1) 1 Sm. L. C. (8th ed.) 417. (2) L. R. 9 Eq. 345, 353.

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just what they required. That being so, and the consideration being a good one, the contract which granted to the plaintiffs the exclusive privilege to put up their poles and wires on the railway track was, when entered into, not an unreasonable one, since it was beneficial, not alone to the immediate parties, but to the general public. If, then, the covenant was good at the time it was made and in the general interest, it does not necessarily become bad and against public policy, because the Canada Pacific Railway Company, after a period of nineteen years of uninterrupted and mutually agreeable action under the agreement, now desire, largely in their own interest, to put up telegraph wires along the line of the New Brunswick Railway Company. The contract, being good and beneficial to the public at the time it was made, is not rendered invalid by circumstances which have since occurred. No complaint has ever been made, nor is any now made, that the service rendered by the telegraph company is insufficient; nor does it appear that increased means are required for doing telegraphic work along the line of this railway from Fairville to Vanceboro.

This agreement does not give the plaintiffs a monopoly of telegraphic business between St. John and the State of Maine. Throughout the eighty miles' length of road, the railway track is in width sixty-six feet, or thereabouts, and there is nothing to prevent other companies acquiring the right to construct telegraph lines in the immediate neighborhood of the New Brunswick Railway, and parallel with its track. In the case of the Canada Pacific Railway Company their special business is not the building of telegraph lines, although incidental to it; and it looks as if that which they are now seeking is rather for their own convenience than the interest of the public.

Questions arising out of promises said to be in restraint of trade are discussed in *Elves* v. *Crofts* (3); *Jones* v. *Lees* (4); *Mumford et al.* v. *Gething* (5); *Mallan* v. *May* (6). In this case, at p. 665, Parke, B., says:

(3) 10 C. B. 241.
(4) 1 H. & N. 189.
(5) 7 C. B., N. S. 305.
(6) 11 M. & W. 653.

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"It is for the Court to determine whether the contract be a fair and reasonable one or not; and the test appears to be, whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided." In *Whittaker* v. *Howe* (7), "an agreement by a solicitor, for valuable consideration, not to practice as solicitor in any part of Great Britain for twenty years, was held valid." In *Wiggins Ferry Co.* v. *Chicago and Alton Railroad Co.* (8), Norton, J., in delivering judgment, says: "The only element of restraint of trade to be found in the obligation of defendant is, that it will never employ any other ferry but the Wiggins ferry to transport freight from the Illinois shore, opposite the city of St. Louis, or sent to it from said city. This restraint is not general as to space, but only partial and special, and it is only when a contract is granted for general restraint of trade that it will be held illegal and void; but it is otherwise if the restraint be partial and reasonable."

This question is also considered in Story Eq. Jurisprudence, s. 292.

In support of the contention that this agreement is in restraint of trade and contrary to public policy, a number of cases were cited at the argument, from reports of decisions in several Courts in the United States, and these seem to bear directly upon the point under discussion.

McCrary, C.J., in giving judgment in *Western Union Telegraph Co.* v. *Burlington and South-western Railway Co.* (9), says: "In our opinion it is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing lines of telegraphic communication along its right of way. The purpose of such contracts is very plainly to cripple and prevent competition, and they are therefore void, as being in restraint of trade and contrary to public policy."

(7) 3 Beav. 383.

(8) 39 Am. Rep. 523.

(9) 11 Fed. Rep. 1.

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In *Western Union Telegraph Co.* v. *St. Joseph and Western Railway Co.* (10), where a contract gave the plaintiffs the exclusive privilege of constructing and operating a line of telegraph along the line of the defendants' railway, the same Chief Justice says: "I have little doubt that the clause referred to is void; and should any telegraph company desire to erect another line along the railroad, I do not think the plaintiff could be heard to object."

In *Western Union Telegraph Co.* v. *American Union Telegraph Co.* (11), Crawford, J., in referring to a contract like the one in this case, says: "Such contracts are not favored by the law; they are against the public policy, because they tend to create monopolies, and are in general restraint of trade." Several other cases, chiefly from southern and western Courts, were cited, where the same doctrine was held. The authorities are collected in Redfield on Railways (12), and in Greenhood on Public Policy, 674.

No reasons are given by the Judges for the principle laid down, beyond saying that such contracts are made and entered into to cripple and prevent competition, and tend to create monopolies. But, after all, do they create monopolies; and are they in such general restraint of trade as to be void in law? In my opinion they are not. As I have already said, at the time this agreement in the present case was made, it tended to facilitate business, to ensure the safe running of trains, and to promote the public interest. In 1869, when this covenant was made, there was nothing to prevent another company erecting telegraph lines parallel to those put up by the plaintiffs on the roadbed of the railway company; nor do I see any distinction in respect to the legal rights, between an agreement of this kind, made with a private person, and that made with a public corporation. No monopoly has been thereby created, nor is it in general restraint of trade.

(10) 3 Fed. Rep. 430.

(11) 38 Am. Rep. 781.

(12) 6th ed., p. 422.

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In a note to *Western Union Telegraph Co.* v. *Burlington and South-western Railway Co.*, the editor says: "The only question is, does a contract by a railway company to give the exclusive use of its bed to a telegraph company give the telegraph company a monopoly in that section of the country? If an opposition company could run its wires on a parallel line, without incurring an expense which would be prohibitive, it is hard to see why a railway company that makes a contract of this kind should not be bound by it." It seems to me that this reasoning is sound, and hard to answer.

Although Chief Justice McCrary, and other Judges affirm that the principle that such contracts are void is well established by Courts in the United States, and whilst the opinions of their Judges are always treated with great respect and consideration in our Courts, still, I can find no English or Canadian decision where a similar doctrine is laid down; and with my present view of the law, I am not prepared to follow the cases which have been cited.

The plaintiffs' counsel endeavours to distinguish the cases under consideration from those cited by the defendants, contending that they arose out of contract—this one out of easement. I cannot agree with this contention. Whatever rights the plaintiffs have are given by the covenant, whereby they obtain a license to erect poles and establish telegraph lines on the company's railway. No easement is created by the agreement. It lacks one of the essential qualities mentioned by Mr. Washburn in his work on Easements, namely, two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests. Here there is only one—the land over which the telegraph lines pass by right of license from the railway company. Again, this privilege is not imposed for the benefit of corporate property.

Next, it is urged that this agreement is void under section 240 of The Railway Act, 51 Vict. c. 29, passed by the Parliament of Canada in 1888, which provides that no company shall make or give any undue or unreasonable preference or advantage to or in favour of any par-

ticular person or company, or any particular description of traffic in any respect whatsoever. As this agreement prevents the New Brunswick Railway Company from carrying poles for another railway company on equal terms, it gives an undue preference, and is therefore void. This section, it seems to me, does not apply to the plaintiffs' agreement. It refers to the traffic arrangements between different railway companies, and was never intended to apply to agreements such as that made with the plaintiffs in 1869. Section 90 (sub-section (m)) provides that the company may construct or acquire electric telegraph and telephone lines for the purposes of its undertaking; and, therefore, say the defendants, the New Brunswick Railway Company has the right to construct a telegraph line on its roadbed from Fairville to Vanceboro. But this section does not apply to the New Brunswick Railway Company so as to enable them to break their contract. It is not the New Brunswick Railway Company which is seeking to establish telegraph lines. The Canada Pacific Railway Company is seeking to construct a telegraph line over the New Brunswick Railway Company's r[illegible]

Further, it is put forward that this contract is void, because the telegraph company, by its Act of incorporation, is only authorized to carry on a particular business in the United States, and it exceeds its powers if it carries on a similar business out of that country. But a foreign corporation may enter into a contract in this country, and seek to enforce the performance of it by suit. No reason has been given why the Western Union Telegraph Company may not establish and operate lines outside of the United States. There are some cases in the Upper Canadian Courts, more particularly *Genesee Mutual Insurance Co.* v. *Westman* (13), which seem to decide that a foreign corporation cannot transfer the exercise of corporate powers from one country to another. Other cases which bear upon this subject are the *Bank of Montreal* v. *Bethune* (14), decided in 1835,

(13) 8 U. C. Q. B. 487.

(14) Rob. & Jos. Dig. 783.

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and *Union Rubber Co.* v. *Hibbard* (15). From a careful examination of these cases, I incline to think that the decisions were only meant to apply to the Acts of incorporation then under consideration. However that may be, I find in Lindley on Partnership (vol. 2, p. 1484, appendix), the following: "Notwithstanding some Canadian decisions to the contrary, it is conceived that a foreign corporation can sue in this country on all contracts entered into with it in this country, provided such contracts are warranted by the constitution of the corporation, and are not illegal by English law. The Canadian decisions are based on the theory, that as no state can validly authorize a body corporate to transact business out of its own territory, no corporation can sue in a foreign country on a contract entered into there. But the true question is, not whether one state can legally grant powers of contracting, etc., in another state, but to what extent does one state recognize the acts of another? The right of a foreign corporation to sue in this country is conferred by English law, and not by the law of the state creating the corporation. The right of a corporation to sue in a foreign country, as well as its right to contract in a foreign country, are both based, not on the law of the state creating the body corporate, but on the extent to which the foreign country chooses to recognize that law." Then the writer adds: "It is curious, however, that this point should never have been disputed or decided in this country."

This statement of the law commends itself to my judgment, and I prefer to follow it, rather than what is stated in the Upper Canadian decisions before mentioned.

In *The City of Berne* v. *The Bank of England* (16) the law is thus laid down: "It is thought that any association or body capable of suing and being sued in the Courts of its own country (provided the Government of that country be recognized by and be at peace with this country) can sue and be sued here."

(15) 6 U. C. C. P. 77.

(16) 9 Ves. 347.

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Erle, C.J., in *Brantly* v. *South Eastern Railway Co.* (17), says: "A foreign company has a locus standi here; and so, no doubt, has an English company in a foreign country. We make no enquiry as to the constitution of a foreign company, any more than we should into the generation of an individual suing here." In "*The Connecticut and Passumpsic Rivers Ry.* v. *Comstock*, decided in 1870 in Lower Canada, it is said that a foreign corporation, legally incorporated, may validly enter into contracts in that Province, and sue in the Courts of the Province the persons with whom they contract, to compel them to fulfil their obligations. And in *Barned's Banking Co.* v. *Reynolds* (18), decided in Upper Canada in 1878, it was said incidentally that as a matter of course the plaintiff, an English company, had a right to sue there.

If, then, this contract is legal by the laws of this country, I think it is not beyond the statutory powers of the corporation.

Then, again, it is said that this agreement is invalid, as being contrary to The British North America Act, s. 92, s.-s. 10 (letter A). The argument is that the plaintiffs have no right to make a contract for the construction of telegraph lines to connect with similar lines in the United States. This section defines the exclusive powers of Provincial Legislatures, and letter A, subsection 10, excepts certain local works and undertakings. It seems to me that no legislation was necessary to enable the plaintiffs to make this contract, and it is not affected by The British North America Act. The European and North America Railway Company had a right to build their railroad from Fairville to Vanceboro, on the boundary line of the United States, and, therefore, they were authorized to enter into contracts for the erection of telegraph lines, which, according to their view, would facilitate the working of their railway. The whole work had to be done on their own land, over which they had complete control, and no further legislation was necessary.

(17) 12 C. B. N. S. 70.

(18) 3 A. R. 371.

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Next, it is urged that this agreement is not binding on the New Brunswick Railway Company, because it is not in writing, as required by the Statute of Frauds, nor is it under the corporate seal of the company. Further, it is said that the agreement, being with the E. & N. American Railway Company, their successors and assigns are not bound, as they are not named.

The admitted facts show that there is an agreement in writing with the E. & N. A. Ry. Company, which is referred to in a supplementary agreement, made between the plaintiffs and the New Brunswick Railway Company, covering other branches of their railway. Besides, there was a verbal agreement, between the plaintiffs and the St. John and Maine Railway Company, that the telegraph service should be and continue the same as it had been under the original agreement. It is clear from the undisputed allegations in the bill of complaint, that all of the railway companies which have managed and controlled this railway, including also the receivers, from 1869 till the present time, have acted upon this agreement. Since the New Brunswick Railway Company have gone into possession of and operated this road, they have enjoyed all the privileges of this agreement. They have acquiesced in and acted upon it. By their own acts, they have become a party to the contract, and are bound by its provisions. It is not necessary that the president should have signed his name or affixed his seal in order to make the company liable. A corporation is bound by acquiescence, and the New Brunswick Railway Company are estopped by their acts, and the agreement of their lessor, from saying that there is no writing under a corporate seal.

In *Tulk* v. *Moxhay* (19), there was a covenant by the purchaser of a piece of land, that he would keep and maintain a piece of land named, and a garden, in its then form, and in sufficient and proper repair as a pleasure ground; and Lord Cottenham held, "the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land

(19) 2 Ph. 774.

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in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day at a greater price, in consideration of the assignee being allowed to escape from the liability, which he had himself undertaken." So I say here, that it would be most inequitable if the New Brunswick Railway Company, who took a lease of this road, with a full knowledge of this contract, should be able after having taken possession of the railway, and for years acquiesced in the agreement, to say successfully that it is not binding on them.

In *Crook* v. *Corporation of Seaford* (20), the Court held that though the agreement was not under seal, the corporation were bound by acquiescence, and must perform the agreement to grant a lease. *Somerset Coal Canal Co.* v. *Harcourt* (21), may be cited as authority that, if necessary, the Court would direct a conveyance to be made by the New Brunswick Railway Company. In *Western* v. *MacDermott* (22), it was held that whether the covenants did or did not run with the land, a purchaser with notice of the covenants would be bound by them in Equity. And *McLean* v. *McKay* (23), follows *Tulk* v. *Moxhay*.

This case differs from *Ackroyd* v. *Smith* (24). That case was cited as an authority, that it is not competent to a vendor to create rights unconnected with the use or enjoyment of the land, and that the owner of land cannot render it subject to a new species of burthen, so as to bind it in the hands of an assignee. Here, on the contrary, the right given is connected with the use and enjoyment of the land, and is appurtenant to it.

It was claimed by the plaintiffs, in the course of the argument, that this covenant is in the nature of an easement. I incline to agree with this view, but think to

(20) L. R. 6 Ch. 551.
(21) 24 Beav. 571.
(22) L. R. 2 Ch. 72.
(23) L. R. 5 P. C. 327.
(24) 10 C. B. 164.

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so hold is not necessary to a decision of this case. In the *Trustees of the Village of Watertown* v. *Cowen* (25), Chancellor Walworth held that a covenant not to erect a building on a common or public square owned by the grantor, in front of the premises, is a covenant running with the land, and passes to a subsequent grantee of the premises, without any special assignment of the covenant, and that it was a grant of a privilege or easement which passed under the conveyance. This matter is much discussed in Gale on Easements, 85-87, and *Rowbotham* v. *Wilson* (26).

A distinct ground was taken by the applicants, that the mere use by the New Brunswick Railway Company of the telegraph facilities on the premises they purchased does not show an intention to become a party to the agreement between the E. & N. A. Railway Company and the plaintiffs. I have already considered this. I am of opinion that all the facts show conclusively that the New Brunswick Railway Company not only intended, but actually did become a party to the agreement.

Another contention of the applicants is, that by the agreement between the European and North American Railway Company and the plaintiffs, they do not bind their assigns. The covenant to give exclusive rights is from the railway company only, and the words successors and assigns are not used. The owner of land cannot render it subject to loose species of burden, so as to bind it in the hands of assigns. That the covenant of exclusion did not pass any interest in the land, as such an interest is not necessary to plaintiffs to the full enjoyment of their rights; that the covenant does not run with the land, and no easement was created by the agreement. On the contrary, the plaintiffs contend that this is not a covenant, it is a grant; and that an absolute easement is created by the grant. I cannot agree with the plaintiffs' contention that this grant or covenant creates an absolute easement. It bears analogy to an easement, but no easement is thereby created. Whether a covenant or a grant, it has imposed an equitable

(25) 4 Paige 514. (26) 8 H. L. C. 348.

burden upon the land, and the New Brunswick Railway Company entered into possession of the property subject to this burden. In *London and South Western Railway Co.* v. *Gomm* (27), the Master of the Rolls says, referring to *Tulk* v. *Moxhay*: "Of course that authority would be binding upon us, if we did not agree to it, but I most cordially accede to it." In this case the Master of the Rolls also discusses the question now being considered. Here, however, the New Brunswick Railway Company have acquired the property subject to certain covenants of which they have taken advantage and have enjoyed. As lessees, they are bound by all the covenants of the lessors. Even if they took the property without notice, they were put upon inquiry, and were fixed with constructive notice of the covenants. But, in fact, the New Brunswick Railway Company took possession of the property, with notice of this agreement, and for years have acquiesced in it.

It is insisted by the applicants, that by the sale of the E. & North American Railway to the St. John and Maine Railway Company, by a decree of the Equity Court, the St. John and Maine Company acquired all the mortgagees' rights. The mortgage having been executed before the agreement, the purchasers are not bound to give exclusive rights.

Now, the property and rights conveyed by the mortgage were all the rights which then existed, and also the after-acquired rights, including whatever was necessary to continue, hold, and operate the line of railway, together with all privileges and franchises. Among these was the right to build a line of telegraph, as incident to the power of operating a railway. When the right was used, and the privileges were acquired by the mortgagors under the contract, they enured to the benefit of the mortgagees. By the barrister's conveyance, the St. John and Maine received and took all the property mortgaged, and "all other rights and things of whatsoever name or nature, necessary to build, continue, hold, or operate the said line of railway, and all and singular,

(27) 20 Ch. D. 583.

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WESTERN UNION TELEGRAPH COMPANY v. NEW BRUNSWICK RAILWAY COMPANY.

Tuck, J.

the rights, liberties, privileges, easements," etc. By the deed and under chapter 49, s. 108, Consol. Statutes there would vest in the purchasers the right which the European and North American Railway Company had acquired from the telegraph company, to have their telegraph service for the operation of the road, and this would impose upon the railway company the corresponding burden of giving to the telegraph company what they had received from the mortgagees. Even admitting that this burden was put upon the land, after the mortgage, yet when the receivers, Kaye and Burpee, took possession for the mortgagees, they did not repudiate the contract, but for years accepted all the privileges under it, and on their part discharged the liabilities imposed upon the railway company by the contract. They are equally bound, whether the right passed under the mortgage or the burden was adopted by them.

If, under the Act of incorporation of the St. John and Maine, the right of the plaintiffs was altogether gone, it was competent for them to renew the agreement. It is not denied that a parol agreement was made and acted upon between the parties, from the 1st September, 1878, when the St. John and Maine took control, until the 1st May, 1883, when the New Brunswick Railway Company took possession under their lease. And that this parol agreement was confirmed by the New Brunswick Railway Company by the supplementary agreement of 1884 is not disputed. In fact, they admit, as has been stated more than once, that they had notice, and in my opinion are bound by the terms of the agreement.

Lastly, it is argued by counsel for the applicants that there are no circumstances in this suit to cause the Court to grant an injunction order.

I think that if the Canada Pacific Railway Company be permitted to construct and maintain their telegraph lines on the New Brunswick Railway, as they propose to do, irremediable damage would be done the plaintiffs. Besides, it would be difficult, if not impossible, to compute the damage. The plaintiffs' telegraph lines extend over a large part of the territory of the United States, and they have cable connections with

Europe. If another line was established, as proposed, I fail to see how a correct account can be kept of the daily loss which must accrue to the plaintiffs. The tolls received, for which the Canada Pacific Railway Company should account, could not be accurately determined. If the injunction order were dissolved, and it should ultimately be determined that the plaintiffs are right in their contention, the damage they would sustain in their business could not be estimated by the mere money loss. Admitting that the plaintiffs are right, it does seem to me that the defendants ought to be restrained by an order out of this Court.

Then there is another element which is always to be considered in cases of this kind, and that is, the damage would be continuous, and there is no adequate remedy at law. Trespass might be brought every day, and the plaintiffs ought not to be driven to such a remedy, which would be attended with immense expense, and be wholly inadequate. It may be urged, that the Canada Pacific Railway Company will suffer great loss if the result shows that an injunction order ought not to have been granted. But looking at the matter from that standpoint, and weighing it carefully in my mind, I have come to the conclusion that upon a question of convenience and inconvenience, and of probable loss, the balance is in favour of continuing the order. For these reasons, the application to dissolve the injunction must be refused and with costs.

1888.

December 29.

ALWARD ET AL. v. KILLAM.

Practice—Married woman—Suit relating to separate estate—Parties—Next friend—Joinder of husband as co-plaintiff—Demurrer.

Where a husband is made a plaintiff with his wife in a suit relating to her separate estate, the objection that the suit should have been brought by the wife's next friend may be taken by demurrer.

Isabella Alward, wife of Mark Alward, was the owner in fee simple of a piece of land situate in Petitcodiac, Westmorland county. In 1885 they mortgaged the property to James Aiton to secure the sum of $800. In July, 1886, they entered into an agreement with the defendant for the sale of the property to him for $1,200, part of which was to be applied by them in paying off the mortgage. Subsequently, at the request of the defendant they conveyed the property to John M. Brown, a relative of the defendant. It was also agreed that the defendant should discharge the mortgage and that the balance only of the purchase money should be paid to Alward and his wife. Brown, after the conveyance of the property to him, went into possession as the agent of the defendant. The defendant made default in paying the balance of the purchase money to Alward and his wife, and this suit was brought by them for a decree for specific performance by the defendant of his part of the agreement. The defendant demurred to the bill on the ground, inter alia, that the subject matter of the suit was the separate property of the female plaintiff, and that the suit should have been brought by her next friend.

W. B. Chandler, in support of demurrer.

D. L. Hanington, Q.C., *contra*.

1888. December 29. PALMER, J. :—

This case raises, to the profession, a principle which is most important. It is a principle which is pretty well understood among Equity lawyers in other countries;

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but here it does not appear to be so well understood. I will, therefore, try, if I can, to state the way in which it strikes my mind, and what the principle is on which I shall act until I am ordered to do otherwise by some Court of Appeal.

The action is one in which the wife's rights are more or less involved. It is brought in the name of the husband and wife. On the principles of Equity, as I understand them, such an action can be for no more than the marital rights of the husband, and it is not the way to bring an action in this Court in respect of separate rights of the wife. Whenever a claim is made out to be only as regards the separate rights of the wife, then the action must be brought by herself alone, by her next friend, and in no other way is she a party to such an action at all.

There is another rule in this Court, that is, that a mere want of parties is no ground for demurrer. If a party who brings a suit has no right to relief, from being a party to it without any interest, it is a ground of demurrer; and therefore in deciding a question of this kind these two principles must be kept in mind.

It is perfectly clear to my mind that this action is for a claim by the plaintiff's wife against the defendant, that is to say, this property cannot be conveyed to the plaintiff here. At all events, the wife ought to have her separate rights and interests preserved in it. Any lawyer can readily see that she is necessarily a party to it. Therefore it is not a question of mere want of parties, but that the plaintiff has no right to bring the suit. He cannot bring the suit to enable the wife to acquire her own separate property. This is, therefore, not a want of parties. It is a want of equity in the plaintiff. The plaintiff has no right to enforce the separate rights of his wife. Therefore I think the case fails on demurrer, and I will have to allow the demurrer. The result will be that the plaintiff will have to amend on the usual terms. The plaintiff may amend his bill in such way as counsel may advise on payment of costs of the demurrer.

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The proposition laid down in the principal case, that husband and wife ought not to join as co-plaintiffs in a suit relating to the wife's separate property, but that the suit must be by the wife's next friend, is abundantly supported by authority: Owden v. Campbell, 8 Sim. 551; Sigel v. Phelps, 7 Sim. 239; Davis v. Prout, 7 Beav. 288; Roberts v. Evans, 7 Ch. D. 830. The husband, however, should be joined in the suit as a defendant: Wake v. Parker, 2 Keen, 59; England v. Downs, 1 Beav. 96; Thorby v. Yeats, 1 Y. & C. C. C. 438; Davis v. Prout, *supra*; Roberts v. Evans, *supra*; unless he has no adverse interest, when he may be a co-plaintiff: Meddowcroft v. Campbell, 13 Beav. 184; Beardmore v. Gregory, 2 H. & M. 491; Davis v. Prout, *supra*. It is also well settled that the objection that the suit should be by the wife's next friend, and that the husband should not be a co-plaintiff, can be taken by demurrer: Wake v. Parker, *supra*; Jessop v. McLean, 15 Gr. 489; Blackburn v. McKinley, 3 Chy. Ch. 65. If the objection is taken by demurrer the Court will give leave to amend, by striking out the name of the husband as plaintiff, and making him a defendant, and by inserting the name of another person as next friend: England v. Downs, *supra*; Wake v. Parker, *supra*; Roberts v. Evans, *supra*. The next friend must be a person of substance: Hind v. Whitmore, 2 K. & J. 458; Stevens v. Thompson, 38 Ch. D. 317; and see further notes to Robertson v. Appleby, *post*, p. 509. The provisions of The Married Women's Property Act, 58 Vict. c. 24, enabling a married woman to sue in all respects as if she were a *feme sole*, do not affect her right to sue by her next friend: Cox v. Bennett, [1891] 1 Ch. 623; Stevens v. Thompson, *supra*. By this Act, s. 3, s.-s. 2, "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding, shall be her separate property, and any damages or costs recovered against her in any such action or proceeding, shall be payable out of her separate property and not otherwise." By section 13, "Every woman married before or after commencement of this Act, shall have in her own name, against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonging to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any proceeding under this section, it shall be sufficient to allege such property to be her property." The Act is retrospective as to procedure, and would therefore seem to apply to a married woman, though married before the commencement of the Act, 1st January, 1896, to enable her to sue or be sued alone after that date, whether in respect of a cause of action arising before or after that date: James v. Barraud, 49 L. T. N. S. 300; Gloucestershire Banking Co. v. Phillips, 12 Q. B. D. 533; Weldon v. Winslow, 13 Q. B. D. 784; Weldon v. De Bathe, 14 Q. B. D. 339; Lowe v. Fox, 15 Q. B. D. 667; and see Walsh v. Nugent, 1 N. B. Eq. 335. The undertaking for damages of a married woman, on an application for an interlocutory injunction, must be accepted, though it is illusory by reason of her not having any separate estate: Re Prynne, 53 L. T. 465; Pike v. Cave, [1893] W. N. 91; 68 L. T. 651.

JOHNSON v. SCRIBNER ET AL.

1889.
June 6.

Statute of Frauds—Pleading—Raising defence at hearing—Specific performance—Agreement—Conflicting evidence—Part performance—Possession—Repairs—Lien—Costs where specific performance refused, but other relief granted.

In a suit for specific performance of an agreement for sale and purchase of a leasehold interest in land, it is not necessary that the defendant plead the Statute of Frauds in an answer denying the agreement in order to set up the defence at the hearing.

Where in a suit for specific performance of an alleged agreement to assign a leasehold interest in land with building thereon, in consideration of an indebtedness to the plaintiff by the defendant for repairs to the building, it appeared that the plaintiff went into possession, collected the rents, and made repairs, but that these acts were consistent with the evidence of the defendant that the plaintiff was given the management of the property for the purpose of paying defendant's indebtedness to him, the Court refused to grant specific performance, but decreed that the plaintiff was entitled to a lien on the property for the amount of the debt and any money properly expended in respect of the property.

Under the above circumstances neither party was allowed costs of suit.

The facts fully appear in the judgment of the Court.

Argument was heard May 16th, 1889.

W. B. Wallace, for the plaintiff.

S. Alward, and *J. F. Ashe*, for the defendants.

1889. June 6. KING, J.:—

This is a bill filed for the specific performance of an alleged agreement to assign and convey a leasehold interest in certain premises on Haymarket Square, in the city of Portland, now the city of St. John. The plaintiff alleges that in the spring of 1885 he did certain repairs to the amount of $186.33 on the buildings on the premises at the request of Charles B. Scribner, the defendant, who was then the assignee of the lease; that Scribner was unable to pay him, and offered to sell the property to him for $280, and that the plaintiff accepted the offer. This was about the fifteenth of October, 1885. The lower flat was at the time occupied by Robert Nixon as a [illegible]elling and store. The plaintiff further

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alleges that Scribner went with him to Nixon and told him about the sale, and Nixon then attorned to the plaintiff. The plaintiff collected the rent from Nixon for two years. The plaintiff also let the upper flat to his brother, and, at the request of the tenants, made certain repairs upon the building That Scribner, at the time of the sale, handed to him what papers he had in the way of title deeds, and that they were subsequently lost; that by the agreement the plaintiff's account for the repairs was to go upon the purchase money; that he was to deduct from the purchase money the amount of any back charges for taxes, rates, and rent; and that before November, 1887, the plaintiff had paid the full amount of the purchase money, but had not applied for a conveyance. In December, 1887, Scribner conveyed and assigned his interest in the property to the defendant Nixon. Scribner denied the agreement, and contended that plaintiff's possession and management of the property were by virtue of an agreement that he should hold possession and collect the rents to secure the payment of the debt due him. It was contended by Mr. Wallace, for the plaintiff, that the defendants not having set up the Statute of Frauds in their answer, could not rely upon it at the hearing, and he cited *Heys* v. *Astley* (1), and the language of Knight Bruce, L.J., disapproving of the contrary proposition laid down by the Lord Chancellor in *Ridgway* v. *Wharton* (2), but this latter was, as stated, a decision of Lord Chancellor Cranworth, and I do not think that it is to be considered as overruled by *Heys* v. *Astley*; indeed, in the latter case, L. J. Turner expressly refrains from expressing an opinion one way or the other as to *Ridgway* v. *Wharton*. *Ridgway* v. *Wharton* is consistent with the rule as laid down by Sir William Grant in *Spurrier* v. *Fitzgerald* (3), and by V.C. Wigram in *Beatson* v. *Nicholson* (4). So then the Statute of Frauds may be set up.

The next question is as to whether the plaintiff has shown part performance sufficient to take the case out

(1) 4 DeG. J. & S. 34.
(2) 3 DeG. M. & G. 677.
(3) 6 Ves. 548.
(4) 6 Jur. 620.

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of the Statute. It is laid down in *Maddison* v. *Alderson* (5), at page 479, cited at the argument by both the learned counsel, that the authorities show that all the acts relied on as part performance must be unequivocally, and in their own nature, referable to some such agreement as that sought to be enforced or maintained in the action. Wigram, V.C., in *Dale* v. *Hamilton* (6), says: "It is in general of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in, if there were no contract. Of this, a common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that some contract has taken place between the litigant parties; and it has, therefore, on that specific ground, been admitted to be an act of part-performance."

Here the plaintiff is shown to be in the possession of the property for two years, from the middle of October, 1885, until November, 1887, leasing it, collecting rents, giving receipts in his own name to the tenants, changing the tenants, making repairs as they are required, making application to the water commissioners as owner, and in fact doing all such acts as the owner would do or be likely to do, and during all that time Scribner, so far as appears to me, has entirely withdrawn from all interference with or management of the property. We are from all this reasonably to presume that the plaintiff's possession was by virtue of some contract with Scribner, the legal owner. The question then is, what was the nature of such contract? The plaintiff says that the contract was one of purchase, and if he proves a parol contract of purchase the acts that have been referred to would amount to sufficient part performance of such contract to take it out of the Statute of Frauds. The plaintiff's case, as already stated,

(5) 8 App. Cas. 467.

(6) 5 Hare, 381.

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is that Scribner about the 15th of October, 1885, sold him the property by parol agreement; that the price was to be $280, and that plaintiff's bill for repairs, amounting to $186.33, was to go toward the purchase money, and that the plaintiff was to pay all back charges against the place and deduct these from the purchase money, paying Scribner any balance. Scribner, on the other hand, says that the contract was that the plaintiff was to go into possession and collect the rents and generally control and manage the place until he, the plaintiff, could from the rents repay himself the amount due him for repairs. He also says that such further repairs as would be required were to be made by plaintiff. On page 54 of the evidence he says: "I told Mr. Johnson he could do the repairs." Which of those accounts is to be taken as correct? The positive testimony on the plaintiff's behalf is, first, that of himself, and he swears to the contract as set out in the bill; second, of Pierce, who swears that Scribner told him he had sold the property to the plaintiff; third, of Dibblee, who swears to a conversation between Scribner and the plaintiff relating to it; fourth, of Robert Johnson, who swears to what Scribner said when the delivery of possession took place; fifth, of Andrew Johnson, as to the terms of the bargain, as stated to have been heard by him. There is also evidence as to Nixon's admissions, which only become material when once the contract is established, and become material then for the purpose of binding Nixon. Thus, Herrington swears that Nixon said the plaintiff had bought; William Crossin's and Alexander Johnson's testimony is to the same effect. On the other hand, I have said there is the direct evidence of Scribner, who swears that the agreement was, as was in substance stated, that Johnson was to go into possession, collect the rents, and, out of them, pay the amount due him. Nixon gives the same statement of it, and, thirdly, there is the evidence of Mabee, who says that in 1886 the plaintiff told him that he only held the property for his claim against it.

In support of the plaintiff's view of the case, and as a circumstance of corroboration, there is the fact

that it is admitted that the plaintiff and Scribner were negotiating for a sale, and, according to Scribner, the plaintiff was willing to give $280, the amount he says he bought it for, while Scribner wanted $20 more. Then there is the fact that afterwards the plaintiff went into possession and collected the rents as already described. This would be, of itself, consistent with either view. The fact, however, that Johnson gave receipts in his own name, without reference to Scribner, seems to lead to the conclusion that Johnson, at all events, acted as though he were the real owner; and, corroborative of that, further, would be the fact that Scribner does not appear to have been consulted in any way, or to have taken any part in the management of the property thereafter. On the other hand, there are circumstances making the other way. We are to look at Scribner's action, and it is somewhat difficult to suppose that if Scribner sold to Johnson for $280, out of which Johnson was to repay himself his bill of $186 for repairs, and out of which there was to be deducted any back charges, that Scribner should not in some way have applied for the balance, or in some way have sought to find out from Johnson what he was to get out of the property. His silence for two years is rather inexplicable with the idea that he thought that he had made a sale of the property; while, if Johnson was in for the purpose of collecting the rents, and out of it pay his own bill and all incidental repairs, it might reasonably perhaps be that Scribner's silence would be susceptible of a more rational explanation. Then it appears that after the alleged sale, Scribner had some negotiations with Mr. Mabee respecting a sale, and we have Mr. Mabee's testimony that Johnson told him that he held the place for the purpose of repaying himself the charges which he had against it. It appears from Johnson's statement that he knew of Mabee's seeking to purchase the property, and that this was after the sale which he says was made to him; because he says, when asked the question, "Did you have any conversation with Scribner in the presence of Fred Johnson with regard to a person by the name of Mabee, about Mabee offering to buy it?"

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he said, "Yes, Scribner told me one evening, or morning, he came over, sometime after I had purchased, that Mabee would give him $300 for it." "What did you say to him?" "I asked him if he was going back on me in that way, and he said he was not." On the other hand, as regards Mabee's testimony there is this observation to be made, that if Mabee states entirely what took place, it is difficult to see why Mabee did not go on and complete the purchase, if Johnson merely told him that he had held it for the repairs he put on it, and the forty dollars he paid for getting the water put into the premises.

I feel there is great difficulty in deciding the matter, and the evidence and the circumstances making one way or the other are so evenly balanced that on the whole I have come to this conclusion that, without for a moment thinking, or without stating or concluding that Johnson has stated what is false, I think that the onus being upon him, and the circumstances and testimony being conflicting, and the circumstances being so evenly balanced, that the plaintiff, upon whom the onus rests, has not sufficiently given preponderating testimony to make out the case which he seeks to set up.

Then there arises a question upon the case that is set up by the defendant. It seems to me to disclose a state of facts which gives to the plaintiff an equitable interest in the possession, and I come to the conclusion that if there was not a contract of sale, there was at all events a contract that plaintiff should be allowed to have and retain possession until his debt was paid; in pursuance of this he was let into possession, and in pursuance of this an agreement was made that he was to have such repairs made as would be necessary; and I think he is entitled, as against Scribner, to remain in possession until he should be repaid his debt, and the amounts that are properly chargeable against the property in respect of expenses. But this the defendant did not allow, for the property was sold and the plaintiff was dispossessed.

The case of *The Unity Joint-Stock Mutual Banking Association* v. *King* (7), cited by Mr. Wallace, I think bears upon this view of the case. The next question was whether the agreement so binding upon Scribner is binding upon Nixon, and I think that it is. In the first place Nixon, by his first answer to the bill, admits that he knew of Johnson being placed in possession for the purpose of paying himself out of the rents the bill for repairs that was due him. It is also in evidence that he (Nixon) requested repairs to be made while a tenant; that he stated he would not remain in possession unless some of those repairs were made; those repairs then having been made with Nixon's knowledge, I have no doubt whatever that Nixon would be bound by any agreement that would be binding upon Scribner.

In the case of *Jones* v. *Smith* (8), it was decided that where a party charged has notice that the property in dispute is incumbered, or in some way affected, he is deemed to have notice of the facts and instruments, to a knowledge of which he would have been led by due enquiry after the fact which he actually knew; also, where the conduct of the party charged evinces that he had a suspicion of the truth, and wilfully or fraudulently determined to avoid receiving actual notice of it, there is also constructive notice.

I think here there was not only actual notice, but also constructive notice by Nixon of the real arrangement that was made, and that the property is liable in his hands to the carrying out of the arrangement made between Scribner and Johnson.

The next question is as to whether relief could be obtained in this action. In the case of *Mortimer* v. *Orchard* (9), the bill was for the specific performance of a parol agreement to renew; the only witness for the plaintiff proved an agreement different from that in the bill, the two defendants by their witnesses proved an agreement different from both, and it was held that in

(7) 25 Beav. 72. (8) 1 Hare, 43. (9) 2 Ves. 243.

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strictness the bill ought to be dismissed, but specific performance was decreed according to the answers, with costs against the plaintiff.

In Fry on Specific Performance (10) it is said: "In a more recent case, where one contract was alleged and another proved, the bill was dismissed without prejudice to the filing of another bill," citing *Hawkins* v. *Maltby* (11). Continuing, this learned author says: "The inclination of Lord Cottenham's mind seems to have been to struggle with apparently conflicting evidence, rather than to dismiss the bill, where there had been part performance." In one of the cases in the Privy Council (12) Turner, L.J., observed: "There are cases in which the Court will go to a great extent in order to do justice between the parties when possession has been taken, and there is an uncertainty about the terms of the contract."

Oftentimes when an objection is made against giving relief different to that which is set up, it is alleged, and very often, one can see, properly so, that if such were allowed the defendant might be surprised; but that objection has no weight here, because the relief to which I think the plaintiff is entitled is a relief which is set up by the answers of the defendants, and, of course, the defendants cannot affect to be surprised by that.

I, therefore, think that the defendants should be held bound to the carrying out of the agreement which has been made, and I think that it should be done—not as in *Mortimer* v. *Orchard* (13)—upon the plaintiff being subject to paying costs, which, as stated in the American note to that case, is an exception to the general rule, that the successful party, although he may, for special reasons, be deprived of costs, never pays costs to the opposite party.

My conclusion as to costs would be that the plaintiff should not receive costs, but that he should not pay costs.

(10) 2nd ed. 274.

(11) L. R. 3 Ch. 188.

(12) East India Co. v. Nuthumbadoo, 7 Moo. P. C. 482, at p. 497.

(13) 2 Ves. 243.

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I, therefore, declare that the plaintiff is entitled to a lien and charge upon this property for the amount of his bill for repairs, admitted to be $186.32; and, further, any expenses that he may have properly incurred in respect of the management of the property, and in respect of any sums that he may have properly paid as against the property.

And I decree that he be entitled to the possession of the property, and to retain possession of the property until such sums are paid, and that it be left to a barrister to determine the amounts that he has paid out in respect of repairs, and for charges upon the property. I reserve power to make a further order after such enquiry shall have been had and report made thereon.

The rule in equity, deducible from authorities not always in agreement, appears to be that a defendant desirous of obtaining the benefit of the Statute of Frauds must either plead the statute: Cooth v. Jackson, 6 Ves. 375; Moore v. Edwards, 4 Ves. 23; Rowe v. Teed, 15 Ves. 375; Blagden v. Bradbear, 12 Ves. 466; Ex parte Whitbread, 19 Ves. 212; or by answer deny the agreement, which will be sufficient without pleading the statute: Ridgway v. Wharton, 3 De G. M. & G. 677; and that if the benefit of the statute is not claimed in either of these ways it cannot be had at the hearing: Baskett v. Cafe, 4 De G. & Sm. 388. If a defendant in his answer admits the agreement, and does not claim the benefit of the statute, he will be considered to have waived it, and cannot set it up at the hearing: Cooth v. Jackson, *supra*; Jackson v. Oglander, 2 H. & M. 465; Ridgway v. Wharton, 3 De G. M. & G. 677, 691. Where from the bill itself it does not appear whether the agreement is in writing or not, advantage of the statute may be taken by general demurrer: Barkworth v. Young, 4 Drew. 1; Field v. Hutchinson, 1 Beav. 599; Heard v. Pilley, L. R. 4 Ch. 548; or by demurrer alleging that it is not in writing, within the statute: Wood v. Midgley, 5 De G. M. & G. 41. In Barkworth v. Young, *supra*, Kindersley, V.-C., said: "If the bill states an agreement in writing, it is unnecessary to add that it was signed by the party sought to be charged, because from the statement that it was in writing it is necessarily to be inferred that it was signed; because if the paper was not signed it was not an agreement. But as a mere verbal agreement is still an agreement, you cannot from a mere allegation of an agreement, infer or presume that it was in writing. And as the fact that it was in writing is neither expressly alleged in the bill, nor necessarily to be inferred or presumed from what the bill does allege, the mere allegation of an agreement amounts to nothing more than the allegation of a verbal agreement, and then the defence may be made by demurrer."

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April 9.

Mortgage of bank stock—Double liability—Indemnity of mortgagee—Construction of Trust Deed—Preference—Unenforceable Claim.

The plaintiff deposited with the defendants, a banking firm, a sum of money at interest, and received as security 275 shares owned by the defendants in the M. bank, which were transferred into the plaintiff's name. The plaintiff gave to the defendants an acknowledgment, stating that he held the shares in trust and as collateral security for the due payment of moneys deposited with the defendants, on the payment of which he would re-transfer the shares to them. On a redistribution by the bank of the shares, they were reduced to 99. The dividends on the shares were always paid by the bank to the defendants, who treated the shares as their own in their office books. The bank went into liquidation, and the plaintiff was obliged to pay $9,900 double liability on the shares. The defendants made an assignment for the benefit of their creditors, and the deed of trust contained the following clause: "In the next place in full, or so far as the proceeds of the said joint property will extend, to pay all persons, by and in whose name the stock of the bank belonging to the said M. and B. (the defendants), whether in the name of M. & Co. (the defendants), or the said M. or B., or any other person or persons, firm or corporation, before transferred to such persons, is or has been held as security for money loaned by any person or persons to the said M. and B., all claims they may have against the said M. and B. by reason of any double liability they may incur, or moneys they shall be obliged to pay for double liability on such shares under section 20 of chapter 120 of the Revised Statutes, or other statute or statutes of the Dominion of Canada, on account of the said shares, standing in the name of the said persons, or having so stood."

Held, (1) that the plaintiff and defendants stood in the relation of mortgagee and mortgagor in respect of the shares, and not of trustee and *cestui que trust*, and that the defendants were not liable under such relation to indemnify the plaintiff.

(2) That the plaintiff was a beneficiary under the trust deed, in respect of the amount he had paid as double liability, and that his right to be such was not intended to depend upon his having an enforceable right to be indemnified.

The facts fully appear in the judgment of the Court.

E. McLeod, Q.C., *A. H. Hanington* and *C. A. Palmer*, for the plaintiff.

F. E. Barker, Q.C., and *G. B. Seely*, for the defendants.

1889. April 9. Tuck, J.:—

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The facts of this case are, briefly, that the plaintiff had on deposit with Maclellan & Co., $50,000; that as collateral security they transferred to him 275 shares of Maritime Bank stock, which on redistribution were reduced to 99, and on which he had to pay to the liquidators of the Maritime Bank $9,900; that on Maclellan & Co. making a deed of trust, the following clause (D) was inserted therein, by reason of which it was urged that he should be repaid the $9,900 by the trustees of Maclellan & Co.:

"In the next place in full, or so far as the proceeds of the said joint property will extend, to pay all persons by and in whose name the stock of the Maritime Bank of the Dominion of Canada belonging to the said Thomas Maclellan and Alfred C. Blair (whether in the name of Maclellan & Co., or the said Thomas Maclellan, or Alfred C. Blair, or any other person or persons, firm or corporation before transferred to such persons), is or has been held as security for money loaned by any person or persons to the said Thomas Maclellan and Alfred C. Blair, all claims they may have against the said Thomas Maclellan and Alfred C. Blair by reason of any double liability they may incur or moneys they shall be obliged to pay for double liability on such shares under section 20 of chapter 120 of the Revised Statutes, or other statute or statutes of the Dominion of Canada on account of the said shares, standing in the name of the said persons or having so stood."

The following is the receipt which was given by Marsters at the request of defendant Maclellan:

"The 275 shares of the Maritime Bank stock which now stand in my name, I hold in trust and as collateral security for the due payment of moneys deposited with you by me. When these are repaid this stock will be retransferred to you by me or my executors."

There can be no doubt from the evidence that Maclellan & Co. from the time the shares were transferred to Marsters in 1882, down to the failure of the Bank in 1887, to a certain extent treated the shares as their

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own; that is, there was no change in their bookkeeping as to their Maritime Bank stock, and they received the dividends as they became payable. This was an ordinary business transaction. Maclellan & Co. were indebted to the plaintiff in the sum of $50,000, and the amount being large, they proposed to give him collateral security on Maritime Bank stock for the debt. When the stock had been transferred and the receipt signed, which was really the agreement between the parties, they stood to each other in the relation of mortgagor and motgagee, clothed with whatever trust that relation creates. It was Marsters' duty to so deal with the stock as to be able, when his debt should be paid, either to make a retransfer, or account in money for its fair value; and, if he received dividends or any bonus, account for them. So far he was a trustee, but no farther. By the contract between the parties Marsters became the legal owner of the 99 shares, subject to an equity of redemption of Maclellan & Co. Marsters did not occupy the position which a trustee does to his cestui que trust, unless he is made to do so by the receipt of the 25th September, 1882, as to the 275 shares. It is argued that Marsters is made a trustee, liable to perform all the duties of that office, and get all the benefit arising from it, by reason of the words "in trust and as collateral security," in the receipt. I cannot accede to that proposition. The words "in trust and as collateral security" in the receipt, were used by Maclellan & Co., who prepared the paper, to show that Marsters was not the absolute owner of the stock, as on the books of the Maritime Bank he would appear to be.

In my opinion the words "in trust" did not make the plaintiff a trustee in the sense in which a person is made one by a deed which conveys property to him in trust for certain purposes, or by a will, which devises and bequeathes real and personal estate to him upon specific trusts. The meaning I intend to convey is that Marsters is no more a trustee because the words "in trust" are in the receipt, than if they were not there. It is a clear rule that the cestui que trust is bound to save the trustee harmless as to all damages relating to

the trust, when the trustee has acted honestly and fairly, but I have not been able to find such rule binding on the mortgagor or mortgaged property.

There are many cases which establish the proposition that if the mortgage contains no covenant for repayment, the fact of the advance being made at the request of the mortgagor raises a contract by parol, and therefore the personal estate of the borrower remains liable to pay off the mortgage, but there is none to my knowledge, for the other proposition that the mortgagor is liable to indemnify the mortgagee for all damages which may accrue to him by reason of his holding the mortgaged property.

Phene v. *Gillan* (1) was cited and commented on by both parties. It is in some particulars very much like the present one. In that case there was a transfer by way of mortgage of shares in a banking company. The mortgagor afterwards paid off the debt, and applied for a retransfer of the shares, but the directors of the company did not permit the retransfer to be made. In the meantime a creditor recovered judgment against their public officer, and threatened execution against the mortgagee, as one of the shareholders. It was held that where the mortgage was made simply as an absolute transfer, subject to redemption, and nothing had passed binding the mortgagor to take a retransfer of the shares, the mortgagor was not liable to indemnify the mortgagee against debts incurred after the transfer was made on the mortgage, and before the mortgage debt was paid off. The present case differs from that one in this particular, that here the mortgage debt has not been paid; otherwise, as between Marsters and Maclellan & Co., leaving out of consideration the trust deed, it bears a close resemblance to it.

Vice-Chancelior Wigram, in delivering judgment, says in one place: "The plaintiff, by the transfer of the shares, became absolute owner thereof at law, and acquired all the rights, and became subject to all the liabilities of a shareholder, both as between himself and

(1) 5 Hare 1; 9 Jur. 1086.

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the world, and himself and the other shareholders; and in the absence of express contract, I cannot make out the principle upon which the law should imply a contract that the defendant, in the circumstances of this case, should indemnify the plaintiff against the consequences of the transfer of the shares."

And in considering another part of the case he says: "I will first suppose the mortgage to have been in the common form; that is to say, an absolute transfer, subject to redemption, and nothing to have passed by which the defendant was bound to take the shares again. In that simple case, is the defendant liable in this Court for all the engagements of the company, good and bad, in exoneration of the plaintiff, in the same manner as he would have been if he had continued registered owner of the shares? In that simple case I should incline strongly to say the defendant would not be liable. The question is not, whether the defendant could redeem the shares without indemnifying the plaintiff, but whether he is under a personal liability to indemnify him, it being admitted that the company is insolvent and the shares comparatively valueless. The plaintiff became a partner for his own benefit, and at law he acquired all the rights and became subject to all the liabilities of a partner. I assume there is not at law any implied contract for the indemnity which the plaintiff asks. His rights and liabilities during the time he held his shares for his own benefit must be the same in equity as at law, so far as regards the personal liability of the defendant."

Now, this judgment of Vice-Chancellor Wigram is a clear authority for the defendants' contention, that in the absence of an express contract, the law does not imply one that Maclellan & Co. should indemnify the plaintiff against the consequences of transferring the shares.

Burnett v. *Lynch* (2), and *Humble* v. *Langston* (3) were cited as explaining the principle on which *Phene* v. *Gillan* was decided, but they are not directly in point.

(2) 5 B. & C. 601.

(3) 7 M. & W. 517.

A mortgagee stands in a different position from a trustee in respect of indemnity for damages, because the relation of a mortgagee to his mortgagor is quite distinct from that of a trustee to his cestui que trust. The mortgagee holds the mortgaged property for his own benefit, the trustee holds it for the benefit of his cestui que trust. Marsters held the stock in the Maritime Bank for his own benefit and not for that of Maclellan & Co.; surely a very different position from that he would have occupied had the stock been transferred to him, expressly in trust for another. This is really the distinction drawn by the Vice-Chancellor in *Phene* v. *Gillan*, and it seems to be a sound one. It is said that no authority like it is to be found in the books, and the only reference to the case is in Lindley on Partnership (4), and Coote on Mortgages (5). In Coote, it is said that "if the mortgagor elect to be foreclosed, the mortgagee has no remedy against him for expenses incurred in maintaining the property in mortgage, such as payment of calls on shares mortgaged, nor for legal liabilities attached to the property."

On the same principle Maclellan & Co., had they remained solvent and paid the plaintiff his $50,000 and interest, could not have been compelled to take a transfer of the stock in the absence of an express contract to do so, or an election to redeem. Nor can a mortgagee even compel a mortgagor to take back the mortgaged property. He may suffer himself to be foreclosed, although under our registry laws no retransfer is necessary, for the mortgage may be cancelled on the records. It does seem a little singular that no similar case can be found, but this may be because ever since the judgment was delivered in 1845, down to the present, it has been accepted as good law. *Castellan* v. *Hobson* (6) was very different from this. Vice-Chancellor James in that case held that it was a question of trustee and cestui que trust, and that the plaintiff was entitled to indemnity from the real equitable owner of the shares, for

(4) 4th ed. 1304. (5) 4th ed. 734. (6) L. R. 10 Eq. 45.

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whom he was trustee. There was no point as to mortgagor and mortgagee, and *Phene* v. *Gillan* was not called in question, nor even mentioned. Both this case and *Evans* v. *Woods* (7) arose out of stock-jobbers' operations, and are not authorities in the present one. Jones on Pledges, sections 437 and 438, cited by the plaintiff, if an authority either way, is favourable to the defendants. Whilst the decision in *Phene* v. *Gillan* is not binding on me I am disposed to follow it as being sound in principle. But there was another point decided in *Phene* v. *Gillan* which turned the judgment in favour of the plaintiff. The Vice-Chancellor held that the mortgagor, having elected to take a re-transfer of the shares, the mortgagee became a trustee for the shares of the mortgagor, and that the mortgagor was bound to indemnify him against the whole expenses or liabilities which he had properly incurred by holding and maintaining the shares.

Mr. McLeod, for the plaintiff, urged that under the circumstances M. c'ellan & Co. elected to take a retransfer of the shares because after the transfer they treated the shares as their own by receiving the dividends. But this, I think, was no evidence of such election, for they were clearly entitled to the dividends when they were paying Marsters interest on his deposit of $50,000. Besides, the debt had not been paid, and how could they have exercised their right to redeem? Maclellan & Co. were never in a position to ask to have the shares back. Making up a statement of their liabilities and putting in this stock was not an exercise of their right to redeem, nor was the putting of clause "D" in the deed.

And now comes a very important question as to the plaintiff's right under clause "D" in the trust deed. By way of helping to put a proper construction on the words "all claims," it was urged that it would be inconsistent with natural justice to hold that Marsters had no claim against Maclellan & Co. for this double liability. I fail to see the force of that contention in this case. I am not prepared to say that this money is due ex æquo et

(7) L. R. 5 Eq. 9.

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bono, and that it could be recovered in an action of assumpsit. If there were no other circumstances here but the relation of mortgagor and mortgagee it would not at all follow that the double liability has been paid under circumstances which make it just and equitable that it should be repaid, and neither Maclellan & Co. nor their trustees are under any obligation from the ties of natural justice to pay if there is no legal obligation.

Then the several contentions; that words are ordinarily to be construed according to their primary meaning; if there is any ambiguity in a paper it must be taken more strongly against the person who prepared it, and that in construing an instrument it ought to be read most strongly against the person preferring it for signature, are elementary principles and need not be argued. But the difficulty does not arise as to the principles themselves, it comes from the application of them. It is said that the word "claim" in clause (D) is not confined to legal claim; that the most extended meaning that the word will bear should be given to it, and that it should be made to include all legal, moral, and equitable claims, in order that the plaintiff should be repaid whatever he should be called upon to pay for double liability. I differ from that view, and think the words "all claims" have no such extended meaning. In my opinion the word "claim" in clause (D) means legal claim, and the true construction to be put upon this clause is, that whenever a person who held Maritime Bank stock from Maclellan & Co. as collateral security for any indebtedness, should be obliged to pay a double liability by reason of holding such stock, that moment his claim became a complete legal claim, and he was entitled to have the amount repaid to him as a preference claim under clause (D). When the deed was being prepared, or about to be executed, it was uncertain what the liability of stockholders in the Maritime Bank would be. They might be called upon under the double liability section of the statute to the full extent of their stock, or for a part, or for none. There was no claim at the time, and, therefore, it could not be provided for with the same certainty that preferences would be, say to accommodation

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endorsers on promissory notes, because as regards them the amounts would be fixed. But the Maritime Bank had failed and was in liquidation, and what at the time it was given was supposed to be a good security, might turn out to be worse than valueless; the holder of such stock might have to shoulder a heavy burden, therefore Mr. Blair determined that persons in such a position should be preferred in the deed. And it seems to me that when he used the word "claim" he used an apt one to express his meaning. As much as if Blair had been talking to Marsters upon this very subject just before the deed was executed and said to him, "It is bad enough for you to have to lose the money you have deposited with us, but you must not suffer an additional loss because of that security you hold; there is no claim yet, but if you should be called upon to pay by reason of double liability on that stock the amount so paid shall be a preference claim in our trust estate." It seems to me that is just what clause (D) means. True, as Mr. Blair says in his evidence, he did not mean to create a liability; that is, he did not mean to bring into existence some new matter to rank on the estate, but his object was that any money paid for double liability should be a preference claim on the estate of Maclellan & Co. It means as if Blair had said, "There is the liability; the fear exists now that you will have to pay, and when you do the amount paid shall be a legal preference claim on our estate." I think that this is the fair meaning of the words "all claims" in clause (D). They cover just such a case as that now under consideration. If this is a correct view then the decision in *Pheue* v. *Gillan* does not govern this case, for my opinion is based wholly upon what is the proper construction of the trust deed. I think it is a strained and unnatural construction to say that the words "all claims" mean, that when any person had paid double liability he should have a preference, provided the fact of payment gave him a claim in point of law.

It requires, it appears to me, more than a proper amount of legal acumen and ingenuity to find this meaning for the words. The clause itself, the surrounding

circumstances, and the evidence of Alfred C. Blair, one of the defendants, all go to show that such a construction ought not to be put upon the words.

Suppose Maclellan & Co., when they transferred the stock to Marsters had used this language: "We hereby agree to pay you any claim you may have by reason of being obliged to pay double liability on this stock," could there be any doubt that, if solvent, they would have to pay Marsters, and that his claim would be complete when he paid the money; or, leaving clause (D) out of the deed, would he not be entitled to rank on the estate as a general creditor for the money he paid? Would not any one say, Why, this is the very money which Maclellan & Co. agreed to pay? But that case, I think, is no stronger than the one which arises under the deed.

The evidence of Alfred C. Blair, if relevant, shows clearly what his intentions were. He says: "My instructions were (that is to his solicitor) that Captain Marsters should be protected in the matter of any double liability claim that might arise, to the extent of $9,900." Again he says that "at the time he signed he believed that it preferred Captain Marsters, and that it was his intention that he should be preferred for this $9,900 double liability." Without this evidence I should have come to the same conclusion, but it is satisfactory to know that Mr. Blair intended what, I think, clause (D) means.

It may seem that I have given more time than necessary to the consideration of points upon which, according to my view, this case does not turn. My reason for having done so is that, as Mr. A. H. Hanington, plaintiff's solicitor and counsel, has taken so much pains to prepare his case carefully, I have thought he was entitled to have my view on the different parts of it.

My decision is that the plaintiff be repaid out of the trust estate the sum of nine thousand nine hundred dollars, being the amount of double liability on the Maritime Bank stock, transferred to him as collateral security by Maclellan & Co., together with his costs. And that the trustees shall be paid their solicitors' costs, counsel fees and other costs incidental to this suit out of the trust estate.

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August 31.

PARKS v. PARKS ET AL.

Executors and trustees—Accounts passed in Probate Court—Administration Suit—Res judicata—Construction of Will—Jurisdiction of Equity Court.

The testator P., by his will, bequeathed to his wife an annuity of $1,200 during her life, and to the plaintiff an annuity of $2,000 during her life, and directed his executors and trustees to set apart out of the funds of the estate, stocks or securities sufficient to pay both annuities, and that if the income therefrom should not be sufficient, a portion of the principal should be applied for the purpose, and that under no circumstances whatever should there be any default or delay in paying the annuities. The will then contained a number of devises and specific legacies and the testator devised all the residue of both his real and personal estate after the payment of his debts, funeral and testamentary expenses, to his son, J. H. P. He then appointed his wife, his son, J. H. P., and three others to be the executors and trustees of his will. Probate of the will was granted to all of the executors. The trustees failed to set apart funds for the payment of the annuities. In an administration suit brought by the plaintiff, for the purposes, *inter alia*, of construing the will, and determining whether the trustees had distributed the estate and accounted in accordance with the will, J. H. P. claimed that the trustees, after paying the debts and setting off specific legacies, were unable to comply with the directions of the will as to appropriating funds for the payment of the annuities, and that he had expended the whole of the corpus of the estate in paying the annuities, and had passed his account in the Probate Court. By the executors' accounts filed and passed in the Probate Court it appeared that the Judge of the Probate Court found and decreed a balance due J. H. P. of $5,020.

Held, that the Probate Court not being a Court of construction, and having no authority to determine questions relating to the meaning of a will and whether executors and trustees have discharged their duties in accordance therewith, the suit was not *res judicata* by reason of its decree.

The facts fully appear in the judgment of the Court.

C. N. Skinner, Q.C., and *J. G. Forbes*, for the plaintiff.

W. Pugsley, for the defendants.

1889. August 31. PALMER, J.:—

This is a suit to administer the estate of the late William Parks. It appears by the pleadings that the testator died seised of a considerable amount of real and personal estate, and leaving a will by which he bequeathed to his wife and daughter all his household furniture, and his dwelling-house during their lives with remainder over. He also bequeathed to his wife an annuity of

$1,200 a year during her life, and to his daughter, the plaintiff, $2,000 yearly during her life, and directed his executors and trustees to appropriate out of the funds of the estate sufficient stock funds, or securities, so that the income thereof would be sufficient for the payment of these annuities. These funds so appropriated for his wife's annuity he gave to such persons as she should by her will appoint, and the funds appropriated to pay the daughter's annuity, at her death to such persons as she should by her will appoint, and it also directed that if the income from those funds should be insufficient to answer the annuities the trustees should apply a portion of the principal to such payment. Then follows a rather remarkable statement in the will in these words:

"And that under no circumstances whatever shall there be any default or delay in paying the said respective annuities as aforesaid."

Then he gives in fee to the defendant John H. Parks the cotton factory, together with all the engines, machinery, tools and implements used and employed therein; then he devises to William H. Parks certain lands in Kent county. The testator then expresses his desire that a dwelling-house—known as Clifton terrace—should become vested in his son, John H. Parks, in fee simple, and after some clauses, which are not important in this suit, the will proceeds:

"And as to the rest and residue of my estate, real and personal, after the payment of my just debts, funeral and testamentary expenses, I give, devise and bequeath the same to my son John H. Parks, his heirs and assigns forever."

He then appoints his wife executrix and trustee, and his son John H. Parks, his brother Thomas Parks, and his friends John Hegan and James Hegan, to be executors and trustees, and then there is a declaration that while any trust remains to be executed there shall always be two trustees, and he declared that—

"If my trustees, or either of them, or any of the persons appointed as such, shall die, or disclaim, or be unwilling to execute the trusts of my will, it shall be lawful for my wife, and, after her death, for the trustees, to

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substitute by writing, under her or their hand, any person or persons as such trustee."

This will was proved in the Probate Court of St. John on the 10th November, A.D. 1870, and probate granted to Ann Parks, John H. Parks, Thomas Parks, John Hegan and James Hegan, since which Ann Parks, Thomas Parks and James Hegan have died, and it appears, by the evidence, that by writing, the surviving executors on the 28th July, A.D. 1884, professed to appoint the plaintiff and William Parks trustees. The plaintiff declined and William Parks accepted. It appears that the trustees and executors entirely neglected the directions of the will as to appropriating the funds, the income from which was to pay the annuities, and by the answer the defendant, John H. Parks, set up that the assets of the estate, after the payment of debts and setting off the specific legacies, were entirely insufficient to enable them to do so, and that he has expended the whole of the corpus of the estate in paying the annuities, and has passed his accounts in the Probate Court. It appears that the executors filed their accounts in the Probate Court, including therein the amounts advanced to one of themselves, the widow, on her annuity, and also the plaintiff on her annuity, and also funds arising from the proceeds of some real estate not specifically devised, and that the learned Judge made a decree thereon, upon the whole of these matters, finding a balance due John H. Parks of $5,020.

The first question is this: Whether this matter is res judicata by that decree? The law on this subject is well stated by Shaw, C.J., in *Cordis* v. *Perry* (1). He says:

"Any decree directing the executor to pay or not to pay a legacy to any particular person, or at what time a legacy should be paid, whether made upon or without notice, would afford the executor no justification."

It is difficult to conceive how a subsequent ratification or allowance of a payment already made can be of

(1) 11 Pick. 503.

any greater force or effect. The object of such an accounting by the executor before the Judge is to show that he has paid according to his charges; and upon producing proof of the fact of payment such charge is allowed. But whether such payment is rightful is a question for which the executor himself stands responsible. To hold that an allowance of a payment in account under such circumstances would bar a legatee whose legacy is not yet payable would be pressing the doctrine of res judicata beyond all reasonable limits. I think the decree of a Judge of a Court of Probate is final unless vacated by an appeal, but as to matters without his jurisdiction, it is null and void. It is no part of his duty to settle the legal construction of a will, to determine in the case of different claims to whom payment should be made, or when the amount is contested what the sum shall be. All these questions belong exclusively to this Court. The executor may, if he chooses, procure the decision of any controverted right before acting, or he may act on his own responsibility and decide for himself. The relative rights of legatees, and other questions affecting the distribution of an estate, cannot properly be heard upon the settlement of the executor's accounts. For the same reason, the executor cannot be allowed for payments in his accounts the effect of which would prejudice the rights of those who claimed a larger share than had been paid them.

As I think this is the law, it shows conclusively that the proceedings in the Probate Court are no answer to this suit.

The next question in the case is: What is the true construction of the will? If there is enough of real and personal estate not specifically devised to have enough set apart so that its income would pay the annuities, and there remained enough to pay the debts, there is little trouble in construing it. The rule laid down by the House of Lords in *Greville* v. *Browne* (2), would make it clear that those annuities and the debts are charged

(2) 7 H. L. C. 689.

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on all such, by virtue of the devises thereof, to John H. Parks; but if there is not, then most important and difficult questions of construction will arise upon the terms of this will which I do not now intend to decide. Before doing so I would require them to be more elaborately argued before me than has been done.

The first is, whether, taking the whole will together it was not intended that these annuities should be paid in priority to every other devise in the will, and if so, they would be a charge on every part of the estate.

Whether this is so must depend upon what is decided to have been the intention of the testator as expressed by every clause in the will. A more mature consideration of this question has made me more doubtful on the point than I was when I delivered my former judgment in this case. If this is not so, the next question is, Whether the personal property of the deceased specifically devised should not have been used for payment of the debts if it required all the rest of the personal estate to be set apart to make a fund sufficient to pay the annuities? I do not propose to decide these questions until it is ascertained what were the amounts of those several funds and also the amount of the liabilities of the estate, and before proceeding I will direct inquiries as to all these matters. In the meantime, as it now appears that William Parks is a trustee, he must be made a party, and as this change has to be made I will also direct that William H. Parks, the devisee of the Kent county lands, be also made a party; also any parties who have become interested in the specific devises to John H. Parks since the death of the testator. There will be an order to that effect.

The enquiries will be:

1. What was the amount of the personal estate that came into the hands of the executors?

2. What was the value of the real estate of the testator not specifically devised?

3. What is the value of the different portions of the real estate specifically devised?

4. What was the amount of the debts of the testator paid by the executors?

5. What was the value of the personal estate specifically devised to the testator's widow and daughter and received by them?

6. What was the value of the personal estate specifically devised to John H. Parks and received by him?

7. What is unpaid of the said annuities?

I reserve all other questions for further directions.

The probate Court has no jurisdiction over trustees' accounts: MacLaren v. Grant, 32 N. B. 644; 23 Can. S. C. R. 310. With respect to executors' accounts its decision is final and conclusive, subject only to an appeal to the Supreme Court: Harrison v. Morehouse, 2 Kerr, 584; MacLaren v. Grant, *supra*, but not where there has been fraud: MacLaren v. Grant, *supra*, per Tuck and Fraser, JJ., Hanington, J., *diss.* "A Court of Equity considers an executor as trustee for the legatees in respect to their legacies, and, in certain cases, as trustee for the next of kin of the undisposed of surplus; and as all trusts are the peculiar objects of equitable cognizance, Courts of Equity will compel the executor to perform these, his testamentary trusts, with propriety. Hence, although in those Courts, as well as in Courts of Law, the seal of the Court of Probate is conclusive evidence of the factum of a will, an equitable jurisdiction has arisen of construing the will, in order to enforce a proper performance of the trusts of the executor. The Courts of Equity are consequently sometimes called Courts of Construction, in contradistinction to the Court of Probate": Wms. Exors. (9th ed.), 243. And at page 1876 the same learned writer says: "Executors and administrators are for most purposes considered, in Courts of Equity, as trustees; for instance they are held in equity to be personally liable for all breaches of the ordinary trusts of their office: Re Marsden, 26 Ch. D. 783. Upon this principle, those Courts have exercised a jurisdiction over them, in the administration of assets, by compelling them, in the due execution of their trust, to apply the property to the payment of debts and legacies, and the surplus, according to the will, or in case of intestacy, according to the Statute of Distributions: Adair v. Shaw, 1 Sch. & L. 262. Hence a Court of Equity will make an order for payment of a personal legacy; or for the distribution of an intestate's personal estate: Com. Dig. Chan. (3 D. 1); Howard v. Howard, 1 Vern. 134; and will compel an executor or administrator, in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them. And, even in a case where the testator directed that the executor should not be compelled by law to declare the amount of a residue bequeathed to him, the Court directed an account against him: Gibbons v. Dawley, 2 Ch. Cas. 198. So an account has been decreed of an intestate's personal estate, notwithstanding an account before taken, and a distribution decreed in the Spiritual Court: Bissell v. Axtell, 2 Vern. 47. And a bill was, in the case of Dulwich College v. Johnson, 2 Vern. 49, held on demurrer to be properly brought for the discovery of assets, before the will was proved, during the litigation thereof in the Probate Court. See also Phipps v. Steward, 1 Atk. 285." The Probate Court has no jurisdiction to construe a will, and no assumption of jurisdiction on its part will conclude the question of the meaning and effect of a will in a Court of Equity: Gawler v. Standerwick, 2 Cox, 16; Walsh v. Gladstone, 13 Sim. 261; 1 Ph. 294, Thornton v. Curling, 8 Sim. 310; Campbell v.

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Beaufoy, Johns. 320; Loffus v. Maw, 3 Giff. 592; Hastings v. Hune, 6 Sim. 67. Where an executor or administrator, although acting *bona fide*, distributes the estate on what turns out to be an erroneous construction, he is liable to make good the funds he has parted with: Saltmarsh v. Barrett, 31 Beav. 349; Attorney-General v. Kohler, 9 H. L. C. 654; Re Hulkes, 33 Ch. D. 552. Since the printing of this note the New Brunswick Legislature at its recent session (1898) has provided by Act to consolidate and amend the law relating to Courts of Probate, to be cited as "The Probate Courts Act," for an accounting in the Probate Court by trustees under a will from time to time, during the continuance of the trust, of their administration of the trust estate: section 32. By section 38, "The passing and allowing of any account of a trustee as herein provided shall, subject to appeal to the Supreme Court, as in other cases under this Act, have the same force and effect as if the accounts had been passed and allowed by the Supreme Court in Equity, under the powers and procedure of such Supreme Court in Equity prior to the passing of this Act."

An interesting inquiry is suggested by this legislation, whether it has made Probate Courts Courts of construction with reference to trustees' accounts. If such is the result its working out will be followed with considerable curiosity not unmixed with misgiving. As the Act contains no similar provision with reference to executors' accounts the anomaly would be presented of executors' accounts not being *res judicata* in the Court of Equity, in so far as their propriety depended upon the construction of the will, and of such an inquiry being concluded in the Court of Equity by the decree of the Probate Court with respect to trustees' accounts.

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December 23.

DOWD v. DOWD.

Practice—Setting cause down for hearing—Interrogatories—Insufficiency of plaintiff's answer—Cause at issue—C. 49, C. S. N. B., s. 31, and Act 45 Vict. c. 8, s. 2.

The plaintiff answered defendant's interrogatories on November 28th, and on December 12th took out a summons to set the cause down for hearing. The defendant objected that the cause was not at issue, claiming that he had two months in which to except to the answer.

Held, that under section 31 of chapter 49, C. S., and Act 45 Vict. c. 8, s. 2, the remedy of a defendant upon an insufficient answer is not to except thereto, but to move within a reasonable time to dismiss the bill upon fourteen days' notice of motion, and that a reasonable time having here elapsed, and the defendant not now desiring to have the bill dismissed, the cause should be set down for hearing.

This was a summons to set the cause down for hearing. The facts are fully stated in the judgment of the Court. Argument was heard December 19th, 1889.

R. A. Borden, for the plaintiff.

J. Roy Campbell, for the defendant.

1889. December 23. PALMER, J. :—

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In this case a very important question as to practice has arisen. I have looked very carefully into the matter, and will now proceed to deliver the opinion I have formed upon it.

A replication to the defendant's answer was served on July 19th, 1889. The defendant filed cross-interrogatories for the examination of the plaintiff, and answers to them were served on the 28th November, 1889. This application to set the cause down for hearing on *viva voce* evidence, was made on the 12th December, no exceptions to such answers having been put in. Mr. Campbell, for the defendant, on the return of the summons, objected that the cause was not ripe for setting down for hearing, as the defendant had, he contended, two months to file exceptions to the plaintiff's answers, under the general order of the Court of Chancery in England of 1828, which was in force at the time of the making of the practice of this Court in 1839, and by which the plaintiff has undoubtedly two months to except to the defendant's answers to his bill. The Order is given in 1 Grant Chan. Prac. p. 344.

The whole point now is whether this is so or not. The manner in which the statutes have dealt with the practice has rendered the matter somewhat ambiguous. Mr. Campbell cited before me the case of *Davis* v. *Davis* (1), which was decided by my brother *Fraser*. That case is reported as follows:

"The plaintiff's solicitors took out a summons to have the cause set down for viva voce hearing. The cause was at issue, and after replication the defendant had served cross-interrogatories, the answer to which had only been on file six days. Held, that under C. S. c. 49, s. 37, and 45 Vict. c. 8, the defendant had two months to file exceptions to the answers to the cross-interrogatories, and therefore the cause was not at issue and could not be set down for hearing."

There must be some mistake in this report of that case, for, in the first place, it states that the cause was

(1) 9 C. L. T. 259.

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at issue and then it winds up by saying the cause was not at issue, and I confess I have arrived at the opposite conclusion, and I am the more impressed with this view on a careful consideration of the question raised. If the law is such that you can put off for two months the time when the plaintiff can get on with his suit it would be, in my opinion, a very long and unnecessary delay; but if the law is so I am bound by it. I have taken occasion, therefore, before deciding the matter to look fully into it in order to arrive at the real position of the law in relation thereto.

This matter is governed by section 31, c. 49, C. S., and by Act 45 Viet. c. 8, s. 2. Section 31 of c. 49 is as follows:

"Any defendant, after putting in a sufficient answer, and within fourteen days after the plaintiff shall have joined issue thereon, as provided by section 36, may, without any bill of discovery, file interrogatories for the examination of the plaintiff on such points as shall arise out of such answer, and for the purpose of proving the same and disproving the plaintiff's case, and deliver a copy thereof to the plaintiff's solicitor, which shall be answered by the plaintiff in like manner, and under the same rules of practice, as defendants are bound to answer plaintiff's bill.

How must he answer? He must answer fully as to his knowledge and as to his belief. That goes to the substance of the answer and the form in which it is to be put in; it does not provide that the remedy against an insufficient answer shall be the same as the law gives to the plaintiff, but the subsequent part of the section deals with the defendant's remedy by enacting that: "If the plaintiff shall not answer such interrogatories in manner aforesaid, it shall be lawful for the Court, on motion, to dismiss the plaintiff's bill, notice thereof being first given fourteen days prior to such motion being made, or to make such other order as the justice of the case may seem to require."

Now, if the law intended that the practice was to be the same as objections to the defendant's answer, there would have been no necessity for the latter part

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of the section, because everything would follow, judgment would be upon that, and for every reason. When we look at the enormous delay that would take place there does not appear to be any necessity for any other remedy.

In my judgment, when an insufficient answer has been put in the defendant can move at once to have the plaintiff's bill dismissed, because he has not answered in the way the law compels him. The matter would then come before the Judge, and he would decide whether he has or has not sufficiently answered. What then takes place? He has not absolutely to dismiss; he can dismiss the bill, or he can make such order as the justice of the case requires—ordinarily that the party should pay the costs of the answer, and put the defendant in as good a position as if he had answered, and if he did not do that the Judge would dismiss the bill.

To my mind that seems sufficient without any of this delay, and I think the statute has worked that out very well without going any further.

At the same time I think the plaintiff in pursuing his suit ought to wait a reasonable period so as to give the other party time to move the Court—fourteen days ordinarily is sufficient—but at all events it should be a reasonable time; that would be a good cause to show against the summons to set down, but if the summons is taken out there is nothing to prevent the defendant at any time from making this motion. If the answer is not sufficient all the defendant has to do is to move to have the bill dismissed and no harm is done him, and in the meantime if there is no reason why the cause should not be tried, there should be no delay; and, therefore, I feel myself constrained to make the order asked for.

The case will be set down for hearing at the January sittings. I have been very particular about this, especially as it is said one of my brother Judges has taken a different view.

By the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 55, "any defendant, after putting in a sufficient answer, and within fourteen days after the plaintiff shall have joined issue thereon, as hereinafter provided (section 75), may file interrogatories for

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the examination of the plaintiff, or any one or more of the plaintiffs, and shall deliver a copy thereof to the plaintiff's solicitor, which shall be answered by the plaintiff within twenty days after service of such copy, in like manner and under the same rules of practice as a defendant is bound to answer the plaintiff's interrogatories, but no replication to such answer shall be necessary. If the plaintiff shall not answer such interrogatories in manner aforesaid, it shall be lawful for the Court on motion to dismiss the bill, notice thereof being first given to the plaintiff's solicitor fourteen days prior to such motion being made, or to make such other order as the justice of the case may seem to require." By section 56 "exceptions to the defendant's answer, or to the plaintiff's answer to interrogatories filed by the defendant, shall be filed and a copy thereof served upon the opposite solicitor within twenty days after the service of a copy of such answer, otherwise the answer on the expiration of such twenty days shall be deemed sufficient; such exceptions shall be set down for argument by the party excepting within fourteen days from the service of a copy thereof on the solicitor of the opposite party, otherwise he shall be considered as having abandoned the exceptions, and the answer excepted to shall thenceforth be deemed sufficient. Ten days' notice of the time of arguing such exceptions shall be given by the party excepting to the solicitor of the opposite party. Exceptions may be set down for argument on the *ex parte* order of a Judge." Under the practice of the English Court of Chancery, if plaintiff did not file his answer to interrogatories they were ordered to be taken *pro confesso*: Lewes v. Morgan, 5 Price, 471. Filing interrogatories for the examination of the plaintiff does not affect the defendant's right to dismiss for want of prosecution: Jackson v. Ivimey, L. R. 1 Eq. 693.

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In re HARRIET LIGHT, *a Lunatic.*

January 4.

Lunatic—Committee—Sale of land—Sections 137 and 138, c. 49, C. S. N. B.

Land belonging to a lunatic cannot be sold by her committee under sections 137 and 138, c. 49, C. S., except by public auction.

This was a petition by the committee of the estate of Harriet Light, a lunatic, for leave to sell by private sale a piece of wilderness land situate in York county, of which she was seised in fee, on account of it being exposed to waste.

The petition was heard January 3rd, 1890.

G. G. Ruel, for the petitioners.

1890. January 4. PALMER J.:—

In this matter Mr. Ruel yesterday presented a petition to me on behalf of the committee of Harriet Light,

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a lunatic, praying for an order giving power to the committee to sell some land belonging to the lunatic, and of which she was seised in fee simple.

I can find no authority for the committee to sell, or for this Court to authorize the committee to sell, except what is contained in the 138th section of c. 49, C. S. (1).

That section, in my opinion, must be read with the two preceding sections, and particularly the 136th, which defines the person whose estates those different sections were designed to affect.

The 136th section begins with these words: "Where such person," that is a lunatic, "may be seised of any freehold estate in fee, or any absolute interest in leasehold estates," etc. The section then goes on to authorize leases, etc. I cite these words for the purpose of giving the interpretation of the words used in the 138th section, and which begins in the same manner.

"Any such person," that, as I read it, means any such person as may be seised of any estate in fee, etc., and evidently is incorporated into the section when you take it altogether. The section says: "Any such person or the committee of his estate in his name, by order of the Court, on the petition of any party beneficially

(1) Section 136. "Where such person may be seised of any freehold estate in fee, or any absolute interest in leasehold estates, and it may be for his benefit that leases or under leases should be made of such estates for terms of years, and especially to encourage the erection of, or the repairs of, buildings thereon, or otherwise improving the same, the Court may order such committee to make leases of any part or the whole of such estate, according to the interest of the lunatic therein, subject to such rents, covenants and conditions as such Court may direct."

137. "No absolute sale of the real estate, or any part thereof, of any such person shall be made, without at least thirty days' notice of the time and place of such sale, by advertisement in one or more of the newspapers published in the county wherein the land is situate, or if there be no newspaper published in such county, then in the Royal Gazette. The surplus (if any) after answering the purpose of such sale, shall be applied by the committee, under the direction of the Court, for the support of such lunatic and his family."

138. "Any such person, or the committee of his estate in his name, by order of the Court, on the petition of any party beneficially interested in the lands seised or possessed by such person, or any interest therein, or any money secured therein, and on hearing the parties concerned, may convey any such lands, or assign or discharge any such mortgage or lien, as by such order may be directed."

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interested in the lands seised or possessed by such person, or any interest therein, or any money secured therein, and on hearing the parties concerned, may convey any such lands, or assign or discharge any such mortgage or lien as by such order may be directed."

Then the 137th section says: "No absolute sale of the real estate, or any part thereof, of any such person shall be made without at least thirty days' notice of the time and place of such sale, by advertisement in one or more of the newspapers published in the county wherein the land is situate," etc.

I think that the sections taken altogether evidently contemplated that this Court should be authorized to make an order that such real estate might be sold, but it distinctly and unequivocally prevents that being done where the sale is to be absolute—that is, the whole estate of the lunatic—unless by public auction, and, therefore, I think that I could only comply with the prayer of this petition by making the order under the provisions of the Act I have read, that the committee should sell it at public auction and in the way appointed by the Act.

If that will suit the parties I will make the order in that form, otherwise I shall refuse the order.

For present New Brunswick statutory provisions as to estates of lunatics, see section 218, *et seq.*, of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), and Trustee Act, 1850 (13 & 14 Vict. c. 60) (Imp.) in force in New Brunswick; see section 206 of 53 Vict. c. 4. In the absence of statutory authority, the Court has no power to sell or charge the estate of a lunatic: Ex parte Smith, 5 Ves. 556; Ex parte Dikes, 8 Ves. 80; Re Hulford, 1 Jur. 524; Ex parte Birch, 3 Swan. 98; and the Court must, consequently, confine itself within the limits of the Act defining its powers: In re Corbett, L. R. 1 Ch. 516; Re Vavasour, 3 Mac. & G. 275. But an enactment for the benefit of a lunatic ought to receive a wide rather than restricted construction: Per Lindley, L. J., In re Ware, [1892] 1 Ch. 344; Re Keenan, 2 Chy. Ch. 492. Where the lunatic was a married woman, it was held that the statutory powers conferred by the English Lunacy Regulation Acts, 25 & 26 Vict. c. 86, 16 & 17 Vict. c. 70, did not operate to make execution by her committee a sufficient conveyance of her legal estate in freehold property, since by the Fines and Recoveries Act, 3 & 4 Wm. IV., c. 74, her separate examination and acknowledgment are essential to her conveyance, and are acts which cannot be performed vicariously: In re Stables, 4 De G. J. & S. 257; 33 L. J. Ch. (N. S.) 422. In the case of a married woman married after the 1st of January, 1896, conveying her

separate real estate, a separate examination and acknowledgment are not necessary: The Married Women's Property Act, 58 Vict. c. 24, s. 4 (2); Re Drummond and Davie's Contract, [1891] 1 Ch. 524. *Quære*, as to a married woman married before the 1st of January, 1896. See section 4 (1) of the Act, notes to Horn v. Kennedy, *ante*, p. 311; Re Drummond and Davie's Contract, *supra*.

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1888.

December 13.

Partition—Legal title in dispute—Bill retained, with liberty to bring an action at law—Parties—Joinder of lessee—Multifariousness—Objection at hearing.

Where, in a partition suit, the title at law of the plaintiff is bona fide in dispute, the Court will not decree partition, but will retain the bill with liberty to the plaintiff to bring an action to establish his title at law.

Quære, as to whether the lessee of a tenant in common should be made a party to a partition suit.

The objection that a bill is multifarious should be raised by demurrer or in the answer, and cannot be taken at the hearing, though the Court itself may take the objection with a view to the regularity of its proceedings.

The facts of this suit are fully stated in the judgment of the Court.

D. L. Hanington, Q.C., for the plaintiff.

W. B. Chandler, for the defendants.

1888. December 13. TUCK, J.:—

The bill in this case sets out that John Tingly, Agnew Tingly, jr., and Josiah Tingly were in the year 1838 seised and possessed in fee simple of a lot of wilderness land situate in the parish of Sackville, in the county of Westmorland, known as lot No. 48 in letter B division of the township of Sackville, or a part thereof known as the gore, and being so seised on the 12th of February, 1838, by deed conveyed it to Thomas Ayer, Joseph Ayer, Jesse Ayer and William Ayer, their heirs and assigns. A description of this property is given in the bill. It is also alleged that Thomas, Joseph, and William Ayer were possessed of a saw mill near these lands.

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That Joseph Ayer was an uncle of the plaintiff, and lived with him, and about the year 1850 gave him verbally his share in the saw mill and land known as the gore. That in the same year, 1850, the plaintiff took possession of the interest of Joseph Ayer in the saw mill and gore lot, and also in the Olive lot (so called), together with Thomas, Jesse and William Ayer, and is still in the sole and exclusive possession of that interest; that in the year 1850 the plaintiff and the said Thomas, Jesse and William Ayer purchased from Oliver Barnes a lot of wilderness land, situate in the parish of Sackville and known as lot No. 47 in letter B division, and also known as the Olive lot. A deed was executed to them of this lot, but not registered. It was left with William Ayer, and afterwards came to the possession of Alfred Ayer, who still has the same and refuses to register it. Lot 47 lies adjoining the gore lot. That Thomas, Jesse and William Ayer and the plaintiff took possession of both lots, and occupied them as one block as tenants in common, and no lines were run or kept up between lot 47 and the gore lot; that afterwards, and many years since, a division or partition was made of the said lots, forming one block, whereby Thomas and Jesse Ayer took for their share the north-easterly part, or the part lying to the north-east of a line run from the centre of the south-easterly line of lot 47, through to Sugar brook, and William Ayer and the plaintiff took as their share the portion lying next the Walker road, and to the south-westerly of the line to be run to Sugar brook. This division was recognized and acted upon by the parties, but no deeds of exchange were executed between them.

That afterwards, on the 2nd January, 1859, Jesse Ayer conveyed his share in the two lots to George Anderson and John N. Ayer. That thereupon George Anderson and John N. Ayer executed to Jesse Ayer a bond in the penal sum of £600, conditioned to maintain Jesse Ayer and his wife and the survivor of them during their natural lives, and to secure the performance of the condition of the bond conveyed to Jesse Ayer certain lots of land described in the bill. And it is alleged that the condition of the bond and mortgage was performed by

Anderson and Ayer; that Jesse Ayer and his wife are long since dead, and the mortgaged lands and premises are discharged.

That on the 26th of January, 1865, John N. Ayer conveyed all his shares and interest in lots 47 and 48 to George Anderson, before named. George Anderson departed this life intestate about the 6th of March, 1873, without having made a conveyance of his share in the lands, and left him surviving, his widow, Arabella, and four children, namely, the defendants Rupert T., Ernest L., Jesse A., and Carrie B. Anderson.

That Rupert T. Anderson, afterwards, on the 24th June, 1880, leased to the defendant, James Anderson, for the term of seven years from the 1st of July then next, "that lot of woodland situate in Westmorland, bounded southerly by Walker road, westerly and northerly by lands of James Anderson; northerly and easterly by lands of Alfred Ayer, containing 80 acres, more or less," at an annual rent of $20. That on the 26th day of February, 1875, William Ayer conveyed all his interest in the said lots to his son Alfred Ayer.

That on the 9th day of January, 1882, Alfred Ayer conveyed his quarter interest in lot 47, or the Olive lot, to the defendant, James Anderson, and "also one-half interest being the interest of the late William Ayer and the late Joseph Ayer in that certain half lot of woodland situate in Sackville, and known as lot No. 48 in letter B division of the township of Sackville, and bounded as follows: On the south-west by lot No. 47, known as the Olive lot; on the south-east by the Walker road, north-west by the Sugar brook, and north-east by lands of James Anderson; the half lot containing 90 acres, more or less."

That Thomas Ayer, before named, conveyed his interest in lots 47 and 48 to Joseph Sears. This deed has never been registered, and is now in possession of John B. Tingly, who refuses to deliver it to the plaintiff or have it registered. That Joseph Sears took possession of his interest in the two lots and afterwards conveyed them to John B. Tingly. Before the conveyance to Tingly, the plaintiff had purchased from Joseph Sears

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his interest in the lots, and paid him part of the purchase money. This fact was known to Tingly, who afterwards, by deed duly executed, and registered on the 21st day of December, 1880, conveyed all his interest in the lots to the plaintiff. The plaintiff then took possession of the interest originally owned by Thomas Ayer in both lots. He claims that during the past 35 years he has had sole and exclusive possession of the shares and interest originally conveyed to Joseph Ayer in lot 48, or the gore; and that he is entitled to Joseph Ayer's interest therein by virtue of the gift thereof already mentioned. He claims further, that when Alfred Ayer conveyed to James Anderson his (Ayer's) only interest in the gore was that conveyed to him by his father, William Ayer, and this interest was all that James Anderson received by such conveyance.

The plaintiff complains that the defendant, James Anderson, by himself and his servants, has, against the plaintiff's repeated protest, during the past six or seven years, cut and hauled from off lots 47 and 48 logs, trees and other lumber, for which he has refused to account to the plaintiff. The defendant, James Anderson, denies that any division of the lots was ever made, and refuses to divide the part thereof next the Walker road with the plaintiff.

In conclusion, the plaintiff claims that he is entitled unto an undivided one-half part of that portion of said two lots lying between a line run from a stake set on the centre of lot No. 47, when the alleged division was made by land surveyor Philip Palmer through to Sugar brook and the Walker road; and the defendant, James Anderson, is entitled to the other half part, which portion of the two lots the plaintiff and defendant, James Anderson, hold in common and undivided. And that he is also entitled to an undivided four-eighth part and share, or one half of that portion of the lots lying to the north-easterly of said line from the stake to Sugar brook; and the defendants, Rupert T. Anderson, Ernest L. Anderson, Jesse A. Anderson, to the other half part in equal shares, which last mentioned portion of said two lots they hold as tenants in common and undivided.

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By his bill the plaintiff prays that the defendants may be restrained by order of injunction from cutting down, hauling away, or interfering with any of the trees, logs, timber or wood growing on the two lots, and from committing any further waste thereon. Also that the partition and division of said two lots made by and between Jesse Ayer, Thomas Ayer, and William Ayer and the plaintiffs be ratified and confirmed; and that the lands and premises may be partitioned and divided between the defendants and the plaintiff in shares, according to the shares that each may be entitled to by law; and that the plaintiff may occupy and hold two shares thereof respectively in severalty. The plaintiff asks also that an account be taken of all logs, timber, trees and poles cut by the defendants, or either of them, on the said lots, or either of them, and of all rents and profits received by the defendants, or either of them therefrom, and that such defendants, or defendant, be ordered and decreed to pay to the plaintiff the fair value of his share.

James Anderson, one of the defendants, put in an answer, and Carrie B. Anderson, an infant, answered by John Ford, as her guardian ad litem. The other defendants did not answer.

By his answer, the defendant, James Anderson, whilst admitting many of the allegations in the plaintiff's bill, denies that Joseph Ayer ever gave the plaintiff his share in the saw mill, or in lot No. 48, being the gore lot. He denies also that the plaintiff ever took possession of said share of the mill lot and the gore, together with the Olive lot, with Thomas, Jesse, and Wm. Ayer as tenants in common of the two lots. He also denies any sole and exclusive possession by the plaintiff from the year 1850, or any other time, of Joseph Ayer's interest in the gore lot; and claims that Joseph Ayer's interest remained vested in him until his death on the 14th March, 1875, when it passed to and was possessed by Charles Barnes, Richard Wilson, jr., and Amie Anderson, under a devise contained in the last will of Joseph Ayer, and that finally by divers mesne assignments this share became vested in him, James Anderson,

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as a purchaser for value, without notice of any interest in any other person. The defendant, James Anderson, also denies that Thomas Ayer, Jesse Ayer, and William Ayer and the plaintiff, as tenants in common of lots 47 and 48 or part of lot 48, or in any other capacity, agreed to divide or did divide and make partition of the two lots, and denies any possession taken by the different parties of the respective portions in the manner specified in the bill. No such division as that alleged, nor any other, was ever recognized and acted upon. He alleges that when Alfred Ayer executed to him (Anderson) the deed mentioned in the 11th paragraph of the plaintiff's bill, Ayer had a good right and title in fee simple to the share and interest of Joseph Ayer in lot 48 as a purchaser for value without notice.

The defendant, James Anderson, admits having cut and hauled in the winter of 1885 and 1886 upon lot 48 400 logs, containing about 33 M superficial feet, and denies that he ever cut any more, except about 40 logs for a driving dam, cut on lot 47 in the year 1881. Besides this, he alleges that he never received any rents issues or profits from the two lots.

The defendant, James Anderson, says that he was never called upon to account by the plaintiff; his solicitors may have called upon him to do so. The plaintiff never forbade him to cut. The plaintiff's brother objected to the cutting in the winters of 1885 and 1886. He also says that he was willing to divide the lots at any time, but claims and alleges that the plaintiff never had any right, title or interest, either legal or equitable, in Joseph Ayer's share in lot 48, and that such interest is vested in him, the defendant, in fee simple.

The case was heard before me, without a jury, at a special sitting of the Court, held at Dorchester.

At the conclusion of the plaintiff's case, on motion of the plaintiff's counsel, an order was made that the bill be taken pro confesso against the defendants Rupert T. Anderson, Ernest L. Anderson and Jesse A. Anderson, for want of appearance.

At the hearing the plaintiff testified that Joseph Ayer, his uncle, about forty years since, or more, gave

him his (the uncle's) share of a saw mill and the gore lot, number 48; that he (the plaintiff) then went into possession of what had been Joseph's share of the gore, and had continued in possession thereof ever since. There was no conveyance in writing from Joseph Ayer to the plaintiff. In May, 1844, Oliver Barnes conveyed to Thomas Ayer, Jesse Ayer and the plaintiff the Olive lot, number 47. Afterwards, on the 1st day of May in the year 1872, the plaintiff went into possession of Thomas Ayer's one-fourth interest in both lots, 47 and 48, under a deed from John B. Tingly and wife. Thomas Ayer had before this conveyed to Joseph Sears and Harris Sears. Then there was a mortgage from Harris to Joseph Sears, and the latter conveyed in fee simple to John B. Tingly, leaving the equity of redemption outstanding in Harris Sears.

The plaintiff also gave evidence that about 38 or 39 years since a division or partition was made of both lots between himself and Thomas, William and Jesse Ayer, whereby he and William were to have that portion of the land lying to the south-west of a line running along the said lots, and surveyed by the late Philip Palmer; and Thomas Ayer and Jesse Ayer were to have that part of the land lying to the north-east of this line. This partition was by parol, and no conveyances were ever executed between the parties.

Other evidence was given on behalf of this plaintiff by William Ogden and Albert Ayer as to the possession by the plaintiff of Joseph Ayer's share, and also as to the division. Several witnesses testified as to the trees and timber cut and hauled by the defendant, James Anderson, upon the land.

On the part of the defendants, Christopher Richardson, James Anderson and Alfred Ayer were examined to impeach the plaintiff's title to Joseph Ayer's interest in the gore lot, and the plaintiff's evidence as to the parol division of both lots. Besides this the defendant, James Anderson and his witnesses, gave evidence as to the quantity of timber cut and its value.

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When the evidence was all in, Mr. W. B. Chandler, the defendants' counsel, took several objections to the partition being made as prayed for in the bill. He contended that the bill is multifarious; first, because it prays for the confirmation of a parol partition, and also seeks partition of the premises after the parol partition shall have been confirmed; and, secondly, because it prays partition of two parcels of land, in one of which, as plaintiff alleges, James Anderson has no interest whatever, except as lessee, and as such lessee he is not a proper party to the suit. I incline to think, as to the first ground, that the bill does pray for multifarious relief when it seeks to confirm a parol partition already made, and then to have a partition of all the premises, but I cannot see any multifariousness in the second ground taken. In Freeman on Co-tenancy and Partition (2d ed.), at section 273, it is stated that "upon a leasing of his moiety by one of the co-tenants, his lessee becomes liable to account to the co-tenants of the lessor." But, however this may be, the defendant ought to have taken this objection in his answer or by demurrer. He is precluded from raising this objection at the hearing, although the Court might of its own motion have done so, "with a view to the order and regularity of its proceedings." This is decided in *Greenwood* v. *Churchill* (1) and in *Jones* v. *Calkin* (2).

Then it was insisted that the suit is defective because Harris Sears is not a party, there being an equity of redemption outstanding in him. At the hearing, in answer to this objection, Mr. Hanington, plaintiff's counsel, contended that the plaintiff had been for twenty-three years in possession of any interest which Harris Sears had in the north-east side of the land; he stated, also, that he could apply to amend by making Harris Sears a party. I think it would be well for the plaintiff to consider the propriety of making an application to have this amendment made, before taking any further step in the suit.

(1) 1 Myl. & K. 546.

(2) 3 Pug. 380.

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But there was another objection of a more substantial character made by the defendants' counsel. He contended that the Court has no power to make the decree prayed for, as the suit is for the establishing of a purely legal title. I think that the evidence shows clearly that the title to the quarter of the gore formerly owned by Joseph Ayer, is bona fide raised in this suit, and whenever the legal title is honestly in dispute the Court of Equity must stay its hand, and not make any decree of partition until the title at law has been settled. And this is true, even if there were a large preponderance of evidence before the Court of Equity in favour of the party seeking the partition. The plaintiff here claims title by parol gift and possession extending over a period of more than forty years. This the defendant disputes, and claims title in himself, and offers evidence in support of his contention. Before I can proceed to decree a partition, this question, being a purely legal one, must be settled.

Not only is the question of the fact, as to the gift and possession of the gore lot to be determined, but there are several matters of law which have been raised by the defendants' counsel. Among others, there is this, and an important one, that a parol partition to be binding must be made by the person owning the fee, and at the time of the alleged partition Ogden had no title whatever, as his possession, if any, had not ripened into a title. It is a settled principle of law that a bill for partition cannot be made the means of trying a disputed title. At the hearing my attention was called by plaintiff's counsel to the case of *Burke* v. *Smith*, also known as the Govang case, not reported, decided by the learned Judge in Equity, Mr. Justice *Palmer*, about five years since, as putting forward a different principle. Not having seen the judgment in that case I am unable to say upon what facts, or under what circumstances, the learned Judge gave his decision. But the cases of *Potter* v. *Waller* (3), decided by Vice-Chancellor Knight Bruce; *Boulton* v. *Boulton* (4), by Sir W. Page Wood and Sir C. J.

(3) 2 DeG. & Sm. 410.

(4) L. R. 7 Eq. 298.

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Selwyn, L.JJ.; *Slade* v. *Barlow* (5), and *Giffard* v. *Williams* (6), all decide that a disputed title cannot be tried by means of a bill of partition. The same doctrine is laid down in Smith's Principles of Equity (edition of 1884), p. 101, and Knapp on Partition, pp. 43, 44 and 46. In the latter book the writer says: "To obtain partition in equity it is necessary for the legal title to be clear and undisputed." On page 46 he says, "Where the legal title is in dispute, or where it depends upon doubtful facts or questions of law, a bill for partition will not lie."

I regret to have to come to this conclusion, because it seems to me that it would be more convenient and less expensive for the parties to have all the questions involved determined now, when the facts are known to the Court, rather than after the litigants have gone through the tedious process of a suit at law.

I shall retain the bill for a year, with liberty to the plaintiff to bring an action, and shall reserve the question of costs.

The Court of Chancery will not entertain a suit for partition in any case where the title being purely legal, the main purpose of the suit is not partition, but to prove the legal title; that is to say, a disputed title cannot be tried by means of a bill for partition: Potter v. Waller, 2 De G. & Sm. 410; O'Hara v. Ecclesiastical Commissioners, 11 Ir. Eq. Rep. 262; Bolton v. Bolton, L. R. 7 Eq. 298; Hopkins v. Hopkins, 9 P. R. 71. The suit for a partition is based on the assumption that there is no litigation between the parties as to their respective titles: Slade v. Barlow, L. R. 7 Eq. 296. In Freeman (2nd ed.), section 502, it is observed that there is a material difference between a doubtful and a disputed title, and the learned writer considers whether the mere fact that the defendant disputes the complainant's title is sufficient to oust the Court of its jurisdiction. "A large number of cases exist in which no attention whatever is given to this distinction, and the broad proposition is asserted that whenever the complainant's title is disputed or suspicious, equity will not proceed with the partition until the dispute has been settled at law. But in a few cases in which the distinction between a disputed and a suspicious title has suggested itself to the Court, the conclusion has been reached that the bare denial of complainant's title did not necessitate a reference to the legal tribunals; that equity had jurisdiction to determine whether the title was free from suspicion, and would, notwithstanding the defendant's objections, proceed whenever, in its judgment, the title was clear. 'I do not understand, however, that the bare denial of the complainant's title is any obstacle to the Court's proceeding. The defendant must answer the bill, and if he sets up a title adverse to the complainant, or disputes the complainant's title, he must discover his own title, or show wherein

(5) L. R. 7 Eq. 296. (6) L. R. 5 Ch. 546.

the complainant's title is defective. If, when the titles are spread before the Court upon the pleadings, the Court can see that there is no valid legal objection to the complainant's title, there is no reason why the Court should not proceed to order the partition': Lucas v. King, 2 Stock. Ch. 280. 'If a bare denial of the title, when there was no reasonable doubt or suspicion attending it, would authorize the dismissal of the complainant's bill, it would place this equitable jurisdiction at the mercy of every unconscionable defendant': Overton's Heirs v. Woolfolk, 6 Dana, 374. Whether the view here given be sustained or not, this much is certain, whenever a Court of Equity determined that there were any serious doubts in regard to the legal title, it would not proceed until those doubts were judicially determined and removed." In Burt v. Hellyar, L. R. 14 Eq. 160, a legal question was decided in a suit for partition, no objection being taken, and the Court ordering the decree to be prefaced with a statement of the desire of all parties that the case should be decided by the Court. And see Wood v. Wood, 16 Gr. 471, where a question of title between co-defendants was decided in a partition suit. Where the plaintiff and defendant in a partition suit each claimed a moiety of the estate, and produced evidence of title, the Court refused, at the instance of co-defendants, who set up a claim to the property, and alleged illegitimacy on the part of the defendant, but who produced no evidence of title, to adjourn the question for further inquiry: Backhouse v. Paddon, 13 L. T. N. S. 625. Where there is a legal dispute as to title the Court will order the bill to be retained for a year, with liberty to the plaintiff to bring "such action as he may be advised" to establish his title: Giffard v. Williams, L. R. 5 Ch. 546; Bolton v. Bolton, L. R. 7 Eq. 298. If the title of the plaintiff is clear, but the defendants set up conflicting titles between themselves, the Court will direct that the plaintiff's moiety be set off to him, and that the partition between the defendants be reserved until their titles be settled at law: Phelps v. Green, 3 Johns, Ch. (N. Y.) 303. The plaintiff must show by his bill that he has an interest in the property sought to be partitioned, as otherwise the bill will be dismissed: Parker v. Gerard, Ambl. 236; Jope v. Morshead, 6 Beav. 213. An equitable title will be sufficient: Cornish v. Gest, 2 Cox, 27; Miller v. Warmington, 1 J. & W. 493; Cartwright v. Pultney, 2 Atk. 380; Swan v. Swan, 8 Price, 518; Heaton v. Dearden, 16 Beav. 147. If at the time of filing a bill a plaintiff has no title, he cannot maintain the suit by subsequently acquiring a title and amending his bill: Evans v. Bagshaw, L. R. 8 Eq. 569.

In O'Reilly v. Vincent, 2 Moll. 330, it is said that tenants or persons having partial interests are not necessary parties to a partition suit. Where, however, one tenant in common leased his undivided share for 99 years, it was held that the lessee was a necessary party: Cornish v. Gest, 2 Cox, 27. And see Fitzpatrick v. Wilson, 12 Gr. 440. Where an interest will not be bound or concluded by a decree, a Court of Equity will dispense with the persons, representing that interest, being made parties: Story, Eq. Plead., section 151. The question is thus referred to in Freeman, section 480: "A lessee of a moiety has an interest which cannot be divested without making him a party. The co-tenants may, if they choose, go on and have a decree of partition without bringing him before the Court. By such partition, the legal title vests in the assignees of the various properties, subject to the equities of the lessees who were not parties. But whenever it is proposed by the partition to affect the rights of lessees, they must be made parties defendant, or in some other manner brought before the Court."

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October 1.

McINTOSH v. CARRITTE.

Injunction—Nuisance—Effluvia—Acquiescence—Jury—Finding of fact upon application for interim injunction—Res Judicata—Hearing—Act 53 Vict. c. 4, s. 83.

To constitute a private nuisance arising from offensive odours they must occasion material discomfort and annoyance for the ordinary purposes of life, according to the ordinary mode and custom of living.

The doctrine of acquiescence in relation to nuisance considered.

Where on an application for an interim injunction to restrain a nuisance a jury finds upon the facts, under Act 53 Vict., c. 4, s. 83, the question upon them is *res judicata* for all the purposes of the suit, and cannot be re-tried at the hearing.

The facts of this suit fully appear in the judgment of the Court. Argument was heard September 29th, 1890.

C. A. Palmer, and *J. D. Hazen*, for the plaintiff.

F. E. Barker, Q.C., and *C. A. Stockton*, for the defendant.

1890. October 1. PALMER, J.:—

This is an application for an injunction order to restrain the defendant from so operating a manufactory of fertilizers in the parish of Simonds, in the county of St. John, as to cause offensive effluvia and smell to escape from it into and upon the plaintiff's dwelling-house and garden situate contiguous thereto. The defendant upon the hearing of the application denied that he had caused any nuisance to the occupation by the plaintiff of his premises. I, in the most exhaustive manner, tried that question out with the assistance of a jury, under the 44th section of chapter 49, C. S., and the jury found that the plaintiff's contention was correct, and that a nuisance had been committed by the defendant and was being continued at the time of the trial.

The trial was continued and the verdict given after the Act 53 Vict. cap. 4, came into force, section 83 of which is in substitution of the section before referred to, but whether the finding can be considered to be under

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the first Act or the second, I think, makes no substantial difference. The question that presents itself to the Court is: Whether when such a question has been so tried and the fact found is it not res judicata for all purposes, until set aside, either on motion for a new trial or by some appellate Court? I think it is, and I can see no useful purpose that can be served by allowing the parties to try the matter over again at the hearing. It would follow that the fact that the defendant has committed the nuisance complained of is incontrovertibly established, and whatever right the law would give the plaintiff as a consequence he is entitled to. The case does not stand as it did before the law authorized such a trial; then it was uncertain how such a fact might be found at the hearing, no matter how probable it may have appeared on one side or the other, and therefore it was the constant practice of the Court to refuse or grant the application for an interim injunction according as the balance of convenience might appear to be either one way or the other, and at the same time imposing such conditions that would enable the Court, when the matter was finally determined, to do justice to the party who might then be shown to be right. It follows that I am now obliged to give to the plaintiff any remedy that this Court ought to give after the hearing, under the circumstances of this case, to prevent a repetition of the injury.

The jury has passed upon the question of fact, and I was obliged to decide the question of law involved in my direction to them, and when once the defendant's operations are pronounced a nuisance, that includes both the law and the fact, but I have no doubt the law I laid down to the jury is the correct law governing the case. It was as follows: If the vapours, gases or effluvia from the defendant's works have caused material discomfort and consequent annoyance for the ordinary purposes of life according to the ordinary mode and custom of living of the people in this country, to the plaintiff and his family in the occupation of his dwelling-house and garden, then it is a nuisance.

And I have no doubt myself of the fact that a disagreeable effluvia and stench have escaped from the de-

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fendant's manufactory into the grounds and dwelling-house of the plaintiff so as most materially to interfere with the comfort of himself and his family, and that this has been a legal wrong; and I think it is equally clear that it is the duty of this Court to prevent the continuance of it by injunction order, unless the defendant has shown that the plaintiff has lost such right by reason of his acquiescence in what the defendant has done; and the principal argument before me has been upon that question. This question certainly does present one of the most difficult questions that it is possible for any Court to consider. The effect will be, if the plaintiff has done anything to deprive him of his right and thus enable the defendant to continue such a material nuisance as to practically render his dwelling-house uninhabitable, that he has lost that right forever; therefore, it would require the most careful consideration to see whether or not the defendant has made out that case against the plaintiff.

It will assist in discussing this question to have a clear understanding what acquiescence is, in order to take away a party's right.

Nowhere can I find a better definition of it than is given by Lord Wensleydale and Lord Chelmsford in addressing the House of Lords in *Archbold* v. *Scully* (1). Lord Wensleydale there says (2): "So far as laches is a defence, I take it that where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches."

And Lord Chelmsford says: "Acquiescence, in the sense of mere passive assent, cannot be regarded as anything more than laches or delay."

And Lord Cranworth, in *The Rochdale Canal Co.* v. *King* (4), says (5): "Mere acquiescence (if by acquiescence is to be understood only the abstaining from legal proceedings) is unimportant. Where one party invades

(1) 9 H. L. C. 360.
(2) At p. 383.
(4) 2 Sim. N. S. 78.
(5) At p. 89.

the rights of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations."

It appears to me that the only principle that can be applicable to this case is one often recognized by this Court, namely, that if one man stands by and encourages another, though but passively, to lay out his money under the obvious expectation that no obstacle will be thereafter imposed, the Court will not permit any substantial interference with it by him who formerly permitted those acts of which he now either complains or seeks to obtain an advantage by.

This is the rule laid down in *Powell* v. *Thomas* (6), and the rule is most aptly expressed by that most eminent and accurate lawyer, Lord Justice Thesiger, in *De Bussche* v. *Alt* (7), where he says (8): "If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term 'acquiescence,' and in that sense may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words and conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for

(6) 6 Hare, 300. (7) 8 Ch. D. 286. (8) At p. 314.

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the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding."

Now, whether a person stands by in such a manner as to induce a person to commit an act must depend upon whether the party had a full knowledge of the act, and also of the consequences. It is apparent that justice requires this, and therefore we find it laid down by an eminent equity lawyer, Sir William Grant (9), that in order to bind by acquiescence the party must have full knowledge; and also it is laid down in Kerr on Injunctions at page 17, that if an act had been permitted or expenditure allowed to be made under an erroneous opinion and in ignorance of the consequences there is no acquiescence. I do not think the principle can be better laid down than Mr. Kerr lays it down in these words: "In order to justify the application of the principle, it must clearly appear that the party against whom acquiescence is alleged should have full knowledge of his rights, and should by his conduct have encouraged the other party to alter his condition, and that the latter should have acted upon the faith of the encouragement so held out."

These are the principles of equity governing cases of this sort, from which it is apparent that no decision in one case can be much guide for another; each must be judged by its own circumstances, and therefore I have not thought it necessary to go through and criticize all the cases cited by counsel, and many others, apparently conflicting. They will all, I think, be reconcilable by application of the principles I have named.

Take the facts relied upon in this case, about which there is very little dispute. Of the mere building of the factory the plaintiff had no right to complain; there is

(9) In Randall v. Errington, 10 Ves. 428.

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not the slightest evidence that he knew that the putting of it there would necessarily infringe upon his rights or create a nuisance upon his premises. There is no doubt that he did know that the defendant had operated it as a factory for a whole year, from May, 1889, to May, 1890, so as to create a nuisance without any complaint; and while I do not wish to say anything to encourage anybody to go to law on the slightest provocation, yet I think it would have been better if Mr. McIntosh had promptly notified Mr. Carritte of the inconvenience he was suffering. But still there does not appear to have been any expenditure that Mr. McIntosh knew Mr. Carritte was making afterwards that would only be useful in case such nuisance was allowed to continue. There would appear to be three answers to that contention: First, I do not think there is any evidence that Mr. McIntosh knew that the defendant was putting up a drier, which is the only expense that was incurred in the factory, but if he did, I do not consider it proved that he knew that expenditure would be useless unless Mr. Carritte was allowed to continue the obnoxious smells so as to be a nuisance to him in his dwelling-house. He may well have thought that that very act would have obviated the nuisance, and not only is there no proof that Mr. McIntosh knew such a factory could not be operated without the consequence of creating a nuisance to him, but there is no reason even now why he should be satisfied of it. I confess I myself am not satisfied on that point. How, then, am I to say that he knew when he allowed Mr. Carritte to expend money in putting in his drier that it would be useless unless he allowed him to commit the nuisance upon his (McIntosh's) premises? I therefore think that I cannot, under this evidence, determine that Mr. McIntosh has lost his right. I have taken a great deal of trouble since the giving of the verdict in this case to ascertain, if possible, whether this manufactory cannot be run without creating a nuisance upon plaintiff's premises, and for that purpose have employed a person to stay about the premises for three or four days while the factory was in full operation, with the result of his reporting that there was little or no nuis-

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ance committed during that time. I shall heartily rejoice if the defendant's industry, which appears to be a very beneficial one to the community in its results, and to have been carried on by him in good faith, should be able to be continued, and he should be able to conform to the law in operating it. He claims that he can, and he has done so since the verdict was given in this case. I confess that I have formed an opinion that it is quite possible such may be the case, but I must warn the defendant not to put any faith in my opinion one way or the other. He must act upon what he may suppose to be his rights, according to his own judgment and the advice of his counsel, and he must do so on his own responsibility. I can give him no warrant to do anything.

The order I will make will be an injunction to restrain the defendant, his servants and workmen and agents from allowing a stench, gases or effluvia to issue from his factory mentioned in the bill so as to occasion nuisance and annoyance to the plaintiff as owner or occupier of the dwelling-house and garden in the bill mentioned. I cannot make the order more particular. The amount that may be allowed to escape without amounting to a nuisance is a question of degree, and if the defendant can carry on his manufactory in such a manner as to avoid any substantial issue of such gases, smell or effluvia he will not violate the injunction. Whether he does so or not may be tried in another proceeding.

The question of costs I have been somewhat doubtful about, and if the defendant had merely put his excuse upon the fact of the delay, and want of notice of the injury to the defendant, I think it would have been my duty to have said nothing about costs, but he has made a most severe contest over a matter in which the jury have found, and in which I think he was clearly in the wrong, and therefore he must pay the costs. I cannot tell whether it is possible for the defendant to work up and save the property in the materials he has on hand to be manufactured without creating a nuisance to the plaintiff's property, and it may be found desirable he should do so on making proper compensation to the plaintiff. I reserve liberty to either party to apply to stay or

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vary the injunction order, or for any other thing that may be advised to be necessary.

"It is not necessary to constitute a private nuisance that the acts or state of things complained of should be noxious in the sense of being injurious to health. It is enough that there is a material interference with the ordinary comfort and convenience of life—'the physical comfort of human existence'—by an ordinary and reasonable standard: Walter v. Selfe, 4 De G. & Sm. 315; Crump v. Lambert, L. R. 3 Eq. 409; there must be something more than mere loss of amenity: Salvin v. North Brancepeth Coal Co., L. R. 9 Ch. 705, but there need not be positive hurt or disease": Pollock on Torts (4th ed.), 366. In Robinson v. Kilvert, 41 Ch. D. 88, Cotton, L.J., said: "If a person does what in itself is noxious, or which interferes with the ordinary use and enjoyment of a neighbour's property, it is a nuisance. But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life." And Lopes, L.J., in the same case, said: "A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade." And see also Reinhardt v. Mentasti, 42 Ch. D. 685. In Rapier v. London Tramways Co., [1893] 2 Ch. 588, Lindley, L.J., said: "The question is whether the defendants do or do not create in the conduct of their business such a smell as diminishes the reasonable enjoyment and comfort of the plaintiff's house. The fact that somebody with a sensitive nose smells some ammonia, and does not like it, will not prove a nuisance; it is a question of degree. You can only appeal to the common sense of ordinary people. The test is whether the smell is so bad and continuous as to seriously interfere with comfort and enjoyment." In Spruzen v. Dossett, The Times L. R. March 4th, 1896, Stirling, J., quoted with approval the language of Wigram, V.C., in Walter v. Selfe, 4 De G. & Sm. 322, as laying down the true test in cases of this kind. The question of acquiescence with respect to injurious acts to property was considered in Mitten v. Wright, 1 N. B. Eq. 171.

1891.

September 19.

CLOSE v. CLOSE ET AL.

Partition—Sale—Joinder of wife of tenant in common.

Quære, whether the inchoate right of dower of the wife of a tenant in common is barred by a sale of the land in a partition suit to which she is made a party.

Andrew B. Close died on the 7th of December, 1883, intestate. At the time of his death he was seised in fee of two lots of land situate in York county. He left him surviving a brother, the plaintiff, Richard C. Close, and the following sisters, Lucinda, Elizabeth, and Mary M., who are spinsters. Abram Close, a brother, predeceased him, leaving two sons, Alfred and Henry, and a daughter Lucy. Lucy married William DeVeber, and died subsequently to Andrew B. Close, leaving her surviving her husband and five children, namely, Leverett J. DeVeber, Harry F. DeVeber, Frederick W. R. DeVeber, Ida C. DeVeber and Lillian M. DeVeber. In a suit by the plaintiff for the partition and sale of the lands of Andrew B. Close, the plaintiff's wife and the wives of Alfred and Henry Close and Leverett J. DeVeber were made defendants to the suit.

G. F. Gregory, Q.C., for the defendants.

James A. VanWart, Q.C., for the plaintiff.

1891. September 19. SIR JOHN C. ALLEN, C.J.:—

It is admitted by the counsel for both parties that it is desirable that a sale of the land in respect to which this suit is brought should be made, instead of a partition, and I certainly agree that it should be sold, and decree accordingly, and order that the two parcels of land described in the plaintiff's bill be sold separately.

The only question in the case is whether the land should be sold subject to the inchoate rights of dower of the defendant Bathsheba Close, the wife of the plaintiff; of Amanda Close, the wife of the defendant Alfred Close; of Abbie Close, the wife of the defendant Henry Close, and of Bell DeVeber, the wife of the defendant

Leverett J. DeVeber; or, whether their respective rights will be barred by the decree of sale made in this case.

Section 204 of the Act 53 Vict. c. 4, is relied on in support of the latter construction. That section enacts as follows: "The decree of the Court whereby any portion of lands held in co-parcenary, joint tenancy, or tenancy in common, shall be decreed in severalty, shall transfer to such co-parcener, joint tenant or tenant in common all the right, title and interest of the other parties interested therein, as well infants and married women, as others being parties to such proceeding."

I am inclined to think that the words "married women" in this section, used as they are, in connection with the word "infants," mean married women who are parties to a partition suit because they are part owners of the land sought to be divided, and not to cases where they are only made parties because they have rights of dower in the land. The succeeding words of the section, "as others being parties to such proceedings," may, however, include married women who have only rights of dower, as it does not occur to me at present what other parties those words could refer to except tenants by the curtesy and dowresses. Section 203 may also be referred to as showing who are bound by a sale.

I have been unable to find any case in Ontario throwing any light on this point. The case of Cassey v. Cassey (1), which related to the sale of an inchoate right of dower, depended on a statute, and, at all events, does not affect the present question.

The American cases relating to suits for partition, where rights of dower were involved, also appear to have been regulated by statute. Thus in 4 Kent's Com. (12th ed.), 365, it is said that a final decree of partition under the New York Revised Statutes binds all parties named in the proceedings, and having at the time any interest in the premises divided as owners in fee or as having a contingent interest therein, or an interest in any undivided share of the premises, as tenants for years, for life, by the curtesy, or in dower. And in note (c) refer-

(1) 15 Gr. 399.

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Allen, C.J.

ring to the case of *Jackson* v. *Edwards* (2), the effect of the proceedings in a partition suit on a wife's inchoate right of dower, where she is a party to the suit, is fully considered.

My impression at present is against the inchoate right of dower being barred by a decree of partition under our statute, but I do not feel clear upon it. The property to be divided is small, and probably of not much value, and it would no doubt materially affect the price to be obtained if it was sold subject to the inchoate rights of dower of the four married women.

The order that I propose to make is, that the property be sold in two lots by the Referee in Equity, according to the directions of the Act 53 Viet. c. 4, ss. 201, 202; that the net proceeds be paid to the Clerk in Equity; that the costs of all the parties, plaintiff and defendants, be taxed and paid to the respective parties entitled to the same; and that the balance remain in Court to the credit of the cause, subject to a further order for the distribution of the same, on which both parties may be heard.

My reason for taking this course is that the parties may have an opportunity for settling the question of dower if they can. But if they cannot settle, then I shall probably direct the balance, after payment of the costs, to be paid into Court, deposited on interest, and the annual interest to be paid to the several parties in the proportions to which they are respectively entitled, during the lives of Bathsheba Close, Amanda Close, Abbie Close and Bell DeVeber, respectively. If any or either of the above named married women should survive her husband such survivor to be entitled to the annual interest during her life of one-third of the share of this money decreed to be her husband's share. See *Skinner* v. *Ainsworth* (3).

For example, if Richard Close should die before his wife, Bathsheba, she would then be entitled to receive during her life the annual interest of one-third of the portion of the money decreed to belong to him after the

(2) 7 Paige, 386.

(3) 24 Gr. 148.

costs are paid. And in like manner, if Alfred Close or Henry Close should die before their respective wives, the widow or widows surviving would each be entitled to receive during their lives respectively the annual interest of one-third of the shares decreed to belong to their respective husbands. And Bell DeVeber would be entitled to receive the annual interest of one-third of the share allotted to her husband in case she survive him.

The very small amounts which could, under any circumstances, be coming to nearly all these females in case they survive their husbands, shows how desirable it is that the parties should arrange among themselves these contingent claims, so that the proceeds of the sale after the costs are paid should be paid over to the heirs at once.

The real estate of Andrew B. Close will, in the first instance, be divided into five shares, of which Richard, Lucinda, Elizabeth and Mary Margaret will take five each, the other one-fifth will be divided among the heirs of Abraham Close (a brother of Andrew), Alfred and Henry each taking one-third, and the other one-third being divided among the five children of Mrs. DeVeber.

The question left open in this case subsequently arose in Hannaghan v. Hannaghan, 1 N. B. Eq. 302, and Mr. Justice Barker in a learned and satisfactory judgment held that the wife of a tenant in common could be made a party to a partition suit, with the effect of barring her inchoate right of dower.

1891. March 14.

WELDON ET AL. v. WILLIAM PARKS & SON (LTD.) ET AL.

(No. 1. Post, p. 433.)

Company—Debentures—Mortgage—Foreclosure suit—Application by shareholder to defend.

A company was authorized by Act to issue debentures for the purpose of redeeming mortgages against a property it was acquiring. In a suit to foreclose a mortgage given by the company to secure the debentures, a shareholder applied to be allowed to defend the suit on the ground that the proceeds of the debentures had been applied to a purpose not authorized by the Act; that the holders of them took with notice thereof, and that the directors of the company refused to defend the suit.

Held, that upon evidence of the applicant's allegations the application should be granted.

This was a petition of William J. Parks, a shareholder of the defendant company, to be allowed to defend the suit. The facts are sufficiently stated in the judgment of the Court.

Argument was heard March 9th, 1891.

E. McLeod, Q.C., for the petitioner.

F. E. Barker, Q.C., for the plaintiffs.

1891. March 14. PALMER, J.:—

This is a suit to foreclose a corporation's equity of redemption under a mortgage executed by the company under the powers contained in the Act of Assembly, 51 Vict. c. 57, to secure certain scrip issued by the company. It is alleged that the company issued the scrip and borrowed money thereon from the Bank of Montreal and others, and used the same without paying off the indebtedness of the company, as provided for by the Act referred to; that the holders of such scrip knew of this misappropriation—in fact, that the company and the holders of the scrip have dealt improperly with it. William J. Parks, a stockholder, has asked to be allowed to come in and defend, alleging that the directors of the company improperly refused to do so; and the question is whether, under the circumstances, this ought to be done. The first principle of law applicable to this case

is that William J. Parks, as a stockholder, is simply an individual member of the company, and has no standing in Court ordinarily in respect of injuries done the company, and that the company alone has the right to protect its property. If a person wrongfully takes away the property belonging to the company, none but the company can bring an action to recover it. So in an equitable claim to defeat these bonds the company alone, prima facie, are the persons to protect their rights. The inconvenience, if it were to the contrary, would be obvious. Every member might take it upon himself to bring a suit or defend every suit, and the number of suits with the same object could only be limited by the number of members in the corporation. In an ordinary partnership, one partner cannot sue a third party in respect of partnership rights; on the other hand, where the officers of the corporation are acting ultra vires in a case where no majority can bind, and where the transaction cannot be confirmed at a general meeting against one single dissentient, there one individual member may, to protect his rights, sue on his own behalf or others, or in the same way defend. Therefore, I think, when an individual member asks leave to defend a suit in his own name he has to make out a case that justice requires he should be allowed to defend. The Court has power to allow him to do so, or bring a suit if it is necessary. See *Colman* v. *Eastern Counties Railway Co.* (1); *Cohen* v. *Wilkinson* (2); *Richardson* v. *Hastings* (3); *Bagshaw* v. *Eastern Union Railway Co.* (4), and *Bronson* v. *La Crosse and Milwaukee Railroad Co.* (5).

Here, if I understand the applicant aright, he alleges that the holders of this scrip, for whose benefit this suit is brought, had notice that the moneys that were given for it were not to be applied to the purpose mentioned in the Act, but to a wholly different purpose, and that, therefore, the scrip was improperly issued and ought not to be paid. If he is prepared to furnish me with the evidence of that, I think it would be my duty to allow him

(1) 10 Beav. 1.
(2) 12 Beav. 125.
(3) 11 Beav. 17.
(4) 7 Ha. 114.
(5) 2 Wall. 283.

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to defend, so that the matter would be tested at the hearing, both in respect as to how far the law might decline to enforce such indebtedness, and also whether or not the facts relied on to prove such misappropriation exist, and the notice thereof are true. If the matter is further contested I will have to give an opportunity to the petitioner to show me that he has a bona fide case, and also hear what answer the plaintiffs have to it, when I will have to decide, being governed by the principles alluded to. If the purposes of justice require it, he should be allowed to defend as he asks; but as all this would take time, and I am very unwilling that the Court should be compelled to keep charge of this property any longer than is absolutely necessary, I would recommend that both parties should agree that I should order that William J. Parks have leave to answer in his own name on condition that he does so within one week from this time, and that he consent that this hearing shall proceed after one day's notice from the time that he receives answers to his interrogatories to support his answer, if he files any; if he does not, then twenty-four hours after service of his answer.

It is curious after considerable, though by no means exhaustive, research to be unable to find that the precise question determined by the above decision has come before the English Courts. The nearest reference the writer has been able to find in English cases in support of the decision occurs in class suits, where a party having the conduct of proceedings, being guilty of misconduct, the Court committed the conduct of the proceedings to some other of the parties. Thus, where in a creditors' suit the plaintiff is guilty of delay, the Court will, on the application of any other creditor, make an order giving him the conduct of the cause: Powell v. Wallworth, 2 Madd. 183; and see Sims v. Ridge, 3 Mer. 458, 463; Jeudwine v. Agate, 5 Russ. 283; Edmunds v. Acland, 5 Madd. 31; Fleming v. Prior, 5 Madd. 423; Wyatt v. Sadler, 5 Sim. 450; Price v. North, 2 Y. & C. Exch. 628; Lord Alvanley v. Kinnaird, 8 Jur. 114; Dan. Ch. Pr. [illegible] Am. ed.), 1169. "In the Court of Chancery actions were commenced enough in which one person represented and acted on behalf of many; and if any one of the many could satisfy the Court that the person appointed to represent them did not adequately represent the interests of the class, it was a reason for putting someone else in his place," per Lindley, L.J., Moser v. Marsden, [1892] 1 Ch. 490. In Watson v. Cave, 17 Ch. D. 21, James, L.J., said: "It is always possible that a person professing to represent parties is not really representing them; the mode of remedying that is not for any person who thinks himself aggrieved to appeal from an order which has been professedly made on his behalf, but to make some application to the Court

below, where, if a proper case is made out, no doubt the Court would allow such person to be added as a defendant, and then he could apply as a defendant to get rid of the order, or to take the conduct of the suit out of the hands of the plaintiff, who professes to represent, but does not in truth represent, the wishes of the great body of the bondholders." See also Fraser v. Cooper, 21 Ch. D. 718; May v. Newton, 34 Ch. D. 349; Wilson v. Church, 9 Ch. D. 558. American cases of repute are to be found expressly in point supporting the decision in the principal case. In Thompson's Commentaries on the Law of Corp., section 4478, the author, after remarking that the general rule is that shareholders will not be permitted in a suit in equity against the corporation, to appear and answer the bill for the company, says: "But the principle which opens the doors of equity to stockholders as plaintiffs, for the purpose of asserting rights belonging to the corporation which its unfaithful directors will not assert in its name, operates as well to allow the stockholders to come in and defend in right of the corporation, where an action is being prosecuted against it in equity, which its unfaithful directors will not defend in its name." And at section 4589 he again refers to the subject, and quotes the following passage from the judgment of Mr. Justice Nelson in Bronson v. La Crosse and Milwaukee Railroad Co., 2 Wall. 283, 302: "The Court, in its discretion, will permit a stockholder to become a party defendant, for the purpose of protecting his own interest against unfounded or illegal claims against the company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defence. But this defence is independent of the company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests, and of those who may join him, and against whom any proceeding, order, or decree of the Court in the cause is binding and may be enforced. It is true, the remedy is an extreme one, and should be admitted by the Court with hesitation and caution, but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong." In Koehler v. Black River Falls Iron Co., 2 Black. 715, a stockholder was allowed to come in and defend a suit to foreclose a mortgage given collusively by directors of a company on its corporate property. See also Graham v. Boston, Hartford & Erie Railroad Co., 118 U. S. 161.

The doctrine laid down in the principal case plainly cannot be invoked on every refusal of directors to defend suits brought against their company. "Where an application is made to a Court to assist one or more shareholders against others, or against the managing body, the first matter to be considered is, whether the rights which the complainants seek to enforce do or do not depend on the views which may be taken by the majority of the shareholders. The Court will interfere to prevent the violation of rights which do not depend on the views of other shareholders; but, as a general rule, the Court will not interfere between members of companies for the purpose of enforcing alleged rights arising out of matters which are properly the subject of internal regulation. It will not interfere to control a majority, unless it sees that the majority has been, or is doing, or is about to do, that which is illegal even for a majority to do; and it follows from this, that the Court will not interfere in matters properly the subject of internal management until all reasonable attempts have been made to take the sense of the general body of members on the matters

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in question; nor even then unless it is called upon to interfere to give effect to the will of the majority against a factious minority. . . . These who complain of the managing body should, before appealing to the Court, endeavour to bring their grievances before their fellow shareholders, and ascertain what the views of the majority are. . . . If the majority disapprove the conduct complained of, they can sue in the name of the company, and so obtain redress; or if the defendants prevent that course by turning the scale of votes, an action by one shareholder on behalf of himself and others may be supported. If, however, the majority, acting *bona fide*, agree with and sanction the course adopted or proposed to be adopted by the managing body, and if that course is not illegal if approved by the majority, the Court clearly cannot interfere. But if that course will be a fraud on the minority, or illegal, although sanctioned by the majority of shareholders, then, even if it is approved by all of them except one, the Court will interfere at the suit of that single dissentient shareholder, and protect him and his interests; and in such a case it is not essential that he should appeal to the other shareholders before applying to the Court": Lindley, Law of Companies (5th ed.), 574, *et seq.* In MacDougall v. Gardiner, 1 Ch. D. 13, James, L.J., said: "I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in Mozley v. Alston, 1 Ph. 790, and Lord v. Copper Miners' Co., 2 Ph. 740, and Foss v. Harbottle, 2 Hare, 461, should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there is something illegal, oppressive, or fraudulent—unless there is something *ultra vires* on the part of the company, *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company—there may be claims against officers, there may be claims against debtors, there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject matter of litigation, or whether it will take steps itself to prevent the wrong from being done."

Where the authorized officer refuses to affix the corporation seal to the answer of a corporation, a mandamus will lie to compel him, and in the meantime proceedings in equity will be stayed: Rex v. Windham, Cowp. 377; Dan. Ch. Pr. (4th Am. ed.), 146.

GILBERT v. DUFFUS ET AL.

1890.

August 15.

Trust—Construction—Grant to issue—Death of one of the issue before distribution—Share vesting in survivor.

A trust deed provided that upon the death of F. the estate should be divided to and between all the daughters of the donor who should survive him, and the issue of any daughter who might have died before him leaving issue, in equal shares, but so that the issue of any daughter who might so die leaving issue should only take the share their deceased mother would have taken had she survived the donor and been living at the time of distribution, and that if any, who might survive the donor, died before the said F. leaving issue, then the issue of such deceased daughter should take and receive the share their mother would have taken had she been living at the time of distribution, and that if any daughter survived the donor, and died before the said F. without issue, then the share of the daughter so dying should go and be divided equally among her surviving sisters or sister and the issue of any deceased sister; such sister, however, to take only the share their deceased mother would have taken had she been one of the surviving sisters; that the share of each of the said daughters who might be living at the time of the distribution should be paid to them as each of them came of age, but that the share coming to the issue of any deceased daughter might be paid, notwithstanding such issue might not at the time of distribution be of age. One of the daughters died in the lifetime of F., leaving two children, one of whom predeceased F.

Held, that the surviving child took the whole of his mother's share.

The facts of this suit are fully stated in the judgment of the Court.

Argument was heard August 2nd, 1890.

G. G. Gilbert, Q.C., for the plaintiff.

G. Sidney Smith, for the defendants.

1890. August 15. PALMER, J.:—

This suit is for the declaration of the rights of the parties under a trust deed made by the late Francis Ferguson, dated 9th March, 1858, which, after providing that the trust property should be held for the benefit of Ann Eliza Ferguson, his wife, during her life, contained the following declaration of trust:

"And after the decease of the said Ann Eliza Ferguson pay and divide the whole of the said principal sums to and between all the daughters of the said

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Francis Ferguson, who shall survive him, and the issue of any daughter who may have died before him leaving issue, in equal shares, but so that the issue of any daughter who may so die leaving issue shall only take the share their deceased mother would have taken had she survived the said Francis Ferguson, and been living at the time of the said distribution, and if any daughter who may survive the said Francis Ferguson, die before the said Ann Eliza Ferguson leaving issue, then the issue of such deceased daughter shall take and receive the share their mother would have taken had she been living at the time of the said distribution, and if any daughter survives the said Francis Ferguson, and die before the said Ann Eliza Ferguson without issue, then the share of the daughter so dying shall go and be divided equally among her surviving sister or sisters, and the issue of any deceased sister; such issue, however, taking only the share their deceased mother would have taken had she been one of the surviving sisters; the share of each of the said daughters, who may be living at the time of distribution, to be paid or transferred to them respectively at the respective ages of twenty-one; but nothing herein shall prevent the share on such distribution coming to the issue of any deceased daughter being paid to such issue, notwithstanding such issue may not at the time of distribution be of the age of twenty-one, and notwithstanding the deceased mother of such issue may have died under the age of twenty-one, if such should have been the case."

There were five daughters. The first married A. S. K. Prescott, and died in the lifetime of Ann Eliza Ferguson; she had two children, J. F. E. Prescott and P. A. K. Prescott, the latter died in the lifetime of Ann Eliza Ferguson, the other being still alive. The second daughter married John Duffus, who has since died, the widow being still alive. The third daughter, Agnes, married John T. C. Burpee, who died leaving her him surviving, and she is still alive. The fourth, Elizabeth, married Frank Hazen. He died leaving his wife surviving him, and she is still living. The fifth, Marian, married Thomas Gilbert, and both she and her husband are still alive.

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The only question in the case is, whether Mrs. Prescott's share (who died after the donor and before the death of Ann Eliza Ferguson) goes to her son, who is still alive, or a moiety of it goes to the personal representative of her deceased son. The decision of this question depends upon whether the gift vested in the daughter at the making of the deed of trust, or did not vest until it vested in the grandson at the death of his grandmother.

The rule on this subject is that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of the gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence. It follows that a declaration of trust in favour of a person in esse simply, without any intimation of a desire to suspend or postpone its operation, immediately confers a vested interest.

Another rule is that if words of futurity are introduced into the gift the question arises whether the expressions are inserted for the purpose of postponing the vesting, or point merely to the deferred possession or enjoyment.

This question, like every other of construction, can only be determined by ascertaining what is the meaning of the language used; that language in this case is: "The share their deceased mother would have taken (the share in dispute) had she survived the said Ann Eliza Ferguson and been living at the time of the distribution." Here the only issue of the daughter living at the time of the vesting is one son, and therefore he takes the whole of his mother's share.

The costs of all parties to be paid out of the estate.

By c. 77, C. S. N. B. s. 28, "Where any person being a child or other issue of the testator to whom any personal or real estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the life time of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." This section has no application to a gift to a fluctuating class of objects who are not ascertainable until the death of the testator. Thus, where a

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testator bequeathes all his personal estate to his children in equal shares, the entire property will belong to the children who survive the testator, without regard to the fact of any child having, subsequently to the date of the will, died in the testator's lifetime leaving issue who survive him: Olney v. Bates, 3 Drew. 319; Browne v. Hammond, Johns. 210.

1890.

NEALIS v. JACK.

November 19.

Will—Construction—Annuity—Gift over after death—Rule in Shelley's Case—Absolute interest—Duration of trusteeship.

W. by her will gave and devised all her real and personal estate unto J., as executor and trustee, his heirs and executors, to hold the same to the sole use of her daughter during her natural life, and after her decease, unto the use of her heirs; and also willed and devised that her said executor and trustee should sell and dispose of any real or personal estate that she might die seised or possessed of, and after payment of her just debts and funeral and testamentary expenses, invest the proceeds in such securities as he might think fit, and that he should annually or semi-annually pay the interest accruing on such securities to her said daughter, and in case of her death to her children. The daughter survived the testatrix.

Held, (1) That the daughter took an absolute interest. (2) That the trust continued during the daughter's marriage.

The facts fully appear in the judgment of the Court.

Argument was heard November 8th, 1890.

A. O. Earle, for the plaintiff.

I. Allen Jack, Q.C., for self, and other defendants.

1890 November 19. PALMER, J.:—

This is a suit to administer the estate of Mary R. Wilkinson in the hands of the defendant Jack as executor and trustee under her will, the material part of which is as follows: "I give and devise all my real and personal estate, wheresoever situate, unto the said Isaac Allen Jack, executor and trustee as aforesaid, his heirs and executors, to hold the same to the uses and trusts following, that is to say, to the sole use of my daughter Jane during her natural life, and after her decease, unto the use of her heirs, and I hereby will and devise that my said executor and trustee shall sell and dispose of any

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real or personal estate that I may die seised or possessed of, and after payment of my just debts and funeral and testamentary expenses, invest the proceeds in such securities as he may think fit, and he shall annually or semi-annually pay the interest accruing on such securities to my said daughter Jane, and in case of her death to her children."

The female plaintiff, Jane, was at the date of the will and still is the wife of the plaintiff Hugh Nealis, and the other defendants are her children. The first question that arises in the case is, What is the effect of the said devises; have the children any interest in the said devise? I think they have not. Whether they have or not depends upon whether by the first clause the use is given to the female plaintiff absolutely without any remainder over, and I think that it is clearly so.

There can be no doubt that this is so if the first clause is that she is to have it during her natural life, and after her decease her heirs. In such case, under the rule in Shelley's Case, the word "heirs" would vest the estate in the ancestor. If the devise, "and in case of her death," meaning the death of the female plaintiff, "to her children," is to operate by the same rule, the female plaintiff would be entitled to it during her lifetime, and the remainder would vest in her children after her death; but it is clear, I think, that this latter devise is merely substitutionary in case the female plaintiff died in the lifetime of the testatrix, in which case it would be vested in her children, if she had any. See the rule as laid down in Jarman on Wills (1).

This point being disposed of, the next question that arises is, When does the trust end? It is clear that the will directs that the trustee is to invest and hold the property and only pay the interest as he shall see fit to the female plaintiff; therefore I am satisfied that the testatrix's intention is sufficiently apparent that, at all events, it should be held in trust for some period. What that period is it is extremely difficult to determine, but in view that the beneficiary was a married woman and

(1) 4th ed. p. 858.

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under certain disability, and certain discretionary powers were vested in the trustee, I think I am bound to consider that the testatrix had some object in it, and I cannot conceive of any other than that the beneficiary being a married woman, she might be induced by her husband to anticipate and make away with the fund, if she had the power to do so, when the trustee might not think it advisable, and therefore not see fit to pay it. I therefore think that in administering the estate the trust must be continued during the marriage of the female plaintiff, and it is the duty of the trustee to pay over to the married woman as much of the proceeds or interest from the securities that he has invested under the will, as he thinks fit in her interest to do; or if he should wish to cease to act as such trustee he can only be relieved therefrom by some substitute being appointed by this Court with the like powers and duties.

I think the trustee is entitled to a commission of 5 per cent. on the interest that he may receive and pay out on these securities, but nothing for investing the principal, as I understand he has been allowed a commission for that in the Probate Court.

I allow and pass the accounts of the said trustee, and determine that there is now in the hands of the trustee the sum of $3,003; and I order and direct him to be at liberty to retain his commission out of the said interest before paying the same over; and I further order that the costs of all parties to this suit be paid out of the corpus of the estate. I reserve all other questions which may be raised with reference to the administration of the estate, with liberty to any party to apply.

In re THE GOODS OF PRICE

1890.

August 19.

Will—Construction—Gift to a class—Lapse.

G. P. by his will divided the residue of his real and personal estate into two parts, one of which he gave to the heirs of E. P., his brother, and this part he sub-divided into nine equal shares, and directed that one share be paid to each of five persons who were the heirs of E. P., one of whom was E. B.; a sixth share he gave to the three sons of E. P.'s son, J. P., namely, N., W., and J., to be divided to them, and the remaining three shares to be equally divided between the children of W. L., a deceased son of the said E. P. The other moiety he directed to be equally divided between the children of his brother A. P. E. B. and N. predeceased the testator without leaving issue.

Held, that the shares of E. B. and N. did not lapse, but vested in their next of kin.

This was a petition under The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 212, by the executors of the will of George Price for the opinion of the Court respecting the construction of the will. The facts are sufficiently stated in the judgment of the Court.

A. W. Baird, for the petitioners.

Pugsley, S.-G., D. Mullin, and *J. J. Porter*, for the legatees and next of kin.

1891. August 19. PALMER, J.:—

George Price by his will divided the residue of his real and personal estate into two parts, one of which he gave to the heirs of Edmund Price, thereinafter named, to be divided into nine equal shares, which he directed to be paid to Allan Price, Mary Watson, Wartz Cliff, Esther Barker and Deborah Belyea, each one share; to the three sons of John Price, son of said Edmund Price, namely: Nathaniel L., Walter, and John, one share, to be equally divided to them, this share to be paid by a certain note of hand which he then held against the said Nathaniel L., Walter, and John, the remaining three shares of the above named nine to be equally divided between the children of the late William Price, son of the afore-named Edmund Price. The other moiety he directed to be equally divided between the children of his brother Aaron Price. The question on the construction of this

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will is: Who are entitled to the share of Esther and Nathaniel L., who both died without issue in the lifetime of the testator?

One contention is that these shares lapsed, and, by consequence, as to them the testator died intestate. This, like every other question arising on the construction of wills, is to be determined by what was the intention of the testator as expressed in the will, and all rules laid down for the construction of wills have for their object this end, and are good law as far as they assist to that end, and never can be sound when by adhering to them a Court would have to depart from such intention, no matter how it can be discovered, in the words of the will itself.

One of these rules is that a devise or legacy lapses by the death of the devisee or legatee before the testator: *Elliot* v. *Davenport* (1). This result is brought about by another rule, which is, that a will speaks at the time of the testator's death, unless the contrary intention is apparent from the words of the will itself. This rule is well expressed by section 19 c. 77 C. S., which enacts as follows: "Every will shall be construed with reference to the real or personal estate, comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary contention shall appear by the will."

If this is so, where a will professes to make a gift to a person who has no existence, it is apparent that it could not operate, and the property would not pass, and consequently would remain in the estate; but if the testator, instead of giving to donors separately, makes a gift to them as belonging to a class, or rather, if he gives to a class, as to the heirs of A. B., such a gift would not fail so long as there were any persons answering the description of heirs at the time of the death; and so, if it can be seen from the will that the testator intended that the will should speak at its date, that is, that the legacy should vest in the legatee, and then go to his personal representatives, although such legatee should die in the lifetime

(1) 1 P. Wms. 83.

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of the testator. And if from the will it is not apparent that the testator intended anything more than an attempt to give to a person in existence at the date of the will, and who died before the death of the testator when the gift alone could take effect it is apparent that such a gift would fail, but if on the other hand, it sufficiently appears by the will that the testator intended the gift to operate absolutely and at all events whether to the man himself or any other set of persons whom he intended as the objects of his bounty then it would operate, and this is the question in the case.

To determine this the first thing to look at is the general scheme of this part of the will, and from it I think the testator intended that the property should be equally divided among those he called the heirs of his brother, Edmund, and those he called the heirs of his brother Aaron. The devise in dispute is one equal part to the heirs "hereinafter named," of the late Edmund Price. What does this mean? There can be no doubt, whatever, that if the words "hereinafter named" were left out of the clause it would be a gift of the property to the heirs of Edmund Price in existence at the time of the death of the testator, and the word "heirs," as here used, would mean not technically the heirs at law, but what is commonly and vulgarly understood by such word, that is, such persons as under the law would succeed under the Statute of Distributions to the kind of property given here. As it is turned into personalty, it would simply mean his next of kin or other personal representatives, and so read it would clearly give this property to the representatives of Esther Barker and Nathaniel L. Price, although they died before the testator.

The next question is: Does the fact that the testator limits the gift to the heirs thereinafter named, and afterwards names not only all the children of Edmund Price alive at the date of the will, but also all the issue of any children of Edmund who died before the date of the will, limit such gift to the particular persons named, and prevent their representatives from taking it, although they were heirs of Edmund just as much as those that would in that case receive it? Put the question in

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another way. May not the words "hereinafter named" be a mere false demonstration? In any sense they must be false, if you read the will as of the date of the death of the testator, because in that case there could be no gift either to Esther Barker or to Nathaniel L. Price, for no such person had existence.

After a great deal of consideration, I think the true construction of the clause, taken altogether with the whole will, is that the testator did intend to point out who were the heirs in existence at the time of the writing of the will, and that he intended all to participate, and that it should go to the whole of the heirs of Edmund Price, and was not intended to defeat that object. This rule is thus expressed, falsa demonstratio non nocet cum de corpore constat; which means, where a description is made up of more than one part, and one part is true but the other false, then if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. Here, in any sense, the words "hereinafter named" are false, or rather inapplicable, because two of the persons named have gone, and if you confine it to the others without them, then the words "to the heirs of the late Edmund Price" are false, because those who remain are not the whole of such heirs. There is another rather curious thing about the devise that is divided into nine equal shares to be paid among others to Esther Barker and Nathaniel Price. This direction as is shown by the cases of *Johnson v. Johnson* (2), and *Re Mason's Will* (3) means that it is to be paid to the personal representative when the legatee has died in the lifetime of the testator, and the legacy has not lapsed by reason of the Statute. It follows that in my opinion the petitioners should pay the several shares that they were directed to pay to Esther Barker and Nathaniel L. Price to the persons who are entitled to their personal property respectively, and distribute it as directed by the Statute of Distributions, and pay the costs of all parties to this application out of the corpus of such two shares pro rata.

(2) 3 Hare, 157.

(3) 34 Beav. 494.

WELDON ET AL. v. WILLIAM PARKS & SON (LIMITED), ET AL. 1891.

September 8.

(No. 2. Ante, p. 418).

Practice—Staying proceedings pending appeal—Interlocutory application.

Where a party is exercising an undoubted right of appeal the Court will stay proceedings under the judgment appealed from where necessary to prevent the appeal, if successful, from being nugatory.

Observations upon appeals in interlocutory proceedings.

The facts sufficiently appear in the report of the suit, ante, p. 418, and in the judgment of the Court.

F. E. Barker, Q.C., for the plaintiffs.

C. N. Skinner, Q.C., and *W. Pugsley*, Q.C., for the defendants, William Parks & Son (Ltd.).

E. McLeod, Q.C., for the defendant, W. J. Parks.

1891. September 8. PALMER, J.:—

(After referring to an application by the defendants for a commission to examine witnesses, His Honour proceeded as follows):

I refused such because the application was made in the middle of the hearing, and on account of the delay in the making of it, or rather I declined to stay proceedings on the hearing until such commission could be issued and returned. From this decision William Parks & Son, Ltd., and also William J. Parks appealed. They then applied to me to stay proceedings and not to proceed further with the hearing until the appeal was disposed of. This I declined to do, and I then gave an opinion by which I assessed the debt due the Bank of Montreal at $87,437 with interest from the first day of June, 1891. These parties then applied to me to stay entering the decree, which would be the result of the opinion I had given, until the appeal was disposed of. This application I heard, and have delayed till this time giving any judgment thereon, because, al-

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though I do not deny that the point involved in the appeal may be somewhat doubtful, and therefore such appeal is bona fide, though I am strongly impressed with the idea that one of the main reasons of such appeal is for delay, I thought that since such an order might be granted either by myself sitting in this Court, or by the Court appealed to, the practice ought to be uniform, and I therefore asked my brother Judges for their view upon what they thought I ought to do in the matter. I have waited for their answer, which I got a few days ago, and I am sorry to say that they do not think that they ought to give an opinion upon the main points involved until the parties were heard before them. At the same time they suggested that I might allow the matter to go on if I could secure the defendants from any injury by taking undertakings from the Bank of Montreal, as a condition of refusing such stay. I am left to deal with the difficulties in the case, and I will point them out as best I can.

I have never been satisfied with a party's absolute right to appeal on every interlocutory motion or order that is made in the Supreme Court in Equity. This course is not, I think, advantageous, as, in the nature of things, it can be used for almost interminable delay. In my opinion, it would be better if the law only allowed objection to all these interlocutory proceedings on one appeal from a final judgment given in the case, or by leave of the Judges; but I cannot legislate in the matter.* I must deal with the law as it is. The Legislature has, I think, given by sections 3, 105, 106, 107 and 108, of 53 Vict. c. 4, the absolute right to appeal upon every order and decision that is made by this Court separately, and the question is what right the party appealing has to a stay of proceedings in all those cases? The rule whether proceedings should be stayed pending the appeal is that such stay is in the discretion of the Court. The Court, however, is unwilling to suspend the execution of decrees except in cases where there is a danger of the object of the appeal being defeated before the appeal can be heard, and when that is the case the Court

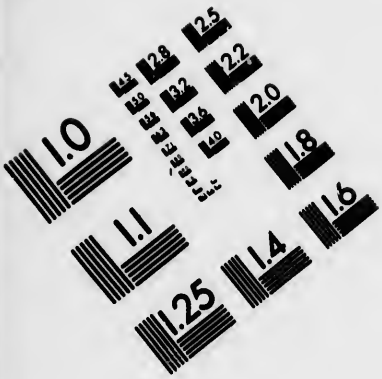
* See observations in *Fuller* v. *Chapin*, 165 Mass. 2.

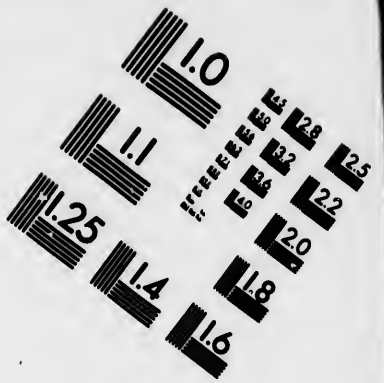
will suspend the execution of the decree pending the appeal; so also where there is danger of irreparable mischief if the proceedings are not stayed it is usual to suspend proceedings, and in cases where the Court has directed the sale of real property which may be prevented in case the appeal is successful; and sometimes the Court can prevent the consequences by terms imposed either upon one side or the other, and when this can be done this mode is usually resorted to. The rule that proceedings ought to be stayed when there is danger of the object being defeated before the appeal can be heard may, I think, be better stated in the language of Brett, L.J., in *Wilson* v. *Church* (1): "The Court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal, if successful, from being nugatory."

And Lord Justice Cotton laid down the rule "that when a party is appealing, exercising his undoubted right of appeal the Court ought to see that the appeal, if successful, is not nugatory."

It has been argued in this case that if I enter this decree with the appeal pending, and the Clerk is allowed to settle the minutes of it under the 104th section, then inasmuch as the appeal from that decree or order must be made within twenty days after the settling of the minutes that decree cannot afterwards be interfered with even if the appellants should be successful on the appeal from my order; and therefore if I do not stay the proceedings the right will be gone and the appeal rendered nugatory. Whether this will be so or not will depend upon whether on an appeal from such decree the fact that I had made the decision appealed from wrongly could be successfully taken; if it can the results claimed by the appellants would appear to be inevitable. The consideration that would decide such a question would be whether such a decision upon an interlocutory application to issue a commission could be put on the same footing as the rejection of evidence on the viva voce hearing or not. I confess that I have very great difficulty in answering

(1) 12 Ch. D. 459.





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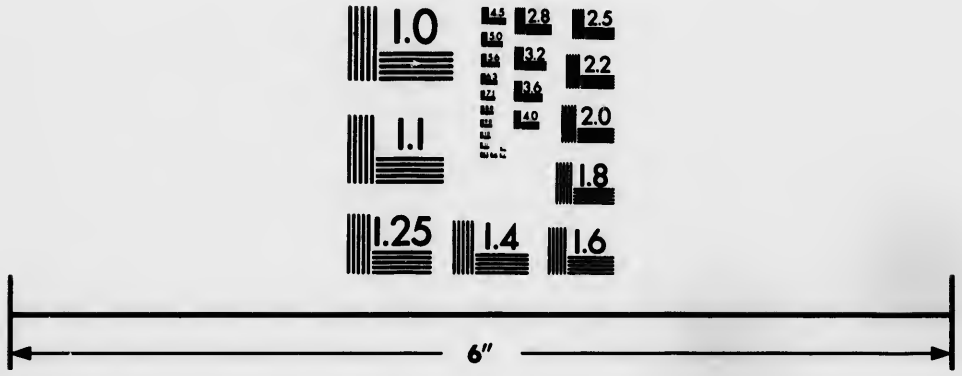

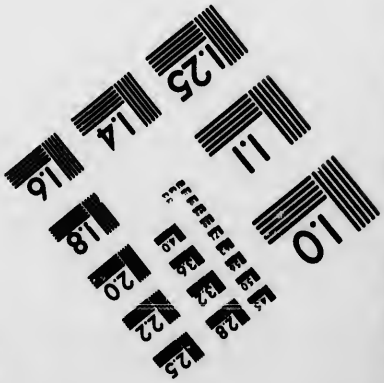

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such a question, and as my opinion would be of no authority in the only Court that could decide it, I will not here enquire into it further. It was upon this question that I had hoped my brethren would have felt themselves at liberty to give their opinion, which, if adhered to, would be authoritative, and the parties could have safely relied upon it, but instead of deciding this I will, according to the suggestion of my brethren, endeavor to secure the appellants against injury by reason of the Court deciding that such is the law, by staying the proceedings unless the bank will secure the parties against such an effect.

The next point is that if the appeal succeeds and the Bank of Montreal's claim is reduced by the amount that the appellants claim, the appellants say they will be able to pay the amount and thus prevent the sale though they may not be able to do so if too large an amount is decreed against them. I have no doubt that the forced sale of a party's real estate is by the law considered such an irreparable injury that the Court will not feel itself justified in permitting it until it is finally determined that it is the right of the party to have it done.

When I use the term "irreparable injury" I do not mean an injury that could not be compensated for, but an injury in the practical and commercial sense. I do not think the law ought to sanction and decree the forced sale of any person's property until it has finally determined that such a sale should take place. Here there is no doubt that if the amount of money the plaintiffs claim in this case is not paid there must be sufficient of this real property sold to pay it and pay the costs of this suit, and the only injury that the defendants can receive is that the property will be sold charged with a greater lien than it ought to be if the appellants succeed on their appeal; and it may be that the appellants can be sufficiently secured from injury by the Bank of Montreal undertaking by their counsel to abide by any order this Court may make as to damages or restitution in case this Court shall hereafter be of opinion that the defendants, William Parks & Son, Ltd., or the defendant William J. Parks, have sustained any by reason of this Court re-

fusing the order for the commission or the stay of proceedings in this case which the Bank of Montreal ought to pay if the said William Parks & Son, Ltd., or the said William J. Parks, should succeed on their said appeal; or an undertaking in some such terms substantially. If this is done the stay will be refused, if not, it will be granted.

I allow costs to neither party on this application. As soon as this undertaking is filed I will direct the Clerk to enter a minute of the final decree in this case, as I have announced my opinion on all the points involved in it. The terms of the Bank of Montreal's undertaking I will settle upon hearing the counsel on both sides.

See McGrath v. Franke, ante, p. 97; Robertson v. St. John City Railway (No. 2), post, p. 476.

In Bradford v. Young, In re Faiconar's Trusts, 28 Ch. D. 18, the Court of Appeal substantially followed the decision in Wilson v. Church, 12 Ch. D. 454. In the former case, however, Pearson, J., in the Divisional Court, said: "I have looked at the authorities, and particularly at what was said by the Lords Justices in Wilson v. Church, where an application was made to stay the distribution of a fund in the hands of trustees, pending an appeal to the House of Lords. Lords Justices Cotton and Brett were of opinion that the application ought to be granted, but Lord Justice James dissented. As I am not acquainted with all the facts of that case, I do not know exactly what the grounds of his dissent were. But, looking at what was said by Lord Brougham in Walburn v. Ingilby, 1 My. & K. 79, it appears to me by no means the settled rule of the Court that, without any special ground being shewn, a fund which has been ordered to be paid out should be retained in Court simply because there is an appeal from the order. Such a rule would, as Lord Eldon pointed out in Huguenin v. Baseley, 15 Ves. 180, 'palsy the arm of justice.'"

Proceedings under an injunction will only be stayed pending an appeal where irreparable injury would be done, and not merely inconvenience or annoyance, such as the loss of the good-will of a business: Walford v. Walford, 3 Ch. 812; Storey v. Lord Lennox, 1 My. & Cr. 685; and see Flower v. Lloyd, W. N. (1877) 81; and Polini v. Gray, Sturla v. Freccia, 12 Ch. D. 411. The same principle applies in the case of dissolving or postponing injunctions: Walburn v. Ingilby, 1 My. & K. 84; Penn. v. Bibby, L. R. 3 Eq. 308.

"Proceedings to commit a defendant for a breach of an injunction, will not be stayed pending an appeal from the judgment or order granting the injunction: Gamble v. Howland, 3 Gr. 281, 303; and see McLaren v. Caldwell, 29 Gr. 438; and pending an appeal from a judgment awarding an injunction, the injunction will not be suspended: *Ib.*, and see S. C., 6 Ont. App. at p. 494; Fox v. Toronto & Nipissing R. W. Co., 26 Gr. 352, unless in the case of a mandatory injunction, where obedience to the injunction would render the appeal nugatory: see Dundas

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v. Hamilton & Milton Road Co., 19 Gr. 455; but see McGarvey v. Strathroy, 6 O. R. 138; 19 C. L. J. 393, where Proudfoot, J., refused a sequestration to enforce an injunction restraining the defendants from permitting water to flow on plaintiff's land pending an appeal, after security had been given. See also Toronto v. Toronto Street Ry. Co., 12 P. R. 361 "; Holmested and Langton's Jud. Act, 673.

1891.

November 13.

In re MARGARET McAFEE.

Dower—Petition—Barred by lapse of time—Statute of Limitations—Chap. 84, C. S. N. B., s. 3.

The husband of the petitioner gave a mortgage of a piece of land in which the petitioner did not join. The husband died in 1859, owning the equity of redemption, and the petitioner remained in possession of the mortgaged premises from then until 1870. In 1891 she brought the present petition for the admeasurement of her dower in the land.

Held, that twenty years having elapsed since her husband's death, the petitioner's right to bring an action at law by writ of dower was extinguished by section 3 of chapter 84, C. S., and that by analogy the present petition was barred in equity.

This was a petition by Margaret McAfee, under section 237 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), for the admeasurement of her dower in certain land. The facts fully appear in the judgment of the Court.

D. Mullin, for the petitioner.

C. Doherty, Q.C., for William McAfee.

1891. November 13. PALMER, J.:—

Thomas Bain, the husband of the petitioner, died in October, 1859, seised of the land in which dower is now claimed. The petitioner remained in possession from his death until the year 1870, and this petition was brought in September, 1891. The respondent William McAfee is now the owner in fee under a sale by the Supreme Court in Equity in a suit for foreclosure and sale under a mortgage given by the deceased himself, and in which the petitioner did not join. From the petition it appears that thirty years have elapsed after the petitioner's right to dower could have been enforced until she has

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taken proceedings to endeavor to do so, and the sole question in the case is whether this Court will enforce such a claim after that length of time. I do not think that the fact that the widow remained in possession without enforcing her claim makes any difference. The mere fact of the widow being in possession and not having her dower assigned to her does not alter the case. This has been decided in Upper Canada in *Leach v. Shaw* (1), but it would make no difference in this case if the Statute of Limitations applies to dower, as twenty years have elapsed between the time she ceased to occupy in 1870 and the time of filing this petition. The main question to be decided in this case, and I believe it is the first time it has arisen in this Province, is whether our Provincial Statute of Limitations, C. S., c. 84, s. 3, applies to a widow's right of dower. The enactment is as follows: "No person shall make an entry, or bring an action to recover any land, but within twenty years next after the time at which the right to make such entry, or to bring such action shall have first accrued."

It cannot be disputed that if the right of the widow to bring an action for dower is an action to recover any land then, at law the right would be barred at the end of twenty years. There are two arguments against it applying. The first is that the statute itself is directed to and only includes actions at law, and that it does not apply to suits in Equity; and if this is sufficient reason that this Court should refrain from dealing with the case at bar and give any other remedy than the legal one, then that contention might prevail.

The law relating to equitable bars by length of time in proceedings in the Court of Equity was very much discussed in the case of *Cholmondeley v. Clinton* (2), in which Sir William Grant gave a very clearly reasoned and elaborate judgment, and came to the conclusion that a period of time extending over more than twenty years had not barred the right of the Marquis. The same case came before Sir Thomas Plumer (3), who succeeded

(1) 8 Gr. 498. (2) 2 Mer. 171. (3) 2 J. & W. 1.

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Sir William Grant, and he in a most masterly judgment (4), stated what he thought of the unsoundness of the views of Sir William Grant; ever since which time nearly every Equity lawyer of note, including Lord Eldon and Lord Redesdale, has explicitly adopted Sir Thomas Plumer's views and Lord Redesdale in *Horenden* v. *Lord Annesley* (5), states the law on the subject to be as follows: "I think the rule has been laid down that every new right of action in Equity that accrues to the party, whatever it may be, must be acted upon, at the utmost, within twenty years. * * * In every case of equitable title (not being the case of a trustee, whose possession is consistent with the title of the claimant), it must be pursued within twenty years after the title accrues." I think this rule would apply to a claim that is entirely an equitable one, and ought not to be adopted in a case in which a Court of Law and a Court of Equity have concurrent jurisdiction and in which the action in the Court of Law was not barred. A claim for dower is a legal claim although enforceable in equity, and, therefore, delays that might deprive a suitor of the right to enforce a mere equitable claim would not affect dower so long as the legal right to it exists, for it could be enforced by an action at law.

This reduces the question to whether the action at law is taken away by the section of the Statute of Limitations which I have referred to, and that depends upon whether such an action is an action for the recovery of any land, and is within the words of the section. "Land" by the interpretation Act, c. 118, s. 14, C.S., when used in the statute, "includes lands, houses, tenements and hereditaments, all right thereto and incident therein." Therefore the section must be read, "No person shall bring an action to recover any lands, houses, tenements, and hereditaments, or any right thereto, or incident therein." This reduces the question to whether dower is a right in land or incident therein. My opinion is that dower is an interest in land, and therefore within the meaning and the definition in the interpretation Act. Taking then the

(4) See p. 138, *et seq.*

(5) 2 Sch. & L., at p. 637.

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word "land" to mean an interest in land, dower is clearly an interest in land, and, therefore, in my opinion, it would not be a sound interpretation not to hold that the right of a widow which occurs upon the death of the husband to sue out a writ of dower is a right of action within the above section to recover land. If this is good law, and the question came before me in a Court of Law I would have to have said that this was entirely within the statute, and that the widow who had not brought her action to establish her right to dower and had allowed upwards of 30 years to elapse after that right had first accrued is barred by the statute and comes too late. It appears to me that this petitioner in order to successfully assert her right in a Court of Law must have prosecuted it within twenty years from the death of her husband, and I further think that where any statute has fixed the period by which a claim, which is a purely legal claim, if made in a Court of Law would be barred, that claim is by analogy barred at the same time in a Court of Equity.

It follows, this being my opinion, I must dismiss this petition, but inasmuch as this is the first time the question has arisen in this Province since the passing of the Act, of which the section in the Consolidated Statutes I have referred to is a re-enactment, and having in view that the right to dower was not within the old Statutes of Limitations of Henry and James I think I ought to say nothing about the costs; but the petition must be dismissed.

This decision, both in its reasoning and in the conclusion arrived at, is completely in accord with Marshall v. Smith, 5 Giff. 37. By section 31 of chapter 84 C. S. N. B. "No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit."

1892.
January 11.

NEW BRUNSWICK RAILWAY COMPANY AND BROWN v. KELLY.

NEW BRUNSWICK RAILWAY COMPANY AND BROWN v. KELLY. (No. 2).

Practice—Injunction Order—Refusal—Dismissal of bill—Summons in suit—Conditional appearance—Waiver—Appeal—Stay of proceedings.

An application under section 24 of The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), upon bill and affidavits for an injunction order, was refused with costs. The bill and affidavits were not filed, and a summons was not issued in the suit. The costs of the application were taxed and paid. The defendant filed an appearance, and applied to dismiss the bill for want of prosecution.

Held, that there being no summons in the suit, the suit was not in Court, and that the plaintiffs could not be compelled to issue the summons and proceed with the suit, or be dismissed, and that the application should be refused.

Goslin v. Goslin, 27 N. B. 221, distinguished.

Quære, whether a defendant who has appeared before summons issued can apply to dismiss the suit for want of prosecution if a summons is not issued.

An application in June, 1890, upon bill and affidavits for an injunction order stood over until the 15th of August, 1891, when it was refused. Notice of appeal was given on the 10th of October following, and on the same day the summons in the suit was issued. On the 16th the defendants filed an appearance, and gave notice of application to dismiss the bill for want of prosecution, on the ground that the summons should have been issued immediately after the refusal of the injunction order.

Held, that the plaintiffs were not in default, and also that they were not compellable to issue the summons in the suit pending the appeal, and that the application should be refused.

The facts of both suits appear in the judgments of the Court. Argument was heard November 3rd, 1892.

Blair, A.-G., and *J. A. VanWart*, Q.C., for the plaintiffs.

G. F. Gregory, Q.C., and *C. E. Duffy*, for the defendants.

1892. January 11. SIR JOHN C. ALLEN, C.J.:—

This was an application to have the plaintiffs' bill in this case dismissed for want of prosecution. In December, 1889, the plaintiffs applied for an injunction to restrain the defendant from proceeding in two actions of trespass

against David Brown and Alfred Tracey respectively. The application was made upon a bill and affidavits, no summons having been issued, and the injunction was refused with costs. The costs were taxed in May, 1890, and paid, and in October last the defendant gave notice of the present application. Neither the bill nor the affidavits on which the injunction was applied for have been filed, nor have any proceedings been taken by the plaintiffs since the injunction was refused. On October 16th last, the day on which the defendant gave notice of this application, an appearance was filed in the case. The plaintiffs' answer to the application is that there was no suit in Court, no summons having been issued and the bill not having been filed.

The Equity Act, 53 Vict. c. 4, s. 16, enacts that all causes in equity shall be commenced by summons (1), or an order for appearance (2 or 3), which shall include the names of all the parties and disclose in brief form the relief for which the bill is to be filed. The summons is to be made returnable within twenty days after service, and is to be served personally or by leaving a copy at the defendant's place of residence with some adult person. The orders for appearance (2 and 3) are applicable to cases where the defendants do not reside within the Province. Then section 22 of the Act declares that the plaintiff shall file his bill with the Clerk of the Court within three months after the commencement of the suit, or within such further time as the Judge may allow.

The following sections prescribe the practice relating to injunctions, so far as is material to the present question. Section 24 declares that an order of injunction may be applied for to a Judge before or after the summons is issued or bill filed, on notice to the opposite party, and the application may be heard on production of the bill before filing, or of a sworn or certified copy thereof after filing, with affidavits. Section 27 enacts that when an injunction shall be obtained before hearing, whether after notice or ex parte, and no summons or order for appearing, as the case may be, shall have been issued in the suit, the same shall be forthwith issued, and the suit proceeded with as in ordinary cases,

1892.

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and that it shall be the duty of the party obtaining an ex parte injunction order to forthwith file with the Clerk the bill and affidavits on which the order was obtained.

I think it very clear that ordinarily a suit in equity cannot be commenced without issuing a summons or obtaining an order for the defendant's appearance, though probably there might be cases where the defendant might waive the issuing and the service of a summons and enter an appearance and the plaintiff then file his bill and proceed with the cause. But that is not the present case, for the plaintiff here has done no act to adopt the defendant's notice of appearance, or to estop himself from objecting that there is no suit pending which he was bound to prosecute. The 27th section of the Act applies only to cases where the injunction order has been granted. In such cases if the plaintiff does not obey the directions of the Act and issue the summons (if the order was granted before summons was issued) no doubt the defendant would have a remedy. See *Goslin* v. *Goslin* (1). There would be a necessity for issuing the summons and going on with the suit in that case because the injunction order had restrained the defendant from doing some act. But where is the necessity of compelling a party who has made an unsuccessful application for an injunction order before any suit was commenced to issue a summons, and commence a suit against a party whom he sought to restrain, when he, the applicant, had no wish to continue the proceedings and had paid his opponent the costs incurred in resisting it? Under such circumstances a plaintiff would have a right to dismiss his bill: 1 Smith's Ch. Pr., 312; Daniell's Ch. Pr. (5th ed.), 690; *Dixon* v. *Parks* (2); *Thompson* v. *Thompson* (3).

I think the clear intention of the Act is that there should be a summons served in every case which is to be prosecuted, generally before the bill is filed; but in cases where an injunction is granted before the summons, then forthwith after the granting of the injunction. As there is no direction in the Act that a summons shall is-

(1) 27 N. B. 221. (2) 1 Ves. 402. (3) 7 Beav. 350.

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sue where an application for an injunction order founded on the facts stated in the bill has been refused, I think the fair construction of the Act is that no summons is necessary unless the applicant for the injunction desires to prosecute the suit. The maxim, expressio unius est exclusio alterius, will apply in this case. I cannot agree that the mere application for an injunction, as in this case, was the commencement of a suit—the injunction having been refused, though perhaps it might have been so if the injunction order had been granted; because in that case the plaintiff is bound to issue a summons and proceed with the suit. But as the 16th section of the Act says: "All causes in equity shall be commenced by summons," it is difficult to say that there is a cause in Court until a summons has issued. The granting of an injunction therefore before summons is not the commencement of a suit, but a particular jurisdiction given by the Act, to be forthwith followed by the commencement of a suit and then to form part of the proceedings of the suit. If there was no suit in Court at the time the present application was made, the 91st section of the Act cited by Mr. Gregory will not apply, because the plaintiff was not "required to take any step in the cause." In order to show that the plaintiffs did not consider that their suit was terminated by the refusal to grant the injunction, the defendant's solicitor relied on what took place at the taxation of costs of the application, namely, his objecting to the charge of a retainer, contending that such charge was properly costs in the cause and not of an interlocutory proceeding in the cause. There is some difference between the respective solicitors as to what was said at that time; but in the view which I take of the Act—that the plaintiffs were not required to issue a summons on the refusal of the injunction—it is not necessary to consider what may have been said about the abandonment of the suit at the taxation of the costs.

The case differs from *Goslin* v. *Goslin, supra*, in this particular, that there an injunction order having been granted the plaintiff was required by the Act to issue a summons within a reasonable time thereafter, and not

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having done so the defendant had a right to apply for a dismissal of the suit for want of prosecution; but here there was no such obligation on the plaintiff. An objection was taken during the argument that the defendant, having filed an appearance, could not afterwards apply to dismiss the suit because the plaintiff had not issued a summons. In answer to that it was said that there was no practice in this Province authorizing a conditional appearance to be entered; that a defendant could not make any motion to the Court until he had appeared, and that therefore he might appear generally and then apply to set aside the previous proceedings for irregularity. I am not prepared to admit the correctness of that statement, for the case of *Hudson Bay Co.* v. *Pugsley* (4), expressly decides the contrary. In fact it was the practice of the Court of Chancery in England long before the passing of the Act 17 Vict. c. 18, sub-chap. 2, by which the practice of the Court of Chancery in England was adopted in this Province. I prefer, however, not to decide this application on any question of waiver arising out of the appearance, but rather to decide the matter on what I consider the meaning of the several sections of the Act referred to. I therefore think the application should be dismissed with costs.

I come now to the next case.

I cannot see any distinction in principle between this case and the preceding one, though the facts are somewhat different. An application was made in June, 1890, to restrain the defendant from proceeding in an action of trespass brought against Brown. The matter stood over, pending the decision of the Supreme Court on a motion for a new trial in the action of Kelly v. Brown.* After judgment was given in that case I refused the injunction with costs on the 15th August last. The plaintiffs then took out a summons, calling on the defendant to show cause why the taxation of costs on my order refusing the injunction should not be stayed until the plaintiffs had an opportunity of appealing from my order of August 15th, and in the meantime staying the taxa-

(4) 27 N. B. 15.

* 31 N. B. 643.

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tion of costs and all proceedings in the matter by the defendant. Notice of appeal was served on October 10th last, and the plaintiffs on that day issued a summons in the present case and the defendant filed an appearance in the suit on October 16, and on the same day gave notice of an application to dismiss the plaintiffs' bill for want of prosecution. On October 21 the plaintiffs filed the bill and affidavits on which they had applied for an injunction.

The defendant's contention in this case is that the summons should have been issued immediately after the refusal of the injunction; that the plaintiffs had lost the benefit of their bill by not proceeding with due diligence, and that they could not regain it by afterwards issuing the summons, and the defendant might apply to dismiss the bill.

I cannot adopt that view of the practice. The plaintiffs certainly were not bound to issue the summons while the question of granting the injunction order was pending, nor do I think they would be bound to issue it pending the appeal from the order refusing the injunction, though that question does not arise here, the point for determination being whether the plaintiffs were in default on or before October 16th. What possible benefit would it have been to the defendant if the plaintiffs had issued the summons in August immediately after the injunction was refused? The object of the injunction was to restrain the defendant from exercising her legal right to the property in dispute until the plaintiffs' alleged equitable right to it was determined. The injunction order having been refused and the plaintiffs having appealed against my order refusing it, it would seem to me to be an extraordinary practice if the plaintiffs were compelled to proceed with the suit until the validity of my order was determined by the Court of Appeal. The question is now before the full Court on the appeal, and I do not think I have any right to make any order that would affect that appeal, such as an order to dismiss the suit. At all events whether the injunction was properly refused or not, as the Act gives no direction respecting the issuing of a summons in a case such as this, where

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the injunction was refused, I am not prepared to say that the plaintiffs have neglected to take any step in the cause, which by the practice of the Court they were required to take; and therefore I think the application should be dismissed with costs.

In Goslin v. Goslin, 27 N. B. 221, it was held that where an injunction order is granted before summons, the summons must be issued within a reasonable time, or the defendant, if he has not appeared, may apply to dismiss the suit for want of prosecution.

By section 80 of The Supreme Court Act, 60 Vict. c. 24, a plaintiff is deemed out of Court unless he declares within one year after the writ of summons or capias is served or executed. Where plaintiff does not declare within a year judgment of *non pros* cannot be signed against him, on the ground that the action is altogether out of Court. See Chit. Arch. (11th ed.) 1466; Miller v. Weldon, 1 Han. 375, 377; Caldwell v. Craigg, 32 N. B. 145; Rorke v. McCarthy, 6 Ir. Law Rep. 29; Thompson v. Armstrong, 1 Ir. Jur. N. S. 335. In Miller v. Weldon, *supra*, the defendant moved for judgment as in case of nonsuit for not proceeding to trial pursuant to a peremptory undertaking. It was discovered that the cause had never been entered, and that the only paper on file was the notice of appearance. In refusing the motion, Ritchie, C.J., is reported to have said: "Under such circumstances it is manifestly clear that we can give no judgment as prayed, and to allow a judgment to be signed in a case not properly entered would not only be in direct defiance of a rule of Court, but . . . when a cause has not been duly entered . . . there is no cause in Court. If there is no cause in Court it is quite impossible for us to give judgment." It would seem, however, that had the defendant applied to have the case entered previous to his motion for judgment he would have succeeded. See Oulton v. Milner, 3 Pug. 221, per Wetmore, J.; and Gleeson v. Domville, 33 N. B. 548, per Van Wart, J.; and see Smith v. Halifax Banking Co., 33 N. B. 1. An injunction having been obtained, does not of itself prevent the bill being dismissed, and the injunction is *ipso facto* dissolved by the dismissal of the bill: Day v. Snee, 3 V. & B. 170; Hannam v. South London Waterworks Co., 2 Mer. 61; Green v. Pulsford, 2 Beav. 70.

Where a plaintiff had obtained an injunction *ex parte* on the usual undertaking to be answerable in damages, and after the injunction had been dissolved, the defendant moved to dismiss the bill for want of prosecution, and for an inquiry as to damages, the Court made an order to file replication, or else that the bill should be dismissed, but refused at that stage of the proceedings to direct an inquiry as to damages: Southworth v. Taylor, 28 Beav. 616; 29 L. J. Ch. 868.

A bill may be dismissed for want of prosecution although a notice of motion by the defendant to dissolve an injunction is pending: Farquharson v. Pitcher, 3 Russ. 383; or although an order has been made to give security for costs and that in the meantime proceedings be stayed: La Grange v. McAndrew, 4 Q. B. D. 210; or although interrogatories have been filed for the examination of the plaintiff: Jackson v. Ivimey, 1 Eq. 693. A bill cannot be dismissed during the pendency of a demurrer: Simpson v. Densham, 2 Cox. 37"; Anon, 2 Ves. 287.

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In Futvoye v. Kennard, 2 Giff. 533, the defendants obtained against the plaintiff, who was in contempt for non-payment of costs, an order to stay all further proceedings in the cause until the plaintiff had cleared his contempt or given security, and afterwards moved to dismiss the bill for want of prosecution. In refusing the motion the Court said: "This application is wholly irregular. The defendants have themselves obtained an order, which prevents the plaintiff from doing the very thing which they complain he has not done."

By Order xxix., rule 1, of the English Supreme Court of Judicature Act Rules, "if the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a Judge to dismiss the action with costs, for want of prosecution," etc. Where, before statement of claim, an action was stayed until the plaintiff should give security for costs, and the time for delivering a statement of claim expired, and no security had been given, it was held that the action might nevertheless be dismissed: La Grange v. McAndrew, 4 Q. B. D. 210. A bill was filed against A. and B. A. obtained an order to stay proceedings until the plaintiff paid the costs of a former suit for the same object, and which had been dismissed with costs. The plaintiff, not paying the costs, was prevented from proceeding against A. Held, that B. could have the bill dismissed for want of prosecution: Lautour v. Holcombe, 10 Beav. 256.

Where there is more than one defendant, a defendant moving can only have the bill dismissed as against himself: Ward v. Ward, 11 Beav. 159. The dismissal of a suit, not set down to be heard, for non-prosecution is not a bar to a subsequent suit in respect of the same matter: See In re Orrell Colliery Co., 12 Ch. D. 681.

If on an application to dismiss the bill for want of prosecution the plaintiff is given time to take the next step, the order generally provides that in default of his taking the step within the time the action stands dismissed without further order. If at the end of such extended time the required step has not been taken, the suit is at an end: Whistler v. Hancock, 3 Q. B. D. 83; King v. Davenport, 4 Q. B. D. 402. The rule laid down by these cases is not affected by Carter v. Stubbs, 6 Q. B. D. 116, and Hollender v. Ffoulkes, 16 P. R. 225, which are quite distinguishable.

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June 4.

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Married woman—Mortgage of Separate Real Estate—Parol agreement to assign mortgage in consideration of its payment—Specific performance—Statute of Frauds—Lien.

A married woman procured the plaintiff to make payments from time to time on account of the principal and interest of a mortgage on freehold property, forming part of her separate estate, by verbally undertaking to have an assignment made of the mortgage, or to convey the mortgaged premises to the plaintiff.

Held, that the agreement not being in writing could not be specifically enforced, but that it was binding on the separate estate of the married woman, including the realty, and that the plaintiff should be paid out of the same, with interest.

The facts fully appear in the judgment of the Court.

C. E. Duffy, for the plaintiff.

The defendants did not appear.

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It appears by the statements in the bill that the plaintiff, Edith J. Bulley, is a daughter of the defendant Arthur C. Bulley and Harriet A. Bulley, his wife, now deceased. The said Harriett A. Bulley in her lifetime was seised in fee simple of several lots of land, situate in the parish of Burton, in the county of Sunbury. She, in her lifetime, with her husband, the said Arthur C. Bulley, gave a mortgage bearing date the 26th April, 1881, upon a certain portion of the said lands called and known as the shipyard property, to the Hon. James D. Lewin and the Hon. Charles Duff, surviving executors of the last will and testament of the Hon. John Robertson, deceased, to secure the sum of $250 and interest, and the plaintiff, at the request of the said Harriet A. Bulley, and with the consent of her said husband, the said Arthur C. Bulley, did with her own money from time to time fully pay off and satisfy the said principal and interest money of the said mortgage, the said Harriet A. Bulley promising her, the said plaintiff, if she would pay the said principal money and interest that she, the said

Harriet A. Bulley, would reward her for doing so by either procuring for her an assignment of the said mortgage or would convey to her, the said plaintiff, by deed, the said mortgaged lands and premises. It further appeared by the statements in the bill that after the plaintiff had paid off the said principal and interest of the said mortgage that the said Harriet A. Bulley, in pursuance of her said agreement, took steps with a view to having the said mortgage assigned by the mortgagees to the said plaintiff, but afterwards changed her mind and concluded, with the consent of her husband, the said defendant Arthur C. Bulley, to convey the said shipyard property to the said plaintiff in satisfaction of the moneys she, the said plaintiff, had so paid at the instance and at the request of her said mother. It also appeared that the said Harriet A. Bulley, in the month of November, 1890, in pursuance of her intention to convey the said property to the said plaintiff instructed her husband, the said Arthur C. Bulley, to prepare a deed of the said shipyard property to the said plaintiff from herself and the said Arthur C. Bulley, which deed was prepared, and after the said Harriet A. Bulley knew that it had been prepared she sent a message to a justice of the peace for the said county of Sunbury to come and see to the execution of the said deed by herself and her said husband and take their acknowledgment of such execution, but being taken suddenly and seriously ill, and continuing prostrated by her illness until her death on the 3rd day of January, 1891, it was not decided prudent by the plaintiff or the said Arthur C. Bulley, or any of the family of the said Harriet A. Bulley, to see to the execution and acknowledgment of the said deed; in fact in the anxiety and concern of the family as to the condition of the said Harriet A. Bulley they lost sight for the time being of the necessity of her executing the said deed, and consequently failed to procure her execution of the same. The plaintiff also claimed to have paid at the instance of the said Harriet A. Bulley rates and taxes for several years upon the said lands, amounting in all to the sum of $12.73, and also at her request to have expended the sum

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of $25 towards repairing the buildings on the said lands. It also appeared by the bill that the said Harriet A. Bulley died without having made any last will and testament, and that letters of administration upon her estate were granted to the plaintiff and the defendant Ethel M. Bulley. Mary A. Currie, a judgment and execution creditor of the defendant Arthur E. Bulley, who is a son of the said Harriet A. Bulley, and James Holden, sheriff of Sunbury, who had levied upon the said Arthur E. Bulley's interest in his mother's real estate, and advertised the same for sale, were made defendants to the suit. It also appeared by the statements in the bill that the mortgage to Lewin and Duff, although fully paid up, had not been cancelled upon the records of the county. The prayer of the bill was that it might be deemed that the money expended by the plaintiff in payment of the mortgage debt as well as the money expended by her in the payment of rates and taxes and in repairing the buildings should be paid out of the separate estate of the said Harriet A. Bulley, with a prayer for further relief and for the giving of all proper directions and the taking of all proper accounts, and with a prayer for an injunction restraining the making of any sale by the sheriff of Sunbury under the execution against the said Arthur E. Bulley. An injunction order was granted on the 17th July, 1891, by His Honour the Chief Justice restraining the defendants Mary A. Currie and James Holden from proceeding to a sale of the lands until further order. The defendant Mary A. Currie appeared to the suit, but did not put in any answer, plea or demurrer, and the bill was therefore taken pro confesso against her for want thereof, and was taken pro confesso against all the other defendants for want of an appearance. I required the plaintiff to produce viva voce testimony to support the case made by the bill, which was done. The plaintiff gave evidence of her having, at the instance and request of her mother, made payment out of her own moneys of the principal and interest of the Lewin and Duff mortgage, upon the understanding with her mother that when the payments were made the mortgage should be assigned to her, the said plaintiff. The evidence

further disclosed the fact that there was another mortgage on another property called the homestead property owned by Harriet A. Bulley, and that such mortgage was held by one William Currie, and that another daughter of Mrs. Bulley, the defendant Ethel M. Bulley, was assisting out of her moneys and at the request of her mother to pay off that mortgage, with the understanding that when it was paid off she (Ethel) was to have the homestead lot. In a letter under date the 14th February, 1889, written by Mrs. Bulley to A. Wellesley Peters, of St. John, who was the agent for Mr. Lewin, the surviving executor of the Robertson estate, and the surviving mortgagee to whom payments on this mortgage were made, Mrs. Bulley says: "I fear I have occasioned you much trouble in not arranging about the mortgage on the old shipyard. I wish to have the mortgage transferred to my two daughters Ethel Mason Bulley and Edith Jane Bulley. Will you kindly let me know what it will cost?" To this letter A. W. Peters must have made a reply, but what his letter contained does not appear, as it was not produced in evidence; but from Mrs. Bulley's letter to him of 20th February, 1889, it may be inferred that he had suggested to Mrs. Bulley that she had better give her daughters a deed of the property rather than have an assignment of the mortgage made to them. The plaintiff on her examination said she had seen a letter in her mother's possession from A. W. Peters to her, in which he had stated it would be better for her mother to deed the property to the daughters than assign the mortgage to them. As I have already said, this would seem to have been the case from Mrs. Bulley's letter to A. W. Peters, under date the 20th February, 1889, in which she says: "I am much obliged to you for all the trouble you have taken for me. I do not wish to deed the property, but as my daughters have paid the instalments I propose to transfer the original mortgage to them if it can be done legally. Will you add to your kindness by letting me know by post card how much I am to remit." To this letter A. W. Peters, under date the 25th February, 1889, wrote to Mrs. Bulley as follows: "Yours of 20th inst. received. Mr. Al-

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mon, the solicitor of the estate, says your daughters having as you say, paid the instalments, the assignment of the mortgage can be made to them, you and your husband joining in it. Cost, $5.00." From these letters it would seem that Mrs. Bulley desired that the Lewin and Duff mortgage should be assigned to her two daughters, the plaintiff Edith J. Bulley and the defendant Ethel M. Bulley, because, as she alleged in her letters, they had paid the instalments upon it. The evidence showed very clearly that Edith M. Bulley had never paid anything on the Lewin and Duff mortgage on the shipyard property; what she had paid was on the Currie mortgage on the homestead property. Nothing further appears to have been done until November, 1890, when it was arranged by Mrs. Bulley with the plaintiff and with the defendant Ethel M. Bulley that she should in consideration of the moneys paid by the plaintiff on the Lewin and Duff mortgage on the shipyard property convey that property to the plaintiff, and in consideration of the moneys paid by the defendant Ethel M. Bulley on the Currie mortgage on the homestead property convey the homestead property to Ethel M., to carry out which arrangement a deed from Mrs. Bulley and her husband, the defendant Arthur C. Bulley, to the plaintiff of the shipyard property, and a deed of the homestead property to Ethel M., were drawn up ready for execution, but were not executed in consequence of the sudden illness of Mrs. Bulley, followed by her death. When this arrangement about the two deeds was made discharges of the two mortgages were to be procured. The Currie mortgage has been discharged upon the records, but the Lewin and Duff mortgage has not yet been discharged. As part of the arrangement made in November, 1890, that the mortgages were to be discharged, Mrs. Bulley, under date the 15th November, 1890, wrote to A. W. Peters as follows: "I do not know how to apologize for all the trouble I fear my delay has caused you. If you will send me a post card to tell me I may remit the amount to cancel the mortgage on the part of the Robertson estate I purchased here, I will do so by return of post, when please let me have the papers." On this letter is a memoran-

dum made by A. W. Peters as follows: "Sent her a post card with memorandum; $2.50 amount due." It was while the affair was in this state that Mrs. Bulley was taken ill, and this, without doubt, accounts for the fact that no further action was then taken in the matter.

The plaintiff has brought this suit to be repaid out of the separate estate of the said Harriet A. Bulley the moneys she paid on account of the Lewin and Duff mortgage, the rates and taxes and the sum paid by her for repairs upon the property. I think there can be no question in this case that the engagement which Mrs. Bulley made with the plaintiff when the latter made the payments she did upon the Lewin and Duff mortgage, was an engagement contracted with reference to and upon the faith of the credit of the shipyard property, which was then the property of Mrs. Bulley, as her separate property, for although acquired by her by deed during coverture, that would not the less make it separate estate; by the Consolidated Statutes, c. 72, s. 1, it would be so, for that section enacts that "the real and personal property belonging to a woman before, or accruing after marriage, except such as may be received from her husband while married, shall vest in her and be owned by her as her separate property." The judgment of Turner, L.J., in the case of *Johnson* v. *Gallagher* (1), lays down most clearly the nature and extent of the rights and remedies of the creditors of married women against their separate estates. In Matthewman's Case (2) it is said by Kindersley, V.-C., when alluding to what is the law as to the extent to which a married woman may contract obligations, engagements, or debts which the party with whom she is contracting may insist shall be paid out of her separate estate, says: "That is a moot question; but I think the principle laid down by Lord Justice Turner in *Johnson* v. *Gallagher* (3), is a sound one, and that it is the principle which the Court ought to adopt. As I understand that principle, it is this: If a married woman, having separate property, enters into

(1) 3 DeG. F. & J. 494.

(2) Law Rep. 3 Eq. 781.

(3) 3 DeG. F. & J. 491.

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a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a feme sole) would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in the manner I have mentioned must depend upon the facts and circumstances of each particular case. It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract expressly making her separate estate liable, such contract would bind it; nor is it necessary that there should be any express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation." In *Butler* v. *Cumpston* (4), Malins, V.-C., says, in referring to the case of *Johnson* v. *Gallagher* (5), that he was sorry to find that Lord Justice Turner and Lord Justice Knight Bruce did not quite take the same views in regard to this branch of the law, but his own judgment entirely accorded with the opinion of Lord Justice Turner, and that he thought the rules laid down by him were founded in law and good sense. This case was decided in November, 1868, and in December, 1869, was followed by the case of *Picard* v. *Hine* (6), which determined that where a married woman contracts a debt which she can only satisfy out of her separate estate, her separate estate shall in equity be made liable to the debt. Lord Hatherley, L.C., in this

(4) 4 Law Rep. 7 Eq. 16.
(5) 3 DeG. F. & J. 494.
(6) Law Rep. 5 Ch. 274.

case says that the position of a married woman who contracts as a feme sole has been placed upon a sound foundation by Lord Justice Turner in his judgment in *Johnson* v. *Gallagher*. And Giffard, L.J., in the same case says that as to the law of the case it is unnecessary to say anything, because in the judgment of Lord Justice Turner, in *Johnson* v. *Gallagher*, everything relating to the subject is clearly laid down. In 1873 the Judicial Committee of the Privy Council, in delivering judgment in the case of *The London Chartered Bank of Australia* v. *Lempriere* (7), approved of and adopted the judgment of Lord Justice Turner in *Johnson* v. *Gallagher* as to the liability of the separate estate of a married woman for debts contracted with reference to such estate, and Lord Justice James, who delivered the judgment, says, at page 594, that it is true that in *Shattock* v. *Shattock* (8), the Master of the Rolls expressly overruled the judgment of Lord Justice Turner in *Johnson* v. *Gallagher*, but he adds that their Lordships of the Judicial Committee of the Privy Council are not able to concur in his view of the authorities, and have arrived at the conclusion that Lord Justice Turner's judgment is expressed with his usual accuracy. So far, therefore, as this Court is concerned the decision of the Judicial Committee of the Privy Council is a binding decision, and the case of *Shattock* v. *Shattock* must be considered as overruled.

Having referred to these authorities and dealing then with the present case, I think that Mrs. Bulley, when she requested the plaintiff to pay the principal and interest of the Lewin and Duff mortgage upon the understanding that she, the plaintiff, should be secured by having the mortgage assigned to her, intended so to contract with the plaintiff as to make herself, that is to say, her separate property, the debtor to the plaintiff. There neither was nor could be any pretence under the facts that the defendant Arthur C. Bulley was in any way to be considered as the debtor, so as to relieve the separate estate of the mother. How then is the matter affected by the evidence in the case, in the first place by the

(7) Law Rep. 4 P. C. 572.

(8) Law Rep. 2 Eq. 182.

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letters of the mother to A. W. Peters, in which she stated that both of her daughters having made the payments of the instalments on the Lewin and Duff mortgage, she wished the mortgage assigned to them both, and in the next place by her change of mind in regard to having the mortgage assigned, and concluding that instead she would convey by deed to the plaintiff the shipyard property, and to the defendant Ethel M. Bulley the homestead property on which was the Currie mortgage, towards the payment of which Ethel had made payments at the request of her mother? It is very clear to me from the evidence that Ethel never made any payments on the Lewin and Duff mortgage, but that all such payments were made by the plaintiff. What the mother may have had in her mind in stating in her letter to A. W. Peters is that both daughters had made payments, and that she wished the assignment of the mortgage to be made to both, I can only conjecture. It may be that she wished both mortgages assigned to both daughters irrespective of the payments made by each, which might not be an unreasonable family arrangement, both mortgages having been given in the same month (April, 1881) and both for nearly the same amount, one being for $250 and the other for $200, but, however this may be, the assignment of the Lewin and Duff mortgage to the two daughters was never made but was virtually abandoned by the new proposal to give to the plaintiff a deed of the shipyard property, and to Ethel a deed of the homestead property. Had the proposal (which was unfortunately frustrated by the illness and death of Mrs. Bulley) been carried out, each daughter would have had the property in respect to which she had expended her moneys. While the bill sets forth this agreement as to the giving of a deed to each daughter, and the evidence shows that the deeds to effectuate that object were drawn out, and that Mrs. Bulley actually thereafter made arrangements to have them executed and duly acknowledged, I do not think that I could now make a decree and direct that agreement to be specifically performed, because I am of opinion that under the Statute of Frauds such an agreement,

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relating to lands, to be enforced would require to be in writing. I think now that there can be no doubt that specific performance may be granted in respect to a contract made with a married woman where the consideration on her part is an engagement binding on her separate estate. *Picard* v. *Hine* (9), above cited, decides that. In *Johnson* v. *Gallagher* (10), Turner, L.J., at page 514, qualifies the statement as to the liability by adding, "except as the Statute of Frauds may interfere where the separate property is real estate," and the same qualification is to be found in some of the other cases dealing with the question. In *Shattock* v. *Shattock*, already referred to as overruled on the main question, Lord Romilly, on page 192, says: "The engagement need not be in writing, but if not in writing, it must be proved that it was entered into with an intention on the part of the married woman of making her separate estate liable to discharge that debt, and this intention will not be inferred from the mere circumstance of her contracting the debt. When I say that the engagement need not be in writing, of course there is this qualification, that if the separate property of the married woman consists of real estate only, the Statute of Frauds applies as in every case affecting land." As, therefore, the uncompleted agreement to convey the shipyard property to the plaintiff cannot, in my opinion, be enforced because it is not in writing, it becomes necessary to consider in what way I can give the plaintiff relief. As the letters from Mrs. Bulley to A. W. Peters showed that the then intention of the mother was that the assignment of the mortgage should be made to both daughters, Ethel M. Bulley has executed an assignment of her interest in the Lewin and Duff mortgage moneys to the plaintiff—indeed her release to the plaintiff produced in evidence covers any possible claim she could have under the letters written by her mother to Peters, and gives the plaintiff the full benefit of such mortgage moneys—therefore the plaintiff is fully entitled to all such moneys. I have had some doubts as to the proper course to adopt in respect to the

(9) Law Rep. 5 Ch. 274.

(10) 3 DeG. F. & J. 494.

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relief to which the plaintiff is entitled. She might, I think, have filed her bill asking under the facts and the evidence that Mr. Lewin, the surviving executor of the Robertson estate, assign and transfer the mortgage on the shipyard property to her and then after obtaining the assignment as assignee have filed her bill to foreclose the mortgage. This, however, would not relieve her from filing a bill to be paid out of her mother's separate estate the sums paid by her for rates, taxes and repairs if she can claim for the moneys thus paid. All this would necessitate several suits in equity, but, having considered the whole matter very carefully, I think this circuity of proceeding can be avoided, and that, by treating the moneys paid by the plaintiff at her mother's request on the mortgage as well as the other moneys paid by her also at her mother's request, as a debt chargeable against the mother's separate estate, I can make a decree which will make the separate estate the fund to pay such debt. Of course in such case the amount might be decreed to be paid out of the personal estate of Mrs. Bulley, which was separate property, and an account directed to be taken of such personal estate had it not been that the evidence disclosed the fact that Mrs. Bulley died without leaving any personal estate. I possibly would in the first place have directed an inquiry to ascertain the amount of her personal estate which was separate property, if there had been personal estate, and if that proved insufficient, then have directed that recourse should be had to her real estate by sale thereof to meet the claim of the plaintiff. As there is no personal estate, and the plaintiff by her bill confines the payment of her claim to the separate estate of her mother known as the shipyard property, therefore no enquiry need be directed as to any other real estate the separate property of the mother. It may be here stated that the defendant Arthur C. Bulley, the husband, in his evidence avowed himself cognizant of all his wife's transactions as stated herein and in the bill and expressed his willingness that the plaintiff should be paid her claims out of the separate estate of his late wife. From what I have said it follows that it

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is only necessary to ascertain the amount which the plaintiff has paid out of her own moneys at the request of the said Harriet A. Bulley in order to make a decree in the suit. The bill having been taken pro confesso against all the defendants the allegations therein are substantially admitted, and therefore it appears that the plaintiff has paid out of her own moneys, at the request of the said Harriet A. Bulley, the whole amount of the principal and interest of the mortgage made and given by the said Harriet A. Bulley and the said Arthur C. Bulley, her husband, to the said Lewin and Duff, surviving executors of the Robertson estate; also the sum of $12.73 for rates and taxes and $25 for repairs paid at the request of the said Harriet A. Bulley. I do not think it necessary to make any reference to ascertain the amounts due the plaintiff, as they are stated in the bill and admitted by the allowing it to be taken pro confesso. The plaintiff ought to have interest on such amounts as were paid on the mortgage, that is to say, she will be considered a creditor for the amount of the principal of the mortgage and interest up to this date in like manner as if she had become the assignee of the mortgage. I think she ought to be paid the amount paid by her for the rates and taxes, amounting to $12.73, and also the $25 paid by her for the repairs, but I do not see my way clear upon the principle under which interest is allowed to give her any interest on these two sums. The plaintiff's claim will therefore stand at $452.73, made up as follows: Principal of mortgage, $250; interest thereon from 26th April, 1881, to 26th May, 1892, $165; as also for rates and taxes, $12.73, and for repairs, $25. The plaintiff will also be entitled to subsequent interest on the principal of the mortgage from the 26th May instant until the sale of the separate property of the said Harriet A. Bulley, as hereinafter directed. The decree will be that the separate property of the said Harriet A. Bulley is chargeable with the said several sums I have just mentioned and with the costs of this suit, and that the real estate described in the bill and known as the shipyard property be charged with the payment of the said moneys and costs and that the said shipyard property

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be sold at public auction under the direction of a referee in equity for the county of Sunbury, and that after payment out of the proceeds of the sale to the plaintiff of the several sums to which she is entitled as aforesaid, together with her subsequent interest on the principal of the mortgage and the taxed costs of the suit, including the costs of the reference and sale, that the surplus be paid into Court with liberty to the heirs of the said Harriet A. Bulley, the said Mary A. Currie, or any other person interested therein, to apply to have the same paid out according to their respective interests therein. The injunction granted restraining the defendant Mary A. Currie and the defendant James Holden, sheriff of Sunbury, from making sale under the execution against Arthur E. Bulley to be made perpetual.

See *Chute* v. *Gratten*, post, p. 538, and on appeal, 32 N. B. 549; *Johnson* v. *Scribner*, ante, p. 363; *Cunningham* v. *Moore*, 1 N. B. Eq. 116; *Waters* v. *Waters*, 1b. 167.

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July 16.

ROBERTSON v. THE ST. JOHN CITY RAILWAY AND JOHN B. ZEBLEY.

(No. 1. Post, p. 476.)

Practice—Discovery—Production—Sealing up irrelevant matter—Foreign corporation—Books abroad—Production after refusal to give information by answer—Exceptions.

The plaintiff is only entitled to discovery as to all material matters relevant to his own case as made out by the bill, and not to the defendant's case.

Where defendant's books contain parts not relevant to the plaintiff's case, and to the inspection of which the defendant objects, the defendant on the hearing of a summons for discovery should state the existence of such parts, that the order may be qualified by giving him liberty to seal up such parts. If defendant does not take this course, the liberty will be granted to him on application by summons taken out for the purpose.

Production will be ordered against a defendant foreign corporation; and it is no answer that its books are abroad.

Application may be made for production, though the information has been refused in answer to interrogatories, and it cannot be objected that the answer should have been excepted to.

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The facts are sufficiently stated in the judgment of the Court.

C. J. Coster, for the plaintiff.

Pugsley, S.G., for the defendants.

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The bill in this suit is brought to enjoin the defendants from applying the funds of the defendant Company to another object than that authorized by the charter, and for an account of the earnings of the Company, and to compel an account and refund of any funds of the Company that have been misapplied.

The defendants have put in an answer, but have refused to answer as to the entries of the receipts and expenditures of the Company; upon which this application was made for the production on oath and inspection of all documents in their possession relating to the matters in question in this suit.

It appears that the Company's books and papers are kept in New York, and it was not denied on the argument that they had books containing accounts showing the cost of construction and equipment of the railway, and a statement of the receipts and disbursements in connection with the running of it, and the cost of the buildings, machinery, and other property constructed or purchased by the Company, and also with reference to the money raised by the Company on mortgage or mortgage bonds or debentures or by any sale or hypothecation of the Company's property.

The matter has been before me for a considerable time, but the defendants have ultimately refused to produce anything, and the plaintiff's counsel has required me to make an order, and as this is the first case in which these questions relative to procedure in connection with the production of documents have arisen before me I have considered it my duty to state my views as to that part of the practice of this Court which relates to discovery by the production and inspection of documents.

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Previous to the passing of the Act 17 Vict. c. 18, s. 17, of which the 61st section of 53 Vict. c. 4, is a re-enactment, in order to obtain production and inspection of documents it was necessary to exhibit interrogatories as to the documents in possession of the defendants. By that section (which is a copy of the 18th section of the Imperial Act 15 & 16 Vict. c. 84), it is enacted that:

"It shall be lawful for the Court or a Judge at any time during the pendency of any suit or proceeding, to order the production upon oath by any party thereto, of such of the documents in his possession or power relating to any matter in question in such suit or proceeding, as the Court or Judge shall think right, and the Court or Judge may deal with such documents when produced in such manner as shall appear just. The costs of such application and production to be in the discretion of the Court or Judge."

As I think this section was not intended to enlarge the right of discovery but merely to give a more prompt mode of enforcing it by production and inspection instead of mere answers to interrogatories, the general principles on which discovery is enforced in equity must be a guide upon the question of the right to production. These rules I had occasion to lay down minutely in the case of *Gilbert v. Union Mutual Life Insurance Co.* (2), and they are these: That the pleadings in a case and the rules of practice in connection with the law of discovery determine, a priori, what question or questions in a case shall come on for trial, and the right of a plaintiff to discovery is in all cases confined to the question or questions in the case which according to the rules and practice of the Court is or are about to come on for trial. Another rule is, that it is the right of the plaintiff in equity to exact from the defendant a discovery upon oath of all matters of fact which being well pleaded in the bill are material to the plaintiff's case, and which the defendant does not by his form of pleading admit. Another rule is that the

(2) 25 N. B. 221.

right of the plaintiff is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to discovery of the manner in which the defendant's case is to be established or to the evidence which relates exclusively to his case. In point of fact, the last proposition is contained in the section under consideration, for it enacts that the documents which are obliged to be produced must be in the possession or power of the defendant and relate to the matter in dispute—that is to facts material to the case made by the bill and not admitted by the answer—and as to them the plaintiff has the right of discovery, but the plaintiff has only the right to the inspection of entries in the books in which he has an interest—by which I mean matters which are material to the plaintiff's case made by the bill. See *Tyler* v. *Drayton* (3).

I have to consider whether or not I should not qualify the order for production by adding directions that defendants should be at liberty to seal up such parts of the books as shall not in any way relate to the matters in question in the cause. But, if such is the case, it was the proper course for the defendants resisting this summons to state the existence of entries, to the discovery of which they object. See Hare on Discovery (4).

This was not done, and, therefore, I have no right to infer that any harm will be done by the general order. If, however, such general order is calculated to do any harm, it is open, and it is the proper course, for the defendants to make special application by summons for that purpose. See *Talbot* v. *Marshfield* (5).

I have some doubts as to the form of the order, but, although it is not denied that the defendants have books in which there are entries such as are required, I have no distinct admission of the number or character of such books or other writings so as to properly describe them in an order for production. What the plaintiff asks for and what he is entitled to is the production under oath

(3) 2 S. & S. 309.

(4) 2nd ed. 281.

(5) Law Rep. 1 Eq. 6.

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of all documents in their possession or power relating to the matters in dispute; that means that they shall make oath to what they have and then produce them; and therefore the order I will make is to direct each of the defendants generally within ten days after the service of this order upon the defendants' solicitor to file an affidavit stating what books or other documents he or the Company have in their possession or power in which there are entries relating to the matters in dispute (if any), showing the cost of any building, machinery or other property constructed, purchased or owned at any time by the Company, or any entry with reference to money raised by the defendant Company on mortgage, mortgage bonds or debentures, or upon any sale, hypothecation or pledge of the Company's property, and to leave with the Deputy Clerk of this Court such of the said documents admitted by them as he or they may not show by such affidavit are not in their or either of their possession or power, according to the form No. 2 in Seton on Decrees (4th ed.) page 133.

The defendants objected to the production, because in their answer they, although interrogated, had refused to answer with reference thereto, and they argued that the plaintiff ought to have excepted to the answer and could not apply for production, but it is apparent if this was the compulsory practice of the Court it would lead to great delay. The practice is clear that instead of excepting the plaintiff can apply for production.

Wigram, in his valuable book on Discovery, at page 200 says: "The motion for production of documents is in the nature of an exception to the answer, and the judgment of the Court upon motion for production will be regulated accordingly. If the plaintiff under the old practice would have succeeded in his exceptions to the answer in not setting out the documents he will be entitled to an order for their production, otherwise he will not be so entitled."

This appears to be exactly this case, and no argument has been attempted to be made to me to show that the defendants can protect themselves from answering,

but if they did the decision of this Court in *Gilbert* v. *Union Mutual Life Insurance Co.* is a complete answer.

Again it has been argued that these books ought not to be produced because this is a foreign corporation and the books are abroad. With reference to the first point I know of no rule which would put a foreign corporation in any different position from a domestic one, or any other person. This Court can only have jurisdiction over the matter because of property within its jurisdiction, the right to which it is called upon to adjudicate upon, and there is no pretence that the Court has not jurisdiction to entertain the suit—the not demurring to the bill admits it—and it would be a sorry day for the suitors in this Court if parties remaining out of the jurisdiction of the Court could deal with property over which no other Court has jurisdiction to adjudicate upon and refuse discovery that persons within the jurisdiction would be obliged to make.

Then, as to the books being abroad, the rule is clear that that makes no difference. Mr. Daniell in his valuable book on the Practice of the Court of Chancery, at page 1827 (4th Am. ed.), says, that the mere circumstance of the documents being abroad, is no answer to the application for production; but in such a case a reasonable time will be given to bring them to this country, and if the party does not comply with the order, the Court will consider it as if he had had them here in the first instance, and had refused to produce them.

These are the principles upon which this Act of Assembly should be administered, and it is clear that it is my duty to make the order.

It has been suggested that I could not enforce the order against a foreign defendant, the defendant not being within the jurisdiction of the Court. That is true so long as he keeps himself and his property out of the jurisdiction, but if the proper orders of this Court are not obeyed it is not powerless; it has the ordinary process of contempt against any property of the defendants within the jurisdiction, and if it is not obeyed it is a contempt of this Court, for which it would issue a sequestration against the property.

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I have been this particular as I thought it my duty to let the practitioners of this Court know on what principles I feel myself bound to administer the law with reference to the production of documents relating to matters in dispute in causes pending in this Court.

As this is the first application of the kind, I will not give costs against the defendants, but make them costs in the cause.

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August 4.

BARCLAY v. McAVITY.

Practice—Answer—Setting up fraud—Exceptions—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 72—Costs of Exceptions.

Where a suit is brought to enforce an agreement, an answer setting up that the agreement was made fraudulently cannot be excepted to on the ground that the defence of fraud can only be put forward in a cross bill to set the agreement aside. The remedy of the plaintiff is by application to the Court under section 72 of Act 53 Vict. c. 4, or to object at the hearing to evidence of fraud being given.

Where exceptions are allowed in part, neither party is entitled to costs.

Where some exceptions are wholly allowed, and others disallowed, the costs are set-off and the balance only is payable. Where the costs would be nearly equal no costs are given, or they are made costs in the cause.

The plaintiff by his bill alleged that on the 24th of April, 1883, he obtained letters patent in Canada for an invention called "Barclay's Improved Lubricator for Steam Engines," and that by an agreement dated the 1st of January, 1888, between himself and the defendants, the latter were given the sole and exclusive right to manufacture and sell the lubricator in the Provinces of New Brunswick, Quebec and Ontario to the end of the term for which the patent was granted, and any renewal thereof. That the defendants were to make quarterly returns of the machines manufactured, to keep books showing the sales, and to pay the plaintiff a royalty of $3.75 for each lubricator made. That the defendants commenced and have continued the manufacture of the lubricator, and have sold a large number of them, but have not made full and true returns of the

number manufactured, and have refused to do so, and have alleged that lubricators manufactured and sold by them are not the plaintiff's lubricator. The plaintiff alleged and charged that all lubricators manufactured and sold by the defendants since the date of the agreement were in fact, substance, and in truth his lubricator, or a colourable imitation thereof, and he prayed for an account by the defendants.

Interrogatories were delivered for the examination of the defendants, which contained, *inter alia*, the following:

6. "Is it not true that the said defendants did not make full and true returns of the number of the said lubricators as required by the second section of the agreement set out in the fourth paragraph of the bill of complaint? Were not lubricators sold by said defendants that were not put in the returns made to said plaintiff? Did said defendants keep as required by the said agreement, regular books of account containing all items, charges and memoranda relating to the manufacture and sale of the said lubricators, or what books of account were kept by said defendants? Set out in your answer to this interrogatory a copy of all entries contained in said books of account relating to said matters."

11. "Is it not true that all the lubricators for steam engines manufactured and sold by the said defendants since the date of said agreement are in fact, substance, and in truth, the said plaintiff's lubricators described in said agreement, or lubricators varying only colourably from said plaintiff's lubricator, or in what particulars did said lubricators sold by said defendants vary or differ from the said lubricators described in said agreement? In your answer to this interrogatory set out in detail a description of the lubricators sold by said defendants, and the number thereof, and point out the principal points of difference between said lubricators and said plaintiff's lubricators? Were not the said lubricators manufactured and sold for the purpose of avoiding the payment of said royalty to said plaintiff, or otherwise?"

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To these interrogatories the defendants answered as follows :

6. "It is not true that the said defendants did not make full and true returns of the number of said lubricators as required by the second section of the agreement set out in the bill of complaint; and further, that no lubricators manufactured by said defendants under said agreement were sold by the defendants which were not in the returns made to the said plaintiff. And further, that the defendants did keep, as required by said agreement, regular books of account containing all items, charges and memoranda relating to the manufacture and sale of the said lubricators, and that the said books of account were at all times open to the inspection and examination of the said plaintiff, or his legal representative, and that accounts of the manufacture and sale of said lubricators were from time to time rendered by said defendants to the said plaintiff, and the said plaintiff has received full and proper accounts of the same."

11. "It is not true that all the lubricators for steam engines manufactured and sold by the said defendants since the date of said agreement are in fact, substance, and in truth, the said plaintiff's lubricators, described in said agreement, or lubricators varying only colorably therefrom. That the said defendants manufacture as many as twenty different kinds of lubricators, many of which were manufactured by the defendants for years previous to the making of said agreement, but that no record or account is kept of the number of said lubricators so manufactured, and that it is impossible to give any account of the number of lubricators so manufactured and sold, and said defendants cannot ascertain the number thereof. That the said lubricators were not manufactured and sold for the purpose of avoiding the payment of said royalty to said plaintiff, but the same were manufactured and sold in the ordinary course of the defendants' manufacturing business. And the said defendants do claim and submit that at the time of the making of the agreement between the plaintiff and the defendants, the defendants were induced to enter into said agreement by the fraud of the said plaintiff in stat-

ing and pretending that he was the rightful owner of the patent aforesaid, and entitled to have the said lubricator patented in Canada, whereas in truth and in fact the said lubricator was an infringement on other patents in Canada, then and now in full force, and the said patent held by said plaintiff was fraudulent and void, and said defendants claim that the same should be declared fraudulent and void, and be set aside."

To these answers the plaintiff filed the following exceptions:

1. "That the said defendants have not in and by their knowledge, remembrance, information, and belief, answered and set forth in their answer to the sixth interrogatory a copy of all entries contained in said books of account relating to the matters therein interrogated upon."

2. "That the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their answer to the eleventh interrogatory in what particulars the lubricators sold by said defendants varied or differed from the lubricators described in the agreement set out in the bill of complaint. And that said defendants in their answer to said interrogatory did not set out in detail a description of the lubricators sold by them, and the number thereof, or point out the principal points of difference between said lubricators and said plaintiff's lubricators."

3. "That the said defendants in their answer to the said eleventh interrogatory set up that said lubricator was an infringement on other patents in Canada then and now in force, and that said patent held by the plaintiff was fraudulent and void, and defendants claimed in said answer that the same should be declared fraudulent and void, and be set aside; the said plaintiff contends that said allegation is bad and insufficient, and that said defendants are estopped from setting up in said answer the said allegations, and from trying out in this suit the validity of said patent. In all or some of which particulars the said plaintiff is advised that

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the said answer of the defendants is evasive and insufficient, and ought to be amended."

Argument was heard August 1st, 1892.

C. W. Weldon, Q.C., for the plaintiff.

C. A. Palmer, Q.C., and *A. H. Hanington*, for the defendants.

1892. August 4. PALMER, J.:—

The first exception is in effect that the defendants have not set out the accounts in their books relating to the matters; there is some difficulty as to what is meant by the words "relating to said matters," as that is all that is stated in the interrogatory. Of course the words taken by themselves would be entirely indefinite, as it would be impossible to know what were the matters referred to, and the only thing by which the defendants could tell their meaning is the matters that were mentioned in that interrogatory—that is, the entries in the books that they were required to make by the agreement alleged in the bill as having been made between the parties, and I think that the defendants ought to have fairly understood it, and, therefore, they should have answered, and this exception must be wholly allowed, and the defendants ordered to answer by setting out, as far as they can, a copy of any entries made under that agreement relating to it. They have already sworn that they did keep the accounts as stated.

The second exception covers two grounds. First, that the defendants have not answered as to their knowledge and belief in what particulars the lubricators sold by them differed from those which they agreed to sell for the plaintiff under the plaintiff's patent, and, secondly, that they did not set out in detail all that they sold. This exception must, I think, be allowed as to the first part, and overruled as to the second, as I think the second has been sufficiently answered. It follows that the defendants must put in an answer as to their knowledge, information and belief, as far as they can, how the other lubricators which they by their answer allege they sold

are different from those that they were to sell for the plaintiff.

The third exception is in effect an objection to setting up in the answer a fraud in making the agreement to enforce which the suit is brought, on the ground that the defendants cannot set up fraud by their answer, but must do so by a cross-bill to set the agreement aside; but if this is so, it is either a ground for striking out the clause under section 72 of 53 Vict. c. 4, or an objection to giving such a defence in evidence at the hearing. It is clearly not a ground for exception to the answer, for such exceptions are, since the passing of the Act referred to, confined to stating too little, and not the stating too much; therefore, this exception must be wholly disallowed; so that I will have wholly allowed one exception, have allowed one in part, and the other part disallowed, and the third have wholly disallowed, and the question now is what I should do with the costs in the matter.

The rule as to costs on the hearing of exceptions to an answer before this Court is, that if the party excepting is given the costs of the exceptions that are allowed, and the other party is entitled to the costs of the exceptions which are disallowed, if some of the exceptions are allowed only in part neither party is entitled to the costs in relation to these exceptions. In such cases where some of the exceptions are wholly allowed, and some wholly disallowed, these are set off and only the remaining part paid, and if the costs on each side are nearly equal then the Court refuses to give costs to either party or makes an order that the costs of both parties should be costs in the cause. Here I think the costs would be as nearly equal as possible, and, therefore, I will order that the costs of these exceptions be costs in the cause.

The order I will make is that the whole of the first exception and a part of the second be allowed; and unless the defendants shall, in ten days after service of this order on their solicitors, put in a good and sufficient answer, and set out on oath as to their knowledge, information and belief a copy of all entries made by them in

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the books of account, or other memorandum of the manufacture or sale of lubricators which they kept under the agreement mentioned in the bill; and also put in a good and sufficient answer as to their and each of their knowledge, information and belief in what particulars the other lubricators sold by the defendants varied or differed from the lubricators described in the agreement set out in the bill of complaint in this suit, the bill may be taken pro confesso.

And it is further ordered that the rest of the exceptions be disallowed. The costs of both parties to this application to be costs in the cause.

The rule that fraud in an agreement can only be set up as a defence by cross bill was very fully discussed in Botsford v. Crane, 1 P. & B. 154. Ritchie, C.J., there said: "It is quite clear in this case, that defendants' entire, substantial resistance to the plaintiff's claim is founded on the alleged invalidity of the agreement, and I think, to enable defendants to avail themselves of this, the agreement should have been impeached by a cross bill. A cross bill is simply a mode of defence to the original bill, and its object is to bring every matter in dispute completely before the Court, so that after the litigated point is properly before the Court, the Court may be enabled to make a decree, granting full relief to all parties, in reference to the matters of the original bill. In Richards v. Bayley, 1 J. & Lat. 120, it was held that a party desirous of being relieved upon equitable grounds from an executed contract, must file a bill for that purpose—that he could not rely on those equitable grounds, as a defence to a suit to have the benefit of the contract; and the words of the Lord Chancellor, at page 131, are peculiarly applicable to this case: 'If a cross bill had been filed, the question which has been discussed—whether this transaction could be maintained in a Court of Equity, would have properly come before me.' And again he says: 'Now this case does not come before me upon a cross bill to be relieved from these securities; but it is said that I may act in this manner; that as by this bill, the plaintiffs being only entitled to a security upon the life interest of the defendant in the lands, ask for something beyond that, I am at liberty to deal with this case in any way I may think equitable without a cross bill. There is no authority for such a position. The general rule of the Court requires a cross bill to be filed in a case like the present. . . . This is a contract, whether it be good or bad, which is executed in the sense in which that word is used in this Court; and if executed, then it is the clear rule of the Court that the party desirous of being relieved from a contract executed must file a cross bill for that purpose. It would lead to great inconvenience if it were otherwise, and I am not inclined to relax the practice in this respect. . . . It would be to give relief against the contract of the party, where the plaintiff requires nothing but the aid of the Court to carry it formally into execution. I am not at liberty to do so.' So in Holderness v. Rankin, 6 Jur. N. S. 903, one point made was, whether a cross bill was or was not necessary to raise the question of fraud in the making of the agreement under which plain-

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tiff claimed the property in dispute. Sir G. J. Turner, L.J., in delivering judgment says: 'I am of opinion that a cross bill was necessary to raise this question.' And again: 'It is not according to the course of this Court to set aside a deed at the instance of a defendant as such, although he is entitled to the benefit of his answer, and no decree can be made against it upon the testimony of a single witness. In such a case the defendant ought to file a cross bill.' So in Carter v. Palmer, 8 Cl. & F. 668, in the House of Lords, it was held that to enforce a defendant's equity by impeaching securities a cross bill is necessary, according to the practice in England; and therefore where the plaintiff claimed the full amount of securities, and the defendant offered to pay a part only, alleging an equity against the residue, a decree, giving the plaintiff an option to accept the offer or have his bill dismissed, was held irregular, as it did not decree whether the plaintiff was entitled to the whole sum or to a part only, and that the proper course would be to make a decree giving effect to the securities to the extent of the whole sum due on them, but without prejudice to the defendant's right to file a cross bill to assert his equity. And in Eddleston v. Collins, 17 Jur. 331, Turner, L.J., says: 'The question here is on the right to create the further charges, and not on the right to the ultimate equity of redemption, subject to the charges when created. The appellants then attempted to impeach the securities upon the evidence taken in the cause; but the appellants are defendants in this cause, and I feel great doubt whether it is competent for them to do so. The plaintiff's security is, I must now assume, well created by deed, and I rather apprehend such a security, if impeached at all, must be impeached by cross bill. The security is good until impeached; and to allow the defendant to impeach it by her answer, and by evidence on her part, would be to make a decree in favour of the defendant upon the application of the plaintiff. If the defendant were at liberty thus to impeach the plaintiff's title, she must equally be at liberty wholly to subvert it; and the consequence of allowing this would be, that plaintiffs coming to this Court for relief might find themselves in a position of being decreed to convey to the defendants. The objection to decreeing relief upon the answer to defendants is, perhaps, founded upon deeper reasons than may at first sight appear. It may be the medium of compelling defendants to do justice to plaintiffs by putting any legal rights they may have under the control of the Court, and of thus giving effect to the rule, that he who comes into equity must do equity.'"

Where exceptions are allowed: Newton v. Dimes, 3 Jur. N. S. 583, or overruled: Stent v. Wickens, 5 De G. & Sm. 384; B. v. W., 31 Beav. 346, the costs will in general be ordered to follow the result. But they must be expressly asked for on the hearing of the exceptions: Earp v. Lloyd, 4 K. & J. 58; Crossley v. Stewart, 2 N. R. 57. Such costs are payable immediately: Hannaghan v. Hannaghan, 1 N. B. Eq. 400; Thomas v. Rawling, 27 Beav. 375. Where some exceptions are allowed and others overruled the costs of those allowed will be set off against those overruled: Wiley v. Waite, 1 N. B. Eq. 154; Hendricks v. Hallett, 1 Han. 217; Willis v. Childe, 13 Beav. 454; Dally v. Worham, 32 Beav. 69; Bridgewater v. De Winton, 9 Jur. N. S. 1272; and see Seton, 1256, No. 8, for form of order. Where the costs on each side would be nearly equal, the usual practice is to give costs to neither party: Richards v. Barlow, 1 Paige, 323. Where a party submits to exceptions before argument he must pay or offer to pay the costs properly incurred by reason of such exceptions: Act 53 Vict. c. 4, s. 58. Where a great number of exceptions were taken to an

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answer, and shortly before the argument the defendant submitted to answer, in consequence of which it was argued that the answer was clearly evasive, and that the ordinary costs were greatly inadequate, the Court refused to give extra costs, but reserved the question until the hearing of the cause: Attwood v. Small, 2 Y. & J. 72.

1892. *August* 11.

ROBERTSON v. THE ST. JOHN CITY RAILWAY AND JOHN B. ZEBLEY.

(No. 2. Ante, p. 462.)

Practice—Production—Order for discovery—Appeal—Stay of proceedings—Security to indemnify for delay.

Upon an order for discovery by the defendants, the Court made it a condition of staying proceedings pending an appeal, that the defendants put in security to indemnify the plaintiff from any loss arising from the delay; the Court having no judicial doubt as to the correctness of its order, and considering that greater injury would fall upon the plaintiff by a delay than to the defendants by a refusal to stay proceedings.

The facts sufficiently appear in the judgment of the Court.

C. J. Coster, for the plaintiff.

Pugsley, S.-G., for the defendants.

1892. August 11. PALMER, J.:—

This case came before me first on the 9th February last on an application for the production and inspection of documents. After a great many attempts to ascertain what the defendants were willing to do, I made an order for the usual affidavit for the discovery of documents in each of the defendants' possession relating to the matters in dispute in the case, and the production and inspection of such as they might state they had. From this order the defendants have each appealed, and this is an application to stay proceedings until the appeals are disposed of, mainly on the ground, that unless I would do so they will lose the benefit of their appeals. The other side argue that if I should stay the proceedings whenever the other side appealed

from my decision as to discovery it would prevent my compelling the parties producing the evidence that they might object to on the hearing until each matter was decided on appeal. This practice would completely destroy the energy of the Court, and therefore is not bound to be allowed. To me it is perfectly clear that I cannot act on either of these extreme views, and I will state as best I can my views on the principles on which the Court of Equity acts on staying proceedings upon orders of this description.

The first is that laid down by Daniell at page 1468, that Courts of Equity are very unwilling to suspend the execution of orders or decrees, particularly interlocutory orders.

The second, that the Court will usually order a stay of proceedings where the appeal is of right, if the not doing so would deprive the party of the benefit of his appeal, and they can secure the other side from being damnified by the stay in case the appeal is decided in his favour.

Thirdly, that the stay is in the discretion of the Judge, and must depend upon the circumstances of each particular case, and the fourth rule is that laid down by Lord Langdale, Master of the Rolls, in *Calder* v. *Webster* (1), that there are two things which a person is entitled to show on an application for a stay of proceedings: First, that on the evidence which is before the Court there is probable ground for supposing that the decree might turn out to have been erroneous, and, secondly, by affidavit what the probable injury is which might result from the decree being acted upon in case the decree should be ultimately successful.

Another rule is that laid down by Vice-Chancellor Kindersley in the case of *Lord* v. *Colvin* (2), in which he said:

"In applications of this kind, which must be made to the Judge who pronounced the decree, he is bound to consider the nature of the question decided and the

(1) 1 Jur. 577.

(2) 1 Dr. & Sm. 475.

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grounds of his decision, and whether the case is one of which he might judicially entertain a reasonable doubt."

There are many cases in which the Judge cannot feel any doubt. Here, when I consider what might be the probable injury which might result from this order if acted upon in case the appeal should be ultimately successful, I asked the Solicitor-General what injury he could suggest, and he did not suggest any, except the trouble and expense of bringing the books here, and he rather said that these defendants thought that the application was not made bona fide, and they would not give it. There is certainly nothing in the case which would induce me to think that the application was not bona fide, and when I am to consider this injury, compared to the injury which might possibly result to the other side from the delay, I think there is little reason for the stay, but if the defendants had so far complied with the order as to file the affidavit of what documents they had relating to the matters in dispute, I might have seen a reason to have stayed the rest of the order, but this they have not done.

Then, as to the other ground as to whether I have any judicial doubt as to the correctness of my decision. I certainly have not. I cannot even suggest an argument why the plain terms of the statute should not be complied with. On the other hand, I have asked the plaintiff's counsel in the case to state what protection I should make to prevent loss to their client. They stated the point that the bill was filed for the purpose of preventing the misapplication of the funds of the company, and also alleged a previous making away with the funds, and asking for an account of such funds, and that the books and documents were out of the jurisdiction of the Court, and there was great danger that delay would result in the destruction of the property.

Upon the whole, I think in case I cannot secure the plaintiff from loss by reason of the delay, that I will follow the course that Lord Cottenham pursued in *Storey* v. *Lord John George Lennox* (3). That was a motion on

(3) 1 M. & C. 685.

behalf of the defendant that the execution of an order for the production of documents might be stayed pending an appeal to the House of Lords, and the Lord Chancellor there said: "When it is stated that the appeal will be useless if the execution of the order is not stayed, a very strong ground for staying the execution is, no doubt, laid; but I do not think that such a reason is absolutely conclusive, because there would then be an encouragement to make applications like this upon interlocutory matters, which would be very inconvenient to the practice of the Court. But in this case there is another circumstance, namely, that the suspension of the order will be a delay to the demand of the defendant, who is the plaintiff at law, although an injury to the other side may possibly result from the delay. These two circumstances concurring, induce me, under the particular circumstances of the case, to stay the execution of the order, pending the appeal. If Mr. Wigram's clients suggest any precaution as being necessary to prevent irreparable loss to them, I will make that precaution a condition of the order."

I will not follow that decision with reference to the costs, but make the plaintiff's costs of this application costs in the cause. I will stay the proceedings if the defendant Zebley gives security to the satisfaction of Philip Palmer, Esq., barrister-at-law, by recognizance entered into before him, by two sureties in the sum of $5,000 each, conditioned that the defendant Zebley will abide by and obey and perform any order or direction as to him or his representatives that may hereafter ultimately be made in this cause by decree or otherwise, and that the stay with reference to the other defendant be upon the same terms. If this order is not complied with within ten days then this application to be dismissed with costs.

1892.
September 5.

CASSIDY v. CASSIDY ET AL.

Partition suit—Refusal of amicable partition—Costs.

Where a co-tenant refused to amicably partition a piece of land, and proceeded to strip it of its timber, the costs of a partition suit were ordered to be paid by him, and made a charge upon his share of the proceeds of the sale.

The facts sufficiently appear in the judgment of the Court.

A. I. Trueman, for the plaintiff.

The defendants did not appear.

1892. September 5. PALMER, J.:—

This is a bill for partition of land of small value in Carleton county. It appears by an allegation in the bill that the plaintiff applied to the defendant Lewis P. Cassidy to have an amicable partition, and that he refused to do so, and went on without regard to the rights of his co-tenants in common to strip the land of valuable timber. Having failed to appear, the bill was taken pro confesso against him, which amounts to proof of the allegations in the bill, and consequently he should pay the costs occasioned by the suit.

No doubt, where a suit is brought for the honest purpose of dividing land, and for which none of the co-tenants is to be blamed, and none of them has applied to the others to have an amicable division, the costs of all parties are to be paid out of the estate. But I advise practitioners, particularly with reference to lands of small value, to take care before they bring a suit in this Court for the purpose of partition, that in cases where the parties are sui juris they take measures to try if possible to have the property either sold or divided without the costs that a suit would necessarily involve. The result of a suit for the division of a small piece of wilderness, or even a large piece of wilderness land, is destructive of the property itself, and eats up the whole of it, or, as the common expression is, it is divided among the

lawyers instead of among the real claimants. That such should be the case is a scandal upon the administration of justice, and while I am sitting in this Court I shall, as far as the law will enable me, prevent it being done, and, therefore, while I am willing, when necessary suits are brought, to see that the gentlemen engaged in them are liberally and properly paid, I am not willing that suits should be either brought or defended for the purpose of making costs; and if not for that purpose, if persons who should know better have either gone into a defence or the suit improperly, I shall exercise my discretion when dealing with the question of costs. To persons who undertake the responsibility of a solicitor in this Court, I therefore say again, that I warn them to avoid, if possible, any proceedings that may look like those I have indicated.

The order will be that it be referred to a referee to sell the property; the proceeds to be divided in the manner prayed for in the bill; that the defendant Lewis P. Cassidy pay the costs of the suit, and that his proportion of the proceeds of the property be first applied to pay these costs; and that in the meantime the plaintiff's costs be first paid out of the share if the defendant Lewis P. Cassidy does not otherwise pay them.

The balance of the costs are to be paid pro rata out of the shares of all the other parties to the suit, both plaintiff and defendants. I reserve any other question that may be in the case, with liberty to either party to apply.

By the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 205, "The costs of all parties to any suit brought for the partition of lands, to be ascertained by and taxed by the clerk, shall be shared and borne by the several parties to such suit ratably and in proportion to the value of their respective interests in the lands and premises partitioned, unless the Court otherwise orders; the said costs shall be and remain a lien upon the respective shares of the several parties in the lands partitioned, or in the proceeds of the sale thereof, for the amounts to be paid by them respectively until paid; provided always, that if the Court is of opinion that a plaintiff has needlessly commenced a suit for partition of any lands or other property, or that any party interested in a partition suit, whether a plaintiff or a defendant, has without what the Court may deem sufficient reason, refused either

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before or after the commencement of such suit to agree to a public sale on two months' notice, or an amicable partition of such land or other property without sale or partition by the Court, the Court may in its discretion compel such plaintiff or party to pay the costs of suit, or deprive such plaintiff or party of his costs in any portion thereof." Where in a partition suit one of the defendants did not appear at the hearing, and his answer was unsupported by evidence, and was assumed by the Court to be unnecessary, he was held not entitled to any costs: Shields v. Quigley, 1 N. B. Eq. 154.

In the English Court of Chancery, prior to the Partition Act, 1868 (31 & 32 Vict. c. 40), the rule was that no costs in a partition suit were given to either party up to the hearing, and that the costs of issuing, executing and confirming the commission should be borne by the parties in proportion to their respective interests, or if the estate was sold, these costs were to be paid out of the proceeds of the sale in the first place. No costs were given of any proceedings subsequent to the commission: Agar v. Fairfax, 17 Ves. 533; Calmady v. Calmady, 2 Ves. 569; Baring v. Nash, 1 V. & B. 554; Jones v. Robinson, 3 DeG. M. & G. 913; Elton v. Elton, 27 Beav. 632; Belcher v. Williams, 45 Ch. D. 510, though in Elton v. Elton, *supra*, it seems that the costs of a hearing on further consideration would have been included in the costs to be borne by the parties in proportion to their shares. And see Leslie v. Dungannon, 12 Ir. Ch. Rep. 205. Where a decree for partition was made at the hearing without a reference or commission, no costs were given on either side: Collinson v. Collinson, Seton, 572. If a defendant by his conduct rendered the suit necessary, or increased the expense, he might be ordered to pay so much of the costs as had been thereby occasioned, or his own costs: Hill v. Fulbrook, Jac. 574; Morris v. Thumins, 1 Beav. 411.

The practice in England is now governed by the Partition Act, 1868, section 10 of which provides that "in a suit for partition the Court may make such order as it thinks just as to costs up to the time of the hearing," and under this section the Court is held to have a general discretion in the matter: Simpson v. Ritchie, L. R. 16 Eq. 103, but the practice is that the entire costs up to, as well as subsequent to the hearing, should, in the case of a sale, be paid out of the proceeds, or in the case of a partition, should be borne by the parties ratably, in proportion to their respective interests; unless there are special circumstances arising from the conduct of any of the parties which would induce the Court to apportion the costs otherwise: Miller v. Marriott, L. R. 7 Eq. 1; Cannon v. Johnson, L. R. 11 Eq. 90; Ball v. Kemp-Welch, 14 Ch. D. 512. In Catton v. Banks, [1893] 2 Ch. 221, 224, Kekewich, J., said: "It is settled practice to allow the costs of what is commonly called a 'partition action'—that is, an action in which property is sold for the purpose of distributing the proceeds among two or more parties entitled thereto out of the entire proceeds of sale; and so long as the costs incurred in respect of each share are roughly of about the same amount, the rule works fairly to all concerned, and each party entitled gets, in the ultimate result, a sum calculated on the basis of his paying the share of the entire costs exactly proportioned to his share in the property sold. The fairness of the rule would be somewhat disturbed by the costs incurred in respect of any one share largely exceeding those incurred in respect of the other shares. But it is not usually necessary or right to inquire into such matters, the broad view being that all the costs properly incurred in order to realization and division

are incurred on behalf of all the proprietors." Discussing the way the Court's discretion under the Act has been exercised, North, J., in Belcher v. Williams, 45 Ch. D. 510, says: "The usual practice seems to me beyond all dispute to have been to give the costs of all parties out of the estate. That was done by Vice-Chancellor Malins soon after the Act was passed in Osborn v. Osborn, L. R. 6 Eq. 338; by Lord Romilly, M.R., in Miller v. Marriott, L. R. 7 Eq. 1; by Vice-Chancellor Malins in Leach v. Westall, 17 W. R. 313; by Lord Romilly, M.R., again in Cannon v. Johnson, L. R. 11 Eq. 90; by Lord Selborne in Simpson v. Ritchie, L. R. 16 Eq. 103; and by Sir George Jessel, M.R., in Ball v. Kemp-Welch, 14 Ch. D. 512. I have not attempted to trace the practice any further, and I am not sure whether I could have done so. The practice appears to have become settled, and probably the point was not brought before the Courts afterwards. In Simpson v. Ritchie, Lord Selborne, L.C., said: 'Having regard to the 10th section of the Partition Act, 1868, it cannot be said that the Court is bound by the old rule as to the costs of partition suits. It is impossible to lay down a general rule on the subject; and there may be cases in which the Court, in the exercise of its discretion, will follow the old practice; but in this case I think the costs ought to be paid out of the estate.' That, as I have said, is, I think, the general rule, though there are certain exceptions to it. In Landell v. Baker, L. R. 6 Eq. 268, Lord Romilly, M.R., required each of the parties to pay his own costs up to the hearing, thus following the old practice. That was soon after the Act was passed; but in the late case of Miller v. Marriott, L. R. 7 Eq. 1, he preferred to follow the decision of Vice-Chancellor Malins in Osborn v. Osborn, L. R. 6 Eq. 338. In two other cases—Wilkinson v. Joberns, L. R. 16 Eq. 14, before Lord Selborne, and Porter v. Lopes, 7 Ch. D. 358, before Sir George Jessel—no costs were given up to the trial; but both those cases depended on special circumstances, and in each of them the general rule was recognized to be that which I have stated." In Richardson v. Feary, 39 Ch. D. 45, where a partition inquiry was directed, but a sale refused, the same learned Judge adhered to the old rule in Chancery by giving no costs up to the date of the inquiry and ordering the subsequent costs to be borne rateably. In Belcher v. Williams, 45 Ch. D. 510, North, J., held that the rule which exists in administration, that, as regards an incumbered share, only one set of costs can be allowed to be shared between the mortgagor and mortgagee of the share, does not apply to a partition action; and that both mortgagor and mortgagee should, as a rule, have their costs out of the estate. In Catton v. Banks, [1893] 2 Ch. 221, Kekewich, J., refused to follow this decision, holding that only one set of costs should be allowed out of the entire proceeds of sale in respect of each share of the property which those proceeds represented.

In the case of infants and parties under disability where partition alone is ordered, their costs are charged upon their shares which may be sold for the purpose of raising the costs: Cox v. Cox, 3 K. & J. 554, following Singleton v. Hopkins, 25 L. J. Ch. 50. In Thackeray v. Parker, 1 N. R. 567, it appearing to be for the benefit of infants that a sale should take place for the purpose of raising the costs charged upon their shares, and the parties *sui juris* desiring a sale, Wood, V.C., directed the entirety to be sold before partition. In subsequent cases this practice has been followed, and the jurisdiction is established of selling the estate and dividing the purchase money without a partition: Davis v. Turvey, 9 Jur. N. S. 954; Hubbard v. Hubbard, 2 H. & M. 38; Capewell v. Lawrence, 8 L. T. N. S. 603; Shepherd v. Churchill, 25 Beav. 21; France v. France, Young v. Young, L. R. 13 Eq. 173, 175 n.

1892. September 9.

BURPEE ET AL. v. THE AMERICAN BOBBIN SPOOL AND SHUTTLE COMPANY ET AL.

Practice—Interrogatories—Sufficiency of answer—Exceptions.

Where an interrogatory contains a number of questions, each distinct and complete in itself, some of which are fully answered, an exception for insufficiency must not be to the whole answer, but must point out in what particular the interrogatory is not sufficiently answered.

The plaintiffs, George E. R. Burpee and William F. Harrison, were the owners of a leasehold property in Kings county, known as the Piccadilly Spool Works, and consisting of buildings, plant, machinery and tools, and a tract of timber land. In or about the month of December, 1891, they entered into negotiations with the defendants for the sale to them of the property. After some correspondence the plaintiffs offered to sell for $3,500 of stock in the defendant company and $175 in cash, half of the stock to be preferred and half common stock. This offer was accepted by letter, dated December 30th, 1891. On the 7th of March following plaintiffs executed and delivered to the defendants conveyances and assignments of the property, and these were registered in the registry office of Kings county on the 23rd of March. On the 21st of March defendants mailed to the plaintiffs the defendants' cheque for $175 and the stock certificates. The cheque on being presented for payment was dishonoured. On or about the 26th of March the defendants made an assignment for the benefit of their creditors. The plaintiffs by their bill charged that at the time of transferring their property to the defendants the defendants were aware that they were insolvent, and that their stock was worthless, and that they concealed this information from the plaintiffs, and prayed that their conveyances to the defendants might be delivered up to be cancelled, and ordered to be cancelled on the records, and that the sale be declared void.

The bill of complaint contained, inter alia, the following paragraphs:

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14. "That on the same day, the twenty-sixth day of March (1892), the Globe and Gazette, two public newspapers published in the city of St. John contained notice that the said defendant company had made an assignment for the benefit of its creditors to the defendants William A. French and Leverett S. Tuckerman, which notice is as follows:

'Woonsocket, R.I., March 26.—The American Bobbin Spool and Shuttle Company syndicate, which has lately secured control of nearly all the factories in its line of business in this country, has assigned for the benefit of its creditors to Wm. A. French and L. S. Tuckerman, of Boston; George M. Endicott is president and Edwin A. Jones treasurer of the company. L. S. Tuckerman, one of the assignees of the American Bobbin Spool and Shuttle Co., says a great deal of the company's paper is held in Boston, and that it is all good. Judge Lowell said to-day that a statement of liabilities and assets of the company will be issued Monday.'"

15. "That the said cheque for one hundred and seventy-five dollars was presented for payment at the Merchants Bank of Halifax, at Newcastle, where the same was drawn, and dishonoured, and is now unpaid and in the possession of the plaintiffs."

16. "That a meeting of the said defendant company was called to be held at Portland, Maine, on the tenth day of March last past, which meeting the plaintiffs believe was duly held, and the plaintiffs charge that at the time the said transfers of said property made and handed over, and said certificates of stock and cheque given, the defendant company knew that the said company would require to assign, and that the said stock was worthless, and concealed the said knowledge from the plaintiffs."

Interrogatories were delivered for the examination of the defendants, which contained, inter alia, the following, viz.:

14. "Is it not true, as alleged in the fourteenth paragraph of the plaintiffs' bill of complaint in this cause that on the same day, the 26th day of said month of March, or on some other and what day, the Globe and Gazette, two public newspapers published in the city of

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St. John, or one and which of them, contained notice that the said defendant company, the American Bobbin Spool and Shuttle Company, had made an assignment for the benefit of its creditors to the defendants, William A. French and Leverett S. Tuckerman, or how otherwise? Is not a copy of said notice correctly set out in said fourteenth paragraph of said bill? If defendants say it is not so set out they are hereby required to set the same out correctly in their answer to this interrogatory. Is it not true that the said defendant company did assign for the benefit of its creditors to the defendants, the said William A. French and Leverett S. Tuckerman, or to some other and what person or persons, and did not such assignment cover or include the said Piccadilly Spool Works and property sold, or intended so to be, by the said plaintiffs to the said defendant company, or some and what part of it or how otherwise? Is not the said defendant company insolvent or in financial straits, or how otherwise?"

15. "Was not the said cheque for one hundred and seventy-five dollars drawn on the Merchants Bank of Halifax at Newcastle, New Brunswick, and was not the same presented for payment at said Merchants Bank of Halifax at said Newcastle and dishonoured, or how otherwise? Is not the same now unpaid and in the possession of the plaintiffs or how otherwise?"

16. "Is it not true, as alleged in the sixteenth paragraph of the plaintiffs' bill of complaint, that a meeting of the said defendant company was called to be held at Portland, Maine, on the tenth day of March last past, or at some other and what place and time, and was not the said meeting duly held? Is it not true that at the time the said transfers of said property were made and handed over, and said certificates of stock and cheque given, that the defendant company knew that the said company would require to assign, and that the said stock was worthless, or when did the said company first have such knowledge? Is not said stock of no market value? Did not the said defendant company conceal said knowledge from the plaintiffs, or in what way did the said

defendant company give and communicate said knowledge to the plaintiffs or any of them, and when did they do so?"

To these interrogatories the defendants answered as follows:

14. "The said defendant company do not know whether on the twenty-sixth day of March, or on any day, the said newspapers contained notice that the said defendant company had made an assignment for the benefit of its creditors, or whether such alleged notice is correctly set out in the fourteenth paragraph of the plaintiffs' bill, nor have they any information or belief in reference thereto, as they never saw the said newspapers, stated to contain such notice."

15. "The said cheque was duly drawn on the said bank for the said sum as alleged in the fifteenth paragraph of the plaintiffs' bill by the duly authorized agent of the said defendant company, and the defendant company believe the said cheque was presented at the said bank and dishonoured as alleged, for some reason unknown to the defendant company, and although the said defendant company then had sufficient funds in said bank to protect and pay the said cheque. The said cheque has not been returned or tendered to the said defendant company, and they do not know where or in whose possession it now is."

16. "It is true that a meeting of the said defendant company was called to be held at Portland, Maine, on the tenth day of March last, and the said meeting was duly held. The defendant company deny that at the time the said transfers of the said property were made and handed over, and the said certificates of stock and cheque given that the defendant company knew that the said company would require to assign, and that the said stock was worthless. At the time the said certificates of stock and cheque were given the said defendant company did not know that the company would require to assign, and that the said stock was worthless. In consequence of matters transpiring subsequent to said meeting the company considered

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It was in the interest of all parties to make an assignment, and this was the first knowledge that the company would require to assign. The said defendant company cannot express any opinion as to whether the said stock is of no market value. They believe and admit that under the present circumstances the said stock could not be sold in the market, and in that sense it may be said to have no market value. The said defendant company deny that they concealed such knowledge from the plaintiffs, as they believe the plaintiffs were fully aware of the proceedings and assignment of the defendant company."

To these answers the plaintiffs filed the following exceptions:

1. "That as to the fourteenth interrogatory propounded by the plaintiffs in the form following, that is to say, 'Is it not true as alleged in the fourteenth paragraph of the plaintiffs' bill of complaint in this cause, that on the same day, the twenty-sixth day of said month of March, or on some other and what day the Globe and Gazette, two public newspapers published in the city of St. John, or one and which of them contained notice that the said defendant company, the American Bobbin Spool and Shuttle Company, had made an assignment for the benefit of its creditors to the defendants William A. French and Leverett S. Tuckerman, or how otherwise? Is not a copy of said notice correctly set out in said fourteenth paragraph of said bill? If defendants say it is not so set out they are hereby required to set the same out correctly in their answer to this interrogatory. Is it not true that the said defendant company did assign for the benefit of its creditors to the defendants, the said William A. French and Leverett S. Tuckerman, or to some other and what person or persons, and did not such assignment cover or include the said Piccadilly Spool Works and property sold, or intended so to be, by the said plaintiffs to the said defendant company, or some and what part of it, or how otherwise? Is not the said defendant company insolvent or in financial straits, or how otherwise?' and as to the matters and things in the fourteenth paragraph of the plaintiffs' bill

of complaint set out, the said defendant company hath not made any answer nor stated whether or not it is true that the said defendant company did assign for the benefit of its creditors to the defendants, the said William A. French and Leverett S. Tuckerman, or to some other and what person or persons, and whether such assignment did not cover or include the said Piccadilly Spool Works and property sold, or intended so to be, by the said plaintiffs to the said defendant company, or some and what part of it, or how otherwise; or whether the said defendant company is not insolvent or in financial straits, or how otherwise? The said defendants, the American Bobbin Spool and Shuttle Company as to all or any of these matters has not to the best of their knowledge, information or belief answered either in whole or in part."

2. "That as to the matters and things set forth in the fifteenth paragraph of the plaintiffs' bill in this cause, and as to the fifteenth interrogatory propounded by the said plaintiffs in the words and form following, that is to say, 'Was not the said cheque for one hundred and seventy-five dollars drawn on the Merchants Bank of Halifax at Newcastle, New Brunswick, and was not the same presented for payment at said Merchants Bank of Halifax at said Newcastle and dishonoured, or how otherwise? Is not the same now unpaid and in the possession of the plaintiffs, or how otherwise?' the said defendant company have not answered, stated and set forth whether or not it is not true as it is alleged in the fifteenth section of the said plaintiffs' bill that the said cheque is now unpaid, and that the said defendant company have not sufficiently answered the said interrogatory.".

3. "That as to the matters and things set forth in the sixteenth paragraph of the said plaintiffs' said bill of complaint in this cause, and as to the sixteenth interrogatory propounded by the said plaintiffs in the words and form following, that is to say: 'Is it not true as alleged in the sixteenth paragraph of the plaintiffs' bill of complaint that a meeting of the said defendant company was called to be held at Portland, Maine, on the

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tenth day of March last past, or at some other and what place and time, and was not the said meeting duly held? Is it not true that at the time the said transfers of said property were made and handed over, and said certificates of stock and cheque given that the defendant company knew that the said company would require to assign, and that the said stock was worthless, or when did the said company first have such knowledge? Is not said stock of no market value? Did not the said defendant company conceal said knowledge from the plaintiffs, or in what way did the said defendant company give and communicate said knowledge to the plaintiffs or any of them, and when did they do so?' the said defendant company having denied that they knew at the time the said certificates of stock and cheque were given that the said company would require to assign, have not answered, stated or set forth when the said company did first have such knowledge; and the said defendant company having denied that they concealed such knowledge from the plaintiffs have not answered or set forth in what way the defendant company gave and communicated said knowledge to the plaintiffs or any of them, and when they did so, nor hath the said defendant company otherwise sufficiently answered the said sixteenth interrogatory."

Argument was heard September 1st, 1892.

James Straton, for the plaintiffs.

H. H. McLean, for the defendants.

1892. September 9. PALMER, J.:—

I will state the view I have as to the practice of the Court with regard to answering and exceptions to answers. The point has not been argued or taken before me; if taken I might have dealt with it in a different way, but I mention it now because it is almost impossible for me to perform the labour necessary to decide matters of this kind unless a different practice is pursued. The rule for framing a bill in this Court is this: By our statute the bill must state shortly all the material facts

on which the plaintiff relies for the relief he asks the Court to give, and every material fact of which he means to offer evidence must be distinctly stated in the bill, or otherwise he will not be permitted to give evidence of such fact. A general charge or statement, however, of the material fact is sufficient, and it is not necessary to enlarge minutely on the different matters alleged in order to let them in as proof.

I make these observations because it is the very foundation of exceptions to answers. All practitioners must first understand exactly what facts make out their case and then state them, and they are only at liberty to prove under the bill generally as to the allegations, and before it can be determined whether the defendant is obliged to answer interrogatories founded on the bill the bill must be referred to, and the interrogatories must be directed to what is alleged, because it is apparent that anything that is not alleged is not material to the case, and therefore need not be answered. It follows that on these allegations you frame your interrogatories, and the rule is that the plaintiff is entitled to have the defendant's oath upon any subject or with reference to any fact that is material to his case; in other words, that has been properly alleged in the bill, and having that in view a practitioner can tell at once what is material, and what he ought or what he ought not to answer, and when he does answer he has to answer not only what he knows, but also upon his information and belief as to the matters alleged, and having got that far the answer is put in, and if the other side wants to test its sufficiency he does so by what is called exceptions. And while any form of exceptions is not very often followed in the Court, yet formerly you had to allege in the exceptions the parts of the bill to which the interrogatory applied, as well as show particularly how it was not answered. Afterwards the Court did away with this preliminary part of the exceptions, so that a plaintiff need not now refer to the interrogatory or to the bill itself, and the best form I have seen will be found in 2 Grant's Ch. Prac. 313, as follows:

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"For that the said defendant hath not in and by his said answer to the best of his knowledge, remembrance, information and belief set forth and discovered," etc.

Sometimes, as in this case, the interrogatories are numbered, and contain a great variety of questions in one, and in point of fact one interrogatory numbered is in reality a great many questions. Take the interrogatory in the first exception in this case, and that would be a perfectly proper exception if the defendant company had not answered any of these matters, but on the argument it was admitted by counsel, and it is perfectly obvious on the face of it that the greater part of it has been answered, and the first part is an entirely satisfactory answer. Then see what is the consequence of that. The exception would be too large, and it would not point out particularly what is not answered, but seemingly professes to say that none of it is answered. What follows from that? I have to look through all this matter and it involves a large amount of labour. I have had occasion to look into the matter, and the first time it came before the Court it was heard by Sir John Leach, than whom, perhaps, there never was a more able Equity lawyer, and certainly no man after Lord Hardwicke did more for putting the practice of the Court of Chancery in England on a right basis than did Sir John Leach.

In *Wagstaff* v. *Bryan* (1) the marginal note is this: "Statements in an answer are impertinent if they are neither called for by the bill nor material to the defence with reference to the order or decree which may be made on the bill. Statements in an answer to a bill of revivor which merely show irregularity and misconduct in the former proceedings in the suit are impertinent."

"An exception for impertinence fails if any part of the passage included in it be not impertinent."

And the Master of the Rolls in that case held that each exception must be supported in toto or must fail altogether; that the exception must be overruled, if it included any one passage which was not impertinent; and

(1) 1 Russ. & M. 30.

that the sixth order might be completely evaded if a different rule were adopted; because a party would then be left at liberty to file sweeping general exceptions, and take the chance of succeeding on some small portion of a vast mass of matter.

That was only applicable to exceptions for impertinence, and was not thought to apply, and did not apply to exceptions as to insufficiency.

The matter came before Vice-Chancellor Kindersley, in *Higginson* v. *Blockley* (2). He had to consider the question of three exceptions, and he said he would take the third by way of illustration as his observations on that would apply to the rest. "The exception took five or six questions seriatim, though each was in fact distinct and complete in itself, and this was done probably because all the questions were included under one number in the interrogatories. It was admitted that all these questions but one were fully answered; and under these circumstances could the Court allow an exception in this form? It was, at all events, difficult to conceive a more inconvenient form of exception. To assert in the written exception that the defendant had not answered six questions, and then at the bar to admit that five were answered, but one was not, was at least very improper and inconvenient in point of form. One obvious inconvenience was, that if the defendant was willing to submit to the exceptions, and to put in a further answer, he did not really know what the plaintiff complained of, and was unable to submit unless he went through the whole of the questions and answered them over again—a course both expensive and unnecessary. The plaintiff asserts that the defendant has not answered A. nor B., and thus takes upon himself the onus of proving that the defendant has not answered any of the questions. This might appear somewhat technical, but it was the principle on which the Court acted in *Wagstaff* v. *Bryan* (3). It was not a case of one question involving many branches, but of actually distinct questions, each complete in itself. For these reasons he must

(2) 1 Jur. N. S. 1104.

(3) 1 Russ. & M. 30.

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overrule the exceptions, as the same principle applied to all of them, on which he had reserved his opinion. If there had been reason to think that overruling the exceptions would prevent the plaintiff from obtaining justice when the cause came to a hearing, his Honour would modify the order by allowing leave to amend the exceptions; but for the purposes of the suit it did not signify in the smallest degree whether the exceptions were allowed or disallowed."

I could not more distinctly lay down the rule applicable to the matter.

And Vice-Chancellor Sir John Leach, in *Hodgson* v. *Butterfield* (4), said: "If the plaintiff complains that a particular interrogatory of the bill is not answered he must state the interrogatory in the very terms of it, and cannot impose upon the Court the trouble of first determining whether the varied expressions of the interrogatory and the exception are to be wholly reconciled. But as this defendant has submitted to answer these exceptions he comes too late with the objection now made and must answer fully."

And Daniell (5) lays down the rule as follows: "According to the modern practice, the tenor of the bill and substance of the answer are omitted, and the plaintiff proceeds at once to point out specifically the interrogatories or parts of the interrogatories which are unanswered by separate exceptions, applicable to each part. . . . It is not necessary that the exception should follow the very words of the interrogatory, provided that it plainly points out the interrogatory to which it refers, and does not vary therefrom in any important particular."

See also *Brown* v. *Keating* (6) and *Duke of Brunswick* v. *Duke of Cambridge* (7).

As to these exceptions themselves, the first one unnecessarily sets out the whole interrogatory as if it was to that, and it further states that the exception is as to matters and things in the 14th paragraph of the bill set out, and then the objection is that the company had not made an answer whether they did assign for the benefit

(4) 2 S. & S. 236.
(5) 4th Am. ed., p. 763.
(6) 2 Beav. 58.
(7) 12 Beav. 279.

of their creditors, nor whether said company was involved or in financial straits. It is apparent that no such allegation is made in that paragraph of the bill—all that is there alleged is that a notice had been published that they had assigned. I am inclined to think the exception should have been to matters and things alleged in the bill generally, or more properly, the pleader should have left out entirely both the interrogatory and any allusion to the bill, and merely complained, as he has done by his exception, that that part of the interrogatory had not been answered. I am not prepared to say that there is not quite sufficient in the bill itself to have authorized the question propounded, and the defendant would have been obliged to answer it.

It follows that I must overrule the first exception.

As to the second exception, the complaint is that the defendant has not answered as to the matters set out in the 15th paragraph of the bill, which distinctly alleges that the cheque referred to is now unpaid, and in the possession of plaintiff. This the interrogatory distinctly asks, and it is not answered, and it might be material, and is clearly admissible in evidence in the case, and, therefore, this exception is allowed.

The third exception is founded upon not discovering matters and things set forth in the 16th paragraph of the bill, which distinctly alleges that at the time of the transfer and handing over of the stock and cheque, which the bill seeks to set aside, that the defendants knew that the company would require to assign and their stock was worthless, and concealed said knowledge from the plaintiffs. Upon such a statement as that it is material for the company to answer when they first had the knowledge that the company would assign, and whether they had communicated it to the plaintiffs, and when and where. The interrogatory distinctly asked that, and it is not sufficiently answered; therefore, that exception must be allowed.

As to the costs, the plaintiff will have to pay the costs of the first exception and the defendants the costs of the two latter. The defendant company will be allowed to file an amended answer in thirty days upon payment of the costs of the exceptions.

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September 15.

Practice—Costs—Execution—The Supreme Court in Equity Act, 1890, (53 Vict. c. 4), s. 114.

Where no time is limited by a decree in a suit for payment of costs, a further order for their payment must be taken out, after which an order for execution will be made *ex parte*.

This was an application by the plaintiff under section 114 of the Supreme Court in Equity Act (53 Vict. c. 4) for an execution to issue to enforce payment of costs ordered to be paid in this cause by the defendant. By the decree in the suit it was ordered that the plaintiff's costs be taxed by the clerk, and paid by the defendant. As no time was limited by the decree the question was whether execution could issue at once, or whether a furthe order should be made directing the defendant to pay the costs within a specified time after service of such order. The application was heard September 12th, 1892.

R. LeB. Tweedie, in support of the application.

1892. September 15. PALMER, J. :—

Upon consideration I have concluded that the proper way for a party to proceed to collect costs, if he wishes to take out an execution, is to apply to the Court after taxation and get an order for their payment, after which an order for execution will issue on an ex parte application. This practice I will follow in the future.

Section 114 of The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), is repealed by 58 Vict. c. 18, s. 2, in order to get rid of the construction placed upon it, that an execution against property could not issue except upon order, and the following section enacted in lieu thereof: "114. For the purpose of enforcing a decree or order of the Court, execution may issue against the goods and chattels, lands and tenements, of the party liable to such decree or order, which execution may be according to form (21), and the Court shall also have power to enforce performance of its decrees and orders by execution form (20) against the body of the party liable to such decree or order. Executions against the body shall be executed according to the tenor and effect thereof, and other executions in like manner and with like effect,

as executions issued on the common law side of the Supreme Court. The Court may at any time make an order for any such execution against the body, to issue on application of the party entitled to the same. The costs of such application shall be endorsed on the execution and levied thereunder." By s. 115 of 53 Vict. c. 4, "Where any person is by any decree or order directed to pay any money or deliver up or transfer any property real or personal to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such decree or order upon being duly served with the same without demand. Every order or decree requiring any party to do an act thereby ordered, shall state the time after service of the decree or order within which the act is to be done." In Ex parte Wright, 32 N. B. 54, Fraser and Hanington, JJ., held, Allen, C.J., dissenting, that the provision of section 115 requiring a decree to state the time after service within which the act thereby ordered is to be done, does not apply to the costs of a suit. Fraser, J., was also of opinion, in which Hanington, J., concurred, that the practice of the Court, apart from the Act, does not require a time to be limited by the decree, and apparently it was also his view that where no time is limited costs are payable immediately upon taxation. Where a time is fixed by the decree for the payment of costs an *ex parte* ord r absolute will be made for an execution against the body on proof of service of the decree and non-payment of the costs: Kennedy v. Nealis, February 15, 1898, per Barker, J., and this is in accord with the former analogous Chancery practice in England. "Under the old Chancery practice payment of costs might be enforced by a four-day order and attachment, but the more common method was to issue a subpœna for costs, which directed the person to pay them immediately upon the service of that subpœna. Upon proof of service and non-payment pursuant to the terms of the subpœna an attachment issued, and then an order for sequestration": per Lindley, L.J., In re Lumley, Ex parte Cathcart, [1894] 2 Ch. 273. The attachment issued without notice: Morgan & Davey on Costs, 365. Notice was excused on the ground that the party had been advised of the time within which he had to act, and a second notice was superfluous. See per Jessel, M.R., in Thomas v. Pulin, 21 Ch. D. 366. It is to be observed, however, that it is the view of some practitioners that an order for an execution should not issue *ex parte* if the Act is to receive a strict interpretation, and that the fact that an application is made necessary by the Act indicates that notice should be given. Where no time is limited by the decree for the payment of costs, Fraser, J., apparently thought, as noticed *supra*, that they were payable at once upon taxation. *Quære*, as to whether an execution in such a case should be issued on an *ex parte* order. Where the decree does not fix a time for the payment of costs in a suit in which the defendant appeared and offered contest, a subsequent order fixing the time made *ex parte* is irregular, and an execution issued upon it is also irregular: Ex parte Wright, *supra*. The Supreme Court will not inquire into the regularity of an execution issued out of the Supreme Court in Equity on an application by *habeas corpus* for the discharge of a person imprisoned under the execution: Ex parte Wright, *supra*. A party arrested under execution out of the Supreme Court in Equity for default in payment of costs is entitled to be discharged upon giving bail to the limits: Kennedy v. Nealis, Feb. 28, 1898, per Tuck, C.J. The application for an execution ap-

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parently must be made in open Court by motion. See the language of section 114, *supra*, and section 15 of the Equity Act (53 Vict. c. 4). "The words 'the Court' mean the Court sitting in banc, that is a Judge or Judges sitting in open Court, and a Judge means a Judge sitting in Chambers": per Kay, L.J., Re B., [1892] 1 Ch. 463. And see Ex parte Irvine, 2 All. 516. This is in conformity with the practice in moving for a writ of attachment: Davis v. Galmoye, 39 Ch. D. 322.

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February 28.

MACRAE v. MACDONALD ET AL.

(No. 1. Post, p. 531.)

Practice—Motion to take bill pro confesso—Service of Clerk's certificate.

A motion to take a bill pro confesso for want of a plea, answer or demurrer, will be dismissed if the defendant has not been served six days previously with a copy of the Clerk's certificate of the filing of the bill, and that no plea, answer or demurrer has been filed.

This was a motion to take the bill in this suit pro confesso for want of a plea, answer or demurrer.

The facts appear in the judgment of the Court.

H. G. Fenety, for the plaintiff.

A. H. Hanington, for the defendants.

1893. February 28. PALMER, J.:—

This was a motion by the plaintiff in this suit to take the bill pro confesso for want of plea, answer or demurrer. The defendants opposed the motion on the ground that they had not been served with a copy of the Clerk's certificate of the filing of the bill, and that no plea, answer, or demurrer had been filed; relying upon section 94 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), which enacts as follows:

"Every affidavit to be used in the said Court shall be expressed in the first person and divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, confined to a distinct portion of the subject, and shall in every case be

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filed after being used in the Court. Copies of all affidavits (except affidavits of service of process or of service of any notice or other paper) and other writings intended to be used on any motion or petition of which notice has been given, shall be served on the opposite party six days at least before the day on which such motion is to be made or petition heard; copies of affidavits intended to be used in answer thereto shall be served at least three days before such motion, and copies of affidavits in reply (which shall be confined to new matter alleged in the affidavits in answer) shall be served one day before such motion, beyond which no affidavit shall be allowed."

I think that by the proper construction of this section the Clerk's certificate is a writing, within the meaning of this section, and should be served on the opposite party six days at least before it can be used on the motion. And as no copy of the Clerk's certificate has been served on the defendants or their solicitors, the motion, as there is not sufficient material without such certificate upon which to make the order, must be dismissed.

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Debtor and Creditor—Deed of Assignment—General release—Release of Collateral securities—Mistake—Ignorantia legis neminem excusat—Creditor signing as trustee.

M. executed and delivered to the defendant a leasehold mortgage, and a bill of sale of personal property to secure the payment of $500 and $1,500 respectively. Subsequently M. executed and delivered to the defendant, as party of the second part, a deed of assignment for the benefit of her creditors, being parties of the third part. A condition in the deed stipulated that the parties of the second and third parts, in consideration of the sum of one dollar to each of them paid "did severally remise, release and discharge the party of the first part of, from and against all debts, dues, claims and demands, actions, suits, damages, and causes and rights of action which they then had or might thereafter have against the party of the first part, for or by reason of any other matter or thing from the beginning of the world up to that date." The defendant and other creditors executed the deed. The assignor was indebted to the defendant in no other amount than that secured by the mortgage and bill of sale. In a suit by the plaintiff, a creditor of M., to have the defendant enter a discharge

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and satisfaction upon the records of the mortgage, and to discharge the bill of sale, and to have the same declared null and void.

Held, that the defendant had released the mortgage and bill of sale, and that it was immaterial that he had no intention of releasing them, or that he was ignorant of the legal effect of his act.

The facts sufficiently appear in the judgment of the Court.

F. E. Barker, Q.C., and *W. C. Winslow*, for the plaintiffs.

G. G. Gilbert, Q.C., for the defendant.

1893. February 28. SIR JOHN C. ALLEN, C.J.:—

The bill in this case was filed by the plaintiffs on behalf of themselves and such other creditors of Mary E. McCullough as might become parties to the suit for the purpose of obtaining a decree directing the defendant to enter satisfaction and to discharge from the records of the county of Gloucester a mortgage on certain leasehold property, dated the 2nd April, 1891, given to the defendant by Mary E. McCullough to secure the payment of $500; and also to release and discharge a bill of sale of personal property between the same parties, given to secure the payment of $1,500 to the defendant; and that the said mortgage and bill of sale might be declared to be null and void as against the plaintiffs; and that the defendant should be directed to account for the property, and that the same should be administered under the direction of the Court; and that in the meantime the defendant should be restrained by injunction from assigning or transferring the mortgage and bill of sale, and from in any way disposing of the property thereby conveyed. The bill also stated that on the 18th May, 1891, Mary E. McCullough executed and delivered to the defendant a deed of assignment in trust for the benefit of her creditors of all her property, rights and credits. The parties to this deed were described as follows:

"This indenture made the 18th day of May, 1891, between Mary E. McCullough, of Bathurst, etc., of the first part, and John Sievewright, of Bathurst, etc., of the second part, and the several persons and firms whose

names are hereunto subscribed and seals affixed, creditors of the said Mary E. McCullough, of the third part." The deed then assigned and conveyed to the defendant all the property of Mary E. McCullough, to hold the same in trust to convert it into money, and, after paying expenses, to apply the proceeds towards payment and satisfaction of the debts due the several persons of the third part who should execute the trust deed within two months from the date thereof by an equal dollar rate without any preference whatever. The deed also declared that the parties of the second and third parts, in consideration of the sum of one dollar to each of them paid, did severally "remise, release and discharge the party of the first part of, from, and against all debts, dues, claims and demands, actions, suits, damages, and causes and rights of action which they then had or might thereafter have against the party of the first part for or by reason of any other matter or thing from the beginning of the world up to that date."

The defendant by his answer admitted that he took possession of the property as trustee, so assigned to him by Mrs. McCullough; but alleged that it was subject to a prior claim for the amounts due to him on the bill of sale and mortgage given him by Mrs. McCullough which were preferential claims over the other creditors. The defendant was examined viva voce at the hearing of the case. It appeared by his evidence that on the 9th of May—nine days before the trust deed was executed—he had a correspondence with Mr. Winslow, in whose hands the plaintiffs' claim against Mrs. McCullough had been placed, and who asked for information respecting her affairs, in which he informed Mr. Winslow that her affairs were in a bad state; that her liabilities were $7,350; that she had goods on hand to the amount of $2,970, on which there was a bill of sale for $1,500; that there were probably $1,200 of good debts due to her, and that she was offering 25 cents on the dollar, payable in six and twelve months. The defendant also stated in his evidence that he had notified some of the largest creditors of his having a bill of sale before he executed the trust deed, but that the plaintiffs were not notified

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of it until afterwards, and then by correspondence with Mr. Winslow. He also stated, subject to objection, that he had signed the trust deed as trustee but not as creditor. Mr. Winslow was also examined as a witness, and stated that he had communicated to the plaintiffs that the defendant held a mortgage and bill of sale of Mrs. McCullough's property, but that they were released by a clause in the trust deed which he had executed, and that he (Winslow) therefore advised the plaintiffs to execute the trust deed, and they did so.

The substantial question in the case is whether the defendant, by executing the trust deed, has released his mortgage and bill of sale. The plaintiffs' contention is that he has done so, and I think they are right.

The defendant, no doubt, did not suppose that he had released his securities by executing the trust deed; but the words of the release clause appear to me to be beyond any doubt. There was no evidence that the defendant was a creditor of Mrs. McCullough for any amount except what was secured to him by his mortgage and bill of sale, and he stated in his evidence that he had signed the deed as a trustee and not as a creditor. To what then could his release apply except to his securities? It would have no operation so far as he was concerned unless it applied to them. By the express words of the release the parties of the second and third parts to the deed released and discharged Mrs. McCullough from all debts, claims and demands, causes and rights of action which either of them had against her at the date of the deed. The defendant is the party of the second part in the deed, and the language of it is his own, for he drew it, and therefore could not have been taken by surprise as to its being a part of the deed. I think it is a matter of no importance that the plaintiffs knew when they executed the deed that the defendant claimed that his mortgage and bill of sale had priority over the claims of the other creditors. They never assented to such claim, nor did anything to induce the defendant to believe that they did. On the contrary, they executed the deed after the defendant had done so, and under advice that he had thereby released and discharged his

mortgage and bill of sale. It was no part of their duty to inform him that they intended to dispute his claim to priority over them and other creditors.

It was contended on the part of the defendant that neither he nor the assignor of the trust deed intended that the defendant's securities should be released by his executing the deed; and that under those circumstances the Court would limit the operation of the release to the purpose for which it was intended. There is no evidence of what Mrs. McCullough's intentions or the defendant's intentions were on that subject; and even if there was evidence of it, I do not think it would affect the question. The plaintiffs would not be bound by their intentions; they clearly did not execute the deed with any intention of varying from the terms of the trust, whatever Mrs. McCullough or the defendant may have thought about it. The case of *Teed* v. *Johnson* (1) is a strong authority in favour of the plaintiffs in this case. There the question was whether a surety was released by the terms of a composition deed with an assignment in trust for creditors, and the ground was taken that the assignee executed the deed, not as a creditor, but as a trustee, for the purpose of accepting the trusts, and not with the intention of releasing the defendant (one of the grounds relied on by the defendant in this case), and that if the deed operated to release the defendant it was executed by mistake and in ignorance that such would be its legal effect. The release in that case was substantially the same as in this case, viz., that the parties of the second and third parts covenanted that they released and discharged J. from all debts, claims, etc. A replication on equitable grounds stated that if the deed operated as a release of the debt it was executed in error and by mistake, and in ignorance that such would be the legal effect of it. This replication was demurred to. Alderson, B., said during the argument: "It seems to amount merely to this, that the plaintiffs did not mean to do that which they have done." That is substantially what the defendants say in this case. Martin, B., delivering judgment said: "The deed operates by express

(1) 25 L. J. Ex. 110.

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words to release every debt up to the day of the date; and by its true construction the parties who executed it released every debt due from the original debtor to them at the time of the execution. Even, therefore, though the plaintiffs signed as trustees, the debt was barred." I cannot see any difference in principle between that case and the present one.

The defendant also relied upon several other cases in support of his claim to be relieved from the effect of the release in the trust deed; but they were all cases of deeds executed under ignorance of material facts. *Lyall* v. *Edwards* (2), *Turner* v. *Turner* (3), and *Gandy* v. *Macaulay* (4), depended on a different principle.

In the present case there is no mistake of any fact in connection with executing the trust deed. If there was any mistake on the part of the defendant in connection with it, it is that he did not know the effect his executing the release would have upon his securities, and this is a mistake of law for which the Court will not grant relief: Ignorantia juris neminem excusat; Story's Eq. Jur., ss. 111 and 138.

It was also urged on behalf of the defendant that the release clause in the trust deed only amounted to a covenant not to sue the assignor, Mrs. McCullough. I cannot see the slightest ground to support that contention. The release is absolute and unconditional, and even if there had been a parol agreement with Mrs McCullough that the release was not to operate to discharge her liability to the defendant it would not have had any effect. See *Cocks* v. *Nash* (5), *Bateson* v. *Gosling* (6), and *Cragoe* v. *Jones* (7), where the distinction between a release and a covenant not to sue is clearly pointed out.

Another contention was that the evidence given at the hearing showed that neither the debtor, Mrs. McCullough, nor the defendant intended that the release in

(2) 6 H. & N. 337.
(3) 14 Ch. Div. 829.
(4) 31 Ch. Div. 1.
(5) 9 Bing. 341.
(6) L. R. 7 C. P. 9.
(7) L. R. 8 Exch. 80.

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the trust deed should operate as a discharge of the defendant's securities, but that he would thereby release any debt he would have after realizing on his securities. I need only say in answer to this that there was no evidence of any such intention; and I might add that if there had been, it would not, in my opinion, have helped the defendant's case, for the reasons which I have already stated. And even if the defendant was a creditor beyond the amount secured to him, it is not probable that he could hold his security and claim a dividend under the trust deed.

It was further contended that the validity of the securities was entirely a question between the debtor, Mrs. McCullough, and the defendant, and even if the plaintiffs were entitled to have the property conveyed to the defendant by the bill of sale and mortgage applied to the payment of their debt, they have no right to have the securities set aside, particularly as there was no evidence that there would not be sufficient realized out of the estate outside of the property conveyed by the bill of sale and mortgage to pay the plaintiffs' claim. It is true that there is no such evidence, but the defendant in his answer states his belief that after paying the amounts secured to him by the bill of sale and mortgage, which he claims the right to, there will not be sufficient to pay the claims of the plaintiffs and the other creditors of Mrs. McCullough in full, but there will be sufficient to pay the general creditors a dividend of 25 per cent. This, of course, would depend upon the amount which is realized from the property conveyed to the defendant by the bill of sale or mortgage. As to the right to order the defendant to enter satisfaction of the mortgage on the records of the county, and to release and discharge the bill of sale and to declare them null and void, I think the plaintiffs are entitled to have that done so far as their own debt is concerned; but as there is nothing to show that any other persons than the plaintiffs have become parties to the suit, it might be that the amounts realized from those securities would be more than sufficient to satisfy the unsecured creditors of Mrs. McCullough. In that case it would seem to be

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unfair to the defendant to order him to release his mortgage and bill of sale; but I shall deal with that matter hereafter. As to the power of the Court to order those securities to be given up because they are released by the trust deed, I have no doubt that this is the substantial question in the case. See Shep. Touch. 342.

I think, therefore, that the defendant has released all his claims and right of action against Mrs. McCullough under the mortgage and bill of sale, and that he should be directed to account for the proceeds thereof received or receivable by him under those securities, or either of them, and if not already restrained by injunction, that he should be, from disposing of any of the property conveyed to him by either of the said securities, and from assigning and transferring them, or either of them, till the further order of the Court.

I make no order at present respecting the discharge of the mortgage from the records or the release of the bill of sale for the reasons previously stated; but reserve those questions and any others that may arise in the case for further consideration, with the right of either party to apply.

The principle is abundantly recognized in the authorities that if a creditor releases a debt without a reservation of his securities the securities will become the property of the debtor: Cowper v. Green, 7 M. & W. 633, where Parke, B., quoted the following statement of the law from Sheppard's Touchstone, 342: "'By a release of all debts, are discharged and released all debts then owing from the relensee to the releasor upon especialities or otherwise, all debts also due upon statutes. And therefore if the conusor himself, or his land, be in execution for the debt, and he hath such a release, he must be discharged.' And Mr. Preston adds—'For, by releasing the debt, the security for the debt is released.'" And thus where a creditor, a party to a composition deed releasing the debtor received his dividend on the debt for which he held bills drawn by the debtor, and afterwards sued the acceptors, it was held that the debtor could recover the sums paid by them as money received to his use: Stock v. Mawson, 1 B. & P. 286. An express and indubitable reservation of securities is not, however, necessary. It is sufficient that it clearly appears on the face of the instrument that it was intended that a creditor becoming a party to it should not lose the benefit of his securities. By a deed conveying the real and personal estate of a debtor to trustees for the benefit of his creditors, the creditors executing the deed covenanted that it should operate and inure, and might be pleaded in bar as a good and effectual release and discharge of all and all manner of actions, suits, bills, bonds, writings, obligations, debts, duties, judgments, extents, executions, claims, and demands, both at law and in equity, which

they or any of them had or might have against the debtor or his estate or effects, for or by reason of all or any of the debts or engagements to them respectively due or owing by him, but so that such covenant should not operate on or destroy any mortgage, pledge, lien, or other specific security which any creditor possessed in respect of his debt. It was held, upon the construction of the entire deed, that such general words had not the effect of releasing a judgment previously obtained by one of the creditors who executed the deed, so as to affect the priority of the creditor as between himself and a judgment creditor who was not a party to the deed, or so as to preclude the judgment creditor who executed the deed from enforcing the right which the judgment gave him as against the estate vested in the trustees: Squire v. Ford, 9 Hare, 47. And this reservation may be secured by an express qualification of the effect of the deed by the creditor in his mode of executing it. Thus in Duffy v. Orr, 1 Cl. & F. 253, A., a creditor of a firm, held securities from one of its members for moneys advanced by him, at different times, to the firm, but claimed a balance beyond what those securities would cover. All the creditors of the firm agreed to accept a composition "of 7s. for every 20s. due to the said creditors respectively." The composition was carried into effect by a deed, which witnessed that the several persons who had subscribed it, being creditors of the firm, covenanted to accept the composition in full discharge and satisfaction of the debts due from the firm or for which they were in any manner responsible, and absolutely released the partner on whose property A. held security. A. was the first to sign this deed; but added to his signature the words "without prejudice to any securities whatever that I hold." The other creditors signed in their respective order under A.'s signature. It was held that the composition, thus accepted, did not affect the rights of A. upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce those securities in equity. By the Assignments and Preferences Act, 58 Vict. c. 6 (N. B.), s. 19 (4), "Every creditor in his proof of claim shall state whether he holds any security for his claim, or any part thereof, and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon, and the assignee under the authority of the creditors may either consent to the right of the creditor to rank for the claim after deducting such valuations, or he may require from the creditor an assignment of the security at an advance of ten per cent. of the specified value to be paid out of the estate as soon as the assignee has realized such security, and in such case the difference between the value at which the security is retained, and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate." Section 19 (5), "If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being in security for the payment thereof, but after maturity of such liability and its non-payment he shall be entitled to amend and re-value his claim." Where a secured creditor retains his security, and it produces more than the value put upon it, the surplus, it would seem, is the property of the debtor's estate. See Société Generale de Paris v. Geen, 8 App. Cas. 606; Couldery v.

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Bartrum, 19 Ch. D. 394; Bolton v. Ferro, 14 Ch. D. 171. Under the Dominion Insolvent Act of 1875 a creditor holding security at the time of the insolvency could not realize the security, and prove on the estate for the balance: In re Beaty, 6 A. R. 40; Deacon v. Driffil, 4 A. R. 335. In an administration suit a creditor cannot be compelled to value any securities held by him. He is entitled to rank for the full amount of his claim, and to realize any securities as well, provided that he must not ultimately receive more than 100 cents on the dollar: Rhodes v. Moxhay, 10 W. R. 103; Cooper v. Molsons Bank, 26 Can. S. C. R. 611, at p. 621. And this rule also applies to the administration of assets under a common law assignment, unless otherwise provided by the deed of assignment: Bolton v. Ferro, 14 Ch. D. 171; Beaty v. Samuel, 29 Gr. 105; Eastman v. Bank of Montreal, 10 O. R. 79; Young v. Spiers, 16 O. R. 672. An instructive case in this connection is Molsons Bank v. Cooper, decided by the Judicial Committee of the Privy Council, March 9th, 1898, on appeal from the Supreme Court of Canada.

The respondents were boot and shoe manufacturers at Toronto, and they had an account with the Molsons Bank. Having applied to the bank for a line of credit, they received from the manager, on June 13th, 1891, a letter stating that the Board had granted them a line of credit to the amount of $150,000, to be secured by collections deposited, at a rate of interest of 6 per cent., with one-quarter commission on all cheques and collections outside the city of Toronto. To that letter there was a postscript stating that its meaning was not that the advances should be fully covered by collections, but as near as the respondents could. The respondents stopped payment in August, 1893. In the interval the bank had made large cash advances to the firm in the way of discount of their promissory notes. The respondents from time to time handed the bank large numbers of their customers' notes and bills as collateral security for the advances so made. At the time of the firm's failure the bank held their promissory notes to the amount in all of $145,000, all of which had been discounted, and in addition the bank held as collateral security a large number of customers' notes. These latter they proceeded to realize upon, and at the time of the commencement of this action had received $83,000. This action was brought upon the firm's paper for the recovery of the whole indebtedness, $145,000, and the defence was set up of payment or satisfaction in whole or in part by the money received from the collateral notes. The object of the bank in not applying the money received from the collateral security was that in the distribution of the estate of the firm under the Creditors' Relief Act, they might prove for their whole debt, and so obtain a larger dividend. Mr. Justice Rose gave judgment for the bank for the full amount of the notes sued upon, holding that they were not obliged to credit the money in their hands against the notes, but were entitled to retain the fund so realized as a reserve fund, carrying the amount to the credit of a suspense account. The Divisional Court, on appeal, 26 O. R. 575, set aside this judgment, deciding that the bank were bound to apply the money in reduction of the respondents' debt, and that it ought to be applied *pro tanto* in payment of the notes sued upon. The bank appealed to the Court of Appeal, which restored the original judgment of Mr. Justice Rose, 23 A. R. 146, though the Court was divided. The Supreme Court of Canada, on further appeal, 26 Can. S. C. R. 611, unanimously decided against the bank.

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An appeal taken to the Judicial Committee of the Privy Council was dismissed. The full text of the judgment of Lord Halsbury, L.C., who delivered the judgment of the Committee, has not been received at the time of this writing.

His Lordship is, however, thus reported in a summary of his judgment: The suit raised the question, Were the appellants entitled to treat the sum they had received and realized of the securities as not having been received at all, or were they entitled to recover in respect of the entire amount of their indebtedness? No such right as they alleged could possibly exist. The bargain was intelligible enough—namely, that an overdraft should be allowed, and that cheques, bills, and securities should be deposited to secure repayment. The intention of the parties was made still more clear by the postscript to the letter:—"The meaning of the above is not that the advances shall be fully secured by collections, but as near as you can." It was admitted that $83,000 had been received and realized by the bank on those collateral securities. As the bank received the money, or turned the securities into money when they received them, it was impossible to say that the indebtedness between them and their debtors was otherwise than diminished to the extent of the money which the bank put into their pockets.

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March 14.

Practice—Parties—Assignment of cause of action after suit brought—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), ss. 96 and 97.

After a bill was filed in a suit brought by a married woman by her next friend she died, and her executors assigned the cause of action to the next friend.

Held, that under sections 96 and 97 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), an application to continue the suit in the name of the assignee could be made ex parte, subject to the order being varied or set aside if the defendants were prejudiced in their security for costs.

A mortgage executed by Benjamin H. Appleby and wife to The Provincial Building Society was assigned to Rosanna Reid, wife of Joseph Reid. Rosanna Reid commenced a foreclosure suit upon the mortgage by William Robertson, her next friend, and her husband was joined in the suit as a defendant. During the continuance of the suit Rosanna Reid died, leaving a will by which she appointed her husband and Eliza Mitchell executors, and the suit was continued by them on suggestion as plaintiffs. Subsequently they assigned the mortgage to William Robertson, and obtained an *ex parte* order substituting Robertson as the plaintiff in the

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suit in the place of themselves. The defendants now applied to set the order aside. Argument was heard March 9th, 1893.

C. J. Milligan, for the defendants.

A. W. MacRae, for the plaintiffs.

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This suit was brought by a married woman by her next friend. After filing the bill she died and her executors assigned the cause of action to the next friend; and the plaintiff's counsel applied to me, and I granted an *ex parte* order under section 97 of 53 Vict. c. 4, substituting the assignee as plaintiff in lieu of the original plaintiff. The defendants' counsel applied to me to discharge the order, and the plaintiff's counsel showed cause. The sole question argued was whether a plaintiff can voluntarily assign his interest in a suit, during its pendency in this Court, to another person, and that other person carry on the suit under the section referred to. The two sections, under which it is claimed this may be done, are 96 and 97, and which enact as follows:

"96. A suit or matter shall not become abated by reason of the marriage, death or bankruptcy of any of the parties, if the cause of action survive or continue and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite*, but the suit shall be allowed to proceed in favour of or against the surviving party or by or against the person to or upon whom such estate or title has come or devolved; the Court may, if it be deemed necessary, order that the husband, personal representative, trustee or other successor in interest, if any, of such party or parties be made a party."

"97. An order that the proceedings shall be carried on between the continuing parties and such new party or parties, may be obtained *ex parte* on application to the Court or Judge upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence, and unless the Court or Judge shall otherwise direct be served

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upon the continuing party or parties or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and such order shall from the time of such service be binding upon such party or parties, and such new party or parties shall thenceforth become a party or parties to the suit and shall be bound to enter an appearance thereto in the office of the Clerk within the same time and in the same manner as if he or they had been served with a writ of summons, unless otherwise directed in such order; provided that it shall be open to the party or parties so served within twenty days after such service to apply to the Court by motion or petition to discharge or vary such order; provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians ad litem shall have been duly appointed for such party, and until the expiration of twenty days from such appointment."

At first I thought that although such proceedings did apparently come within the strict words of the Statute—that such words as "by the assignment" are equivalent to any assignment—yet in view of the probability of a solvent plaintiff assigning to an insolvent, and thus working injustice to the other party, that is, thereby depriving the defendant of his security for costs, it might not be so intended. But I think the provisions of the 97th section give the Judge the right to vary the order in all cases where it is necessary and his duty to make the defendant secure for the costs. In this matter the executors of the original plaintiff substituted her next friend for the original plaintiff who was alone liable for the defendants' costs. This in no way altered the defendants' security for costs. I therefore think that my order was right and that there is no necessity to vary it or set it aside. As the defendants have not succeeded they must pay the costs of this application.

The next friend of a married woman must be a solvent person: Hind v. Whitmore, 2 K. & J. 458; and if not solvent an order may be made to stay proceedings till a new next friend be appointed or security for costs given: Pennington v. Alvin, 1

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S. & S. 264, overruling Dowden v. Hook, 8 Beav. 399; and see Martano v. Mann, 14 Ch. D. 419; Schott v. Schott, 19 Ch. D. 94; Re Thompson, 38 Ch. D. 317; Stovel v. Coles, 3 Chy. Ch. 421. In Jones v. Fawcett, 2 Ph. 278, overruling S. C. 11 Jur. 687, the Court refused, on the application of a plaintiff, a married woman, to remove her next friend, and appoint another, where it was evident that the defendant's security for costs would be thereby prejudiced.

An application by plaintiffs to amend by striking out the names of any of their co-plaintiffs will only be allowed upon security for costs being given: Attorney-General v. Cooper, 3 My. & Cr. 258; Lloyd v. Makelam, 6 Ves. 145; Motteux v. Mackreth, 1 Ves. Jr. 142; Fellowes v. Deere, 3 Beav. 353; Swan v. Adams, 7 P. R. 147. If the next friend of a married woman is changed in the course of the suit, he must give security for the costs already incurred, and proceedings will be stayed in the meantime: Witts v. Campbell, 12 Ves. 492; Payne v. Little, 16 Beav. 563.

Under the former practice, if after a suit was instituted, any circumstances occurred, which, without abating the suit, occasioned an alteration in or transmission of the interest in the suit of any of the parties, or rendered it necessary that new parties should be brought before the Court, the proper method of doing it was by supplemental bill: Fraser v. Dewitt, 1 P. & B. 738. Thus if a plaintiff, suing in his own right, made such an alienation of his property as to render the alienee a necessary party to the suit, but not at the same time to deprive himself of all right in the question, he brought the alienee before the Court by supplemental bill, or the alienee might himself file a supplemental bill against the original plaintiff and the other parties to the suit, to have the benefit of the proceedings. In like manner if a plaintiff, suing in his own right, was entirely deprived of his interest, but was not the sole plaintiff, the defect arising from this event was supplied by a bill of this kind. If the interest of a plaintiff, suing in *autre droit*, entirely determined by death or otherwise, and some other person thereupon became entitled to the same property under the same title, as in the case of an executor or administrator upon the determination of an administration *durante minore ætate*, or *pendente lite*, the suit was added to or continued by supplemental bill. In the cases above put the parties to the suit are still, to a certain extent, able to proceed with it, though from the effect of the change of interest, occasioned by the subsequent event, the proceedings are not sufficient to attain their full object; also, that, in the case of the death of a party suing in *autre droit*, if the suit is continued by the individual succeeding to the character of the deceased plaintiff, there is no change of interest which can affect the parties, but only a change of the person in whose name the suit must be prosecuted. Where, however, a sole plaintiff, suing in his own right, was deprived of his whole right in the matters in question by an event subsequent to the institution of the suit, as where a plaintiff assigned his whole interest to another, the plaintiff was no longer able to prosecute for want of interest, and his assignees claiming by a title which might be litigated, the benefit of the proceedings could not be obtained by means of a supplemental bill, but was sought by what was called an original bill in the nature of a supplemental bill. See Dan. Ch. Pr. (4th Am. ed.) 1515, *et seq.* By the Improvement of Jurisdiction of Equity Act (15 & 16 Vict. c. 86, s. 52) (Imp.), it was provided that upon any suit becoming abated by death, marriage or otherwise, or defective by reason of some change or transmission of interest or liability, it should not be necessary to exhibit any bill of

revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings, but that an order to the effect of the usual order to revive, or of the usual supplemental decree, might be obtained as of course, upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability. At p. 1524, Dan. Ch. Pr. (4th Am. ed.), it is said that this section applies to all cases, where, under the former practice, upon a transmission of interest or liability, a simple supplemental bill could have been filed, and the plaintiff was thereby entitled to the benefit of the proceedings already taken place, whether the defect occur before or after decree, and that the common order to revive, and carry on the proceedings, may be obtained when the suit abates, or becomes defective, by the bankruptcy of the plaintiff or defendant; where a new assignee has been appointed . . . and generally in the case of an assignment *pendente lite*. "The decisions upon this section have been by no means uniform, and in cases where, under the old practice, an original bill in the nature of a supplemental bill would have been necessary, it has been held that the order to revive or carry on the proceedings could not be obtained; e. g., where, in consequence of the death of a plaintiff or defendant, or determination of interest, a fresh and distinct interest arose in another person who was not a party to the original suit. See Hills v. Springett, 5 Eq. 123; Auster v. Haines, 4 Ch. 445; Beardmore v. Gregory, 2 H. & M. 491; Watts v. Watts, John. 631," Seton (4th ed.), 1531. Where an order is obtained under the section by the successor in interest of a plaintiff to carry on the proceedings, the successor should in all subsequent proceedings amend the title of the suit so as to include the original title as well as the new title, with the addition of such words as show how the new title is derived: Secar v. Lawson, 16 Ch. D. 121; and see Miller v. Huddlestone, W. N. (1881) 171.

DUNCAN v. THE BANK OF NOVA SCOTIA.

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March 23.

Practice—Recalling witness—Corroborative evidence.

Where the evidence in a suit taken before a referee had been closed and counsel were engaged in summing it up before the Court, an application by the defendant to recall a witness for the purpose of giving evidence of a corroborative nature that had always been available and of such materiality that it could not have been previously overlooked, was refused.

This was an application during the argument of the suit for leave to recall a witness examined on *viva voce* evidence before a Referee. The facts of the application are fully stated in the judgment of the Court.

C. W. Weldon, Q.C., *C. N. Skinner*, Q.C., and *J. G. Forbes*, Q.C., for the plaintiff.

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G. G. Gilbert, Q.C., and *C. A. Palmer*, Q.C., for the defendants.

1893. March 23. PALMER, J.:—

Some of the material facts in this case are, that on the third day of March, 1875, one John Risk, since deceased, procured a loan from the Bank of Nova Scotia, for which he pledged and left with its manager a number of promissory notes, amounting in all to $12,812.81. Among them was one drawn by the plaintiff, payable to J. D. Robertson & Co., for $1,000; one for $1,200 due May 21st, 1875, payable to his own order and endorsed in blank, and another for $1,240 due May 25th, 1875, also drawn by himself, and payable to his own order, and endorsed in blank.

The bank claims that there was another note for $1,000, drawn by plaintiff, payable to J. D. Robertson & Co., and endorsed by them among the notes so pledged. The existence of this latter note is denied by the plaintiff; and whether it was so held or not is one of the issues in the case. Beside these notes the plaintiff was maker of three notes endorsed by J. D. Robertson & Co., payable on the 21st of May, and which were dishonoured.

There is no dispute that on the 26th of May all the bank claimed the plaintiff owed it was his indebtedness on these three latter notes and the $1,200, $1,240 and $1,000 notes, in all six notes. In order to secure them he entered into an agreement with the bank by which he assigned to it certain mortgages, and that shortly afterwards it realized enough money on them to pay the three larger notes mentioned in the agreement. On the 19th June, 1875, J. D. Robertson & Co. paid the three remaining notes for which the bank held the assignment of the mortgages, and the bank then had a surplus of $1,221.30; but if it had the right to claim from the plaintiff another note of $1,000, then such surplus would only be $221.30; and the whole issue tried before me was whether the bank had a right to deduct either or both of these notes of $1,000 each from the money in its hands.

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The plaintiff's contention was that the bank never had but one note for $1,000 which was given for the accommodation of J. D. Robertson & Co., and that they paid the same, or, if not, the bank, by its negligence, had lost the note and enabled J. D. Robertson & Co. to escape payment of it to the injury of the plaintiff; and that, at all events, the bank under the circumstances was not in a position to claim the payment of the note from the plaintiff without giving it up to him.

The evidence proved that the transaction was between Pitcaithly, who was then the manager of the bank, and Risk, and also between him and Duncan to secure the amount that the bank claimed. The bank produced in evidence no books or writings showing that any more than one $1,000 note was delivered to the bank by Risk, from which it was argued that it could not do so. Further, the bank did not call Pitcaithly, and his absence was commented upon as highly suspicious. It was also argued that it was altogether improbable that when he took security from Duncan he could have forgotten or omitted, when the matter was fresh in his mind, so large a claim as $1,000, and that the books of the bank then showed that only one note was entered.

Under such circumstances I had no difficulty in coming to the conclusion that I ought not to allow such a claim for the note. When the bank manager, who now undertakes to say that such a note existed, was called upon for an account, as late as the 25th of April, 1879, and gave a list to Mr. Duncan of the obligations for which the security was given, only one note of $1,000 was claimed. The bank were unable to produce the note. Mr. Melbourne McLeod, in his evidence, says he paid the bank as early as the year 1877 all the claims they had against J. D. Robertson & Co., whether as makers or endorsers, in the whole amounting to about $17,000; that he had lost the memoranda in the fire; that he had no recollection of the particular items, but swears positively that he paid the bank all that it claimed, for part of which they were liable as makers and part as endorsers. It is clear from Robertson's evidence that this

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$1,000 note, although drawn by Duncan, was for Robertson & Co.'s accommodation and they ought to have paid it. The only evidence for the defendants is that of Mr. Robinson, the bank's manager at St. John, who swears that McLeod did not pay it. Against this, however, we have the accounts rendered by the bank, the figures of which it is impossible to reconcile with the idea of their claiming this note, but which Robinson says was omitted by mistake and that the account was made up in ignorance of the fact that J. D. Robertson & Co. had taken up the three notes before mentioned.

It will be observed that while McLeod has not been able to specify particularly the notes and liabilities upon which he paid the $17,000, and is only able to state generally that he paid everything, and has produced no memoranda or books to support his recollection, yet he has given an excuse for this that they were all burned in the fire of 1877, and that he has done the best he could. This was the best evidence in the possession of the plaintiff to prove the fact, and if true completely proves it.

There is no pretence that the bank has lost its books, and it is clear, if it has them, that they ought to show exactly how much money McLeod paid, and for what it was paid. These, however, it does not produce, and everybody must admit that after 16 or 18 years such evidence would be much better than the mere general recollection of the manager of the bank of a merely negative character. When to this is added the fact that the bank is not able to produce the note itself and it does not pretend that it, at any time, notified the plaintiff of its loss, I think prudence requires that the Court should not allow the claim under such circumstances. I say this without attributing any desire on the part of any of the witnesses to tell what they believed to be untrue. It follows that if the case stands, as it now is, I would have to disallow the claim, and order the bank to account to the plaintiff for the balance that it has collected on the securities over and above the $1,200 and $1,240 notes, which, together with interest at six per

cent., would amount to $4,449.45. If there is any mistake as to the amount, and the bank wishes it, I will send it to a referee to ascertain it.

This case was begun in 1886; and was set down for hearing on the 31st of January, 1893; and was heard on evidence taken before the referee, Dr. Barker; and upon a commission issued to Philadelphia. After the case was through, and I had heard the plaintiff's argument in summing it up, and the defendants' counsel partially through, Mr. Palmer, learning of the view I took with reference to the absence of memoranda or entries in the bank's books of the notes received from Risk, and also of the amount of money received from J. D. Robertson & Co. through McLeod, applied to me to have Mr. Robinson recalled and examined *viva voce* and the entries in the books of the bank referred to. He did not produce any affidavit of the reasons why this was not done before, but stated that it had been omitted and could be supplied. Although I had no doubt that I ought not to hear such an application without an affidavit as to the circumstances, yet, before I would deny such an application on that ground I decided to give the defendant time to prepare such an affidavit to prevent injustice being done. It was most strenuously argued by Mr. Weldon, of counsel for the plaintiff, that the application ought not to be allowed, as being dangerous. I have now carefully looked into the matter, and have considered what practice would best conduce to the ends of justice with reference to applications of this nature, and for the benefit of the profession will endeavor to state as well as I can the principles which ought to govern the Court in relation to this subject. It will assist in this to state somewhat in detail the history of how such matters were proceeded with in Chancery.

Previous to the practice in the Court of Chancery of hearing causes on *viva voce* evidence, there was no *viva voce* examination of witnesses for the purpose of the hearing except evidence as to particular facts or issues directed by special order. All other examinations were taken before an examiner, or upon commis-

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sion, and while the proof on either side was being given it was carefully concealed from the parties, and, when all the proofs were in, an order was made for the publication of the evidence—that is, the opening and showing of the depositions and the giving of copies of them to the parties, after which there could be no more examination of witnesses except by special order of the Court. The policy and object of such secrecy was the supposed danger of permitting parties to make up their evidence by piecemeal and to make up its deficiencies by other evidence after they have discovered what it was necessary to prove.

If previous to the publication it appeared to either party that there might be occasion for other testimony and that there was opportunity of obtaining it without delay to the other side it could be given, and the habit was to allow the publication to be enlarged upon affidavit, but the Court would not permit it to be done to the prejudice of the other party by delaying the hearing; but there was an important difference in these matters between enlarging the publication, that is, on an application to take further testimony before the publication, and an application to take testimony after publication had passed. The order postponing publication presupposes that publication has not passed. To do this was almost a matter of course if any reasonable cause was shown, and that the other party would not suffer any harm, as where the hearing was not put off, and sometimes the order was made upon the terms of not hindering the other party from setting the cause down; and after the publication was once enlarged then upon notice and affidavit showing satisfactory cause and an explanation why he was to be allowed to give further evidence after publication passed. Lord Thurlow in *Geast* v. *Barber* (1), allowed a new commission to examine witnesses, but he made the party do it at his own expense, and though publication had not passed he required an affidavit that neither he nor his agent had seen or been informed of the depositions.

(1) 2 Bro. C. C. 1.

In *Dingle* v. *Rowe* (2), which was a motion to enlarge publication and to issue a new commission, the new commission was granted on payment of the costs, in case the other party would not examine in chief but only cross-examine; and on condition that it should be returned without delay and would produce no inconvenience to the plaintiff, and on affidavit by the solicitor that the witness was a necessary and material witness, and that he believed the defendant had not been informed of the contents of the commission. If the publication is actually passed when the application is made for leave to examine a witness, it must be upon special and satisfactory reasons assigned, both as to the previous neglect and of the further examination, and the Courts always watched such an application with jealousy.

The early practice of the Court (per Bacon's Ordinances, 1656) was that if both parties joined in a commission and the defendant produced no witnesses but afterwards sought a new commission it should not be granted; and that he should not be at liberty to examine his witnesses except upon special order and upon showing reason for the delay; and that no witness should be examined after publication except by special order. This rule was continued by Lord Coventry and also by Lord Chancellor Clarendon. In the case of *London* (*Corporation*) v. *Dorset* (3), Lord Nottingham said the rule as to examinations after publication had been strict on this point, but he admitted that special cases rested in the discretion of the Court, and as to which the Court was the judge. In *Newland* v. *Horsman* (4), he laid down the rule that a commission to examine witnesses after hearing must be upon a new state of facts raised at the hearing by the Court.

Afterwards Lord Macclesfield, in *Cann* v. *Cann* (5), said that the prudent method of the Court was, that after publication passed and the purport of the examinations known, neither side should be allowed to enter into

(2) Wightw. 99.
(3) 1 Ch. Ca. 228.
(4) 2 Ch. Ca. 74.
(5) 1 P. Wms. 723.

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a fresh examination of the matters in question, since otherwise there would be no end of things, and such a proceeding would tend to perjury as well as vexation.

Lord Talbot in *Smith* v. *Turner* (6), said that the examination of witnesses after publication passed, especially where it might relate to the matter in issue, was against the rule of the Court, and might be greatly inconvenient and make causes endless.

The rule laid down in all the old books of practice (see Wyatt, Pr. R. 193 ; 1 Har. Pr. 505) is, that if publication is actually passed, the party who meant to enlarge publication (by which is clearly meant the giving of evidence after publication had passed) must show by affidavit some material witness to be examined and satisfactory reasons why he was not examined before, and the party and his clerk and solicitor must make oath that they have not seen or been informed of the contents of the depositions, and will not until the time of publication, etc., and that it will not delay the hearing. From which, the established course of practice, the parties should be warned of the necessity of taking their proofs in proper time, for publication is never passed until there is a rule to examine witnesses, and a rule nisi to pass publication, and in each of these the time is three weeks.

In the case of *Whitelock* v. *Baker* (7), that great equity lawyer, Lord Eldon, stated the principles and practice upon motions to enlarge publication. The Court will not, he observes, enlarge publication (meaning, no doubt, that they will not permit testimony to be taken after publication) without a very special case made. That the party's want of knowledge of the rules of proceeding, or want of attention in his solicitor, are not sufficient. That such a motion requires an affidavit that the party, his clerk in Court, and the solicitor have not seen, or been informed of, and that they will not see, or be informed of, the contents of the depositions until the enlarged time of publication. That no more dangerous proceeding could take place than allowing parties to

(6) 3 P. Wms. 413.

(7) 13 Ves. 511.

make out their case by piecemeal; and that if previous to publication there appears to be any occasion for further testimony, and that it can be had without injury to others, the rule has been to allow the publication to be enlarged upon affidavit, but that the Court will not do that to the prejudice of the other party by delaying the hearing.

I have been thus particular with reference to the old practice because it will be seen from it that if the depositions have been actually seen by the parties a very strong difficulty arises. Lord Eldon, in the case I have referred to, *Whitelock* v. *Baker*, said that although the evidence might be very material he would not dare trust himself by laying down a precedent for such a case. This was the state of the law in England when there was passed what was called the Improvement in Equity Jurisdiction Act (15 and 16 Viet., cap. 86), the 30th section of which enacted that when any of the parties to any suit desires that the evidence should be adduced orally, and on giving notice to the opposite party, the same shall be taken orally. The 31st section enacted that all witnesses to be examined orally under the provisions of the Act should be examined by or before one of the examiners of the Court, etc.

The rules which governed the old practice of not examining witnesses after publication passed could not of course be applied to evidence given *viva voce*. The old rule was the practice in this Province until it was altered by Act, of which 53 Viet., cap. 4, is a re-enactment. By sections 76 and 77, it is enacted that a cause may be heard upon evidence taken *viva voce* at the hearing, and this is the practice commonly pursued here now.

This suit was not heard on *viva voce* evidence before me, but the evidence was taken *viva voce* before the referee and in the hearing of both parties. Another section in the Act, 53 Viet., cap. 4, s. 81, enacts as follows: "Upon the hearing of any cause or motion depending in the said Court, the presiding Judge may on application of either of the parties, or at his own discretion, require the production and oral examination before himself or any other Judge of the said Court of any

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party in the cause, or any witness or person who has made an affidavit therein," etc. Here, no doubt, the person to be examined was the witness Robinson, who had been before examined, and there is no doubt in a case where justice required it, it is not only within the power of the Judge, but it is his duty to allow an oral examination of such a witness, instead of acting wholly upon the evidence taken before the examiner, to be had before himself, and, I think, whether a Judge should or should not make such an examination will depend upon a variety of considerations all depending upon what would best further the ends of justice.

In England when a party, whether through inadvertence or negligence, omitted to prove some particular fact which is necessary to support his case, the Court sometimes allows him to remedy it by giving him leave to prove the fact omitted. This is frequently done in the case of wills disposing of real estate. See *Lechmere* v. *Brasier* (8). And this practice is not confined to cases of wills, for cases have been ordered to stand over in order to prove the execution of a deed or the death of a party. The cases deciding when this may be done are conflicting, and Lord Cottenham, in *Marten* v. *Whichelo* (9), said it is impossible to reconcile the cases or to extract any principle upon which any fixed rule can be founded. The Court has exercised a wide discretion in refusing or giving leave to call witnesses in such cases, and in the doing of which the merits of the case of the plaintiff ought to be taken into consideration.

I think the sound rule is that adopted at nisi prius in the taking of similar evidence, for equity trials are now assimilated to trials at nisi prius.* Something depends upon the stage at which it is asked and the opportunity of answering it. This would not have so much application to a proceeding in equity as it would to nisi prius, on account of the facility with which the matter could be adjourned in equity and without very considerable expense. But the main consideration is that

(8) 2 J. & W. 287. (9) Cr. & Ph. 257.

*Doe d. Leeds v. Connolly, 3 All. 337—Ed.

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pointed out by Lord Eldon, the danger of allowing a witness to be called back after a party has seen where the shoe pinches, not upon a new subject that has been accidentally omitted, but upon a subject that must have been well considered by the counsel, and in which the witness has been examined and stated all he or the counsel thought necessary at the time, and where the evidence offered is merely corroborative. To allow the practice of the Court to be so settled as to enable a person, as Lord Eldon says, to bring forward his proof piecemeal, and go just as far as he considered prudent and let it remain until the case is entirely through and he observes either from the argument of counsel or the bent of the mind of the Judge, that it would be better to make a further statement and give further particulars would, I fear, in the language of Lord Eldon, be a dangerous mode of proceeding.

I think it is better to lay down a practice by which the parties shall be warned not only of their duty but of the necessity of their at first giving evidence of all the facts that may bear upon their case, and that they must not expect the Court to act upon inferior evidence when it can be shown that they had better in their power and did not produce it. This will be carrying out on principle the rule that Judges act on at nisi prius in exercising their discretion in allowing evidence in rebuttal, and recalling witnesses after the case is closed; the one is that new evidence merely corroborative is not allowed in rebuttal, and that a party is not allowed to examine a witness after the whole case is closed upon a matter in which he had been examined. I therefore feel constrained to deny the application in this particular case. The defendants must pay the costs of the suit.

Affirmed on appeal, 32 N. B. 308.

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March 17.

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Injunction—Splitting cause of action—Vexatious arrest—Abuse of process.

The defendant was the holder of forty-eight promissory notes indorsed by the plaintiff, and had obtained judgment in the City Court of Moncton on thirteen of them in separate actions brought when all the notes were due. Some of the notes were of such an amount that two of them could have been included in one action. The plaintiff was arrested twice on executions on two of the judgments and was discharged on disclosure. Immediately after his second discharge he was arrested on a third judgment, and was discharged by habeas corpus. In a suit for an injunction to restrain the defendant from using the process of the City Court of Moncton for malicious or vexatious purposes.

Semble, that the injunction should go if it appeared that the defendant intended to further arrest the plaintiff for the malicious purpose of harassing and punishing him, and endangering his health, and not for the purpose of obtaining payment of the debt.

This was an application for an interlocutory injunction. The facts fully appear in the judgment of the Court. Argument was heard March 12th, 1893.

M. G. Teed, for the plaintiff.

C. W. Weldon, Q.C., for the defendant.

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This is an application for an interim injunction order to prevent the Bank of Montreal from using the process of the City Court of Moncton for malicious or vexatious purposes.

The undisputed facts are that the bank held 48 promissory notes endorsed by the plaintiff for amounts under eighty dollars, and obtained judgment on 13 of them in the City Court of Moncton; that in some of the cases the suits were brought when the amounts were such that two of them could have been included in the one suit; that all the notes were due before any action was brought; that the bank caused execution to be issued upon one and lodged the plaintiff in jail, when he applied to obtain his discharge by disclosure, and that he was fully examined by the bank as to the state of his affairs. That shortly afterwards the bank issued an execution on another judgment and again arrested the

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plaintiff and that he was discharged on a like disclosure, and that before he had time to return home the bank had him arrested on another execution, on which arrest he was discharged on habeas corpus by Mr. Justice *Hanington*. Besides these judgments the bank had recovered a judgment in the Supreme Court for about $2,500, which remains unsatisfied.

In this case the bill alleges that the plaintiff has no property, having assigned it all for the benefit of his creditors, and that the defendant, the Bank of Montreal, held the notes before mentioned and brought the suits as before stated in the City Court of Moncton, and unnecessarily split the actions upon them, and had the plaintiff lodged in jail, and that such proceedings were not for the purpose of obtaining payment of the debt, or in any expectation of collecting the same, but for the purpose of maliciously injuring the plaintiff's health and to otherwise injure and harass him. In support of his case the plaintiff has produced the affidavit of H. C. Hanington, who swears that Mr. Beddome, the bank's manager in Moncton, at the time he served the notice of discharge, told him that the plaintiff would have to go to jail forty times, and afterwards told him he would make the plaintiff as weak physically as he was financially, and would wear him out. Mr. Beddome makes an affidavit in reply in which he states it is not his intention to issue execution on the judgments for the purpose of harassing the plaintiff, but only when he believes he could have them satisfied, or otherwise in the interest of the bank. He denies making the statement that the bank would put the plaintiff in jail forty times, and says his statement was that the bank would send him up again, and he entirely denies that he stated that he would make the plaintiff as weak physically as he was financially. If it became of importance to find out who was right, Hanington or Beddome, as to what took place between them, I should put the question to a jury and be guided by their verdict, but I have not any doubt but that the agent of the bank has purposely divided the claims of the bank so as to have as many suits as possible, for I

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think there can be no other explanation for not including in each suit in the City Court as much of their claim as possible; and it is impossible for me to know really what he intended to do, by the statement in his affidavit: "Nor is it my intention to issue execution on the said judgments already obtained, for the purpose of harassing the said Babang, but when I reasonably believe that I can have them satisfied and paid by so issuing them in the manner of the first one paid as aforesaid, or otherwise in the interest of the said bank." He does not say what the bank thinks will be necessary, or what is his view with regard to what it would be the interest of the bank to do. On the whole if I had now to decide it, I would find that the manager has used and intended to use the executions to be issued out of the City Court of Moncton to give the plaintiff as much annoyance as possible with the object of inducing his friends to buy the bank off, and in this way to get some of the money that is justly due the bank from the plaintiff; and the question is whether he has a right to do this.

No doubt no suitor has the right to use the power of the Court for any purpose except to obtain the money from the property of the defendant that the Court has ordered him to pay, or to have satisfaction by the incarceration of the body. The rule governing the granting of injunctions by this Court to prevent the perpetration of illegal acts may be stated as follows: The Court will protect a party's legal rights from what is deemed irreparable injury, or from injury for which there is no adequate remedy at law, in the case of actual or threatened violation of the right.

By irreparable injury, I do not mean that there is no physical possibility of repairing the injury; all that I mean is that the injury would be grievous and at least a substantial one, and not adequately reparable by damages; and by the term inadequacy of the remedy by damages, I mean that the remedy by damages is not such a compensation as will in effect though in specie place the party in the position in which he was. Here the plaintiff's right, if any, threatened, is, that the bank will maliciously make use of the process of the City

Court of Moncton for the purpose of harassing him and injuring his health, and if this is so I think that would be inflicting irreparable injury in the sense that I have indicated, and if he can make this out clearly he would be entitled to the protection of this Court; but, in order to do this, it becomes necessary to decide what is meant by the word "malicious." It is said that the bank has unnecessarily split up the claims and multiplied suits and judgments, but as they have the judgments they have the right to properly enforce them. All that the splitting them up shows is the intention in the use of the judgments, but does the evidence show that they have or intend to issue executions on the judgments maliciously or in any other illegal manner? This depends upon the meaning of the word "malicious." It means, I think, that the bank has, or intends to issue such execution, and make arrests thereunder for some other than the one purpose of collecting the money recovered by them from the defendant. If they intend to do it to punish the plaintiff or destroy his health, knowing that they cannot collect the debt, that is legal malice, and is what they have no legal right to do.*

* If an act is lawful in itself it does not become unlawful by reason of an improper motive behind it. This was very fully discussed in the recent case of Allen v. Flood, in the House of Lords, [1898] A. C. 1. Lord Watson, who agreed with the majority of the House, in the course of his judgment said, at p. 92: "Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong, for which reparation is due. A wrongful act, done knowingly, and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this—that he may with immunity commit an act which is a legal wrong and but

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In the case of *Tebbutt* v. *Holt* (1), that great common law lawyer, Baron Parke, said: "You must not find for the plaintiff unless you are satisfied that the defendant was actuated by what in law is termed malice; but by the term malice, I do not mean ill-will, or revenge, or the like, but any indirect motive, such as an intention to get more costs for himself from the plaintiff, or the trying to get the debt for his client from some of these persons besides Fraser." This language is peculiarly applicable to this case. As it has been suggested no explanation can be given of the bank's conduct than that the agent intended harassing the plaintiff and endangering his health, so that his friends might be induced to pay something. At all events, it is doubtful whether or not the bank has exceeded or intended to exceed its legal rights in this case. If this is hereafter made out clearly, I think this Court ought then to exercise its discretion and restrain such wrong. What ultimately will have to be done in the case I do not think it necessary now to decide. On the one hand, if the bank should violate

(1) 1 C. & K. 280.

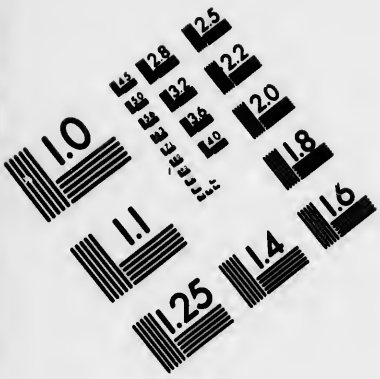
for his privilege would afford a good cause of action against him, all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is usual for him to allege, and necessary for him, to prove an intent to injure in order to destroy the privilege of the defendant. But none of these cases tend to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it; and still less that an act in itself lawful is converted into a legal wrong, if it was done from a bad motive. Lord Bowen (at that time Bowen, L.J.), in the case of Mogul Steamship Co. v. McGregor, laid it down that in order to constitute legal malice the act done must, apart from bad motive, amount to a violation of law. The learned Judge, with his accustomed accuracy and felicity, said (23 Q. B. D. 612):—'We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure,' are words which have accurate meanings well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its term the in-

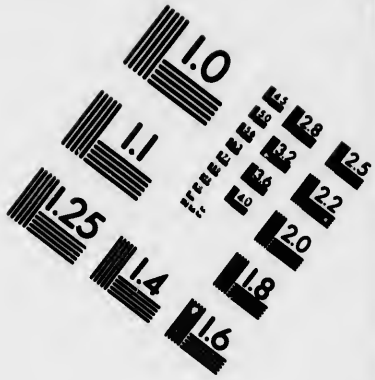
the plaintiff's right, as he apprehends, he would have to obtain another discharge by another disclosure, and the bank would be liable to an action at law for damages, which it is amply able to pay. On the other hand, it is difficult for the Court to frame an order that would only restrain the bank from using the process of the Court improperly. I therefore think justice will be served by not interfering now by interlocutory injunction, but leave the plaintiff at liberty to apply again if the bank attempts to violate the law or act contrary to the statement made by Beddome in his affidavit, or it becomes apparent that the bank intends to go beyond what I have indicated.

I therefore decline to make any order at present, but give the plaintiff liberty to renew his application at any time upon presenting material with such facts added as may arise hereafter, giving the other side six days' notice. In the meantime I will reserve the question of costs.

Where a defendant has brought a number of simultaneous actions at law against the plaintiff, all depending upon similar facts and circumstances, and involving the same legal questions, so that the decision of one would virtually be a decision of all the others, a Court of Equity may interfere to restrain the prosecution of the actions, so that the determination of all the matters at issue between the two parties may be brought within the scope of one judicial proceeding and one decree, and a multiplicity of suits thereby be avoided. Thus in Kensington v. White, 3 Price, 164, the insured had brought five separate actions at law,

fringement of some right.' The words which I have quoted are in substantial agreement with the language used by Bayley, J., in Bromage v. Prosser 4 B. & C. 25, to the effect that, 'malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.' According to the learned Judge, in order to constitute legal malice, the act done must be wrongful, which plainly means an illegal act subjecting the doer in responsibility for its consequences, and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law. Whilst it is true that no act in itself lawful requires an excuse, it is equally true that some acts in themselves illegal admit of a legal excuse, and it is to these that Bayley, J., obviously refers. The root of the principle is that, in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. In my opinion it is alike consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive."





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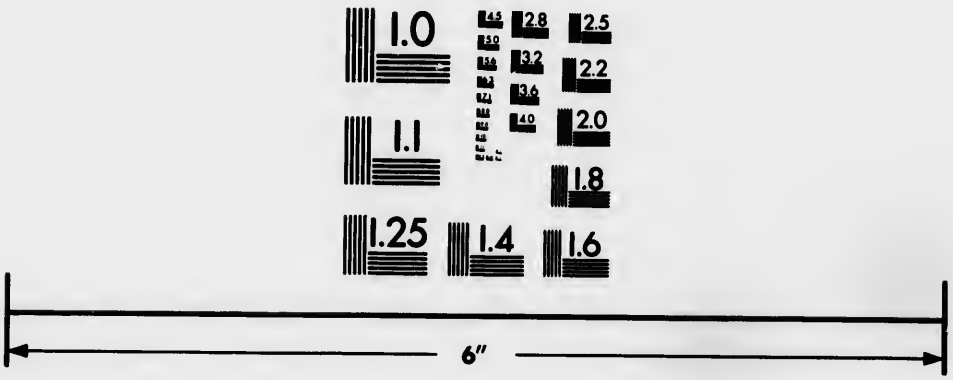

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on five different policies of insurance, effected on different ships, but between the same parties and at the same time. The defence was substantially the same in all the actions. The insurers were held entitled to file a bill in equity to have all the matters tried in one suit, and to restrain the actions at law. In speaking of this equitable jurisdiction, Pomeroy, section 254, says it must be admitted that its exercise is somewhat extraordinary, since the rights and interests involved are wholly legal, and the substantial relief given by the Court is also purely legal. It may be assumed, therefore, he says, that a Court of Equity will not exercise jurisdiction on this particular ground, unless its interference is clearly necessary to promote the ends of justice, and to shield the plaintiff from a litigation which is evidently vexatious. It should be observed that if the pending actions at law are of such a nature, or for such a purpose, that they may all be consolidated into one and all tried together by an order of the Court in which they, or some of them, are pending, then a Court of Equity will not interfere; since the legal remedy of the plaintiff is complete, certain and adequate, there is no necessity for his invoking the aid of the equitable jurisdiction. In Third Avenue R. R. v. Mayor of New York, 54 N. Y. 159, cited by the learned author, the city had brought seventy-seven actions in a Justice's Court to recover penalties for violating a city ordinance concerning the running of cars without a license, each action for a separate penalty. All the actions depended upon similar facts, and upon the same question of law; and a decision of one would virtually decide all. The company brought this suit in equity to restrain the prosecution of all these actions except one, offering to abide the final decision in that one.

The suit was sustained, and the relief granted, because a Justice's Court had no power to consolidate the actions. The decision was placed expressly upon the power of equity to prevent a multiplicity of suits, and the impossibility of the plaintiffs being relieved in any other manner from a vexatious litigation. In In re Ackroyd, 1 Exch. 479, at p. 489, and in Jones v. Pritchard, 6 D. & L. 529, are to be found dicta that the English County Courts have no power to consolidate actions, similar to that possessed by a Superior Court. On the principle that where a common law Court has jurisdiction in itself to give relief against vexatious proceedings, the Court of Equity will not interfere, it would seem that since a Court of Justice has inherent general jurisdiction to prevent abuse of its process by staying or dismissing actions which it holds to be vexatious: Haggard v. Policier Freres, [1892] A. C. 67; Lawrance v. Norreys, 15 App. Cas. 210; Metropolitan Bank v. Pooley, 10 App. Cas. 214; the Court of Equity will not exercise its jurisdiction in such cases. See W. & T. L. C. (4th Am. ed.), 1408, where it is said that the process of a Court, being within its own control, a Court of Equity will not generally interfere. And see *ibid.*, at page 1389, where it is said that the rule that Courts should abstain from interfering with each other's proceedings, on points where they have a common or co-ordinate jurisdiction, is sanctioned by considerations of policy and reason, and should not be disregarded, unless it is apparent that an adherence to it would result in a failure or denial of justice. It is accordingly a general, though not invariable rule, that a Court of equitable jurisdiction will not enjoin a suit in a Court of a like jurisdiction. This is not merely because the tribunal in possession of the cause can afford all the relief that may be requisite, but because both tribunals are equally armed, and each of them may treat the interposition of the other as an

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intrusion. In Freeman on Executions, s. 32, it is said: "Each Court has such general control of its process as enables it to act for the prevention of all abuse thereof. The power of Courts to temporarily stay the issuing of executions is exercised in an almost infinite variety of circumstances, in order that the ends of justice may be accomplished. In many cases this power operates almost as a substitute for proceedings in equity, and enables the defendant to prevent any inequitable use of the judgment or writ." The power of staying vexatious proceedings that are an abuse of its process is probably possessed by the New Brunswick County Courts: Reg. v. Bayley, 8 Q. B. D. 411; Pitt-Lewis' County Courts, 36, though see Hannington v. Stewart, 1 Pug. 242. In the exercise of this power the Court has stayed proceedings in an action where the manifest purpose of the plaintiff was to annoy and vex the defendant, and not to enforce a just demand: Jacobs v. Raven, 30 L. T. 366; Edmunds v. Attorney-General, 47 L. J. Ch. 345; 38 L. T. N. S. 213.

In the case, however, of an inferior Court unable to protect its suitors, where its process is being used for oppressive ends, the duty of interference by a Court of Equity is obvious, and free from officiousness. Further, the rule forbidding the splitting of claims in an inferior Court does not apply to distinct causes of action: Ex parte Lynott, 26 N. B. 126, so that the remedy by prohibition: In re Ackroyd, 1 Exch. 479, does not afford protection against a multiplicity of suits founded upon separate and independent causes of action. Again, an inferior Court has not power in itself to consolidate such actions.

Considerations such as these, make it clear that an application to a Court of Equity for its interposition in restraint of parties to vexatious proceedings in an inferior Court should be entertained.

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(No. 2. Ante, p. 498).

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April 27.

Practice—Bill—No disclosure of cause of action—Taking bill pro confesso—Striking out defendant's name—Dismissal of bill at hearing—Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 38.

A bill may be taken pro confesso against a defendant though it does not disclose a cause of action against him. If a bill does not disclose a cause of action against a defendant, he may apply to have his name struck off the record, or apply at the hearing to have the bill dismissed.

The facts sufficiently appear in the judgment of the Court.

W. Pugsley, Q.C., for the plaintiff.

E. McLeod, Q.C., for the defendant, Helen E. Macdonald.

1893. 1893. April 27. PALMER, J.:—

MACRAE v. MACDONALD *et al.*

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In this case one of the female defendants (Mrs. Macdonald) appeared by Charles A. Macdonald, and was called upon to answer in the ordinary way. This she did not do, and an application is now (at the hearing) made to take the bill pro confesso against her for want of plea, answer or demurrer, in accordance with the provisions of s. 38 of 53 Vict. c. 4. Mr. McLeod now claims that the bill on its face should show some cause of action against her. In this contention he is in error. All the taking of the bill pro confesso means is, that the party against whom it is so taken admits the allegations in the bill; and if the bill contains no cause of action it is quite competent for her to have it raised at the hearing. As far as this defendant is concerned the case is found against her—that is all the allegations in the bill—if there is any cause of action, and if not, I do not see how it can affect her having the bill taken pro confesso, for this only proves what is alleged, and if there is no cause alleged, then, I think (though it does not arise, and I therefore do not now decide it) an application might have been made to strike her name from the record with costs. But this is not necessary, for if the bill shows no cause of action the proper thing is to dismiss it at the hearing. I therefore order the bill to be taken pro confesso against Mrs. Macdonald.

Where a bill does not show that a defendant is in some way liable to the plaintiff's demand, or that he has some interest in the subject of the suit, it may be demurred to: Story Eq. Pl. s. 262; Daniell Ch. Pr. (4th Am. ed.) 321. If, however, the bill states that the defendant has or claims an interest, a demurrer, which admits the bill to be true, will not, of course, hold, though the defendant has no interest; but the objection must be taken in another form, by plea or disclaimer: Story Eq. Pl. s. 570; Daniell, 299. It is no ground of demurrer by one defendant that a co-defendant appears, by the bill, to have no interest: Roberts v. Roberts, 2 Ph. 534.

Where a bill is taken *pro confesso* the plaintiff is not entitled to such decree as he can abide by, but to such decree only as he is entitled to on the record: Stanley v. Bond, 6 Beav. 421; Haynes v. Ball, 4 Beav. 102.

GERTRUDE LOASBY, *an Infant*, BY HER GUARDIAN OLIVER BARBERIE v. THE HOME CIRCLE, JAMES WALKER, AND REVEREND PETER EGAN. 1893. *July 4.*

Infant—Foreign domicile—Appointment of guardian—Jurisdiction—Life insurance—Trust—Action on policy—Person to sue.

Life insurance in The Home Circle, a United States corporation, taken out by L., whose domicile was in Nova Scotia, was payable to E. in trust for L.'s infant daughter by his deceased wife. Upon L.'s death E. was appointed guardian in Nova Scotia of the person and estate of the infant. The infant, after her father's death, removed to New Brunswick for a temporary purpose, and B., her maternal grandfather, having been appointed guardian of her person and estate in this Province, brought this suit to restrain The Home Circle from paying the insurance to E., or to any other person than B., and to restrain E. from receiving it, and obtained an interim injunction.

Held, that the insurance was payable to the legal personal representative of the deceased, and that the injunction should be dissolved.

Semble, though the Court of this Province has jurisdiction to appoint a guardian of an infant residing here, but domiciled elsewhere, it will not supersede the guardian appointed by the Court of the infant's domicile unless necessary in the infant's interest.

This was an application by the defendants to dissolve an injunction order in this suit. The facts are fully stated in the judgment of the Court.

Argument was heard June 12th, 1893.

W. Pugsley, Q.C., for the plaintiff.

A. O. Earle, Q.C., and *R. F. Quigley*, for the defendants.

1893. July 4. PALMER, J.:—

Frederick Loasby married the daughter of Oliver Barberie, who lives at Campbellton, in this Province. The daughter died about a year after marriage, after giving birth to the plaintiff, who is now about the age of 13 years. After the marriage Loasby moved to Springhill, in the Province of Nova Scotia, and married a second wife, and lived there for a period of about twelve years, the plaintiff, his daughter, living with him at his

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dwelling until his death. Some time previous to his death he insured his life with the defendants, The Home Circle, a Massachusetts corporation, having its head office at Boston, but doing business and having members both in this Province and in Nova Scotia, as well as in the United States. The insurance was effected by certificate made by some members of the corporation at Moncton in this Province; and by it the loss was made payable to the defendant Egan, who is a priest of the Roman Catholic Church, in trust for the plaintiff. After the death of the insured his widow took out administration in Nova Scotia of his estate, and Egan was appointed guardian of the person and estate of the plaintiff in that Province. Oliver Barberie was appointed guardian of the person and estate of the plaintiff in this Province, and began this suit, claiming to have the insurance money paid to him as such guardian, and to have the defendant Egan prevented from receiving the same. I accordingly granted an injunction order, ex parte, to restrain the defendant Egan from collecting the money, and the defendants, The Home Circle, from paying it to any person other than the plaintiff or her guardian in this Province, and this is a motion to dissolve that injunction order. What I ought to do in that regard is somewhat influenced by the principles which would govern not only the right to the money itself, but the question into whose hands the money ought to go for the benefit of the plaintiff.

It will be seen that the bottom of the controversy here is a conflict between the power of the guardian appointed in Nova Scotia and the one appointed in this Province. I think that although it is sufficient that an infant resides within the jurisdiction of the Court where the proceedings are taken to give jurisdiction for the appointment of a guardian, and that it does not depend upon the legal domicile of the infant, yet the guardian appointed by the country in which the ward is domiciled is to some extent universal; and the appointment of such guardian in other countries is to some extent ancillary. I think next to the parents of a minor the

country in which its father was domiciled at the time of his death, acting through its proper Courts, has the greatest interest in such infant's welfare; it is that country in which her circumstances are best known, and it is there that the education and mode of living and marriage of such minor can be most wisely settled. Therefore, I think the Courts in all countries best subserve the interests of the infant by recognizing the foreign domiciliary guardianship in all cases where it is conducive to the interests of the ward.* I think the question of the recognition of foreign domiciliary guardianship is one of local policy; but not based on caprice. It is a rule of private international law that the Court in the case of a minor will, when there is no positive local law in the way, and nothing in the foreign guardian repugnant to local institutions, support the authority of the guardian existing under the law of the minor's domicile, and will not defeat it unless it should be abused. I think I am justified in repeating what Lord Campbell said in addressing the House of Lords in *Stuart* v. *Bute* (1), that this Court has undoubted jurisdiction over the case conferred upon it by the Sovereign as *parens patriæ*, and it is its duty to take care of all infants who require its protection whether domiciled in this Province or not, but the benefit to the infant is the foundation of the jurisdiction and must be a test of its right exercise. I think here the application for the guardianship of this infant in this Province, where she has no property, was certainly made with the intention of superseding the Nova Scotia guardian, the infant being domiciled in Nova Scotia and being in New Brunswick only for a temporary purpose, and having no property whatever here. The plaintiff being a foreign child in this Province, this Court had a right, without inquiry as to whether the previous guardian in Nova Scotia was sufficient, if it

* See *Dawson* v. *Jay*, 3 DeG. M & G. 764; *Nugent* v. *Vetzera*, L. R. 2 Eq. 704. The appointment of Rev. P. Egan, by the Probate Court of Cumberland Co., N. S., as the guardian of the person and estate of the plaintiff was subsequently cancelled by the same Court on the application of the plaintiff, and her grandfather Oliver Barbarie appointed in his stead. See *Loasby* v. *Egan*, 27 N. S. 349.

(1) 9 H. L. C. 440, at p. 463.

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appeared to be for the benefit of the child, to make an appointment of a New Brunswick guardian, yet it does not follow from that that the foreign guardian is to be entirely ignored or that such guardian, duly appointed in a foreign country, may not come into this country and claim that his ward was stealthily or improperly carried away from him. On the contrary, an alien father whose child had been carried away and carried into this Province would undoubtedly have the child restored to him by a writ of habeas corpus, and I believe the same remedy would be afforded if a guardian standing *in loco parentis* applied on the ravishment of his ward.

The question of the situs of a deceased's property is much discussed in English cases under the doctrine of bona notabilia, and the decisions there are that the jurisdiction to grant administration in reference to debts due the deceased person never follows the residence of the creditor, but they are always bona notabilia where the deceased person resided.

Specialties are bona notabilia where they are at the time of the creditor's decease, and simple contract debts where the debtor resides. See the judgment of Lord Abinger, C.B., in *Attorney-General* v. *Bouwens* (2).

In this view this infant had no property in this Province while she was domiciled in Nova Scotia, but all this would not be absolutely decisive of the question whether this injunction should be continued or not; such consideration would only be applicable to property actually vested to the infant. This order was granted under the idea that the defendant Egan had the legal right to enforce the payment of this insurance money, and that he held such right of action in trust for the infant, and it was alleged that he would abuse his trust, but it turns out that this is not the legal right of the parties at all. The obligation of the defendants, the insurance company, to pay is an obligation to the dead man and his personal representatives and to them alone. The defendant Egan could not discharge it from that obligation, and only the personal representatives of the assured could. See

(2) 4 M. & W. 172, at p. 191.

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Clearer v. *Mutual Reserve Fund Life Association* (3). Therefore, in any view of the case, such personal representative must be a party to any suit that would enable this Court to deal with the property in any way.

I might perhaps remedy that by amendment if I could see that there would be any danger of injury to the plaintiff's interests if I did not interfere, but I have no right to assume that the Courts of Massachusetts or of Nova Scotia, in whichever of these places the personal representatives of the assured are, will appoint any administrator of the assured's estate without taking proper security to secure the interests of all persons who may be beneficially interested in the assets which come into the hands of such administrator. It appears to me it is there, and not here, that this plaintiff should seek the aid of the Courts to effectuate that object. I am, therefore, clear that this injunction order never should have been made, and it must be dissolved.

The question of costs of this motion will be reserved, and the plaintiff will have leave to make any other application that she may be advised is necessary in order to protect her interests.

The general rule that a beneficiary named in a policy of life insurance cannot maintain an action on the policy, but that it must be brought in the name of the legal personal representative of the insured, was expressly followed in Abbinett v. North Western Mutual Life Ins. Co., 21 N. B. 216. It would seem that an action on a policy within the provisions of the Act 58 Vict. c. 25 (N. B.), to secure the benefit of life insurance to wives and children should be brought in the name of the beneficiary. See Campbell v. National Life Ass. Co., 34 U. C. Q. B. 35; Fraser v. Phœnix Mutual Ins. Co., 36 U. C. Q. B. 422. Where a policy is assigned either absolutely, or by way of mortgage, the assignee can give a valid discharge in equity to the insurers without the concurrence of the legal personal representative of the insured: Ottley v. Gray, 16 L. J. Ch. 512; Ford v. Ryan, 4 Ir. Ch. Rep. 342. By the Policies of Assurance Act, 1867 (30 & 31 Vict. 144), Imp., assignees of life insurance policies were enabled to sue thereon in their own names. Where an assignment was insufficient under the Act, the assignee having but an equitable title by deposit of the policy the insurers were held justified in refusing to pay without the concurrence of the legal personal representative of the assured: Crossley v. City of Glasgow Life Ass. Co., 4 Ch. D. 421. The Court, however, may dispense in such a case with the presence of the legal personal representative under section 44 of 15 & 16 Vict. c. 86, *ibid.* See corresponding section, s. 89 of 53 Vict.

(3) [1892] 1 Q. B. 147.

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c. 4 (N. B.). In Webster v. British Empire Mutual Life Ass. Co., 15 Ch. D. 169, Jessel, M.R., following his decision in the former case, made a similar order; the ground of his decision being, as pointed out by Cotton, L.J., on appeal, that though there was no legal personal representative to give a discharge to the insurers, as he had power to dispense with the presence of the legal personal representatives, his decree would be a good discharge to them. Cotton, L.J., doubted the regularity of this practice, and James, L.J., expressed surprise that a decree was made in the absence of the legal personal representative. However, in Curtius v. Caledonian Fire and Life Ins. Co., 19 Ch. D. 534, the jurisdiction of the Court to make such an order, and the propriety of its exercise, were expressly affirmed, particularly where the legal personal representative would have no interest in any of the proceeds of the policy. A trustee of a policy of life insurance can give a good discharge of its payment, though under the trust he has no express power to give receipts: Fernie v. Maguire, 6 Ir. Eq. 137; Glynn v. Locke, 5 Ir. Eq. 61; Curtin v. Jellicoe, 13 Ir. Ch. Rep. 180.

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June 5.

In re THE PETITION OF WILLIAM G. BATEMAN. CHUTE ET AL. v. AMELIA GRATTEN ET AL.

Married woman—Separate estate—Agreement for mortgage—Suit by creditor—Decree—Priority.

A married woman owning leasehold land as her separate estate, agreed by parol with A. that in consideration of his building a house thereon she would secure him by a mortgage of the premises, and the house was accordingly built. Subsequently she became indebted to the plaintiffs, and they obtained a decree charging her separate estate with their debt. The decree was never registered. After the decree she gave a mortgage to A. in accordance with her agreement with him, and the mortgage was duly registered. In a petition by A. to have the mortgage declared a valid charge upon the property in priority to the plaintiffs' decree:—

Held, that the plaintiffs' decree must be postponed to the equities existing against the property in favour of A. at the time of the decree.

The facts fully appear in the judgment of the Court, and on appeal, 32 N. B. 549.

Argument was heard May 29th, 1893.

W. W. Wells, Q.C., and *W. A. Russell*, for the petitioner.

R. B. Smith, and *James McQueen*, for the plaintiffs.

The defendants did not appear.

1893. June 5. PALMER, J.:—

This was a petition filed by William Bateman. The facts are that the female defendant, a married woman, having in her own right a small piece of leasehold land,

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Palmer, J.

in the county of Westmorland, and some furniture, agreed with the petitioner that he should build a house and barn on the land for the cost of which she and her husband were to give him a mortgage. The petitioner accordingly built the house and barn at a cost of $1,100 upon which she made a payment of $20. Subsequently the female defendant bought an organ from the plaintiffs, and having made default in its payment, they commenced this suit for a decree charging her separate estate with the debt, and that it might be ordered to be sold if the amount was not paid, and a decree to that effect was made. The decree was served on the 20th of February, 1892. The petitioner had notice of the decree and of its service. In April following the defendants, Gratten and wife, executed to the petitioner a mortgage according to the terms of their agreement, and it was duly recorded in the office of the registrar of deeds and wills for the county of Westmorland. The decree obtained by the plaintiff was never registered in this office. The sole question now is whether the decree created a prior lien on the separate property of the female defendant. To decide this the first question that arises is whether the agreement for the mortgage could be enforced in a Court of Equity. It was clearly within the Statute of Frauds and therefore could not unless on the ground of part performance. The petitioner created the whole property by erecting the house and barn, and he never intended to part with the title in them or the materials used in their construction except upon their being charged with a mortgage in his favour. It was argued that this alone did not amount to a part performance that would take the case out of the statute. I think the case comes within the principle that any laying out of money in improving real estate is a part performance. See *Reddin* v. *Jarmyn* (1). This disposes of the case, for if such an equity existed the lien of the plaintiffs would only charge so much of the property as would remain in Mrs. Gratten at the time it was pronounced.* But, if it had been otherwise, I do not think

(1) 16 L. T. 449. * See *Trueman* v. *Woodworth*, 1 N. B. Eq. 83—Ed.

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it would have made any difference to the plaintiffs' rights where they would depend upon the effect of the decree charging a married woman's property with her debts. I think the decree is the same as a judgment at law against a person not under disability of marriage, except that the Court has no power against a feme covert in personam. If she has personal property it has control over that, but it must proceed in rem against that property, for a feme covert is not competent to give a remedy against herself, and it has never been held that by her contract she can create a lien on her property for the payment of her debts. Her creditor would have the right to get a decree and execution against her property. The right to deal with it after contracting debts and being sued therefor in regard to her disposition of her property is exactly the same as a man's. See *Robinson* v. *Pickering* (2). It is settled law that in such cases the right of the creditor is to go against this particular fund—that is, the feme covert's separate estate. Again, if the contracting of the debt could be a charge on the separate estate then such would take effect according to the priority of the dates of the debts, and as the petitioner was first he would have to be paid first. Then as to the effect of the decree. The propositions I have discussed show that its effect is to bind the property the same as a judgment at law. If such a judgment were recorded it would bind the land from that time, and an execution issued thereon would bind the personal property within the bailiwick of the sheriff and held under that execution, and that is the extent to which the property is held, and subject to that the owner of the property would have the right to charge the property or sell it. It follows that all this Court can do is to so charge it subject to any prior charges either in law or equity that are created against it. Therefore the effect of the judgment will be that there will be a direction to the Referee to either sell the property subject to the petitioner's mortgage, or in case he sells it, then to pay first the amount of the

(2) 16 Ch D. 660.

petitioner's mortgage, and afterwards pay the plaintiffs. Inasmuch as the plaintiffs have made this contest and failed they must pay the costs of it, and the order will be made accordingly.*

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* Affirmed on appeal, 32 N. B. 519.

ROBERTSON v. THE BANK OF MONTREAL ET AL. THE SAME v. THORPE ET AL.

1892.

April 12

Garnishee—Fire Insurance—Assignment—Priority—Remedy in Equity—Staying proceedings under Garnishee Act

The loss payable under a policy of fire insurance was assigned by the assured to the plaintiff with the consent of the insurers. A loss occurring, the defendant, a judgment creditor of the assured, obtained an attaching order under Act 45 Vict. c. 17, against the insurers. In a suit by the plaintiff for a declaration of his title to the insurance, and to restrain the garnishee proceedings, he alleged that the defendant intended setting up the claim that the assignment to the plaintiff was fraudulent, and that the plaintiff had merely an equitable title, which could not be used to defeat the defendant's rights under the garnishee process. The plaintiff also alleged that his assignor was insolvent, though he did not allege that the assignor had refused to allow an action at law on the policy in his name.

Held, that the plaintiff was entitled to have his rights determined in equity, instead of under the garnishee proceedings, and that an injunction should be granted.

An assignee of a policy of fire insurance is entitled to sue thereon in equity where the assignor is insolvent, without a refusal by him to allow an action at law in his name.

Alfred J. Babang carried on business as a retail and wholesale merchant at Moncton. Becoming involved in financial difficulties he applied to the plaintiff for assistance and undertook to secure him against any loss arising therefrom. The plaintiff made him numerous advances of money from time to time amounting on the first of May, 1890, to $2,000. The plaintiff also endorsed a large number of promissory notes for Babang's accommodation. Babang was the owner of a warehouse situate on Duke street in which he kept stored a quantity of merchandise. The merchandise was insured with the Citizens Insurance Company of Canada against fire for the sum of $1,000, and with the British American Assurance Company for a like sum. The building was insured in the latter company for $800. For the purpose of securing the plaintiff Babang assigned the loss under

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both policies, with the consent of the companies, to the plaintiff. A fire occurring in September, 1891, both the building and the stock were badly damaged, and each company became liable to pay $900 on the stock. The loss on the building was adjusted at $751. The Bank of Montreal recovered a judgment against Babang for a large amount, and on the first of October, 1891, took out an attaching order under the Garnishee Act, 45 Vict. c. 17, attaching any money payable by The Citizens Insurance Company and The British American Assurance Company to Babang. On the fifteenth of December, 1891, the Bank of Montreal took out a summons against the former company to show cause why an execution should not issue against them for the payment of the money due Babang. The defendant, Thorpe, was a judgment creditor of Babang, and on the twenty-eighth of September, 1891, took out a similar attaching order against both insurance companies. The plaintiff brought suits for an injunction against the Bank of Montreal and Thorpe from proceeding against the insurance companies by garnishee process to enforce payment to themselves of the money assigned to the plaintiff, and for a declaration that the same was payable to the plaintiff. The plaintiff by his bill of complaint alleged that the Bank of Montreal and Thorpe claimed that the assignment to the plaintiff was made for a fraudulent purpose; and that as the policies in law were payable to Babang the plaintiff had merely an equitable interest which could not be set up under the Garnishee Act to defeat the title of the Bank of Montreal and Thorpe. The plaintiff also stated that Babang was in insolvent circumstances. Both suits were heard together.

D. L. Hanington, Q.C., for the plaintiff.

H. H. McLean, for the Bank of Montreal.

Joseph A. Harris, for the defendant Thorpe.

G. C. Coster, for The Citizens' Insurance Company of Canada, and The British American Assurance Company.

1892. April 12. FRASER, J.:—

I think I ought to grant the injunction asked for in these cases. Prima facie the plaintiff is in equity the party entitled to the moneys payable by the two defendant companies under the policies effected with them by the defendant Babang. No doubt the defendants, the Bank of Montreal and Thorpe, being judgment creditors of Babang might very properly apply for attaching orders under the Act to provide for garnishee or trustee process, 45 Vict., c. 17, to attach any debt or debts, sum or sums of money due or owing to Babang, their judgment debtor, but where it is disclosed that the debt has been previously assigned to a third party, as in the present case, to the plaintiff Robertson, it may be questionable whether the judgment creditors have the right even to call upon the garnishees to show cause why they should not pay the debt to them, because in such case it is not a debt which can be attached: *Hirsch* v. *Coates* (1). The judgment creditors may have the right as against the garnishees to obtain the orders mentioned in the 9th section as was done in this case, and the companies could no doubt set up as a defence that the debt had been assigned to the plaintiff, and that they were liable to pay it to the plaintiff. Mr. McLean contended that under the 11th section the plaintiff could intervene and have the full benefit of his assignment, because the section states that the judgment debtor, the garnishee and all other parties in any way interested in or to be affected by the proceeding shall be entitled to set up any defence, etc. It does not appear, however, from the section how the other parties interested are to intervene, nor does it provide for notice to the parties interested. It is true that under the 16th section a party entitled to or interested in any money or debt attached may at any time apply to the Judge of a County Court for an order to discharge such money or debt from the claim of the judgment creditor, but I do not see that it is compulsory upon the party entitled to the money to take such a proceeding.

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(1) 18 C. B. 757.

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FRASER, J.

The Judge of the County Court would not I apprehend have any jurisdiction under the 18th section unless the claim was made by the plaintiff, and the Judge was required by him to act under that section. Neither Babang nor the defendant companies could ask the Judge to compel the plaintiff to put forward his claim with a view to its adjudication under that section—the proceedings under that section I think, as I have already stated, can only be taken at the instance of the plaintiff.

While I am not prepared to say that the plaintiff might not, if he so desired, have his claim adjudicated upon under some of the sections of the Garnishee or Trustee Process Act, I see nothing in the Act to compel him to do so, and besides there appear to be difficulties in his having that full right of defence, if he is to be put upon his defence, that he ought to have. Then the plaintiff may well say that he is the person entitled to the moneys payable by virtue of the policies and should not be prevented by a collateral proceeding between other parties from instituting his own suit to recover these moneys. Further, it seems to me from the allegations in the bills, and which allegations are not disputed by the defendants, the Bank of Montreal and Thorpe, they intend to contest the plaintiff's right to the moneys on the ground of fraud, and if so fraud is a proper subject for inquiry in a Court of Equity, although it might also if the plaintiff so desired be inquired into by the Judge of the County Court under the Garnishee Act. I see nothing, however, in the Garnishee Act to deprive the plaintiff of his right to institute a suit for the recovery of the moneys payable to him under the policies. It was urged that even if the plaintiff was the assignee of the moneys he could not proceed in Equity, but must proceed at law in the name of Babang to recover them. And in support of this proposition *Hammond* v. *Messenger* (2), and *Kerr* v. *Steeves* (3), as also *West* v. *The Trustees of School District No. 5, Parish of Johnston* (4), were cited. The plaintiff, it is true, has not alleged that he had requested Babang to allow his name to be used

(2) 9 Sim. 327. (3) 22 N. B. 124. (4) 22 N.B. 72.

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in a suit at law to recover the money, but I think he has sufficiently brought himself within the principle laid down in the cases cited. He has, I think, stated special circumstances which show that his remedy at law might be obstructed by suing in the name of the assignor, Babang, because he sets forth in his bill that the assignor has become insolvent, and that of itself would, I think, be a sufficient ground for his proceeding in Equity. And then again, it seems that the companies themselves have by their indorsement on the one policy and on the face of the other assented to the plaintiff becoming the assignee of the policy moneys, and admitted that the plaintiff's claim is one which can be enforced in his own name, and, if so, Equity is the only Court in which he can sue in his own name.

As Thorpe has an attaching order against the companies granted by Judge Landry, of the Westmorland County Court, on the 28th September last, and the Bank of Montreal an attaching order granted by Judge Peters, of the St. John County Court, on the 1st day of October last, and as they are made defendants in these suits, complete justice between all parties can be done by an adjudication in these suits.

The defendant companies, it was admitted, have been ready and willing to pay to the parties entitled the moneys payable as losses under the several policies, and while Mr. Geo. C. Coster, who appeared before me as counsel for the companies, stated he could not very well agree to an order being expressed to be made by consent of the companies for the payment into Court of the moneys payable as losses under the policies, yet if the Court thought such order should be made and did make it that the company would of course comply with it, and pay the money into Court. He further claimed that if such order was made the companies should not be made to pay any interest as they have always been ready and willing since the adjustment of the losses to pay the amount of such losses to whoever was entitled to it, and that they have hitherto forborne to file a bill of interpleader simply because they did not want to put the parties to the expense of such a proceeding.

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It is true that applications for payment of money into Court are most commonly made upon admissions in answers, but I see no objection where the admission is made on an interpleader motion such as this, and whether such admission be made by counsel or established by affidavit, to ordering the payment into Court of the fund admitted to be in hand. The payment into Court of the money does not alter the rights of the parties interested in the fund. In the present case I think it will be to the interest of all parties to have the moneys due by the companies paid into Court to abide the result of the suit or the further order of the Court in regard thereto. And I further think the defendant companies should not be required to pay interest.

An order, therefore, for an injunction as prayed for can be drawn up and submitted to me. And it will be further ordered that the companies do on or before the fourth day of May next, pay into the Bank of New Brunswick to the credit of this cause, the amounts admitted to be due by them under the policies referred to without interest. Each of the defendant companies will be entitled to be paid out of the fund to be paid into Court, the costs of their appearance to this suit and of their application upon this motion, to be taxed by the Clerk if the contesting parties and Mr. Coster cannot agree upon the same.*

*On appeal, 31 N. B. 653, the Court, holding that an interlocutory injunction is in the discretion of the Judge, which should not be interfered with, except for some grave and powerful reason, declined to express an opinion upon the merits of the appeal.

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BOYD v. THE BANK OF NEW BRUNSWICK.

December 29.

Bank—Shares—Legacy—Sale by executor—Transfer—Notice of Trust—The Bank Act, c. 120, R. S. Can.

Under "The Bank Act," chapter 120, R. S. Can., a bank cannot refuse to register a transfer to a purchaser by an executor of shares in the bank standing in the name of the testator, though by the testator's will the shares are specifically bequeathed.

The facts are fully stated in the judgment of the Court. Argument was heard December 7th, 1891.

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Palmer, J.

G. C. Coster, for the plaintiff.

F. E. Barker, Q.C., for the defendant.

1891. December 29. PALMER, J.:—

The deceased, John Boyd, had sixty-two shares of the stock of the Bank of New Brunswick standing in his name at the time of his death. After the grant of administration to the plaintiff the bank registered the plaintiff in the register of shares as administrator, and as the person entitled to the shares under the transmission of the title thereto by virtue of the grant of administration.

There are also twenty-six shares registered in the name of Mrs. Albinia Boyd. On her death probate of her will was granted to the plaintiff. In this condition of things the plaintiff wished to sell and dispose of the shares and have the bank assign and transfer the same to purchasers under the 29th and 30th sections of the Bank Act, c. 120, R. S. C. He made and filed with the bank the declaration provided for by the 32nd section, and filed with the bank the probate of the will and the letters of administration showing that he was such executor and administrator, and required the bank to transfer the stock. This they refused to do on the ground that by the will of Mrs. Boyd the stock was specifically bequeathed to be divided among certain legatees. This suit is now brought for a mandatory injunction to compel such transfer, and the question to be decided is whether the bank is compelled to do so without the assent of the legatees and cestuis que trustent. What their duty is in the premises must be governed by what is the proper construction of sections 32, 34 and 35 of the Bank Act and a consideration of the state of the law on the subject at the time that Act was passed.

The first thing to be considered is that these shares are made personal property by the 29th section of the Act, and as a consequence the legal title to them would, on the death of the shareholder, vest in his personal representative, and for that purpose no assent of any legatee or other person to whom they might have been specifically bequeathed is necessary. It is true that it only vests

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in him as trustee, first, to pay the expenses of the estate, secondly, to pay all the creditors, and thirdly to give what remains over to the legatees.

Next to be considered are the following sections of the Act:

32. "If the interest in any share in the capital stock becomes transmitted in consequence of the death, bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this Act, such transmission shall be authenticated by a declaration in writing, as hereinafter mentioned, or in such other manner as the directors of the bank require; and every such declaration shall distinctly state the manner in which and the person to whom such shares have been transmitted, and shall be made and signed by such person; and the person making and signing such declaration shall acknowledge the same before a judge of a court of record, or before the mayor, provost or chief magistrate of a city, town, borough or other place, or before a notary public, where the same is made and signed; and every declaration so signed and acknowledged shall be left with the cashier, manager or other officer or agent of the bank, who shall thereupon enter the name of the person entitled under such transmission in the register of shareholders; and until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to participate in the profits of the bank, or to vote in respect of any such share of the capital stock: Provided always that every such declaration and instrument as, by this and the next following section of this Act, are required to perfect the transmission of a share in the bank which is made in any other country other than Canada, or any other British colony, or in the United Kingdom, shall be further authenticated by the British consul or vice-consul or other the accredited representative; and provided also that the directors, cashier or other officer or agent of the bank may require corroborative evidence of any fact alleged in any such declaration."

34. "If the transmission has taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will, or the letters of administration, or act of curatorship, or an official extract therefrom, shall, together with such declaration, be produced and left with the cashier or other officer or agent of the bank, who shall, thereupon, enter the name of the person entitled under such transmission in the register of shareholders."

35. "If the transmission of any share of the capital stock has taken place by virtue of the decease of any shareholder, the production to the directors and the deposit with them of any authenticated copy of the probate of the will of the deceased shareholder, or of letters of administration of his estate, granted by any Court in Canada having power to grant such probate or letters of administration, or by any Court or authority in England, Wales, Ireland, or any British colony, or of any testament testamentary or testament dative expede in Scotland, or, if the deceased shareholder died out of Her Majesty's dominions, the production to and deposit with the directors of any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import, granted by any Court or authority having the requisite power in such matters, shall be sufficient justification and authority to the directors for paying any dividend, or for transferring or authorizing the transfer of any share, in pursuance of and in conformity to such probate, letters of administration, or other such document as aforesaid."

The effect of these sections, although a little obscure, does not appear to be very different from the Imperial Statute 8 & 9 Vict. c. 91, and by which it was enacted "that all stock standing, and which shall hereafter stand, in the name of any deceased person shall and may be assigned and transferred by the executors or administrators of the deceased, notwithstanding any specific bequest thereof"; but providing "that the bank shall not be required to allow the executor or administrator to transfer any stock or receive the dividends thereon until the probate or letters of administration shall have

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been left at the bank for registration and that the bank may require all the executors who shall have proved the will to join and concur in any transfer."

The next question to be discussed is, whether the bank, having notice of the trusts in the will, is under any obligation to take any notice of them and to see that they are fulfilled? There can be no doubt about what the law was on this point previous to the passing of the Bank Act, for the Court of Chancery in England as early as 1796, in the case of *Hartga* v. *The Bank of England* (1), decided that there was no such obligation on the bank. The Lord Chancellor in that case said: "It is perfectly clear the bank must have permitted Stonehouse (the executor) to transfer into his own name; there could be no possible defence against the desire of him, the legatee, as far as the legal interest goes; and more than that, having a charge for the payment of his own debt. Were the bank to enter into the account of that? But his situation as legatee and also executor enabled him by demand and of right to have a transfer into his own name.' When it was once got into his own name he might put it into any name. All the former strictness of practice in the bank could not have prevented the stock from being put into the name of Stonehouse. When once put into his name, to which he was distinctly entitled, could the bank look farther and enquire whether the stock standing in his name was trust stock? If so the bank would be charged with all the trusts in the kingdom. Then you only rest upon the circumstance of his permitting it to be done by a direct transfer instead of transferring it into his own name one day and into another the next. Is it required for the protection of the bank against the specific legatee that that clause of the will shall be fully set forth to the bank? If that is omitted it is at the peril of the party, and the bank transferring to the executor would stand discharged. The consequence would be exceedingly alarming, if in all cases where there is a legacy in trust, the bank is to take notice of the execution of the trust."

(1) 3 Ves. 55.

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And a few years afterwards, in the case of *The Bank of England* v. *Parsons* (2), the Lord Chancellor said: "I cannot stop where the bank do; for if they look beyond the legal title and take notice of the trusts of the will, they must take notice throughout and stand the consequence of resulting trusts and such as would be raised by this Court. If the Legislature had made any particular provision to guard this species of property, perhaps it might have been expedient and well, but I cannot find any consistent ground upon which the bank can take notice so far and no farther."

The order in that case was that the bank permitting the transfer and paying costs, the action should be discontinued.

The same rule was laid down by Lord Thurlow in *The Bank of England* v. *Moffat* (3), in which he said that in all cases the Act of Parliament giving a power to devise bank stock and treating it as personal property, it must be subject to all the incidents of a gift of personal property; and therefore the bank must permit a transfer of the stock upon the request of the executor.

This being the state of the law, let us endeavour to construe the sections I have referred to. The first thing to be observed is that there is no attempt in these sections to interfere with the executor's common law title or legal interest in the stock. The devolution was what is called in the section "transmission," which is not a transfer of the shares. There is no transfer of the shares in such a transmission—it remains exactly where it was—that is, the original shareholder has it as far as it is possible for a dead man to have anything. It is continued to be held by his personal representative as any other property, and the Act makes a clear distinction between an assignment or a transfer of the shares and a transmission of them; but in order to enable the person to whom the shares are so transmitted to transfer them the sections take away his right to transfer them until the fact of such transmission is authenticated by the

(2) 5 Ves. 665.

(3) 3 Bro. C. C. 260.

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declaration, and the probate or letters of administration are produced, after which, as well as before, he would hold the same, not as a shareholder in his own right, but as the representative of the deceased shareholder. This is of great importance, because in one case his personal estate would not be liable for the liability of the shareholder, and the assets of the estate in his hands would be, whereas if the stock had been assigned to him he would be himself personally liable and the estate would not. In the latter case he would become a shareholder, but in the first he may if he likes transfer the shares without becoming a shareholder at all. The statute contains a different set of directions for the transfer of shares than it does for the transmission of shares.

In the light of what I have said, this plaintiff as administrator de bonis non of John Boyd not only had the legal title to the sixty-two shares, but the transmission of them was registered in his name, so that as far as they were concerned, his right to transfer them was complete, unless the bank was bound to take notice and see that he applied the proceeds of the shares and sales according to law, which would be, as I said before, first to pay the funeral expenses and expenses of the estate, then the debts, and afterwards to give what was left to the legatees.

I have shown by decided cases that no such obligation was upon the bank previous to the passing of the Bank Act, and such an obligation would be burdensome and impossible of performance by the bank, because, if you once admit that the bank would be chargeable with seeing that the executor performs his trust, it is impossible, as is said in the cases I have referred to, to put any limit to such liability, for with notice it would be charged to the fulfilment of every trust no matter how wide, and, as I said before, no Court would be warranted in putting such an obligation upon all the banks in this country without a very clear declaration of the Legislature to that effect. The only suggestion of anything of the kind in the Act is that because the probate of the will or the letters of administration are to be produced to the bank, that the object is to see in whose favour

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there are legacies or trusts of any kind. It appears to me that would be a very strained construction, indeed, for there is another very clear object the Legislature could have had in requiring that, and that is to furnish the bank with evidence of the legal title of the person to whom the stock has been transmitted. I, therefore, am clear that the bank is under no such obligation whatever. How can the bank tell how much money these estates or any other estates may owe to creditors? The law has entrusted the legal title to the stock to the executor or administrator, and has guarded the rights of the different cestuis que trust, creditors, devisees and legatees. First, an executor is the choice of the man who owned the property, the testator, and where an administrator is appointed by law, he is compelled to give security. I therefore think I must decide the matter in favour of the plaintiff and order the bank to make the transfers in the ordinary way.

The matter of costs I have been somewhat in doubt about. I am satisfied, notwithstanding the bank's mistake, the directors honestly believed that they could not safely make the transfer without rendering themselves liable to the legatees, and they are simply trustees for the different shareholders. On the one hand they are bound to protect the whole body of shareholders, and on the other they are equally bound to see that the particular shareholder's (the plaintiff's) rights are fully preserved, and the question of costs, after all, is, whether the expense of deciding this should fall upon the estate of the whole of the shareholders or upon the particular one. As the claim on behalf of the whole has turned out to be wrong, I will follow the high authority of Lord Eldon in the case of *The Bank of England* v. *Parsons* (4), and direct the bank to pay the costs out of the general funds of the bank up to the present time, if they permit the transfer of the shares. If this is done I will direct both suits to be stayed. If it is refused there must be a decree for the plaintiff for costs. I reserve all questions with liberty to all parties to apply for further directions.

(4) 5 Ves. 665.

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The statute incorporating the Molsons Bank provides, by section 36, that the bank shall not be bound to see to the execution of any trust whether express, implied or constructive, to which any of its shares may be subject. A shareholder bequeathed shares to trustees and executors to hold in trust for a person during his life, and then over to his issue. The trustees transferred absolutely the shares to the beneficiary having a life interest, and the bank registered the transfer. In an action by the transferee's issue against the bank, it was held by the Judicial Committee of the Privy Council, on appeal from the Court of Queen's Bench of Quebec, that the bank, in the absence of actual notice of breach of trust, was not liable, having regard to the above section of its act of incorporation: Simpson v. Molsons Bank, [1895] A. C. 270.

Lord Shand, delivering the judgment of the Judicial Committee of the Privy Council, after quoting the above section, said: "This language is general and comprehensive. It cannot be construed as referring to trusts of which the bank had not notice, for it would require no legislative provision to save the bank from responsibility for not seeing to the execution of a trust, the existence of which had not in some way been brought to their knowledge. The provision seems to be directly applicable to trusts of which the bank had knowledge or notice; and in regard to these the bank, it is declared, are not to be bound to see to their execution. Apart from the provision of the statute, it may be that notice to the bank of the existence of a trust affecting the shares would have cast upon them the duty of ascertaining what were the terms of the trust; and that in any question with the beneficiaries whose rights had been defeated by the absolute transfer in favour of Alexander Molson, the bank, whether they had inquired or not, might have been held to have constructive knowledge of all the trust provisions. Assuming this point in favour of the appellants, their Lordships, however, see no reason to doubt that by the clause in question the bank are relieved of the duty of making inquiry, and that they cannot be held responsible for registering the transfer, unless it were shown that they were at the time possessed of actual knowledge, which made it improper for them to do so until at least they had taken care to give the beneficiaries an opportunity of protecting their rights." And see Societe Generale de Paris v. Tramways Union Co., 14 Q. B. D. 424; 11 App. Cas. 20. On the ground that the Bank of England is exonerated by the National Debt Act of 1870 from having regard to trusts of any kind it was held in Law Guarantee and Trust Society v. Bank of England, 24 Q. B. D. 406, that the Bank could not be compelled to register a transfer of consols in the joint names of a corporation and an individual.

CASES.

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APPENDIX.

The opportunity afforded by this volume to publish the judgments delivered by the Supreme Court of Canada in *Sears* v. *The Mayor, etc., of the City of St. John*, and omitted in the report of the case in 18 S. C. R. 702, is gladly taken by the Editor in compliance with the suggestion of Dr. Earle, Q.C., by whose courtesy the judgments were placed in the Editor's hands. The judgments given are those of Sir W. J Ritchie, C.J., and Gwynne and Patterson, JJ. The judgments of Taschereau and Strong, JJ., who took part, are not available. The head note accompanying the judgments is from the report of the case, 18 S. C. R. 702.

SEARS, (PLAINTIFFS) *Appellants* v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF SAINT JOHN, (DEFENDANTS) *Respondents*. 1889.

* *October* 21, 25.

On appeal from the Supreme Court of New Brunswick. 1890.

* *March* 10.

Lessor and Lessee—Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term—Effect of—Specific performance.

A lease for a term of years provided, that, when the term expired, any buildings or improvements erected by the lessees should be valued and it should be optional with the lessors either to pay for the same or to continue the lease for a further term of like duration. After the term expired the lessees remained in possession for some years when a new indenture was executed which recited the provisions of the original lease and, after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby, at the same rent and under the like covenants, conditions and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender and after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option.

* Present:—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

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Held, affirming the judgment of the Supreme Court of New Brunswick (28 N. B. 1.), Ritchie, C. J., and Taschereau, J., dissenting, that the lessors were not entitled to a decree for specific performance.

Held, per Gwynne, J., that the provision in the second indenture granting a renewal under the like covenants, conditions and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant.

Per Gwynne, J. Assuming that the renewal clause was incorporated in the second indenture the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could the clause would operate to make the lease perpetual at the will of the lessors.

Per Gwynne and Patterson, JJ. The option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument containing such clause; and if the second indenture was subject to renewal the clause had no effect as there were no buildings erected during the second term.

Per Gwynne, J. The renewal clause was inoperative under the Statute of Frauds which makes leases for three years and upwards not in writing, to have the effect of estates at will only, and consequently there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors.

Per Ritchie, C.J., and Taschereau, J. The occupation by the lessees after the terms expired must be held to have been under the lease and to signify an intention on the part of the lessees to accept a renewal for a further term as the lease provided.

The facts fully appear in the judgments of the Court.

H. L. Sturdee, for the appellants.

J. Allen Jack, for the respondents.

Sir W. J. RITCHIE, C.J.:—

The facts upon which the decision in this case depends are as follows:—

On the 24th of July, 1855, one Edward Sears, by indenture executed by him and the respondents, leased certain premises in the city of St. John, New Brunswick, to the respondents for fourteen years, from the 1st day of May then last past, at the rental of £100, payable by even and equal half-yearly payments, on the first days of November and May in each year during the term. This indenture contained a covenant, upon the proper construction of which in connection with the attendant circumstances, the determination of this appeal depends, and which is as follows:—

"And it is mutually agreed, covenanted and understood, by and between the parties to these presents, that in case the said The Mayor, Aldermen and Commonalty

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Ritchie, C.J.

of the City of St. John, their successors or assigns, shall erect and put up any buildings or improvements upon the said demised premises within and during the said term, the same shall be valued and appraised by two different persons, one to be chosen by and on the part of the said The Mayor, Aldermen and Commonalty of the City of St. John, their successors or assigns, the other by and on the part of the said Edward Sears, his heirs and assigns, and which two persons, in case of disagreement, shall choose a third, the appraisement or determination of any two of whom shall be final and conclusive, and it shall be at the option and election of the said Edward Sears, his heirs and assigns, to pay or cause to be paid to the said The Mayor, Aldermen and Commonalty of the City of St. John, their successors or assigns, such appraised value of such buildings or improvements to the extent of five hundred pounds, or to continue and extend the lease and demise of the said lot of land and premises with the said right of way unto the said The Mayor, Aldermen and Commonalty of the City of St. John, their successors or assigns, for a further term of fourteen years, at the same yearly rent, payable in like manner and under the like covenants, conditions and agreements as are expressed and contained in these presents; and so as often as such case shall happen at the end or expiration of any lease or demise of the said premises, for any further term or terms, there shall be a like valuation and a like option as hereinbefore mentioned."

The respondents entered into and continued in possession of the demised premises and paid rent as the same matured, until the 1st day of May, 1877; and also, during the term granted by the said indenture, erected a building on the demised premises. On the 1st October, 1877, the assigns of the reversion in the premises, by indenture executed by them and the respondents, renewed and continued the demise of the premises for fourteen years from the 1st day of May, 1869, at the same yearly rent, payable in the same manner, and under the like covenants, conditions and agreements as are ex-

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pressed and contained in the said recited indenture of lease.

The renewed lease expired on the 30th April, 1883, and the respondents continued in possession and paid rent for more than a year after that. On January 28th, 1884, the respondents sent a notice under their corporate seal and addressed to the lessors as follows:—

"Gentlemen,—You are hereby notified that the Mayor, Aldermen and Commonalty of the City of St. John will deliver up to you on the 1st day of May next your lot of land and premises mentioned and described in the lease thereof made to the said Mayor, etc., by Robert Sears and others dated on or about the first day of October, A.D. 1887, as follows": (describing the lot).

On April 30th, 1884, the appellant, John Sears, received from the respondents the following letter under their corporate seal, addressed to the lessors:

"Gentlemen,—The Mayor, etc., of the city of St. John having pursuant to their notice to you, dated the 28th of January last, gone out of possession of the lot formerly held by them under lease dated the first day of October, 1877, which lease has expired, enclosed you will find the key of the building on the lot sent to you on delivering up to you the possession of the lot and the buildings and improvements thereon."

On May 3rd, 1884, the appellants' solicitor wrote to the respondents the following letter, addressed to the Common Clerk of the City:

"Dear Sir,—I am instructed by Mr. John Sears to acknowledge the receipt by him yesterday of your communication of the 30th ult., addressed to Robert Sears, John Sears and George Edward Sears, and to return to the corporation of St. John the key which you enclosed.

The Messrs. Sears refuse to accept possession of the premises referred to in your letter, and under the terms of the lease will look to the lessees for payment of the rent as it matures."

On the same day the Common Clerk replied to this letter stating that the return of the key was not accepted,

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but that it would remain at the Common Clerk's office at the risk of the landlords. No rent was paid by the respondents after the 1st of May, 1884, and the next rent fell due on the 1st of November and payment was demanded from the respondents, which was refused. In January, 1885, the appellants tendered to the respondents for execution a renewal of the said lease, which the respondents refused to execute.

As at present advised, I think that when the present lessees continued to remain in possession and paid rent after the expiration of the term in the lease, they thereby elected to continue in possession under the terms of the lease, which provided for a continuance, and when the lessors, by receiving the rent, acquiesced in their so doing, it was an election on their part not to pay for improvements, and both parties became bound by the terms of the lease, the landlords to continue the lease on the terms of the old one, and the tenants to continue their occupation on the same terms.

This, in my opinion, was the natural and legal result from the continuing in possession and of the payment and receipt of rent, rather than the assumption that the lessees remained in possession wrongfully on sufferance. In other words, that the lessees continued lawfully in possession in accordance with the terms of the lease, instead of unlawfully adverse to the lessors, and subject to their election by mere implication of a new tenancy of an entirely different character. This was not a new contract or a new demise. The tenants continued in possession under the old contract and the old demise by virtue of the terms of the lease, and they were to all intents and purposes continuing tenants, and, therefore, there was no necessity for anything passing between the landlords and the lessees as to the terms on which the occupation was to continue. Both parties knew full well the terms of the lease. When the tenants continued in possession and paid rent, and the landlords accepted it, it must be assumed to have been subject to the terms under the lease, the contract being one and the same by which both parties held. In the absence of anything to show a different understanding the inference is, to my

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mind, irresistible, that the parties intended the occupation to continue under and upon the terms of the lease; and the very fact of the tenants remaining in possession and not asking for payment for improvements showed that the tenants wished the continuance of the lease, they merely acting on the lease as the parties had done when the first term expired. The lessees continued in possession and paid rent, and such rent was accepted and the parties continued to occupy after the expiration of the first lease, which was on the 30th of April, 1869, and on the 1st of October, 1877, a new lease was executed for a further term of fourteen years, commencing from the expiration of the old lease.

If the respondents continued in possession, paid their rent and the same was received by the landlords, in my opinion the rights of the parties thereby became fixed and established, and after that neither parties by their own acts could alter or interfere with them without the assent of the other. If the respondents now called on the appellants to pay for the improvements, what would the appellants' answer be but that they (the respondents) had elected to continue in possession, and had paid their rent and it was acquiesced in and received by the landlords, and that the tenancy is still continuing on the terms of the lease, and that therefore there are no improvements for which they are now entitled to pay?

The appellants in the sixth paragraph of their bill state that the buildings erected on the lands and premises were damaged by fire on the 20th of June, 1877, and that thereafter the building was repaired by the respondents, and that the respondents after the expiration of the indenture of lease and without any valuation of said buildings having been made, continued in possession of the said lands and premises, and paid the rent thereby reserved for the same to the said Robert Sears, John Sears, George Edward Sears and Edward Sears, Junior, up to and until the 1st of May, 1884.

The respondents in their answer said: "We admit that the several allegations contained in the sixth paragraph of the said bill are true, but we allege in addition

thereto that the building so repaired as alleged in the said sixth paragraph was built and was so repaired by us at our own cost during the continuance of the tenancy under the indentures of lease mentioned in the said bill, or of one of them, and that the said building so repaired was standing and being on the said demised premises on the 1st day of May, 1884, and is now standing and being on the said premises, and then was and now is of the value of one thousand dollars and upwards."

The claim to be paid for the improvements which were put on the premises under the first lease and partially destroyed by fire and repaired by the respondents during the second lease has never been released or abandoned by the respondents, and the covenant to pay should the appellants refuse to continue the lease still exists in full force and effect. Under these circumstances I think the appeal should be allowed.

An objection was taken that specific performance could not be adjudged in this case. I can see no objection to the defendants being compelled to execute the lease tendered to them in January, 1885, but if there were any technical difficulties in the way of decreeing specific performance, as chap. 49, sec. 53, Con. Stat. (N. B.) enacts that no suit shall be open to the objection that a merely declaratory decree or order is sought thereby, and that it shall be lawful for the Judge to make a binding declaration of right without granting consequential relief, a declaratory decree of the appellants' right, which is prayed for by the bill, would, I presume, answer all the purposes of a decree for specific performance.

GWYNNE, J.:—

In my opinion this appeal should be dismissed with costs and the judgment of the Supreme Court of New Brunswick sustained.

One Edward Sears, by an indenture of lease dated the 4th of July, 1855, demised a piece of land situate in the city of St. John in the indenture of lease mentioned, unto the Mayor, Aldermen and Commonalty of the said

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city, to have and to hold, to them, their successors and assigns, "from the first day of May then last for the term of fourteen years thence next ensuing, yielding and paying therefor yearly and every year during the said term unto the said Edward Sears, his heirs and assigns, the yearly rental or sum of one hundred pounds lawful money of the province of New Brunswick, by even equal half-yearly payments, on the first days of November and May in each and every year," and the said indenture was expressed to be executed upon the express condition that if the said yearly rent thereinbefore reserved and made payable, or any part thereof, should be in arrear or unpaid by the space of thirty days next after any or either of the days in any year during the continuance of that demise whereon the same ought to be paid as aforesaid, it should and might be lawful to and for the said Edward Sears, his heirs and assigns, into and upon the said lot and premises, or any part thereof in the name of the whole, to re-enter and the same to have again, repossess and enjoy as in his and their former estate, as if these presents had not been made, and the said Mayor, Aldermen and Commonalty of the city of St. John thereout and therefrom to expel, put out and remove, the said indenture or anything therein contained to the contrary notwithstanding.

The indenture then contained a grant of a right of way therein described and a covenant by the lessees to pay the rent by the lease reserved at the days and times therein appointed for that purpose. The indenture then contained the clause following: "It is hereby mutually agreed, covenanted and understood by and between the parties to these presents, that, in case the said Mayor, Aldermen and Commonalty of the city of St. John shall erect and put up any buildings or improvements upon the said demised premises within and during the said term, the same shall be valued and appraised by two indifferent persons, one to be chosen by and on the part of the said Mayor, Aldermen and Commonalty, their successors or assigns, the other by and on the part of the said Edward Sears, his heirs and assigns, which two

persons, in case of disagreement, shall choose a third, the appraisement or determination of any two of whom shall be final and conclusive, and it shall be at the option and election of the said Edward Sears, his heirs and assigns, to pay or cause to be paid to the said Mayor, Aldermen and Commonalty such appraised value of such buildings or improvements, to the extent of five hundred pounds, or to extend and continue the lease unto the said Mayor, Aldermen and Commonalty for a further term of fourteen years, at the same yearly rent, payable in like manner and under like covenants, conditions and agreements as in the said indenture are expressed, and so as often as such case shall happen at the end or expiration of any lease or demise of the said premises for any further term or terms, there shall be a like valuation and the like option as hereinbefore mentioned."

Now this was an indenture of lease for a term of fourteen years certain. The term created thereby must and did terminate on the 1st May, 1869. The lease contained, it is true, a covenant by the lessor that, in the event of certain contingencies happening, he, his heirs or assigns, would execute another lease for a further term of fourteen years, to be computed from the expiration of the first term; but, unless the specified contingencies should happen, no obligation was imposed upon the lessor to give such further lease, and until such further lease should be executed the relation of landlord and tenant between the parties for such new term of fourteen years could not be created, for by the law of New Brunswick, chap. 76, sec. 7, Con. Stat., "all leases, estates, or other interests in lands, not put in writing, and signed by the parties, or their agents thereunto lawfully authorized by writing, shall have the force of leases or estates at will only, except leases not exceeding the term of three years."

As the above covenant of the lessor was inserted wholly and solely for the benefit of the lessees, they could waive the benefit of it. In fact, they alone could be the actors in any proceeding for the enforcement of it. The lessor never could compel the lessees against their will to accept a new lease and so to become tenants of the

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lessor, his heirs or assigns, for a further period of fourteen years, for they entered into no contract whatever, in writing or otherwise, to accept such a lease at the mere will of the lessor, his heirs or assigns. Now the contingencies, the occurring of which imposed an obligation upon the lessor, his heirs and assigns, under his covenant as to the execution of a new lease for a further term of fourteen years were:

Firstly—That within and during the term the lessees had erected and put up some buildings and improvements, which remained upon the demised premises at the expiration of the term.

Secondly—That the lessees should claim to be paid the value of the buildings and improvements so made and remaining on the demised premises. It was only upon these events occurring that the provision contained in the lease as to the valuation of such improvements and the payment thereof or the execution of a new lease for a further period of fourteen years by the lessor, his heirs or assigns, came into operation. If no buildings and improvements had been erected during the term, or if none such remained upon the premises at the expiration of the term; or if any being there, the lessees, either because of the smallness of their value, or for any other reason, claimed no payment whatever in respect of them, there would be no valuation under the provision as to valuation in the lease, and the lessor, his heirs and assigns, would be under no obligation whatever arising under his covenant either to pay anything to the lessees, or in lieu of payment to execute a new lease.

What in fact occurred was this: The lessees did during the term erect certain buildings, which were upon the demised premises at the expiraton of the term on the 1st May, 1869, but there is no evidence that the lessees made any claim to be paid for such buildings. All that occurred, so far as appears, and therefore all that for the purposes of the present case must be taken to have occurred, was that, without anything having been said by the lessor or the lessees as to valuation of the buildings, or as to payment therefor, or as to a new lease for a term

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of fourteen years the lessees simply continued in possession after the expiration of the term and paid the old rent until the 1st October, 1877. Upon the 3rd October, 1874, while the lessees were thus in possession, the lessor executed an indenture whereby he granted, bargained and sold the demised premises, together with other lands, to Robert Sears, John Sears, George E. Sears and William M. Sears, upon certain trusts in the said indenture declared and amongst others, upon trust to demise from year to year, or for any term or number of years, with or without a clause of renewal or provision for payment for improvements, all or any part of the real and leasehold estate thereby conveyed. The grantees under this deed continued to receive from the present respondents until the 1st of October, 1877, without anything being said as to the nature of the respondents' tenure, rent at the same rate as the respondents had previously paid.

Now, under these circumstances, what was the relation existing between the respondents and the owners in fee for the time being of the premises in question from the expiration on the 1st of May, 1869, of the term created by the indenture of lease of the 4th July, 1855, until the 1st October, 1877? And the answer must be, as it appears to me upon principle, and the authority of *Hyatt* v. *Griffiths* (1), that the respondents were tenants from year to year, subject only to such covenants in the expired lease as were applicable to, or might be incident to, a tenancy from year to year; but this is a question now of little importance, for Robert Sears, John Sears, George E. Sears and William M. Sears, the grantors of the indenture of the 3rd of October, 1874, and the respondents, mutually agreed as to the terms upon which the respondents should continue in possession of the premises in question, which terms were embodied in an indenture bearing date the said 1st October, 1877, whereby after reciting the indenture of lease of the 4th July, 1855, and the indenture of the 3rd October, 1874, and the provision therein contained, that it should be lawful for the trustees thereunder to demise from year to year, or for

(1) 17 Q. B. 506.

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any term or number of years, with or without clause of renewal or provision for payment of improvements, all or any part of the real or leasehold estate thereby conveyed, and after reciting further that the said Robert Sears, John Sears, George E. Sears and William M. Sears, parties to the said indenture now in recital, of the first part, had agreed to extend and continue the lease and demise of the said lot and premises comprised in the said indenture of lease (of the 4th July, 1855), with the said right of way, unto the respondents, for a further term of fourteen years, computed from the expiration of the said first term, and that the respondents had agreed to accept such lease, the said indenture witnessed that the said parties thereto of the first part did demise and lease unto the respondents, all and singular, the lands and premises comprised in the said recited indenture of lease, to have and to hold the same unto the respondents for the term of fourteen years, from the 1st May, 1869, thence next ensuing, and fully to be complete and ended, at the same yearly rent, payable in like manner and under the like covenants, conditions and agreements as are expressed and contained in the said recited indenture of lease, and the said respondents did thereby accept the said extension of lease at the rent upon the terms and conditions aforesaid, and did covenant with the parties of the said indenture now in recital of the first part, that the respondents should and would yearly, and every year, during the continuance of the said extended term of fourteen years, well and truly pay the said yearly rent thereby reserved.

Now, it is obvious that it was quite competent for the respondents and the parties of the first part to the above recited indenture, to agree upon any terms and conditions they should think fit to be inserted in the new lease. It was quite competent for the respondents to waive all claim for payment of the value of any buildings or improvements they might erect or make, if they should erect or make any, within and during the second term. It may be that they had no intention whatever to erect or make any such, and therefore they had no object in having a clause inserted in the second lease similar to

that which was in the first providing for payment for improvements. They had not, under the terms of the original lease, any right to demand and insist upon the insertion in any subsequent lease which might be executed of a provision for payment, at the expiration of a second or subsequent term, for improvements which had been made within and during the first term. If a clause similar to that in the original lease providing for payment for improvements, or in lieu thereof for a new lease, should be inserted in any second or subsequent lease under the provision in that behalf contained in the original lease, it would only make provision in respect of improvements to be made within and during the term by such second or subsequent lease granted, and not for a valuation at the expiration of a second, third or fourth term of fourteen years of improvements which had been made during the first term by the original lease granted. Payment on a valuation at the expiration of each term, for buildings and improvements erected and made within and during such term, or in lieu thereof that the lessor would grant a new lease for a further term of fourteen years with a like provision therein contained, if the lessor should require it, for payment of a valuation at the expiration of the new term for such improvement as should, if any should, be made within and during such new term, was the only obligation that the lessor had entered into under the terms of the original lease. It was therefore quite competent for the parties to the indenture of the 1st October, 1877, to leave altogether out of that indenture of lease any provision as to valuation and payment for improvements at the expiration of the term by that indenture granted, whether there should or should not be any improvements made by the lessees on the demised premises within and during such term; and this is precisely what they have done. The parties of the first part to that indenture have given, and the respondents, the parties of the second part thereto, have accepted, a lease terminating absolutely at the expiration of fourteen years from the 1st of May, 1869, without any provision therein contained for any valuation for improvements or for an extended term. The covenants,

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conditions and agreements contained in the original lease, and which are imported into the new lease by the reddendum clause therein, are those relating to the payment of the rent reserved, that is to say, those only to which the respondents are subjected as to payment of rent by their covenant, and in default to eviction by the reddendum clause in the original lease, and which was as follows:

"Yielding and paying therefor yearly and every year during the said term unto the said" (the lessors) the yearly rent or sum of, etc., etc., on the first days of November and May in each year, the first payment to be made on the 1st day of November then next. Provided always, and these presents are upon this express condition, that if the said yearly rent or sum hereinbefore reserved and made payable, or any part thereof, shall be in arrear and unpaid by the space of thirty days next over or after any or either of the days in any year during the continuance of this demise whereon the same ought to be paid as aforesaid, it shall and may be lawful for the said lessors into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess and enjoy as in their first and former state, as if these presents had not been made, and the said lessees therefrom and thereout to expel and put out, this indenture or anything herein contained to the contrary notwithstanding."

The respondents, by acceptance of this lease, voluntarily divested themselves of all right or claim for payment of any improvements, if any, they should make during the term, and the right of the lessors to enter upon the demised premises, upon the expiration of the term of fourteen years thereby granted, become absolute and unconditional, so that any overholding of possession by the lessees after the expiration of such term would be without right, and they might therefore be evicted by the lessors without either a notice to quit or demand of possession. This seems to me to be the true purport, tenor and effect of the second lease; but assuming the covenant for further renewal to be imported into this lease, still the respondents never asserted any interest

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in, or under, such a covenant as being contained in it. They did not at any time since the expiration of the second term pretend to have, or assert any claim to have, any right to compensation for improvements at a valuation, or to have a new lease granted to them for a further term of fourteen years. Up to the day upon which they paid rent for the half-year next ensuing the expiration of the term by the lease granted they were merely overholding tenants, having possession at the mere sufferance of the appellants, and not even claiming to have possession under any other terms. Non-payment of a half-year's rent could not have the effect of converting a tenancy at sufferance into a tenancy for a term of fourteen years, which latter term could only be created by an express demise or by an agreement in writing, executed by the respondents expressly agreeing to become the tenants of the appellants for such a term and possession thereunder, nor could such a payment have the effect of creating an obligation upon the respondents to accept a lease from the appellants for a further period of fourteen years capable of being specifically enforced; for such an obligation could only be created by an agreement in writing to that effect, signed by the respondents. The payment by the respondents and the acceptance by the appellants of a half-year's rent after the expiration of the term had, under the circumstances, the effect only of constituting the respondents tenants of the appellants, by the year, at the old rent; and that tenancy was determined by the notice of the 28th January, 1884, given for that purpose by the respondents under their common seal, and by their abandonment of possession and surrender of the premises executed under their common seal on 30th April, 1884, and their sending therewith the key of the building erected by the respondents upon the premises during the first term to the appellants. The fact of the appellants having sent the key to the Common Clerk of the respondents, who declined to accept it on behalf of the respondents, as indeed he could not do otherwise, or to suffer it to remain in his office otherwise than for and at the risk of

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the appellants, cannot affect the right of the respondents to treat the tenancy as absolutely determined by their abandonment and surrender of the premises to the appellants in the manner above stated, and as the respondents have not entered into any agreement binding them to accept a lease from the appellants for a further term of fourteen years, they cannot be compelled to accept such a lease. In fact the appellants' contention rests wholly upon the fallacy that, as they contended, the lease of July, 1855, contains an agreement of the respondents binding upon them to accept from the appellants, their heirs and assigns, perpetual renewal leases for fourteen years from time to time, so long as the appellants, their heirs and assigns, choose to insist upon the respondents doing so. The original lease is open to no such construction; but if it be a matter of doubt whether it be or not open to such construction, *Harnett* v. *Yielding* (2), which is as sound law now as it was when judgment therein was delivered by Lord Redesdale, is an authority to the effect that a court of equity will not enforce specific performance of agreements, when from the circumstances it is doubtful whether the party meant to contract to the extent that he is sought to be charged. In the present case there is, in my opinion, no foundation whatever for the contention that the respondents ever entered into any such agreement, either in the original lease or in that of the 1st October, 1877, which is the one to which alone since its execution there is any occasion to refer. In view of the actual facts of the case, the authorities cited and relied upon by the learned counsel for the appellants have in reality no application whatever.

In *Kimball* v. *Cross* (3), there was a lease executed for a term of one year for a rent named, "with the privilege of continuing for five years" at an increased rent, also named. The tenant after the expiration of the first year continued in possession and paid rent for the first six months of the second year at the increased rate, and it was held that thereby the tenant had entered upon the

(2) 2 Sch. & L. 549.

(3) 136 Mass. 300.

second term mentioned in the lease, and that the terms of the lease were apt to create a present demise for the five years at the option of the tenant.

Kramer v. *Cook* (4), is to the same effect, and is cited in *Kimball* v. *Cross* in support of the judgment in that case. In *Despard* v. *Wallbridge* (5), a tenant whose tenancy was about to expire was served with a written notice by his landlord, that if he (the tenant) should hold over after the expiration of the term, the landlord would consider the premises as taken by the tenant for another year at an increased rent of $1,500 per annum. The tenant did hold over, and at the expiration of six months of the second year's occupation was sued by the landlord for use and occupation at the stipulated rent of $1,500 per annum, and it was held that the continuing in occupation by the tenant after the receipt by him of the above notice was evidence to go to a jury of an implied promise to pay the increased rent of $1,500 per annum.

McDonell v. *Boulton* (6) is an authority simply to the effect that the tenant by the terms of an expired lease was entitled, if he desired it, to continue in possession for a further fixed term at a stipulated rent, and that as he continued in possession after the expiration of the first term and claimed the benefit of the further term, he could not be ejected by the landlord.

Nudell v. *Williams* (7) is an authority to the like effect, namely, that where a tenant remains in possession of demised premises, after the expiration of a term granted by an expired lease, claiming the benefit of a covenant therein by the landlord to pay for improvements, or in default that the tenant shall continue in possession for a fixed term at a stipulated rent, the landlord cannot treat the tenant as a trespasser, and eject him during the period within which, as stipulated in the lease, the value of the improvements should be ascertained by arbitration.

These two cases proceeded upon the fact that the tenants expressly claimed the right to hold possession

(4) 7 Gray, 550.
(5) 15 N. Y. 374.
(6) 17 U. C. Q. B. 14.
(7) 15 U. C. C. P. 348.

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under the terms of the expired lease, and to have an extended term unless paid for improvements as provided in the lease, and that therefore the landlords could not treat them as trespassers; for in *Dawson* v. *St. Clair*(8), the Court of Queen's Bench for Upper Canada, the same Court as decided *McDonell* v. *Boulton*, had already held that where a defendant who had been in possession of premises demised to him for five years by a lease which contained a covenant of the lessor to grant a renewal for another five years, to commence at the expiration of the first term at a named rent, held possession after the expiration of the first term without asking for a renewal lease and without saying anything in assertion of a claim for such a lease under the lessor's covenant, he could be treated by his landlord as a trespasser, and could be and was ejected without any notice to quit or demand of possession.

Walsh v. *Lonsdale* (9) is simply an authority to the effect that since the Judicature Act a person in possession of premises, claiming under a written agreement for a lease, is now subject to the same remedies at law, and therefore to distress for non-payment of rent in pursuance of the terms of the written agreement equally as before the Judicature Act he would have been subject if the lease had been executed. In *Irvin* v. *Simonds* (10), the action was instituted by the assignee of the lessee to compel the lessor's devisee specifically to perform a covenant which the lessor had entered into in the lease, similar to the lessor's covenant in the present case for a renewal of the lease for an extended term. The assignee of the lease was clearly entitled to the fulfilment of the lessor's covenant, either by payment for improvements or the grant of a renewal lease, and at the expiration of the term granted by the expired lease he claimed the benefit of the lessor's covenant and continued in possession, paying rent and claiming such benefit. The lessor having died, devising the property to the defendant, negotiations were entered into by the plaintiff with the defendant for the renewal lease, and

(8) 14 U. C. Q. B. 97. (9) 21 Ch. D. 9. (10) 6 All. (190.)

one was actually prepared for execution by the defendant, who, however, afterwards refused to execute it and executed a lease of the premises to a third person; thereupon the plaintiff filed his bill for specific performance of the lessor's covenant to renew and for cancellation of the lease executed to the third person; the defendant contended, among other things, that the covenant could be satisfied by payment for improvements, but the Court held that the lessor in his lifetime and his devisee since his death having received rent from the plaintiff, the latter was entitled to specific performance of the lessor's covenant to renew, and decreed accordingly. That case can be no authority for the appellants in the present case, who insist upon forcing a lease upon the respondents, who have made no claim therefor, and who have never entered into any agreement with the appellants to accept the lease sought to be forced upon them, or which can be made the foundation of a decree for specific performance.

I am of the opinion, therefore, that the appeal should be dismissed with costs.

PATTERSON, J. :—

I have not been able to see sufficient reason for dissenting from the judgment of the Court below. The questions have been carefully discussed in able judgments delivered in that Court. I agree with the views on which those judgments proceed, and for the most part with those expressed in that just delivered by my brother *Gwynne*.

The covenant in the original lease of 1855 is so framed as to leave room for difference of opinion upon its proper construction. For my own part I incline to the view that the intention was that the buildings to be valued at the end of any term should be those only which were erected during that term. The words are "within and during the said term," words which were probably unnecessary as far as the first term was concerned, because no other buildings could possibly be the subject of valuation at the end of that term; but in a renewal lease made with "like covenants" the words "within and during the said term" would refer to the new term.

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The parties may well have considered that the payments for the buildings erected during any term, which could not be more and might be less than £500, would be sufficiently compensated by a further term of fourteen years, at the original rent of £100 a year, plus the right to be paid the value of buildings put on the place during the new term. It is only on this understanding of the covenant that any provision is found for payment for buildings erected after the first term. I do not regard the repairs during the second term of the building erected during the first term as equivalent to the erection of a building during the second term, but the repairs might come within the term "improvements," if the tenants were not bound to repair damage by fire, and they were not so bound as far as appears. I do not know that these questions were mooted in the Court below, and I believe they were not raised in the argument here. They do not properly arise, because the rights of the parties depend on the second lease, which was executed in 1877, demising the premises for a term of fourteen years from the 1st of May, 1869. That demise is stated in the instrument itself, as set out in the pleadings, to have been "under the like covenants, conditions and agreements" as are expressed and contained in the said recited indenture of lease, that is to say, in the original lease of 1855. Now, if this second lease had contained an independent covenant such as, in my understanding of the original document, would have been proper, in place of thus, by reference, importing the original covenant itself, it would have provided for valuation of the buildings and improvements erected and made during the second term only. But the covenant imported from the original lease relates to the buildings erected during the first term, and that is, therefore, the building that was to be valued, and which the lessor had the option to pay for, or to grant a new term at the end of the second term, which was the 1st of May, 1883. The question is thus that which was debated in the Court below and before us, namely, the right of the lessor, who took no steps to have the building appraised, the tenants being similarly remiss in that particular, to insist against the tenants who

held over and paid one-half year's rent up to the 1st of November, 1883, which rent was accepted by the lessor, that the tenants were in for another term of fourteen years, notwithstanding that he made them no new lease, and notwithstanding that nothing passed between them on the subject of payment for the building or renewal of the term.

The facts of the tenants retaining possession from the 1st of November, 1883, to the 1st of May, 1884, and then paying another half-year's rent cannot under the circumstances have any significance. When the payment was made the parties were at arm's length.

The terms under which a tenant holds over are to be decided as a question of fact rather than of law: *Oakley* v. *Monck* (11). This is so, whether the contest is respecting a common law, a tenancy from year to year or the assertion of some agreement enforceable in equity: *Walsh* v. *Lonsdale* (12).

The fact here asserted by the appellants and denied by the respondents is that the respondents held over under an agreement that the appellants should grant and that the respondents should accept a lease for a renewed term of fourteen years on the terms of the original lease. This asserted agreement is based entirely on implication. The appellants did not have the building valued and did not intimate to the respondents that they waived such valuation, because they elected to renew rather than pay; and they do not now show as a fact that they had so decided. They say that it should be inferred from them allowing the respondents to hold over and from them, six months afterwards, accepting rent at the former rate.

The respondents took no steps to have the building valued. They were not bound to accept a renewal lease even if offered to them. At least, so I think, though it is possible to argue that, under the mutual covenant, the further relation between the parties was to depend on the option given to the lessor, who might compel the tenants to hold the premises for all time at £100 a year.

The appellants' case requires it to be held that the

(11) 3 H. & C. 706; L. R. 1 Ex. 159.

(12) 21 Ch. D. 9.

1890.

SEARS v. THE MAYOR, ETC., OF THE CITY OF ST. JOHN.

Patterson, J.

respondents should have inferred, and did in fact infer, from the inaction of the appellants, that the respondents had decided not to pay for the building, but to grant a new term. The considerations most strongly relied on to lead to the conclusion are that the respondents held over and paid rent.

The argument is that they must have held under the asserted agreement or else as wrongdoers, and that they cannot be allowed to take the latter alternative. I am very far from being convinced by this argument. I do not recognize the necessity for admitting the premises, nor do I see that the conclusion necessarily follows. I shall not enter upon a discussion, which would not advance the enquiry, as to whether the respondents were in after the end of their term as tenants at will, or on sufferance, or even as wrongdoers, though the charge of holding tortiously does not seem more applicable here than in any one of the numberless cases in which, after the termination of a tenancy from year to year, has been held to have been created by holding over and paying rent. The mere fact of holding over, followed by the payment of rent, does not, in my judgment, imply more in this case than in the ordinary class of cases. The weak point of the appellants' argument is the absence of any agreement to which the holding over can be referred. If they had decided, and so informed the respondents, that they would renew the term rather than pay anything, there might be force in the contention that the holding over was the acceptance of the offered terms. The case would have been within the class of which *Roberts* v. *Hayward* (13) is an example. But the appellants asked us to go further in their favour than they are entitled to ask. An offer to renew, at the original rent, has to be implied before the acceptance comes in question, and it is going a long way to ask the Court to make the double implication.

I am of opinion that, independently of the questions raised, touching the application of the Statute of Frauds, the Court below properly held against the alleged agreement, and that we should dismiss the appeal.

(13) 3 C. & P. 432.

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Held, that no power was vested in the directors to pass the by-law in question, and that it therefore was *ultra vires*; but that the injunction should be dissolved on the ground:

(1) That the plaintiff could not maintain a bill in his own name alone respecting an injury common to all the shareholders;

(2) That the bill was multifarious by the joinder of grounds of complaint against the Maritime Bank and the Bank of Montreal and B. that were independent and distinct.

Though the objection of multifariousness in a bill has not been taken by demurrer, the objection may be taken by the Court.

Where a company was restrained by *ex parte* injunction from holding its annual meeting on the date fixed therefor, it is no ground for refusing a motion to dissolve the injunction that the purpose for which it was granted has been served. BUSBY v. THE BANK OF MONTREAL ET AL 62

2.——*Bank Stock—Mortgage—Double liability—Indemnity of mortgagee—Construction of Trust Deed—Preference—Unenforceable Claim.*] The plaintiff deposited with the defendants, a banking firm, a sum of money at interest, and received as security 275 shares owned by the defendants in the M. bank, which were transferred into the plaintiff's name. The plaintiff gave to the defendants an acknowledgment, stating that he held the shares in trust and as collateral security for the due payment of moneys deposited with the defendants, on the payment of which he would re-transfer the shares to them. On a redistribution by the bank of the shares, they were reduced to 99. The dividends on the shares were always paid by the bank to the defendants, who treated the shares as their own in their office books. The bank went into liquidation, and the plaintiff was obliged to pay $9,900 double liability on the shares. The defendants made an assignment for the benefit of their creditors, and the deed of trust contained the following clause: "In the next place in full, or so far as the proceeds of the said joint property will extend, to pay all persons, by and in whose

name the stock of the bank belonging to the said M. and B. (the defendants), whether in the name of M. & Co. (the defendants), or the said M. or B., or any other person or persons, firm or corporation, before transferred to such persons, is or has been held as security for money loaned by any person or persons to the said M. and B., all claims they may have against the said M. and B. by reason of any double liability they may incur, or moneys they shall be obliged to pay for double liability on such shares under section 20 of chapter 120 of the Revised Statutes, or other statute or statutes of the Dominion of Canada, on account of the said shares, standing in the name of the said persons, or having so stood."

Held, (1) that the plaintiff and defendants stood in the relation of mortgagee and mortgagor in respect of the shares, and not of trustee and *cestui que trust*, and that the defendants were not liable under such relation to indemnify the plaintiff.

(2) That the plaintiff was a beneficiary under the trust deed, in respect of the amount he had paid as double liability, and that his right to be such was not intended to depend upon his having an enforceable right to be indemnified. MARSTERS *v.* MACLELLAN ET AL..... 372

3.——*Shares—Legacy—Sale by executor—Transfer—Notice of Trust—The Bank Act, c. 120, R. S. Can.*] Under "The Bank Act," chapter 120, R. S. Can., a bank cannot refuse to register a transfer to a purchaser by an executor of shares in the bank standing in the name of a testator, though by the testator's will the shares are specifically bequeathed. BOYD *v.* THE BANK OF NEW BRUNSWICK 546

BANKRUPT—*Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)—Person residing and domiciled in Canada member of English firm—Title of trustee under Act to real estate situate in Canada and personalty of such a person—Jurisdiction of English Bankruptcy Court.*] In 1873, Gilbert, James, Gorham, and Walter Steeves carried on business as partners under the firm name of Steeves Bros. at St. John, New Brunswick. Each of them was born and had always resided in New Brunswick. In or about 1874 Gilbert Steeves removed to Liverpool, G. B., and commenced a shipping business under the name of Steeves Bros. & Co., the firm being composed of the same members as the St. John house. Prior to 1882 Walter retired from both firms. Gorham and James never resided in England, or ceased to retain their New Brunswick domicile. In 1882 the firm in Liverpool became insolvent, and Gorham and James cabled from St. John to Gilbert to file a bankruptcy petition of the firm under the English Bankruptcy Act, 1869. The petition was filed July 4th, 1882, and the partners were adjudged bankrupts, and the plaintiff was appointed trustee. On June 27th, 1882, James and Gorham executed at St. John an assignment of all their property, both real and personal, in New Brunswick to the defendant for the benefit of their New Brunswick creditors. This assignment not being recorded, a new assignment was executed and recorded on July 15th. On August 15th the plaintiff recorded in the registry office at St. John a certificate of his appointment. In a suit by the plaintiff for a declaration of his title to the real and personal property in New Brunswick of James and Gorham Steeves:

Held, (1) that the English Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) does not apply to Canada so as to vest in a trustee appointed by the English Bankruptcy Court either the real estate situate in Canada or the personal property of a person residing and domiciled in Canada, though he is a member of an English firm which has traded and contracted debts in England, and has authorized that he be joined in a bankruptcy petition to the Court with the other members of the firm.

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Held, (1) That the suit was properly brought in the name of the plaintiffs and should not be by information in the name of the Attorney-General on their relation. (2) That the building was in violation of the Act and an injunction should be granted. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF ST. JOHN v. GANONG ET AL..... 17

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CHURCH—*Church of England—Grant—Corporation—Construction.*] In 1810 the Crown granted to the rector, churchwardens and vestry of Christ Church, in the parish of Fredericton, and their successors, a lot of land "for the use and benefit of the said church forever, and to and for none other use, interest or purpose whatever." The church was organized on the formation of the Province of New Brunswick under authority from the parent Church of England, in England, to certain persons in New Brunswick to establish churches in New Brunswick in connection with and to be a part of the Church of England in England, and under its ecclesiastical authority.

Held, that the grant was to Christ Church as it existed at the time of the grant, and while it remained in connection with the Church of England and adhered to its faith, creed, doctrines, forms of worship and discipline as then established. BLISS *v.* THE RECTOR, CHURCHWARDENS AND VESTRY OF CHRIST CHURCH, IN THE PARISH OF FREDERICTON..... 314

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Held, that upon evidence of the applicant's allegations the application should be granted. WELDON ET AL. *v.* WILLIAM PARKS & SON(LTD.) ET AL. (No. 1).... 418

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Act of incorporation — Construction — Compliance with requirements of Act—Suit in corporate name—Failure to prove incorporation.] By Act 22 Vict. c. 6, entitled, *An Act for incorporating the Synod of the Church known as the Presbyterian Church of New Brunswick and the several congregations connected therewith*, it is recited that the Presbyterian Church of New Brunswick, constituted of several congregations of Christians holding the Westminster Confession of Faith, is under the ecclesiastical control of a governing body composed of ministers and elders of the church, and known as the Synod of the Presbyterian Church of New Brunswick, and that the said church desire an Act of Incorporation to enable the said Synod to hold and manage lands and property for ecclesiastical purposes, and also to enable the respective congregations in connection with the said church to hold land for grave yards, the erection of churches, and other congregational purposes. Section 1 enacts the incorporation of the Synod, and s. 2 enacts that the first meeting of the Synod shall be held at a certain date, when it shall be deemed organized as a corporation. Section 3 enacts that the trustees of the several and respective congregations so in connection with the said Synod, and their successors, shall be for ever a body politic and corporate in deed and name, and shall have succession for ever, by the name of the said several respective churches; and by that name shall be entitled to sue and be sued, implead and be impleaded, answer and be answered unto, in all courts, and shall have full power and capacity to purchase, receive, take, hold and enjoy goods and chattels, lands, tenements and hereditaments, and improve, sell, assign, and dispose thereof, and to have a common seal,

with power to break, alter or renew the same at pleasure. By s. 4 it is directed that on the first Wednesday in July in each year a meeting of the congregation shall be held in each of the churches for the purpose of electing trustees. Section 5 enacts that when any congregation in connection with the Synod shall elect trustees under the provisions of the Act, the trustees as a corporation shall be known and recognized by the name of the trustees of such named church owned by said congregation, and that the name by which the church is known, and by which the corporation is recognized, shall be enrolled in a book in which the proceedings of the congregation and of the trustees shall be recorded; and that the trustees of the respective churches, when so named and enrolled, shall, when elected, chosen and appointed in manner and form as in the Act directed, be bodies politic and corporate in deed and name, and shall have succession for ever, by the name of the trustees of the so named church by which they are respectively elected. The Synod held a meeting in pursuance of s. 2, at which and subsequent meetings the minister and elder of Calvin church, in the City of St. John, were present, but no meeting of the congregation of Calvin church under ss. 4 and 5, and complying with their provisions, was held. In a suit by the trustees of Calvin church they alleged their incorporation under the above Act,

Held, that s. 3 was to be read with ss. 4 and 5, and that the plaintiffs were not incorporated in the absence of compliance with the requirements of ss. 4 and 5, and that the suit should be dismissed. TRUSTEES OF CALVIN CHURCH v. LOGAN ... 221

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COSTS——1, *Costs of order to setaside order to set cause down for hearing—Attendance on Clerk—Brief—Abbreviating affidavits—Chapter 119, C.S. N. B.*] An order nisi to set aside with costs an order setting a cause down for hearing was made absolute. The order absolute was drawn up by the clerk at the instance of defendant's solicitor with an appointment to settle the minutes. At the taxation of the defendant's costs the clerk allowed $1.34 for attendance on taking out the order nisi and $1.34 for attendance on the order absolute. By the table of fees (c. 119, C. S.), solicitor attending clerk on every decretal order is allowed $1.34, and for all other services not provided for in the table the like fees as are allowed to attorneys on the common law side of the Supreme Court. On the common law side a fee of twenty cents is allowed for every attendance on the clerk.

Held, that the order absolute was neither a decree nor a decretal order, but a special order, and that each attendance should be taxed at twenty cents.

The clerk on the taxation of the above costs allowed five dollars for brief, this being the fee allowed in the table of fees to attorneys on the common law side of the Supreme Court (c. 119, C. S. N. B.), and a service for which no provision being made under the table of fees of the equity side of the Court, the same fees are to be allowed as on the common law side. The table of fees of the equity side provides a fee of twenty cents per folio for drawing bill, answer, plea, demurrer, or other writing, not otherwise provided for, and ten cents per folio for copy.

Held, that brief should be taxed per folio as a writing not otherwise provided for.

Costs allowed of abbreviating affidavits used on the application for the above order, and of making copies of abbreviations. CHASE v. BRIGGS (No. 2).. ... 89

2. Execution — The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 114.] Where no time is limited by a decree in a suit for payment of costs, a further order for their payment must be taken out, after which an order for execution will be made *ex parte*. WRIGHT v. WRIGHT 496

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DEBTOR AND CREDITOR—*Deed of Assignment — General release — Release of collateral securities — Mistake—Ignorantia legis neminem excusat—Creditor signing as trustee.*] M. executed and delivered to the defendant a leasehold mortgage, and a bill of sale of personal property to secure the payment of $500 and $1,500 respectively. Subsequently M. executed and delivered to the defendant, as party of the second part, a deed of assignment for the benefit of her creditors, being parties of the third part. A condition in the deed stipulated that the parties of the second and third parts, in consideration of the sum of one dollar to each of them paid "did severally remise, release and discharge the party of the first part of, from and against all debts, dues, claims and demands, actions, suits, damages and causes and rights of action which they then had or might thereafter have against the party of the first part, for or by reason of any other matter or thing from the beginning of the world up to that date." The defendant and other creditors executed the deed. The assignor was indebted to the defendant in no other amount than that secured by the mortgage and bill of sale. In a suit by the plaintiff, a creditor of M., to have the defendant enter a discharge and satisfaction upon the records of the mortgage, and to discharge the bill of sale, and to have the same declared null and void.

Held, that the defendant had released the mortgage and bill of sale, and that it was immaterial that he had no intention of releasing them, or that he was ignorant of the legal effect of his act. MAY v. SIEVEWRIGHT..... 499
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DISCOVERY — *Practice — Discovery — Production—Sealing up irrelevant matter—Foreign corporation—Books abroad—Production after refusal to give information by answer—Exceptions.*] The plaintiff is only entitled to discovery as to all material matters relevant to his own case as made out by the bill, and not to the defendant's case.

Where defendant's books contain parts not relevant to the plaintiff's case, and to the inspection of which the defendant objects, the defendant on the hearing of a summons for discovery should state the existence of such parts, that the order may be qualified by giving him liberty to seal up such parts. If defendant does not take this course, the liberty will be granted to him on application by summons taken out for the purpose.

Production will be ordered against a defendant foreign corporation; and it is no answer that its books are abroad.

Application may be made for production, though the information has been refused in answer to interrogatories, and it cannot be objected that the answer should have been excepted to. ROBERTSON v. THE ST. JOHN CITY RAILWAY AND JOHN B. ZEBLEY. (No. I.)..... 462
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DOWER — *Petition—Barred by lapse of time—Statute of Limitations—Chap. 84 C. S. N. B., s. 3.*] The husband of the petitioner gave a mortgage of a piece of land in which the petitioner did not join. The husband died in 1859, owning the equity of redemption, and the petitioner remained in possession of the mortgaged premises from then until 1870. In 1891 she brought the present petition for the admeasurement of her dower in the land.

Held, that twenty years having elapsed since her husband's death, the petitioner's right to bring an action at law by writ of dower was extinguished by section 3 of chapter 84, C. S., and that by analogy the present petition was barred in equity. *In re* MARGARET MCAFEE..... 438
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EXCEPTIONS—*Practice—Answer — Setting up fraud—Exceptions—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 72—Costs of exceptions.*] Where a suit is brought to enforce an agreement, an answer setting up that the agreement was made fraudulently cannot be excepted to on the ground that the defence of fraud can only be put forward in a cross bill to set the agreement aside. The remedy of the plaintiff is by application to the Court under section 72 of Act 53 Vict. c. 4, or to object at the hearing to evidence of fraud being given.

Where exceptions are allowed in part, neither party is entitled to costs.

Where some exceptions are wholly allowed, and others disallowed, the costs are set-off and the balance only is payable. Where the costs would be nearly equal no costs are given, or they are made costs in the cause. BARCLAY v. MCAVITY 468
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FRAUDS, STATUTE OF —1. *Pleading—Raising defence at hearing—Specific performance—Agreement—Conflicting evidence—Part performance—Possession — Repairs—Lien—Costs where specific performance refused, but other relief granted.*] In a suit for specific performance of an agreement for sale and purchase of a leasehold interest in land, it is not necessary that the defendant plead the Statute of Frauds in an answer denying the agreement in order to set up the defence at the hearing.

Where in a suit for specific performance of an alleged agreement to assign a leasehold interest in land with building thereon, in consideration of an indebtedness to the plaintiff by the defendant for repairs to the building, it appeared that the plaintiff went into possession, collected the rents, and made repairs, but that these acts were consistent with the evidence of the defendant that the plaintiff was given the management of the property for the purpose of paying defendant's indebtedness to him, the Court refused to grant specific performance, but decreed that the plaintiff was entitled to a lien on the property for the amount of the debt and any money properly expended in respect of the property.

Under the above circumstances neither party was allowed costs of suit. JOHNSON *v.* SCRIBNER ET AL..... 363

2. *Married woman—Mortgage of separate real estate—Parol agreement to assign mortgage in consideration of its payment—Specific performance—Statute of Frauds—Lien.*] A married woman procured the plaintiff to make payments from time to time on account of the principal and interest of a mortgage on freehold property, forming part of her separate estate, by verbally undertaking to have an assignment made of the mortgage, or to convey the mortgaged premises to the plaintiff.

Held, that the agreement not being in writing could not be specifically enforced, but that it was binding on the separate estate of the married woman, including the realty, and that the plaintiff should be paid out of the same, with interest. BULLEY *v.* BULLEY..... 450

——Administrator — Payment of debt barred by 264
——Pleading—Demurrer.....363, 371

FRAUDULENT CONVEYANCE—*Setting aside—Parties—Suit by assignee—Insolvency Act, 1875 (38 Vict. c. 16).*] An insolvent and wife should not be joined in a suit brought by the insolvent's assignee under the Insolvency Act, 1875 (38 Vict. c. 16), to set aside a conveyance executed by the insolvent and wife prior to his insolvency, with intent to defraud his creditors. DRISCOLL *v.* FISHER..... 89

GARNISHEE —*Fire insurance—Assignment—Priority—Remedy in Equity—Staying proceedings under Garnishee Act.*] The loss payable under a policy of fire insurance was assigned by the assured to the plaintiff with the consent of the insurers. A loss occurring, the defendant, a judgment creditor of the assured, obtained an attaching order under Act 45 Vict. c. 17, against the insurers. In a suit by the plaintiff for a declaration of his title to the insurance, and to restrain the garnishee proceedings, he alleged that the defendant intended setting up the claim that the assignment to the plaintiff was fraudulent, and that the plaintiff had merely an equitable title, which could not be used to defeat the defendant's rights under the garnishee process. The plaintiff also alleged that his assignor was insolvent, though he did not allege that the assignor had refused to allow an action at law on the policy in his name.

Held, that the plaintiff was entitled to have his rights determined in equity, instead of under the garnishee proceedings, and that an injunction should be granted.

An assignee of a policy of fire insurance is entitled to sue thereon in equity where the assignor is insolvent, without a refusal by him to allow an action at law in his name. ROBERTSON v. THE BANK OF MONTREAL ET AL..... 541

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HIGHWAY—*Government Railways Act, 44 Vict. c. 25 (D.), s. 5, ss. 7 and 8, and s. 49—Construction—Public Nuisance—Injunction.*] The Court of Equity has jurisdiction to interfere by injunction in cases of nuisance to the public.

Circumstances considered under which the Court of Equity will interfere by injunction to restrain a nuisance to the public.

By section 5, sub-section 7 of the Government Railways Act, 44 Vict. c. 25 (D.), the Minister of Railways has full power and authority . . . "to make or construct in, upon, across, under or over any land, streets, hills, valleys, roads, railways or tramroads, canals, rivers, brooks, streams, lakes or other waters, such temporary or permanent inclined planes, embankments, cuttings, aqueducts, bridges, roads, sidings, ways, passages, conduits, drains, piers, arches or other works as he may think proper." And by sub-section 8 "To alter the course of any river, canal, brook, stream or water-course, and to divert or alter as well temporarily as permanently the course of any such rivers, streams of water, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the side of, the railway, as he may think proper; but before discontinuing or altering any public road he shall substitute another convenient road in lieu thereof; and the land theretofore used for any road, or part of a road, so discontinued, may be transferred by the Minister to, and shall thereafter become the property of the owner of the land of which it originally formed a part."

Section 49 of the Act provides that "The railway shall not be carried along an existing highway, but merely cross the same in the line of the railway, unless leave has been obtained from the proper municipal or local authority therefor; and no obstruction of such highway with the works shall be made without turning the highway so as to leave an open and good passage for carriages, and on the completion of the works, replacing the highway; but in either case, the rail itself, provided it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction: Provided always, that this section shall not limit or interfere with the powers of the Minister to divert or alter any road, street or way, where another convenient road is substituted in lieu thereof, as provided in the eighth sub-section of section five."

Held, that by section 5, sub-sections 7 and 8, power is given to construct a railroad on, along, and over a highway to the extent of occupying the whole of it, and not merely alongside of it, and that section 49 does not limit this power. ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK *v.* THE HONOURABLE JOHN HENRY POPE, ACTING MINISTER OF RAILWAYS AND CANALS, THE MINISTER OF JUSTICE FOR CANADA, AND JABEZ B. SNOWBALL 272

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INFANT—Costs in partition suit.... 483
——*Foreign domicile — Appointment of guardian—Jurisdiction—Life insurance—Trust—Action on policy—Person to sue.*] Life insurance in The Home Circle, a United States corporation, taken out by L., whose domicile was in Nova Scotia, was payable to E. in trust for L.'s infant daughter by his deceased wife. Upon L.'s death E. was appointed guardian in Nova Scotia of the person and estate of the infant. The infant, after her father's death, removed to New Brunswick for a temporary purpose, and B., her maternal grandfather, having been appointed guardian of her person and estate in this Province, brought this suit to restrain The Home Circle from paying the insurance to E., or to any other person than B., and to restrain E. from receiving it, and obtained an interim injunction.

Held, that the insurance was payable to the legal personal representative of the deceased, and that the injunction should be dissolved.

Semble, though the Court of this Province has jurisdiction to appoint a guardian of an infant residing here, but domiciled elsewhere, it will not supersede the

Guardian appointed by the Court of the infant's domicile unless necessary in the infant's interest. GERTRUDE LOASBY, *an Infant*, BY HER GUARDIAN OLIVER BARBERIE *v.* THE HOME CIRCLE, JAMES WALKER AND REVEREND PETER EGAN..... 533

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INJUNCTION—1. *Form—C. 49, Form E., C. S. N. B.*] An *ex parte* injunction order absolute in its terms, by omitting to state that it was to continue until further order, as provided in form E of chapter 49, C. S., was ordered to be varied in this respect with costs of application. BERTON *v.* THE MAYOR, ETC., OF THE CITY OF ST. JOHN. 150

2. *Injury to reversion—Devise to Executors—Title of suit—Parties—Joinder of reversioner and tenant.*] *Quære*, as to whether executors who are seised in fee under a devise of land and building to them in trust can bring a suit in their character as executors to restrain an injury to the reversion, or whether the suit should not be brought in their character as devisees and legal owners of the property.

Quære, as to whether a tenant and landlord can be joined in a suit to restrain an act amounting to a nuisance to the tenant and causing injury to the reversioner. HUMPHREY ET AL. *v.* BANFIL 243

3. *Interim injunction—Jury—Finding of fact upon application—Res judicata—Hearing—53 Vict. c. 4, s. 83.*] Where on an application for an interim injunction to restrain a nuisance a jury finds upon the facts, under Act 53 Vict. c. 4, s. 83, the question upon them is *res judicata* for all the purposes of the suit, and cannot be retried at the hearing. MCINTOSH *v.* CARRITTE..... 406

4. *Restraining application to Parliament for Private Act—Jurisdiction.*] Circumstances considered under which a Court of Equity will interfere by injunction in the exercise of its jurisdiction *in personam* to restrain an application to Parliament for a private Act. THE CORPORATION OF THE BROTHERS OF THE CHRISTIAN SCHOOLS *v.* THE ATTORNEY-GENERAL OF NEW BRUNSWICK AND THE RIGHT REVEREND JOHN SWEENY, ROMAN CATHOLIC BISHOP OF ST. JOHN..... 103

5. *Interlocutory injunction—Suppression of facts—Application to dissolve.*] It is the duty of a party applying for an *ex parte* injunction to state all the material facts within his knowledge, and other facts cannot be brought forward to sustain the injunction on an application to dissolve it. DOMVILLE *v.* CRAWFORD ET AL..... 122

6. *Splitting cause of action—Vexatious arrest—Abuse of process.*] The defendant was the holder of forty-eight promissory notes indorsed by the plaintiff, and had obtained judgment in the City Court of Moncton on thirteen of them in separate actions brought when all the notes were due. Some of the notes were of such an amount that two of them could have been included in one action. The plaintiff was arrested twice on executions on two of the judgments and was discharged on disclosure. Immediately after his second discharge he was arrested on a third judgment, and was discharged by habeas corpus. In a suit for an injunction to restrain the defendant from using the process of the City Court of Moncton for malicious or vexatious purposes.

Semble, that the injunction should go if it appeared that the defendant intended to further arrest the plaintiff for the malicious purpose of harassing and punishing him, and endangering his health, and not for the purpose of obtaining payment of the debt. BABANG *v.* THE BANK OF MONTREAL.. 524

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See INJUNCTION.

INTERROGATORIES—*1. Practice—Insufficiency of answer—Exceptions.*] Where a defendant has answered, though he might have demurred or pleaded, he cannot excuse himself from answering fully on the ground that the bill does not disclose a case against him upon the matters interrogated upon. GILBERT *v.* UNION MUTUAL LIFE INSURANCE COMPANY 266

2. Practice—Sufficiency of answer—Exceptions.] Where an interrogatory contains a number of questions, each distinct and complete in itself, some of which are fully answered, an exception for insufficiency must not be to the whole answer, but must point out in what particular the interrogatory is not sufficiently answered. BURPEE ET AL. *v.* THE AMERICAN BOBBIN SPOOL AND SHUTTLE COMPANY ET AL 484
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LANDLORD AND TENANT—*Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term—Effect of—Specific performance.*] A lease for a term of years provided that, when the term expired, any buildings or improvements erected by the lessees should be valued and it should be optional with the lessors either to pay for the same or to continue the lease for a further term of like duration. After the term expired the lessees remained in possession for some years when a new indenture was executed which recited the provisions of the original lease and, after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby, at the same rent and under the like covenants, conditions and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender and after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option.

Held, affirming the judgment of the Supreme Court of New Brunswick (28 N. B. 1), Ritchie, C.J., and Taschereau, J., dissenting, that the lessors were not entitled to a decree for specific performance.

Held, per Gwynne, J., that the provision in the second indenture granting a renewal under the like covenants, conditions and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant.

Per Gwynne, J. Assuming that the renewal clause was incorporated in the second indenture the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could the clause would operate to make the lease perpetual at the will of the lessors.

Per Gwynne and Patterson, JJ. The option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument containing such clause; and if the second indenture was subject to renewal the clause had no effect, as there were no buildings erected during the second term.

Per Gwynne, J. The renewal clause was inoperative under the Statute of Frauds which makes leases for three years and upwards not in writing, to have the effect of estates at will only, and consequently there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors.

Per Ritchie, C.J., and Taschereau, J. The occupation by the lessees after the terms expired must be held to have been under the lease and to signify an intention on the part of the lessees to accept a renewal for a further term as the lease provided. SEARS v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF SAINT JOHN..... 555

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LIMITATIONS, STATUTE OF—*Mortgage—Principal and surety—Chap. 84, C. S. N. B., ss. 29 and 30—Payment of interest by co-obligor of bond.*] On September 27th, 1850, H. and W. gave their joint and several bond to C. to secure the payment of £1,000 on September 27th, 1855, with interest thereon quarterly in the meantime. As between H. and W. the latter was surety, though they were both principal debtors by the bond. On the same day H. and W. executed to C. separate mortgages on separate pieces of property owned by each to secure the payment on September 27th, 1855, of the amount of the bond, neither party executing or being a party to the mortgage of the other. The mortgage from W. was upon the condition that if he and H., or either of them, their or either of their heirs, etc., paid to C. £1,000 and interest, according to the condition of the bond by H. and W., it should be void. The mortgage given by H. contained a similar provision. The interest on the debt was paid regularly by H. up to the 27th March, 1879, after which his payments ceased. W. and his successors in title were never out of possession of the land mortgaged by him from the date of the mortgage, and never made any payment or gave any acknowledgment. On January 20th, 1881, C.'s representatives commenced this suit for foreclosure and sale of both mortgaged premises.

Held, that the mortgage given by W. was extinguished under the Statute of Limitations, c. 84, C. S. N. B., ss. 29 and 30. LEWIN v. WILSON ET AL..... 107

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LUNATIC—*Sale of land — Committee—Sections 137 and 138, c. 49, C. S. N. B.*] Land belonging to a lunatic cannot be sold by her committee under sections 137 and 138, c. 49, C. S., except by public auction. IN RE HARRIET LIGHT, *a Lunatic*..... 392

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MARRIED WOMAN — 1. *Contracting with reference to separate estate—Chapter 72, C. S. N. B.*] Where it is sought to

charge the separate property of a married woman with a debt contracted by her, it must be shown under chapter 72, C. S. N. B., that she expressly contracted with respect to her separate property.

Where it is sought to charge the personal property of a married woman, her consent thereto must be given under chapter 72, C. S. N. B., and a joint and several note signed by her and her husband in payment of the husband's debt, is not such a consent as is required by the Act.

Observations that property belonging to a married woman is made her separate property by chapter 72, C. S. N. B. GASKIN *v.* PECK ET AL 40

2. *Married woman—Suit relating to separate estate—Parties—Next friend—Joinder of husband as co-plaintiff — Demurrer.*] Where a husband is made a plaintiff with his wife in a suit relating to her separate estate, the objection that the suit should have been brought by the wife's next friend may be taken by demurrer. ALWARD ET AL. *v.* KILLAM..... 360

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MORTGAGE—1. *Assignment — Payment of mortgage debt to original mortgagee—Absence of notice of assignment—Registry Act, c. 74, C. S. N. B.*] A. gave B a mortgage on land to secure payment of A.'s bond held by B. Subsequently A. sold the equity of redemption to C., and B. assigned the bond and mortgage to the plaintiff by a registered transfer. Afterwards C. obtained an advance of money from D. by a mortgage of the equity of redemption, the money being applied by D. to paying B. the amount of the original mortgage, and B. discharged the mortgage on the records. Neither C. nor D. had notice of the assignment of the bond and mortgage to the plaintiff. In a suit by the plaintiff for the foreclosure and sale of the mortgaged premises :

Held, that payment by A. or his assigns to B. of the indebtedness owing upon the bond without notice of the assignment of the bond and mortgage to the plaintiff entitled A. or his assigns to a reconveyance of the mortgaged premises, and that the registration of the assignment of the mortgage did not affect A. or his assigns with notice. LAWTON *v.* HOWE ET AL 191

2. *Set-off — Foreclosure — Assets in the hands of mortgagee—Account—Cross-bill—Representative of estate of deceased mortgagor—C. 49, C. S. N. B. s. 47.*] An executor *de son tort* cannot foreclose a mortgage given to him by the intestate if he has in his hands sufficient assets of the deceased to pay the mortgage debt.

Where, in a suit by an executor *de son tort* for foreclosure of a mortgage to himself by the intestate, it appeared that no administrator had been appointed, and by the answer of the heirs it was alleged that the plaintiff had assets in his hands belonging to the deceased sufficient to pay the mortgage, the Court under c. 49, C. S., s. 47, appointed a barrister of the Court to represent in the suit the estate of the deceased, and ordered the heirs to file a cross-bill against the plaintiff for an account. KENNY *v.* KENNY ET AL 304

3. *Foreclosure—Married woman -Separate property—Parties—Judgment creditor—Disclaimer—Costs.*] A judgment creditor, who has registered a memorial of judgment, is a necessary party to a suit to foreclose a mortgage on land belonging to the wife of a judgment debtor.

A judgment creditor made a party to a foreclosure suit under the above circumstances, upon disclaiming, will not be liable nor entitled to costs, though continued in the suit after disclaimer. HORN ET AL. *v.* KENNEDY ET AL 311

4. *Married woman — Separate estate — Agreement for mortgage—Suit by creditor—Decree — Priority.*] A married woman owning leasehold land as her separate estate, agreed by parol with A. that in consideration of his building a house thereon she would secure him by a mortgage of the premises, and the house was accordingly built. Subsequently she became indebted to the plaintiffs, and they obtained a decree charging her separate estate with their debt. The decree was never registered. After the decree she gave a mortgage to A. in accordance with her agreement with him, and the mortgage was duly registered. In a petition by A. to have the mortgage declared a valid charge upon the property in priority to the plaintiffs' decree:

Held, that the plaintiffs' decree must be postponed to the equities existing against the property in favour of A. at the time of the decree. IN RE THE PETITION OF WILLIAM G. BATEMAN. CHUTE ET AL. *v.* AMELIA GRATTEN ET AL..... 583

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MUNICIPAL CORPORATION — *Suit against Mayor — Ratepayer — Information by Attorney-General—Ex parte injunction —Bill demurrable—Ground for dissolving injunction—C. 49, C. S. N. B. s. 24.*] The Incorporation Act of the Town of Portland, 34 Vict. c. 11, s. 9, provides that no person shall be qualified to be elected to serve in the office of chairman or councillor, or being elected shall serve in either of the said offices, so long as he shall hold the office of police magistrate or sitting magistrate of the said town, or any office or place of profit in the gift or disposal of the Council. By Act 45 Vict. c. 61, the name of the town of Portland was changed to "the City of Portland," and it was provided that instead of a chairman, annually elected by the councillors, there should be a mayor. By Act 51 Vict. c. 52, provision was made for the appointment of a commission of three persons to prepare a scheme for the union of the city of St. John and the city of Portland. The Act provided that one of the commissioners should be appointed by the council of the city of Portland, that each commissioner should be paid a specified sum for his services, besides expenses, and that the cost of the commission should be borne by both cities. The council of the city of Portland appointed the defendant C., who was then mayor of the city, its commissioner. At a meeting of the council held shortly after, presided over by C., as mayor, certain accounts were ordered to be paid, and estimates for the year were approved, and an assessment ordered therefor. The plaintiff, a ratepayer, brought this suit on behalf of himself and all other ratepayers who should come in and contribute to the expense of the suit, to restrain C. from signing orders for the payment of the accounts ordered to be paid by the council, and the defendant W., the chamberlain of the city, from paying them on orders signed by the defendant C., and for a declaration that C. was incapacitated from acting as mayor.

Held, that the suit should be by information by the Attorney-General on the relation of all or some of the ratepayers, the plaintiff not having sustained, or likely to sustain, any injury not common to all the ratepayers.

Where a bill is demurrable the objection may be taken as a ground to dissolve an *ex parte* injunction. MERRITT *v.* CHESLEY ET AL..... 324

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——Trust—Bank—Shares—Legacy — Sale by executor—Transfer..... 546
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NUISANCE—*What amounts to—Effluvia—Acquiescence.*] To constitute a private nuisance arising from offensive odours they must occasion material discomfort and annoyance for the ordinary purposes of life, according to the ordinary mode and custom of living.

The doctrine of acquiescence in relation to nuisance considered. McINTOSH v. CARRITTE 406

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PARTIES—*Practice—Assignment of cause of action after suit brought—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), ss. 96 and 97.*] After the bill was filed in a suit brought by a married woman by her next friend she died, and her executors assigned the cause of action to the next friend.

Held, that under sections 96 and 97 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), an application to continue the suit in the name of the assignee could be made ex parte, subject to the order being varied or set aside if the defendants were prejudiced in their security for costs. ROBERTSON v. APPLEBY ET AL 509

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PARTITION—1. *Partition suit—Assignment of dower—Joinder of widow.*] A suit may be brought for partition of land and assignment of dower, and the dowress should be made a party to the suit. WOOD ET AL. *v.* AKERLEY ET AL..... 305

2. *Legal title in dispute—Bill retained, with liberty to bring an action at law—Parties—Joinder of lessee—Multifariousness—Objection at hearing.*] Where, in a partition suit, the title at law of the plaintiff is *bona fide* in dispute, the Court will not decree partition, but will retain the bill with liberty to the plaintiff to bring an action to establish his title at law.

Quære, as to whether the lessee of a tenant in common should be made a party to a partition suit.

The objection that a bill is multifarious should be raised by demurrer or in the answer, and cannot be taken at the hearing, though the Court itself may take the objection with a view to the regularity of its proceedings. OGDEN *v.* ANDERSON ET AL 395

3. *Sale—Joinder of wife of tenant in common.*] *Quære*, whether the inchoate right of dower of the wife of a tenant in common is barred by a sale of the land in a

partition suit to which she is made a party. CLOSE *v.* CLOSE ET AL..... 414

4. *Refusal of amicable partition—Costs.*] Where a co-tenant refused to amicably partition a piece of land, and proceeded to strip it of its timber, the costs of a partition suit were ordered to be paid by him, and made a charge upon his share of the proceeds of the sale. CASSIDY *v.* CASSIDY ET AL..... 480

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PARTNERSHIP—*Dissolution—Account—Costs—Remuneration to negligent managing partner.*] In May, 1870, plaintiff and C. B. formed a partnership for manufacturing purposes, under a verbal agreement by which they were to contribute equally to the capital stock, and share equally in the profit and loss. No amount was agreed upon as the capital, or when each was to contribute his proportion of it, or in what manner the business was to be managed. In June following J. B. was taken into partnership, under the agreement that each partner should contribute a third of the capital stock and share equally in the profit and loss. The plaintiff managed the business until August, 1871, when C. B. took over the management, and forbade the plaintiff interfering with the business. In a suit brought in October, 1872, for a dissolution of the partnership and an account, it was found on a reference to take the account that the plaintiff had contributed $4,312.97, C. B., $10,407, and J. B., $7,294. It appeared that under the management of C. B., the business was mismanaged and neglected; that he did not keep the partnership accounts in the firm's books, or in books accessible to the plaintiff; that he repeatedly refused, from the time he assumed the management, to render an account to the plaintiff, or to have a settlement of their accounts; that he gave the plaintiff false information of the assets and liabilities of the business, and withheld information asked for, and that the plaintiff had no knowledge of the amount C. B. and J. B. had contributed to the capital of the firm.

Held, (1) that plaintiff's costs of the hearing should be paid by C. B., and that the costs of the reference should be paid out of the partnership assets after payment of the partnership debts, and if the assets proved insufficient, then by C. B.

(2) that C. B. should receive no remuneration for his services in the management of the business. YOUNG *v.* BERRYMAN ET AL..... 110

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PRACTICE—1. *Cause at issue—Setting cause down for hearing—Interrogatories by defendant—Chapter 49 C. S. N. B., ss. 31, 37.*] An application to set a cause down for hearing cannot be made until fourteen days after the replication is filed, the defendant having that time, under sections 31 and 37, chapter 49, C. S. N. B., in which to file interrogatories. CHASE v. BRIGGS, No. 1..... 53

2. *Setting cause down for hearing—Interrogatories—Insufficiency of plaintiff's answer—C. 49, C. S. N. B., s. 31, and Act 45 Vict. c. 8, s. 2.*] The plaintiff answered defendant's interrogatories on November 28th, and on December 12th took out a summons to set the cause down for hearing. The defendant objected that the cause was not at issue, claiming that he had two months in which to except to the answer.

Held, that under section 31 of chapter 49, C. S., and Act 45 Vict. c. 8, s. 2, the remedy of a defendant upon an insufficient answer is not to except thereto, but to move within a reasonable time to dismiss the bill upon fourteen days' notice of motion, and that a reasonable time having here elapsed, and the defendant not now desiring to have the bill dismissed, the cause should be set down for hearing. DOWD *v.* DOWD..... 388

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PRO CONFESSO—1. *Appearance—Appearance after notice to take bill pro confesso—Costs—Chapter 49, C. S. N. B., s. 29.*] Under section 29 of chapter 49, C. S. N. B., a defendant not appearing within one month after the filing of the bill, but seeking to appear before motion is heard to take the bill *pro confesso* for want of an appearance, will only be allowed to do so on offering to pay the costs of the notice of motion and undertaking to answer within the time he would have had had he properly appeared. Arbuthnot *v.* The Coldbrook Rolling Mills Company..... 51

2. *Motion—Answering after notice—Costs—Chapter 49, C. S. N. B., s. 28.*] Where, after notice of motion under section 28 of chapter 49, C. S. N. B., to take the bill *pro confesso* for want of a plea, answer or demurrer, the defendant files and serves an answer, he must offer to pay the costs of the motion up to the time of filing the answer, or be subject to terms of payment of costs on being let in to defend. Manchester et al. *v.* White et al 59

3. *Motion—Answer filed but not served—Costs—Chapter 49, C. S. N. B., s. 28.*] Where, after notice of motion under section 28 of chapter 49, C. S. N. B., to take the bill *pro confesso* for want of an answer, the defendant files an answer without serving a copy, the motion cannot be granted, but the plaintiff may apply either to have the answer taken off file, or for the costs of the notice of motion.

Where defendant files an answer, without serving a copy, the answer may be ordered to be taken off file. Sayre *v.* Harris..... 94

4. *Motion—Answer after notice—Clerk's certificate — Section 28, c. 49, C. S. N. B.*] Where plaintiff gave notice of motion under section 28 of c. 49, C. S. N. B., to take the bill pro confesso for want of a plea, answer or demurrer, and at the motion did not produce a certificate of the clerk that an answer had not been filed, though it appeared from a certificate produced by the defendant that an answer had not been filed until after the notice, the motion was refused. Lloyd *v.* Girvan et al..... 164

5. *Motion—Service of Clerk's certificate.*] A motion to take a bill pro confesso for want of a plea, answer or demurrer, will be dismissed if the defendant has not been served six days previously with a copy of the Clerk's certificate of the filing of the bill, and that no plea, answer or demurrer has been filed. Mackae *v.* Macdonald et al. (No. 1.)..... 498
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PROBATE COURT—*Executors and trustees—Accounts—Administration suit—Res judicata—Construction of Will—Jurisdiction of Equity Court.*] The testator P., by his will, bequeathed to his wife an annuity of $1,200 during her life, and to the plaintiff an annuity of $2,000 during her life, and directed his executors and trustees to set apart out of the funds of the estate, stocks or securities sufficient to pay both annuities, and that if the income therefrom should not be sufficient, a portion of the principal should be applied for the purpose, and that under no circumstances whatever should there be any default or delay in paying the annuities. The will then contained a number of devises and specific legacies and the testator devised all the residue of both his real and personal estate after the payment of his debts, funeral and testamentary expenses, to his son, J. H. F. He then appointed his wife, his son, J.H.P.,

and three others to be the executors and trustees of his will. Probate of the will was granted to all of the executors. The trustees failed to set apart funds for the payment of the annuities. In an administration suit brought by the plaintiff, for the purposes, *inter alia*, of construing the will, and determining whether the trustees had distributed the estate and accounted in accordance with the will, J. H. P. claimed that the trustees, after paying the debts and setting off certain specific legacies, were unable to comply with the directions of the will as to appropriating funds for the payment of the annuities, and that he had expended the whole of the corpus of the estate in paying the annuities, and had passed his account in the Probate Court. By the executors' accounts filed and passed in the Probate Court it appeared that the Judge of the Probate Court found and decreed a balance due J. H. P. of $5,020.

Held, that the Probate Court not being a Court of construction, and having no authority to determine questions relating to the meaning of a will and whether executors and trustees have discharged their duties in accordance therewith, the suit was not *res judicata* by reason of its decree. PARKS *v.* PARKS ET AL..... 382

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RIVER—*Grant of riparian land—Construction of grant—Bed of river ad medium filum—Erection in bed of river—Right of action if probability of damage.*] The M. creek is a tidal water emptying into the Bay of Fundy. Previous to the erection of an aboideau across its mouth it overflowed its banks at high tide. The aboideau was erected in the latter part of the last century by a riparian owner, and was fitted with gates adjusted to open at ebb tide and close at half flood tide, with the result of preventing the creek overflowing its banks. A considerable quantity of fresh water drains into the creek in times of freshets and heavy rains. Above the aboideau is a natural pondage or basin, sufficiently large to hold any heavy drainage into the creek when the gates are closed at flood tide. The creek is navigable for small boats, but ingress or egress is barred by the aboideau. In 1837, C., a riparian proprietor, conveyed a part of the land on the westerly side of the creek adjoining the aboideau to S., and described the land as bounded by the margin or bank of the creek. Ultimately this piece of land was conveyed to the defendant. In 1874 the defendant placed sills and posts in the bed of the creek between high and low water mark and erected a barn thereon. The posts were objected to by riparian owners as tending to obstruct the free course of the creek by causing the collection and deposit of floating material about their base and decreasing the area of the pondage, and eventually producing an overflow. The bed of the creek was divested out of the Crown by the original Crown grant of the marsh lands.

Held, (1) That the conveyance to the defendant's predecessor in title did not pass the soil of the creek, and that the same was reserved for the benefit of all the riparian owners.

(2) That assuming the title passed in the soil *ad medium filum aquae* it was subject to an easement in all the riparian owners to have the creek kept open for pondage purposes.

(3) That the riparian owners were entitled to have the erections removed without

proof of actual damage, if there was a probability of damage being done to them, and to prevent the defendant setting up a right to maintain the erections by acquiescence. JARDINE *et al.* v. SIMON 1

——Presumption that grant of riparian land conveys bed of river *ad medium filum* 14

——What constitutes navigable river.. 13

ROAD—Obstruction—Nuisance—Government Railways Act 252
See HIGHWAY.

SAINT JOHN, CITY OF—1. *Charter—Power to alter level of street—Ancillary to private property—Compensation—Injunction—Delay.*] By the charter of the City of St. John, the corporation were given power to establish, appoint, order and direct the making and laying out all other streets . . heretofore made, laid out or used, or hereafter to be made, laid out and used, but also the altering, amending and repairing all such streets heretofore made, laid out or used, or hereafter to be made, laid out or used in and throughout the said city of St. John and the vicinity thereof. . . . So always as such . . . streets so to be laid out do not extend to the taking away of any person's right or property without his, her or their consent, or by some known laws of the said Province of New Brunswick, or by the law of the land. The charter is confirmed by 26 Geo. III. c. 46. By Act 41 Vict. c. 9, intituled "An Act to widen and extend certain public streets in the city of St. John," it was provided that Dock Street should be opened to a width of sixty-two feet by taking in twelve feet on its easterly side, and carrying the northeastwardly line twelve feet to the eastward through its entire length from Market Square to Union Street, and that Mill Street should be opened to the same width from Union Street to North Street by widening its eastwardly line. The effect of widening Dock Street made it necessary either that Union Street should be lowered and graded to its level, or that Dock Street should be graded up to its level, and that if Union Street was lowered, George Street, opening off it, should also be lowered. The corporation, in January, 1878, decided to excavate and lower Union Street to the extent of twelve or thirteen feet after hearing the report of the city surveyor and the petitions of citizens for and against the cutting down of Union Street, and immediately thereafter entered upon the work by contractors. The plaintiffs were owners of a lot on the corner of Union and George Streets, upon which they had erected expensive business premises, and which, by the lowering of the streets, would be twelve or thirteen feet above them. When the work of cutting down Union Street was about two-thirds done, and approaching the plaintiffs' premises, and after several months had elapsed from the time it was entered upon, the plaintiffs being unable to obtain compensation from the corporation, brought this suit for an injunction to restrain the continuance of the work.

Held, (1) that the corporation were unauthorized to cut down Union Street, and that the plaintiffs were entitled to compensation, for which they had a remedy at law; but (2) that the injunction should be refused on the ground of delay in the application. YEATS *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF ST. JOHN 25

2. *Transfer of harbour—Consent of Common Council — Constitution of Harbour Board—Meaning of expression "Two-thirds of members of Common Council"—Acts, 38 Vict. c. 95 (N. B.) and 45 Vict. c. 51 (D.)—Practice—Form of injunction order—C. 49, Form E, C. S. N. B.*] The charter of the city of St. John grants the harbour of St. John within certain boundaries to the Mayor, Aldermen and Commonalty of the city, but any previous grant of the Crown in any part of the same is reserved and excepted. In addition to the wharves and water-lots owned by the city there are within the limits of the harbour wharves owned as private properties under grants from the Crown and reserved by the charter, and also wharves on lands leased from the city. By Act 38 Vict. c. 95 (N. B.), it was provided, *inter alia*, that the Mayor, Aldermen and Commonalty of the city might contract and agree for the transfer to commissioners, to be duly appointed to constitute and form a Board of Harbour Commissioners for the port and harbour of St. John, of all the right, title and interest of the Mayor, Aldermen and Commonalty of, in and to the harbour of St. John, and of, in and to the land, water and the land covered with water, wharves, tenements and hereditaments within certain bounds of the harbour, provided that at least two-thirds of the members of the Common Council concurred in and agreed thereto. At a meeting of the Common Council held after the passing of the Act a report from the general committee of the Council was submitted recommending that application be made to the Dominion Parliament for legislation placing the harbour of St. John in commission in accordance, *inter alia*, with the terms of the said Act, and that the Board of Harbour Commissioners be composed of five members, three of whom should be appointed by the Governor-General in Council, and two by the Common Council. The report was adopted by the Council on a vote of twelve to four, the Mayor, who was present, abstaining from voting, though he was in favour of the report, and had signed it as one of the general committee. The Common Council was composed of nineteen members, including the Mayor. The Dominion Parliament

in accordance with the terms of a request from a committee of the Common Council by Act 45 Vict. c. 51 created a Board or Corporation of Harbour Commissioners, to consist of five members, three to be appointed by the Governor in Council, one by the Common Council, and one by the St. John Board of Trade. The Act gave the Board large powers relating to the management and control of the harbour, including the mooring and placing of ships at wharves transferred to the board, or at private wharves, in their discretion, and the fixing and regulating of tolls and dues payable by ships at private wharves and slips. On an application to dissolve an *ex parte* injunction restraining the defendants from transferring the harbour and wharf property to the board :

Held, that the Act, 38 Vict. c. 95, should be strictly construed, and that the membership of the Harbour Board not having been constituted under Act 45 Vict. c. 51, in accordance with the terms consented to by the Common Council, the injunction was properly granted.

Quære, whether the consent required by the Act 38 Vict. c. 95 was the consent of two-thirds of all the members of the Common Council, or of two-thirds of the members present at a meeting.

An *ex parte* injunction order absolute in its terms, by omitting to state that it was to continue until further order, as provided in form E of chapter 49, C. S., was ordered to be varied in this respect with costs of application. BERTON *v.* THE MAYOR, ETC., OF THE CITY OF ST. JOHN..... 150

SEALING UP DOCUMENTS..... 462
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SECURITY—Valuation of in proof of claim 507, 508

SECURITY FOR COSTS — 1. *Bond—Obligee—Amount.*] The bond for security for costs in the Equity Court is to the Clerk of the Court, and in the sum of $500. WALSH *v.* MCMANUS 86

2. *Several defendants — Form of bond.*] But one application may be made for security for costs where there are several defendants, and the bond should be for the benefit of all the defendants. STEWART *v.* HARRIS ET AL..... 143

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——Married woman—Mortgage of separate real estate—Parol agreement to assign mortgage in consideration of its payment—Specific performance—Statute of Frauds—Lien 450
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STATUTE OF FRAUDS.
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See LIMITATIONS, STATUTE OF.

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STAY OF PROCEEDINGS—1. *Appeal—Stay of proceedings—Terms—Chapter 49, C. S. N. B., s. 66.*] Upon a judgment overruling the defendants' demurrer, the Court refused to stay proceedings pending an appeal, considering that greater injury would result to the plaintiff by a delay than to the defendant by a refusal to stay proceedings, but the plaintiff was required to accept an undertaking for the payment of the costs occasioned by the demurrer in case the appeal was dismissed, and to give an undertaking to forego them in case the appeal was allowed. MCGRATH v. FRANKE ET AL 97

2. *Appeal—Stay of proceedings—Interlocutory application.*] Where a party is exercising an undoubted right of appeal the Court will stay proceedings under the judgment appealed from where necessary to prevent the appeal, if successful, from being nugatory.

Observations upon appeals in interlocutory proceedings. WELDON ET AL. v. WILLIAM PARES & SON (LIMITED) ET AL. (No. 2) 433

3. *Appeal—Production—Order for discovery—Stay of proceedings—Security to indemnify for delay.*] Upon an order for discovery by the defendants, the Court made it a condition of staying proceedings pending an appeal, that the defendants put in security to indemnify the plaintiff from any loss arising from the delay; the Court having no judicial doubt as to the correctness of its order, and considering that greater injury would fall upon the plaintiff by a delay than to the defendants by a refusal to stay proceedings. ROBERTSON v. THE ST. JOHN CITY RAILWAY AND JOHN B. ZEBLEY. (No. 2) 476
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TELEGRAPH COMPANY — *Exclusive right to construct line- Restraint of trade—Notice of agreement—Acquiescence—Unfair preference — 51 Vict. c. 29, s. 240 (D.)—B. N. A. Act, s. 92, s.-s. 10 (a)—Suit by foreign corporation.*] The E. & N. A. Ry. Co. were incorporated in 1864, under the laws of the Province of New Brunswick, and in 1869 owned a line of railroad from Fairville, N. B., to Vanceboro, on the boundary of the State of Maine. In that year they entered into an agreement with the plaintiffs, a company incorporated in the State of New York, giving the latter the exclusive right to erect and maintain upon the land of the railroad, lines of telegraph which should be the exclusive property of the plaintiffs. The E. & N. A. Ry. Co. agreed to transport gratis employees of the plaintiffs, and materials used by the plaintiffs in erecting and maintaining the lines, and not to transport the employees and materials of any other telegraph company at less than the usual rates. The plaintiffs were to maintain one wire for the use of the railroad, and to furnish telegraphic facilities and supplies at a number of stations on the road. The plaintiffs constructed lines of telegraph, and connected them with their system in the State of Maine. In 1878 the E. & N. A. Ry. Co.'s road was sold under a decree of the Supreme Court in Equity to the St. J. & M. Ry. Co., by whom it was run until 1883, when it was leased to the N. B. Ry. Co. for 999 years. Both of these companies had notice of the agreement, and acted upon it. In 1888 the C. P. Ry. Co. obtained running powers from the N. B. Ry. Co. over the line, and permission to construct a line of telegraph along the railroad. To prevent the construction of the line of telegraph, as being in breach of the agreement

of the E. & N. A. Ry. Co. with them the plaintiffs obtained an *ex parte* injunction order, which it was now sought to dissolve.

Held, (1) that the agreement of the E. & N. A. Ry. Co. with the plaintiffs was not void as an agreement in restraint of trade, or as creating a monopoly, and being contrary to public policy.

(2) That the agreement in respect to the transportation of employees and materials was not invalid under section 240 of 51 Vict. c. 29 (D).

(3) That the plaintiffs, though incorporated in the State of New York, could validly contract with the E. & N. A. Ry. Co., and enforce the agreement by a suit brought in this country.

(4) That the agreement was not invalid under section 92, sub-section 1 (*a*), of the B. N. A. Act, 1867.

(5) That the N. B. Ry. Co., having leased the road with notice of the agreement, and having acquiesced in it, were bound by it. THE WESTERN UNION TELEGRAPH COMPANY *v.* THE NEW BRUNSWICK RAILWAY COMPANY, THE CANADIAN PACIFIC RAILWAY COMPANY, AND THE ST. JOHN AND MAINE RAILWAY COMPANY..338

TENANCY BY THE CURTESY.
See CURTESY.

TITLE—Bill 179, 189, 243
See WRIT OF SUMMONS.
——Change of parties..... 513

TRADE MARK—*Injunction—Colourable imitation—Words calculated to deceive.*] Plaintiff was a manufacturer of lime at Greenhead, and sold it in barrels marked "Greenhead Lime," and it had a market value and reputation as such. The defendants manufactured lime at the same place, and were restrained by injunction from using the plaintiff's trade mark, or any colourable imitation thereof. Subsequently the defendants marked their lime as "Extra No. 1 Lime, manufactured by Raynes Bros. at Greenhead." The general appearance of the defendants' mark resembled the plaintiff's.

Held, that there had been a breach of the injunction. ARMSTRONG *v.* RAYNES ET AL. [144

TRADE NAME—*Fraudulent use of name—Intention to deceive the public—Injunction.*] A right to the use of a name to denote a place of business carried on by a particular person will be protected where it would be a fraud upon that person and the public for another person to make use of it in such a way as to deceive the public into believing that they were dealing with the person who originally used it. MCCORMICK *v.* MCCOSKERY 332

TRANSFER OF ACTION..... 509
See PARTIES.

TRUST—*Construction—Grant to issue—Death of one of the issue before distribution—Share vesting in survivor.*] A trust deed provided that upon the death of F. the estate should be divided to and between all the daughters of the donor who should survive him, and the issue of any daughter who might have died before him leaving issue, in equal shares, but so that the issue of any daughter who might so die leaving issue should only take the share their deceased mother would have taken had she survived the donor and been living at the time of distribution, and that if any, who might survive the donor, died before the said F. leaving issue, then the issue of such deceased daughter should take and receive the share their mother would have taken had she been living at the time of distribution, and that if any daughter survived the donor, and died before the said F. without issue, then the share of the daughter so dying should go and be divided equally among her surviving sisters or sister and the issue of any deceased sister; such sister, however, to take only the share their deceased mother would have taken had she been one of the surviving sisters; that the share of each of the said daughters who might be living at the time of the distribution should be paid to them as each of them came of age, but that the share coming to the issue of any deceased daughter might be paid, notwithstanding such issue might not at the time of distribution be of age. One of the daughters died in the lifetime of F., leaving two children, one of whom predeceased F.

Held, that the surviving child took the whole of the mother's share. GILBERT *v.* DUFFUS ET AL..... 423

TRUST DEED—Assignment for benefit of creditors—Unenforceable claim—Construction of deed..... 372
See BANK. 2.

TRUSTEE—Accounts—Probate Court—Jurisdiction 387

——*Advice of Court—Petition, form of—Affidavit of truth—Hearing—Parties to be represented—Direction by Court—C. 49, C. S. N. B., s. 130.*] On an application by an executor under section 130 of chapter 49, C. S., all of the facts upon which the advice of the Court is sought must appear in the petition itself. If the facts are not stated correctly, the advice given will be no protection to the petitioner.

The facts in the petition must be sworn to by an accompanying affidavit of the petitioner, or his agent having a knowledge of them.

The definite question to be asked should be propunded in the petition, and not a general reference made to the Court for its opinion.

The petition should be presented to the Court *ex parte*, when direction will be

given who is to be represented or have notice of the hearing.

The order of the Court should recite the petition. IN RE ISABELLA BROOKS' ESTATE [269

——Circumstances under which advice of Court will be given to 271
——Costs of application..... 272
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TRUSTEE ACT, 1850 (Imp.)—In force in New Brunswick..... 394

TRUSTEESHIP—Duration of 426
See WILL.

VEXATIOUS PROCEEDINGS—Arrest —Abuse of process – Injunction, See INJUNCTION. 6. [524
——Stay of—Jurisdiction 530

WILL—1. *Construction—Annuity — Gift over after death—Rule in Shelley's Case—Absolute interest—Duration of trusteeship.*] W. by her will gave and devised all her real and personal estate unto J., as executor and trustee, his heirs and executors, to hold the same to the sole use of her daughter during her natural life, and after her decease, unto the use of her heirs; and also willed and devised that her said executor and trustee should sell and dispose of any real or personal estate that she might die seised or possessed of, and after payment of her just debts and funeral and testamentary expenses, invest the proceeds in such securities as he might think fit, and that he should annually or semi-annually pay the interest accruing on such securities to her said daughter, and in case of her death to her children. The daughter survived the testatrix.

Held, (1) That the daughter took an absolute interest. (2) That the trust continued during the daughter's marriage. NEALIS *v.* JACK 426

2. *Construction—Gift to a class—Lapse.*] G. P. by his will divided the residue of his real and personal estate into two parts, one of which he gave to the heirs of E. P., his brother, and this part he sub-divided into nine equal shares, and directed that one share be paid to each of five persons who were the heirs of E. P., one of whom was E. B.; a sixth share he gave to the three sons of E. P.'s son, J. P., namely, N., W., and J., to be divided to them, and the remaining three shares to be equally divided between the children of W. L., a deceased son of the said E. P. The other moiety he directed to be equally divided between the children of his brother A. P. E. B. and N. predeceased the testator without leaving issue.

Held, that the shares of E. B. and N. did not lapse, but vested in their next of kin. IN RE THE GOODS OF PRICE 429

——Construction of, by Probate Court—Jurisdiction—Accounts of executors and trustees 382
See PROBATE COURT.

——Lapse, share of member of fluctuating class dying in testator's life time, [425

——Trust—Grant to issue—Death of one of the issue before distribution—Share vesting in survivor 423
See TRUST.

WITNESS—*Recalling—Corroborative evidence*—Where the evidence in a suit taken before a referee had been closed and counsel were engaged in summing it up before the Court, an application by the defendant to recall a witness for the purpose of giving evidence of a corroborative nature that had always been available and of such materiality that it could not have been previously overlooked, was refused. DUNCAN v. THE BANK OF NOVA SCOTIA..... 513

WRIT OF SUMMONS—1. *Parties—Description—Representative character of parties—Bill—Title—Cause of action—Pleading—Relief—Chapter 49, C. S. N. B. ss. 16 and 22.*] Section 16 of chapter 49, C. S., provides that all causes in Equity shall be commenced by summons, which shall include the names of all the parties, and disclose in a brief form the cause of action for which the bill is to be filed.

Held, that where a plaintiff is claiming in a representative character it should be stated in the summons.

The title of the bill should be of the same parties and in the same character, and in accordance with the cause of action and relief stated in the summons, and the bill itself should be in accordance with the title.

Section 22 of chapter 49, C. S., provides that a bill shall conclude with a prayer for specific relief, under which, without a prayer for general relief, the plaintiff shall have any other relief to which the equities of his case may entitle him.

Held, (1) that the prayer for specific relief must be substantially the same as the cause of action stated in the summons.

(2) That relief to which the equities of a plaintiff's case entitle him under the above section must be consistent with the relief specificially prayed for. VERNON *v.* OLIVER 179

2. *Injunction Order—Refusal—Dismissal of bill—Summons in suit—Conditional appearance—Waiver—Appeal — Stay of proceedings.*] An application under section 24 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), upon bill and affidavits for an injunction order, was refused with costs. The bill and affidavits were not filed, and a summons was not issued in the suit. The costs of the application were taxed and paid. The defendant filed an appearance,

and applied to dismiss the bill for want of prosecution.

Held, that there being no summons in the suit, the suit was not in Court, and that the plaintiffs could not be compelled to issue the summons and proceed with the suit, or be dismissed, and that the application should be refused.

Goslin v. Goslin, 27 N. B. 221, distinguished.

Quære, whether a defendant who has appeared before summons issued can apply to dismiss the suit for want of prosecution if a summons is not issued.

An application in June, 1890, upon bill and affidavits for an injunction order stood over until the 15th of August, 1891, when it was refused. Notice of appeal was given on the 10th of October following, and on the same day the summons in the suit was issued. On the 16th the defendants filed an appearance, and gave notice of application to dismiss the bill for want of prosecution, on the ground that the summons should have been issued immediately after the refusal of the injunction order.

Held, that the plaintiffs were not in default, and also that they were not compellable to issue the summons in the suit pending the appeal, and that the application should be refused. NEW BRUNSWICK RAILWAY COMPANY AND BROWN *v.* KELLY. NEW BRUNSWICK RAILWAY COMPANY AND BROWN *v.* KELLY. (No. 2)..... 442

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