REPORTS

OF

CASES DETERMINED

BY THE

SUPREME COURT IN EQUITY

OF

NEW BRUNSWICK,

WITH

A TABLE OF THE NAMES OF CASES DECIDED, A TABLE OF THE NAMES OF CASES CITED, AND A DIGEST OF THE PRINCIPAL MATTERS.

REPORTER:

WALTER H. TRUEMAN, LL.B.,

BARRISTER-AT-LAW.

VOLUME III.

TORONTO:

THE CARSWELL COMPANY, LIMITED.

1907.

SUP

JUDGES

OF THE

SUPREME COURT OF NEW BRUNSWICK

DURING THESE REPORTS.

THE HONORABLE WILLIAM HENRY TUCK, C. J.
" " DANIEL L. HANINGTON.
" " PIERRE A. LANDRY.
" " FREDERIC E. BARKER.
" " EZEKIEL MCLEOD.
" " GEORGE F. GREGORY.

Judge of the Supreme Court in Equity:

THE HONORABLE FREDERIC E. BARKER.

Attorneys-General:

THE HONORABLE WILLIAM PUGSLEY. *
" " CLIFFORD W. ROBINSON. †
" " HARRISON A. MCKEOWN. ‡

Solicitors-General:

THE HONORABLE F. J. SWEENEY. §
" " W. P. JONES. ¶

* Resigned May 31, 1907.
† Appointed May 31, 1907; resigned October 28, 1907.
‡ Appointed October 28, 1907.
§ Appointed December 8, 1904; resigned February 7, 1905.
¶ Appointed February 7, 1905.

NAM

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED

IN THIS VOLUME.

A.

C.

D.

M.

R.

S.

T.

U.

V.

W.

ERRATA.

Page 79, Foot note.—For "4 Med.," read "4 Mod."

Page 181.—For "J. A. Gregory, K.C.," read "A. J. Gregory, K.C."

CASES DETERMINED

BY THE

SUPREME COURT IN EQUITY

OF

NEW BRUNSWICK.

BUCHANAN v. HARVIE.

1904.

June 4.

Practice—Security for costs—Foreclosure suit.

It is not a ground for refusing an order for security for costs, where plaintiff is resident abroad, that the suit is for foreclosure of mortgage.

Summons for an order for security for costs, on the ground that the plaintiff resides out of the jurisdiction.

The suit was for the foreclosure of a first mortgage on lands situate in King's County, given by the defendant to the plaintiff. The principal money advanced under the mortgage was £3,500, and the condition of redeeming was the payment of £6,000, and a transfer of fully paid-up shares of the par value of £5,000, in a company known as the New Brunswick Salt and Alkali Works, Limited. The mortgaged property consists of 1450 acres of land, a dwelling-house, barns, and a number of other buildings, for which the defendant had paid between $14,000 and $15,000. On the hearing of the summons it appeared from plaintiff's affidavit that no part of the principal money had been repaid, that the mortgage was undischarged on the records, and that the mortgaged premises were in the plaintiff's possession.

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BUCHANAN v. HARVIE.

Argument was heard May 27, 1904.

W. H. Trueman, for the plaintiff:—

Security for costs should not be ordered. A foreclosure suit is distinguishable from an ordinary action. Its purpose is to provide the defendant with an opportunity to redeem, failing which a decree may be made barring his title. Unless he sets up on this application that he has satisfied the mortgage, or that he has a defence on the merits, it would be vexatious that the mortgagee should be ordered to give security. It is not unfair to ask of the defendant that he disclose a *bona fide* defence before this application can be granted. In *Thompson* v. *Callagan* (1), security was ordered in a foreclosure suit where the mortgagor disputed that anything was due. Counsel for the defendant there admitted that in an ordinary mortgage case, it was not usual to grant security, and in the judgment in the case it was accepted that this is the rule. In *Leng* v. *Smith* (2), it was held that a caveator residing out of the jurisdiction, making a claim to land under a registered mortgage, would not be obliged to give security for costs, unless the caveatee in good faith disputed that there was anything due or owing on the mortgage. In *Thuresson* v. *Thuresson* (3), the action was for recovery of land, and judgment for possession was given in favor of the plaintiffs. The defendants appealed, and they asked for an order dispensing with security for costs, on the ground that they had expended $500 in improvements upon the land. It was held that security might be dispensed with, or the lien for improvements charged by way of security, were the plaintiffs not entitled to mesne profits as against the improvements. In *Armstrong* v. *Armstrong* (4), a plaintiff applied summarily for an administration order, and it appeared that he had an interest worth $273 in the estate in respect of which be applied. It was held that he should not be ordered to give security for costs, upon his consent-

(1) 3 Ch. Ch. 15.
(2) 14 Man. R. 258.
(3) 18 P. R. 414.
(4) 18 P. R. 55.

ing that his interest in the estate should be subject to a first charge in respect of any costs which he might be ordered to pay. In the present case any costs from the plaintiff to the defendant could be applied in reduction of the mortgage debt. See *Wheaton* v. *Graham* (1); *Cowdry* v. *Day* (2). The rule that on an application for security for costs the defendant is not bound to disclose his defence is no longer strictly construed. In *Duffy* v. *Donovan* (3), the plaintiff, who lived out of the jurisdiction, sued the defendants for an account and payment of funds which he alleged they held as joint trustees for him. Robertson, J., in Chambers, ordered that the plaintiff should give security for costs, holding that on the application he could not determine whether or not the defendants had in their hands moneys of the plaintiff, for that would be in effect deciding the questions involved in the action. On appeal before Boyd, C., and Meredith, J., this judgment was reversed. Chancellor Boyd said that it appeared to him to be a vexatious proceeding to stay the action until the plaintiff gave security. There was a fund in the hands of the defendants, out of which their costs could be paid. The principles, which were applied in *Re Carroll* (4); and recently in *Re Contract and Agency Corporation* (5), shewed that the discretion of the Court in those cases where the defendants were possessed of funds belonging to the plaintiff, would be exercised against hampering the plaintiff. Mr. Justice Meredith, dealing with the argument that the defendant was not bound to disclose his defence, said that under the circumstances of that case, if the defendant did not choose to disclose it, he could not have the order.

E. G. Kaye, for the defendant:—

The rule that a plaintiff residing abroad will be compelled to give security for costs does not admit of any

(1) 24 Beav. 483.
(2) 5 Jur. (N. S.) 1199.
(3) 14 P. R. 157.
(4) 2 Ch. Ch. 305.
(5) 57 L. J. (Ch.) 5.

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exception. In *Crozat* v. *Brogden* (3), it is referred to as an inflexible rule. The plaintiff here seeks to go into the merits of the action. That cannot be done: *Crozat* v. *Brogden* (1). In *British Linen Co.* v. *McEwen* (2), Killam, J., says: "It has never, so far as I know, been determined that, in answer to the *prima facie* case made for security by shewing the plaintiff to be resident out of the jurisdiction of the Court, a plaintiff can file material * * * and oblige a defendant to shew that he has some defence." This Court held in *Gould* v. *Britt* (3), that it is not a ground for refusing to order security for costs in a suit to set aside a conveyance by defendant, as fraudulent against the plaintiff, that he has an unsatisfied judgment against the defendant in a Court within the Province. The same practice was followed in the earlier case of *Thibaudeau* v. *Scott* (4). It might be argued here that, as the plaintiff has a mortgage upon land within the Province, there is no need of security. The exception that security will not be ordered where the plaintiff has assets within the jurisdiction would not be applicable where the property is the subject-matter in litigation. Security has been required in ejectment and replevin suits.

1904. June 4. BARKER, J.:—

I do not think there is anything in this case to take it outside of the ordinary rule. The plaintiff must give security.

(1) [1894] 2 Q. B. 30.
(2) 6 Man. R. 29.
(3) 2 N. B. Eq. 453.
(4) 1 N. B. Eq. 505.

SHAUGNESSY v. THE IMPERIAL TRUSTS COMPANY.

1904.
June 6.

Company—Debenture mortgage—Foreclosure—Parties—Costs—Form of decree.

A suit to enforce a trust mortgage to secure debentures may be brought in the name of the debenture holders, the trustee being made a defendant.

In a suit by the holder of debentures to enforce a trust mortgage, the trustees made defendants in the suit were disallowed costs of a part of their answer setting up that the suit should have been brought in their name.

Form of decree adopted in suit to foreclose debenture mortgage.

The facts fully appear in the judgment of the Court.

Argument was heard May 17, 1904.

W. Pugsley, A.-G., and *L. P. D. Tilley*, for the defendants, the Imperial Trusts Company:—

The Imperial Trusts Company have the exclusive right to bring an action for the foreclosure of the mortgage in the suit. The contract of the mortgagor is with them and not with the plaintiff debenture-holder. It could only be in event of a refusal by them to take proceedings that he would be entitled to bring them.

A. O. Earle, K.C., and *F. R. Taylor*, for the plaintiff:—

The trustee company have no interest in the subject-matter of the suit not represented by the plaintiff. Whether he intervenes by himself or by them, for the protection of interests exclusively his own, cannot therefore be material.

1904. June 6. BARKER, J.:—

It appears by the record that the defendants, the Algonquin Hotel Company, in order to raise the money necessary for the construction and equipment of their hotel at St. Andrews, issued 375 debentures, each for the sum of

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$100, which were secured by a mortgage on the real and personal property of the company to the defendants, the Imperial Trusts Company, which mortgage is dated January 29, 1895. These debentures are all held and owned by the plaintiff. Among other provisions contained in the mortgage, there is one for the payment to the trust company of a certain remuneration for their services as trustee—that is to say, $100 on the execution of the mortgage, which was paid, and a commission of one per cent. "upon all interest money paid by or through said trust company for said hotel company on said bonds," and "a commission of one-quarter of one per cent. upon all principal moneys so paid," "by or through said trust company," and a further commission of $20 each year after the expiration of five years. These commissions were to be paid by the hotel company, together with moneys whenever deposited with the trust company for payment of bonds or interest. That is, as I read the clause, whenever the hotel company paid to the trust company any money, either for principal or interest, the commission on the amount became payable at the same time. The mortgage also contains the usual stipulation that, in case of default, the trust company were authorized, and it was their duty, to take possession and sell, provided they were requested to do so by a certain proportion of the bondholders, and a sufficient indemnity against costs was furnished. The plaintiff has filed this bill for the enforcement of his security and for a sale of the property; and, strange to say, the only defence set up came from the plaintiff's own trustee, and it is this: The trust company assert that, as mortgagees, they are the only persons in whose name such a proceeding can be taken, or at all events, that the plaintiff cannot do so until the company have refused to proceed or allow their name to be used for the purpose. This contention cannot, I think, be sustained. I can see no reason why the *cestui que trust* should not have the right of enforcing his own security. It is his money, not that of his trustee, which is at stake, and it is his money which, in the case of a deficiency, must

pay the costs. In *Palmer* (1), the practice is thus laid down: "Where there is a trust deed, the action will generally be by one of the debenture or debenture stock holders, on behalf of himself and all the other holders of debentures or debenture stock of the same class, against the company and the trustees of the deed. So, too, where the security is contained partly in the debentures and partly in the trust deed, the action will be by one of the debenture or debenture stock holders, suing on behalf of himself and all the other holders of debentures or debenture stock of the same class against the company and the trustees." The same author says that the trustees and all other persons interested in the equity of redemption should be made defendants, and he adds that sometimes the trustees of a trust deed themselves bring the action to enforce the security, citing *Robinson* v. *Montgomeryshire Brewery Co.* (2); putting that as an exceptional course. The right to take the proceeding does not depend in any way upon the trustee refusing. It is the absolute right of the *cestui que trust*, in order to enforce his own security and recover his own debt. But if the trust company's contention in this respect could be sustained, I should incline to think that there is evidence substantially of a refusal. In the correspondence set out by the trust company in their answer, there is a letter dated October 23, 1903, from which it is fairly to be inferred that the sole reason why the plaintiff's application for leave to use the company's name was not given was that they insisted upon their own firm of solicitors being employed, while the plaintiff, whose money was at stake, and whose interests alone were at stake, very naturally preferred his own. And the only reason given by the company for insisting that the proceedings should be entrusted to the firm of solicitors selected by them, was that the business had originally come through them to the company. It looks as though the trust company viewed the interests of the bondholders as secondary to their own.

(1) Company Precedents, Part III., 346. (2) [1896] 2 Ch. 841.

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In *In re Channell* (1), a *cestui que trust* filed a bill to set aside an investment made by his trustee, and as it appeared at the hearing that the money was in no danger, and could be obtained at any time, the Vice-Chancellor deprived him of his costs. James, L. J., said that he believed that the action would not have been brought if the plaintiff had not read some book on trusts, and thought that he, being a solicitor, would make a little profit out of it. The trustees, as other mortgagees, are entitled of right to be kept whole as to costs and expenses properly incurred in the execution of their trust unless in some way they have forfeited that right by misconduct. In this case the trust company, having been made a defendant, had the right to appear in the suit so that they might have notice of the proceedings and protect themselves as to their commissions, but the simplest form of application to the Court at any time was ample for that purpose. The remuneration to the trust company will be allowed to the extent that it has been earned under the terms of the mortgage—that is, $20 a year for two years, $40; and one per cent. on the $2,922 interest paid; in all, $69.22. It was stated at the hearing by the trust company's Counsel that the commission on the $2,922 had been earned by the company, because the money had been by their direction paid by the hotel company direct to the holders of the bonds. If that be so I am at a loss to see how the company could have answered the sixth section of the bill by saying that they had no knowledge or information in reference to the matters therein set out, except as informed by the plaintiff's bill. This sixth section alleges a default in payment of interest, and that the total sum paid for interest was this $2,922, on which the company now claims a commission because they directed the hotel company to pay it direct, instead of collecting and disbursing it themselves. It seems also difficult to see how the trust company could be in entire ignorance as to whether the hotel company was or was not in default, for the interest coupons were all payable at their St. John

(1) 8 Ch. D. 492.

office. There will be no commission allowed on the proceeds of the sale, as the money thus produced will not be received or disbursed by or through the trust company, but by the officer of this Court.

The trust company having failed in establishing that part of their case which relates to the plaintiff's right of action, should be compelled to pay the plaintiff any costs he may have incurred by reason of that claim being put forward. The sum, perhaps, would be too small to go to the cost of taxing, but the trustees cannot have their costs of the sections in their answer which relate to this point.

The decree will be as follows (see *Batten* v. *Wedgwood Coal Co.* (1)): Assess the amount due the plaintiff on the debentures, including interest up to February 1, 1904, and deducting the $2,922 paid on account of interest, at $54,828, and the trustees' allowance at $69.22. Order the mortgage property sold in one parcel in pursuance of the provisions of the Act of Assembly, under the direction of a Referee, at which sale the plaintiff is to have leave to bid. That in case the plaintiff shall become the purchaser he shall not be compelled to pay as a cash deposit a greater sum than may, in the opinion of the Referee, be sufficient to pay the various charges on the fund taking priority to the plaintiff's claim as a debenture holder as hereinafter set forth, and the balance (if any) which may be payable to the hotel company; and he shall, in satisfaction of the balance of the purchase money, deposit the said 375 debentures held by him with the Referee, who shall hold the same until the sale shall have been completed, and the proceeds distributed, and shall then deliver them up as is hereinafter directed. That out of the said deposit the Referee shall pay the costs and charges having priority to the plaintiff's claim as debenture holder as hereinafter mentioned; and if the whole purchase money is sufficient to pay the plaintiff the said sum of $54,828, together with subsequent interest in addition to the prior charges, the Referee shall deliver the said debentures to the hotel company to be cancelled, and pay them the balance, if any.

(1) 28 Ch. D. 317.

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If the plaintiff shall not become the purchaser, then the Referee shall pay and distribute the proceeds of the said sale so far as they may go, in the following order and priority, that is to say:

1. The costs of the Referee, including therein the costs of sale, advertising, and auctioneer's fees.

2. The sum of $69.22 to the trustees, and also the costs of this suit (excepting the costs of sections 5, 6, 7, 8, 9, and 10 of their answer), to be taxed as between solicitor and client.

3. The plaintiff's costs, to be taxed.

4. The plaintiff, as holder of debentures, the sum of $54,828 and subsequent interest.

5. And if there remain any balance, the Referee shall pay the same to the hotel company, and at the same time deliver the debentures to the company to be cancelled.

But if it should happen that in either of such cases the amount for which the premises shall be sold shall be insufficient for the payment in full of the amount due to the plaintiff, and the prior charges, then the Referee shall distribute the balance remaining after payment of the prior charges equally as a payment *pro tanto* on the debentures, and endorse on each the payment thereon, and he shall deliver the said debentures so endorsed to the plaintiff.

COOL v. COOL.

1904.
June 21.

Will—Construction—Maintenance clause—Lien.

Where a testator by his will gave his estate, consisting of farm and dwelling, and personal property, to his son, upon condition that he would maintain testator's widow and daughters, except in the event of their marrying or leaving home, and declared that they should have a home in the dwelling while unmarried, it was held that the estate was charged with their maintenance.

By his will, dated March 14, 1892, Alexander Cool gave and bequeathed all his real and personal estate to his son, David K. Cool, upon condition that he would maintain and support the testator's wife and his daughters, Ann Cool, Edith Cool, and Emma Cool, during their natural life; in the event of any or all of said daughters getting married or leaving home freely and of their own accord, respectively, then and in such case the testator provided that his said son should be free from any obligation to support or contribute towards the support of his said daughters, or any of them, as the case might be, while away, but that it was his will and clear intention that each of them would have a home in the testator's dwelling house when they so desired while unmarried, who, while they remained home, should work around the house as theretofore. The testator died April 7, 1901, possessed of a farm with dwelling thereon, situate in the Parish of Addington, Restigouche County, and also of personal estate. He left him surviving his widow and the three daughters and son named in the will. The widow and one daughter, Ann, resided at the testator's home at the time of his death, and have since continued to do so. The son, after his father's death, erected a dwelling house on the land, which he occupied for a time and subsequently leased, reserving the rent to himself. The son failed to contribute to the support of the widow and daughter residing at home. By their bill, plaintiffs prayed that

1904. their maintenance and support should be made a charge or lien upon the property devised by the testator.

COOL. v. COOL.

Argument was heard May 28, 1904.

J. D. Hazen, K.C. (*E. P. Raymond* with him), for the plaintiffs:—

The devise to the son is conditional upon his maintaining his mother and sisters. Should he fail to maintain them, their maintenance is made a charge or lien upon the property, to be implemented by sale.

A. A. Stockton, K.C. (*H. F. McLatchey* with him), for the defendants:—

The object of the will was that the mother and daughters should have a home. As they have the exclusive use of the property, except the piece of land upon which he has erected a dwelling, it is not reasonable that the son should support them. The property can not be sold, for that would defeat the will.

1904. June 21. BARKER, J.:—

One cannot read this will of Alexander Cool without being impressed with the idea that his intention in making it was to secure a home for his widow and unmarried daughters, as if he were living, and that he thought by giving all his property to his only son, he was not only constituting him, so to speak, his successor as head of the family, but was furnishing him with the necessary property in conjunction with the work the daughters were to contribute, to keep the family together, provide them with a home, and furnish the widow and daughters with proper support and maintenance. He seems, however, to have forgotten what is now put forward as a fact, that the farm, which was a most important element in making provision for the family, would not on his death go to the son, and could not therefore be made available by him towards fur-

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nishing the support, or maintaining the house. The will must, however, be construed according to the ordinary meaning of the language used. He has blended the real and personal property into one fund for a common purpose, and I think the effect of the language is to charge both with the support and maintenance provided for by the will. See *Swainson* v. *Bentley* (1); *Preston* v. *Preston* (2); *Perry* v. *Walker* (3). There will, therefore, be a declaration to this effect, and the matter will go to a Referee to make the necessary inquiries, and report as to the amounts due, etc. Reserve further consideration until after report.

(1) 4 O. R. 572.

(2) 2 Jur. (N. S.) 1040.

(3) 12 Gr. 370.

1904.
September 29.

ROBIN, COLLAS AND COMPANY, LIMITED v. THERIAULT.

Crown land—Squatter—Grant—Purchaser for value—Priorities—Notice—Registry Act, 57 Vict. c. 20, s. 69; C. S. 1903, c. 151, s. 66—Instrument improperly on registry.

A squatter upon Crown land, which he had partly cleared, and upon which he had built a house, gave a registered mortgage of it in 1874 for value, and in 1881 conveyed the equity of redemption by registered deed to the mortgagee, remaining in occupation of the land as tenant. In 1898 a son of the squatter, having no knowledge of the mortgage or deed, or that his father occupied the land as tenant, obtained a grant of the land from the Crown:—

Held, that he should not be declared a trustee of the land for the purchaser from the father.

Semble, that s. 69 of the Registry Act, 57 Vict. c. 20 (C. S. 1903, c. 151, s. 66), by which it is provided that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration," does not apply to an instrument not properly on the registry, such as a conveyance of Crown land by a squatter.

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

Argument was heard June 30, 1904.

A. O. Earle, K. C. (*George Gilbert* with him), for the plaintiffs:—

Defendant's evidence that he had no knowledge of plaintiffs' title can not be believed. Before applying to the Crown for a grant, he would have made inquiry of his father as to his title. In the absence of evidence to the contrary by the father, it must be assumed that he was told by him (the father) that he held as tenant to the plaintiffs. The Crown grant does not put the defendant in the position of a purchaser for value. His statements to the Government in his application for the grant, being false, entitle the Government to avoid the grant, and preclude him from relying upon it as against us. As a donee

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from his father, he is subject to the same equities that would have prevailed against the father in our favor. Our mortgage and deed being registered, he is affected with notice of them: Act 57 Vict. c. 20, s. 69.

A. A. Stockton, K. C., for the defendant:—

The registration of an equitable title is not constructive notice to a subsequent purchaser of the legal estate. See *Doe d. Hubbard* v. *Power* (1); *Bushell* v. *Bushell* (2); *Ross* v. *Hunter* (3). Section 69 of Act 57 Vict. c. 20, is not retroactive. Even if the defendant's father had been an allottee, under Chap. 14, C. S., he could not have alienated the land by mortgage. See sect. 12 of Chap. 15, C. S., and sect. 13 of Act 42 Vict. c. 4.

1904. September 20. BARKER, J.:—

It appears by the evidence in this case that one Narcisse Theriault, the defendant's father, some time previous to the year 1874, but at what precise time does not appear, entered upon a lot of Crown land situate in the Parish of Caraquet, in the County of Gloucester, containing 50 acres, upon which he made certain improvements, having cleared a small portion of the lot and built a small house on it. In November, 1874, he executed a mortgage on another lot of land of which he seems to have had a grant, and upon his interest in this lot, to one Raulin Robin, Philip Gissett, William Lempriere, and Frederick C. Lane, who were then carrying on business at Caraquet and other places under the name of Charles Robin & Co., to secure the sum of $260 and interest, which mortgage was registered in the Registrar's office in Gloucester, on the 6th November, 1874. On March 2nd, 1881, Narcisse Theriault and his wife conveyed their equity of redemption in the mortgaged premises to the mortgagees for an expressed consideration of $40.20 over and above the amount due on the mortgage, then stated to be $335.09.

(1) 1 All. 271.

(2) 1 Sch. & Lef. 103.

(3) 7 Can. S. C. R. 289.

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This conveyance was registered March 4, 1881. At the same time Robin and others, to whom the equity of redemption had been conveyed, leased the premises—that is, the granted lot and the ungranted one—to Theriault for a year, and to continue from year to year, so long as both parties wished, at a yearly rent of $14. This lease was not registered. In July, 1877, Theriault made an application to the Lieutenant-Governor in Council, under the provisions of Chapter 14 of the Consolidated Statutes, relating to the settlement of Crown lands, in which he stated that he *bona fide* intended to become an actual settler upon this lot of 50 acres; that he had put improvements upon it to the value of $800; that he wished to purchase the lot; and he asked that his petition might be approved of, and that the advertisement usual in such cases might be inserted in the Royal Gazette. This application was duly approved of by J. G. C. Blackhall, a justice of the peace, as required by the Statute, and he certified that he had good reason to believe that the land was only desired for the purpose of immediate settlement and cultivation by the applicant himself. It seems that on May 6th, 1880, or thereabouts, Theriault renewed his application by a petition similar in its terms to the other, except that the value of the improvements was placed at $400. There is nothing to shew that the Government took any action on either of these applications. On the 17th September, 1896, the defendant, who is the youngest son of Narcisse Theriault, and always lived with him, except for a period of three years, when he was out of the Province, petitioned the Lieutenant-Governor under the same Statute. In his application, which is similar to the others, and in the form used in such cases by the Crown Land department, the defendant stated that he was a British subject of the age of eighteen years and upwards; that he did not own any other land in the Province, and that the land in question was the land which his father, Narcisse Theriault, resided on for forty years; that there was a house and barn on it, and about 25 acres in cultivation. He also added: "Have also quit claim from my said father for all

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the improvements made by him on said lot." The defendant also stated in his application that he *bona fide* intended to become an actual settler on the land, and that the land had been improved by his father to the value of $900. This was duly certified by one Poirier, the Labor Act commissioner, in the usual way, and on the 3rd October, 1898, a grant of the lot issued to the defendant. Before that was done, however, returns, as required by the Statute, were filed in the Crown Land office by Poirier, in which he certified that the defendant had expended a certain sum of money in making roads and building bridges; that he had built a house on the lot of not less dimensions than 16 x 20 feet; that from his own personal knowledge and inspection, and not from hearsay, the defendant was then residing, and had been residing for the last three years, upon the land in question, "which had been approved to him." These returns are dated September 7th, 1898, and the truth of them is sworn to by the defendant. Besides the documents already mentioned, the plaintiffs put in evidence the following: A conveyance of these lots from Robin, Gissett and others, who describe themselves as of the Island of Jersey, to Gervais Le Gros and others, also of Jersey, dated March 31st, 1886, and registered June 10th, 1886; also a conveyance from Gervais Le Gros and others to Charles Robin & Company, Limited, a joint stock company incorporated under the laws of Jersey, dated December 31st, 1880, and registered March 7th, 1881. Also a conveyance from Charles Robin & Co., to the plaintiff company (which is also a company incorporated under the laws of Jersey), dated July 1st, 1891, and registered August 4th, 1891.

The plaintiffs seek by this bill to have the defendant declared a trustee for them of this lot, and ordered to convey the same to them; and the grounds upon which they base their claim are that the defendant obtained his grant with full knowledge or notice of their title acquired by means of the conveyances in evidence, and by means of certain fraudulent misrepresentations made by him to the

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Government, which are specifically set out in section 7 of the bill as follows:—"That the statements and allegations in the said application of the said defendant that 'Have also quit claim from my said father for all the improvements made by him on said lot,' and also the statements and allegations in said labor returns that 'Frederick Theriault has performed labor as follows, in payment for Lot Y, Block 44, in the Parish of Caraquet, in the County of Gloucester; on roads, rods 38, and amount $15.58, and also that Frederick Theriault has built a house of not less dimensions than 16 x 20 feet, and is at present residing (and has continued for the last three years to reside) upon the lot of land approved to him in the County of Gloucester, described as follows:—Lot Y, Block 44, Caraquet; that he has paid in full for the same by labor, and that he has cleared and cultivated not less than ten acres of the said lot;' and the statements and allegations in the letter dated September 19, 1897, 'that the lot is the one that I got a quit claim deed on from Narcisse Theriault, my father, in September, 1896,' were false and fraudulently made by the defendant for the purpose of fraudulently obtaining a title to the said land, purchased and paid for by the said plaintiffs."

In section 9 of the bill it is alleged that the plaintiffs were not aware that this grant had issued to the defendant, or that he had applied for it, until some considerable time after the grant had been issued, but that they always believed that a grant of the lot had issued to Narcisse Theriault before the mortgage was made by him to Robin and others in 1874. There was no attempt made to prove this allegation in any way. So far as the evidence goes there is nothing whatever to shew that the true state of Narcisse Theriault's interest in the land was not known to Robin and his co-mortgagees in 1874, and by every one who succeeded to their title down to the plaintiffs. In fact, except as to the plaintiffs, there is no allegation even that Robin and the others, who were parties to the conveyances, did not know that Narcisse Theriault was simply a squatter upon the land without any claim to having a title to it. Neither is it pretended that the plaintiffs

made any attempt to induce the Crown to take proceedings for the cancellation of the grant on the ground that it had been obtained through fraud, or for the purpose of having their rights protected. No one has been put upon the stand to shew that the Crown Land department was not fully informed as to the facts, or that it was in any way deceived, or that the grant was in any way improvidently issued. On the contrary, while the plaintiffs charge the defendant with having fraudulently made untrue statements to the Crown Land department, and obtained the grant as a result, they ask this Court to give them the benefit of the title thus acquired, though, according to them, the conditions of settlement had not been performed, and the Crown had in that way never received the real consideration for the grant. And this in a suit to which the Crown is not a party, and instituted over twenty-seven years since the plaintiffs' title, such as is, had its origin.

Let us see what the plaintiffs' title really is, and what their equities are upon which they seek to sustain this bill. When Narcisse Theriault first entered upon this lot he did so without any authority from the Crown; he was a mere trespasser; he obtained no possession against the Crown, and he acquired by his wrongful act no right of any kind against the Crown. When, therefore, he made the mortgage in 1877 to Robin, he had absolutely no title of any kind or any interest in the land to convey. If the entry had been made with a view of taking advantage of *The Free Grants Act, 1872*, 35 Vict. c. 17, and the lot had been located to him under that Act, any attempted alienation of it would have been futile, because all such alienations are absolutely prohibited by the Act. It is clear, however, that when he petitioned the Lieutenant-Governor in 1877 and in 1880 he put forward as one ground why his petition should be acceded to, that he had cleared a portion of this lot, and in that way satisfied in part the condition upon which grants were issued to settlers. His possession, such as it was, was wrongful, the lot had not been located to him, and he had acquired no title to it in

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any way. I am speaking altogether of rights as between Narcisse Theriault and the Crown, and not of rights which might exist as between him and Robin & Co.; for it is possible that if this grant had eventually issued to him an equity might have attached to the land in favour of the plaintiffs. On that point I express no opinion. The application made by Narcisse Theriault appears to have been made under Chap. 14, Con. Stat., an Act which provides for the settlement of Crown lands, and the object of which was as the Court said in *Stevenson* v. *Flanagan* (1), "to encourage *bona fide* settlers on Crown lands." While there is not in that Chapter any express prohibition as to alienation by the locatee such as is contained in Chap. 15, relating to free grants, the provisions of it are largely personal. It is the locatee who is to reside on the lot for three years; it is the locatee who is entitled to the grant on performance of the conditions; and it is the locatee who is authorized to bring an action of trespass for injuries to the possession which he acquires under his location. The Act contains no provision for the locatee assigning his improvements or his rights in any way, so as to confer upon the assignee his rights against the Government. There is nothing before me to shew what the regulations are which the Government have made under the Act, or whether there is any recognized usage in the Crown Land department by which improvements made upon Crown lands by squatters, such as Narcisse Theriault was, are recognized or protected in any way. There is no allegation in the bill that any such usage prevails here as exists in the Province of Ontario, and which, according to the decisions of the Courts there, form the principal ground upon which cases of this nature are entertained. It seems obvious that Robin & Co. could not have gone to the Government, and by virtue of the conveyances to them claimed as of right to be substituted in the place of Narcisse Theriault. They were residents of Jersey, not prospective settlers on New Brunswick Crown land. Their very title deeds shewed

(1) 30 N. B. 275.

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that they owned other lands in the Province, a fact which of itself would have prevented them from obtaining a grant of land reserved under the Act for settlement as this was. I am therefore unable to see what right of the plaintiffs, either legal or equitable, has been invaded by this grant being made to the defendant. *Farmer* v. *Livingstone* (1) is a case similar in many respects to this. There the plaintiff who had applied for a homestead location and deposited the necessary fee with the land commissioners, filed a bill, which though in form to restrain proceedings in an action of ejectment brought by the patentee of the Crown to recover possession of the lot, really involved the validity of the patent. The plaintiff not only sought to restrain Farmer from proceeding with his action of ejectment, but also asked for a decree declaring him a trustee of the land for him. Though the plaintiff had applied for the homestead location and paid the fee he had not really been entered for the lands in the books of the department, and until that was done he acquired no right, precisely as Narcisse Theriault acquired no right until the land was located to him. Ritchie, C. J., says: "Until he was so entered or was permitted to enter the land he had no homestead, interest in, or claim to the land, and until all the provisions of the Act had been complied with, he had no legal or equitable title, and the lands remained public lands of the Government, and in my opinion his bill does not shew any legal or equitable status under the Statute, capable of being enfored in a Court of Law or Equity. * * * If a party has no legal or equitable rights enforceable in a Court of Law or Equity, he cannot, in the eye of the law, be injured by the letters patent. He is a mere volunteer, and, if so, not a proper party to seek the relief sought by the bill. He must shew a title to the relief asked. This disposes of any right to an injunction." It appeared also in that case that in addition to his applying to be entered for the land under the homestead Act, the plaintiff had actually entered upon the land, occupied it, cleared a portion of it, built a house upon it,

(1) 8 Can. S. C. R. 140.

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and spent $1,000 in improvements. And upon that ground he contended that under a Statute in force in Manitoba where the litigation took place, he could impeach the validity of the patent on the ground of fraud. The Chief Justice, however, held that by his expenditure he had acquired no interest in the land, and, therefore, he had no *locus standi* to interfere between the Crown and its patentees. Strong, J., concurred in this view, and pointed out that outside of some statutory provision, or some such usage as is recognized in Ontario, a squatter on Crown lands has no preferable rights.

It is not altogether apparent to me what the plaintiffs' object was in introducing into their bill the various allegations of fraud on the defendant's part in securing the grant. Their case cannot be strengthened by the defendant's fraud. That might be a good reason for impeaching the validity of the grant in a proceeding instituted for that purpose between the proper parties. But I cannot see how the plaintiffs' equities in reference to the land against the defendant can be improved by the fact that the defendant obtained the grant by wilful misrepresentations made to the Crown. But since the plaintiffs attach such importance to this branch of the case I shall discuss it at greater length than I should otherwise have thought necessary. I have already pointed out that not only the Crown has not complained, and does not now complain, that a fraud was practised upon its officers, but that there is no proof whatever that they were in any way misled by the defendant. The Act provides that the settler shall be entitled to a grant if the lot does not exceed 100 acres in extent; if he does not own any other land; if he has resided on the lot for the three preceding years, has cleared and cultivated ten acres thereof, and has paid $20 in cash, or performed labor on the roads to the value of $30. I do not imagine that the Crown puts such a strict construction on this Act, that if a locatee died during the three years, having only cleared a portion of the ten acres, and only performed a portion of his road work, all his improvements should enure to the benefit of the Government, and the next applicant should be obliged

to commence *de novo* altogether. To do justice between parties the Crown can always do, and I assume always does do, by grace and favor what by law it could not be compelled to do so long as a substantial compliance with the Act is secured, and the object of it is advanced. The defendant stated in his application that the lot was the one on which his father had lived for forty years, that there was a house and barn on the lot, and twenty-five acres under cultivation and that he had a quit claim from his father. He also proved that he himself cleared ten acres, and performed the necessary road work. It is true that he had not himself built the house, or cleared the twenty-five acres, and that he had no quit claim deed from his father. The house was, however, in fact built, and, according to Poirier's instructions to the defendant, that was sufficient. The twenty-five acres were in fact cleared, and ten of them by the defendant himself. No quit claim deed was ever given, but the father Narcisse did verbally assent to the grant issuing, and that was all the Labor Act commissioner required. And, as to the residence, section 3 of the Act expressly provides that temporary interruptions in the residence, when necessary to enable the settler to earn his living, shall not operate as a forfeiture of his claim. I am asked to find that the Crown was misled by all these misstatements, and, that if it had known the facts, the grant would never have been issued. The onus of shewing that was upon the plaintiffs themselves, and it need not have been left open to inference. But, taking it as it is, I do not think any such inference necessarily arises in view of the defendant's own evidence, which is uncontradicted, and in view of the free hand which the Crown necessarily has in dealing with a matter of this kind. Take for instance the statement of the quit claim as the defendant calls it in his application, or quit claim deed as he calls it in one of his letters, and this is the statement to which the plaintiffs attach the most importance. The defendant's petition was presented in September, 1896, and the grant did not issue until two years later. As no quit claim deed was ever given, none can ever have been produced. The grant

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was, however, issued, and it is almost a necessary inference either that the department thought the matter of no importance one way or the other, or else waived the production of the deed, or accepted the verbal assent given by Narcisse Theriault to Poirier, the Labor Act commissioner, as all that was necessary. In *Maxwell* on Statutes (1), it is said: "Where the prescriptions of a Statute relate to the performance of a public duty, they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed or as directory only. The neglect of them may be penal indeed, but it does not affect the validity of the act done in disregard of them." Such instructions confer no rights on third parties, and it has been well settled, as Strong, J., says in *Farmer* v. *Livingstone*, by repeated decisions in Ontario, "that when the Crown has issued letters patent in view of all the facts, the grant is conclusive, and a party cannot, as it is said, set up equities behind the patent." But, if the evidence shewed that the grant had issued as the result of fraudulent misrepresentations made for the purpose by the defendant to the Crown, what would have been the effect? The only result, as I have already indicated, would be that, in a suit instituted for that purpose by the Crown, either of its own motion or by a private individual having an interest in the subject of the grant in the name and by the permission of the Crown, the grant could be cancelled and the title in the land would be revested in the Crown to be disposed of as the Crown might see fit. It would not have given the plaintiffs any right to the grant or improved their position in any way. See *Boulton* v. *Jeffrey* (2); *Cosgrove* v. *Corbett* (3).

In my view the question of fraud has no bearing upon the case, and so far as the plaintiffs rely upon that ground they must fail.

It is said, however, that the defendant is a purchaser with notice of the plaintiffs' title, and he therefore took subject to it. In the first place they contend that the

(1) 3rd ed., p. 528. (2) 1 U. C. E. & A. Rep. 111.
(3) 14 Gr. 620.

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defendant had actual notice that his father occupied the lot as a tenant of Robin & Co. The evidence relied on to prove this fact is, in my opinion, altogether insufficient for that purpose. It appeared that in 1886 the defendant hauled some wood to Robin & Co., and that the price ($19.36) was credited to his father in their books on account of rent accrued due on the lease. The defendant was at that time a lad only 12 or 14 years old, living with his father and working for him. There is not a particle of evidence to fix the defendant with knowledge that the wood was delivered in payment of rent or that it was credited in Robin & Co's books, as it seems to have been. He swears that he knew nothing about the rent, or the lease, or the assignments, until after he had received his grant, and when the plaintiffs seized some of his goods. In fact, when the mortgage was given, the defendant could not have been more than a year or two old. The plaintiffs, however, say they are not driven to rely upon that, as the defendant is fixed with notice by the registry of the mortgage and release of the equity of redemption. By section 69 of Act 57 Viet. c. 20 (C. S. 1903, c. 151, s. 66), it is provided that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, notwithstanding any defect in the proof for registration." And I agree in thinking, as I held in *Carroll* v. *Rogers* (1), that the effect of that section is in all cases to which it applies, to make the registration actual notice to subsequent purchasers of the instrument and its contents. See per Strong, J., in *Gray* v. *Coughlin* (2), when speaking of a precisely similar provision, which has been in force in Ontario for many years, he says: "I hold that under the registry law of Ontario (R. S. O. cap. 114, sec. 80) registration is conclusive, and not merely presumptive, notice."

In order that registration shall operate as notice, the instrument must be of that class to which the Registry Act relates. It must be an instrument such as may prop-

(1) 2 N. B. Eq. 159.

(2) 18 Can. S. C. R. 570.

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erly be registered under the Act, and such as a purchaser has a right to anticipate as possibly on the register, and therefore one which it is his duty to search for if he wishes to protect himself. The registration of an instrument altogether unauthorized in point of law, would be nugatory, and could not operate as notice under section 69 of the Act. I am not at all sure that the Registry Acts were ever intended to apply to conveyances relating to the ungranted lands of the Crown by squatters, whose occupation of the land was wrongful, and who had no title or interest in it, and the possession of which, as well as the absolute title, remained in the Crown, and at its absolute disposal by grant. Until the Crown has made a grant, the title is, so to speak, not a registry title; and one does not look for instruments on the records relating to it. If that be so, such instruments ought, in my opinion, not to be held as amounting to notice simply because they are on the records. Neither, as at present advised, am I prepared to concede that the defendant can, under the peculiar circumstances of this case, be regarded as a subsequent purchaser, even if he had notice of the plaintiffs' conveyances. He does not claim through or under his father in any way, or by the same title as the plaintiffs. He is a purchaser from the Crown direct, and for value, and has a title not only superior to that of the plaintiffs, but better than their vendor, Narcisse Theriault, ever had, or ever could have given them or any one else. It is unnecessary to decide these points, because the registration does not amount to notice, as it took place under some other Act previous to Act 57 Vict. c. 20, and by the special words of that Act the registration, which is made equivalent to notice, is confined to registration of instruments under that Act. The plaintiffs' mortgage was registered in 1874, and the release of the equity of redemption, in 1881, and they are therefore excluded from the operation of section 69 of Act 57 Vict. c. 20, which was passed in 1894. The provision as to notice, which was then for the first time introduced into this Province, made a very important change in the law as to notice of instruments on the records. The section, like

many other sections of that Act, seems to have been copied from a similar provision which has been in force in Ontario for many years past. It differs, however, in one particular. By the express words of the Ontario Statute all instruments, whether registered before or after the Act, are made operative by way of notice to subsequent purchasers, whereas our Act by its express terms, confines the effect of the section to such instruments as may be registered under that Act, giving the section no retroactive operation. I think the plaintiffs have failed in making out the case set up in their bill, and it must therefore be dismissed with costs.

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THE CONTINENTAL TRUSTS COMPANY v. THE MINERAL PRODUCTS COMPANY.

Priorities — Equitable Mortgage — Mining Leases — Judgment Creditor—Sheriff's Sale—Purchaser—Notice—The General Mining Act, C. S. 1903, c. 30.

A company incorporated under the laws of the State of New York executed in New York a mortgage of lands in this Province, and of minerals therein, while the title to the latter was in the Crown, the law of New York, unlike that of this Province, not reserving minerals to the State. Mining leases subsequently were issued by the Crown to the company. A judgment creditor of the company with notice of the mortgage purchased the leases at a Sheriff's sale, under an execution upon his judgment, and paid to the Crown, rent overdue upon the same, whereupon new leases were issued in his own name, the Crown having no knowledge of the mortgage:—

Held, that the new leases were subject to the mortgage.

Semble, that the title of the judgment creditor would have been postponed to that of the mortgagee, though he had been a purchaser without notice of the mortgage.

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

Argument was heard June 30, 1904.

A. A. Stockton, K. C., *J. D. Hazen*, K. C. (*E. P. Raymond* with them), for the plaintiffs:—

The mortgage to the plaintiffs was made under a resolution of the Mineral Products Company authorizing a mortgage upon the lands and tenements of the company. A mortgage of all minerals that might be found in the lands, as well as of the lands, would not be in excess of this power. The word *tenement* is interpreted very broadly where the context requires that it shall be liberally construed. The company was formed to carry on mining operations. Apart from the minerals, the lands of the company would have little, if any, value. It could not have been contemplated that the resolution of the shareholders excluded minerals from the mortgage.

[*Pugsley*, A.-G.:—It is admitted that if the minerals were owned by the company, they would pass with the lands.]

The mortgage would be valid, no matter what the terms of the resolution were. See *Gloucester Banking Co.* v. *Rudry Merthyr Colliery Co.* (1); *Hotel Co.* v. *Wade* (2). While at the time of the execution of the mortgage, the property in the minerals was in the Crown, the minerals would pass to the mortgagee on the title to them being acquired by the company. See *Holroyd* v. *Marshall* (3); *Toledo Railroad Co.* v. *Hamilton* (4); *Trust and Loan Co.* v. *Ruttan* (5); *Guegan* v. *Langis* (6); *Doe d. Kerr* v. *Wetmore* (7); *Doe d. Irvine* v. *Webster* (8); *Boulter* v. *Hamilton* (9). Kingman cannot impeach the validity or sufficiency of the mortgage. He purchased the mining leases with notice of the mortgage, and with knowledge that the company intended that it should include them. The assignment by Sayles of his claim against the company, was a fraudulent device on the part of each to cut out the plaintiffs' title to the leases. Sayles was apprehensive that he was personally liable for debts of the company, and he sought to secure himself against loss by obtaining possession, through Kingman, of the leases. The consideration for the assignment of the debt is said to have been the release of an indebtedness of $12,000 due Kingman by Sayles. As Sayles was admittedly more than able to pay his indebtedness to Kingman, it is not credible that the latter discharged his debt in exchange for an unsecured claim against this insolvent company. To enable Kingman to recover speedy judgment against the company, its treasurer, who is Sayles' son, and Kingman's son-in-law, came from New York to Fredericton, where he was served with the writ in the action. A sale was held under the execution upon the judgment without notice to the plaintiffs, or an opportunity being afforded to them to protect their interests. Kingman pleads that the leases were forfeited to the Government for non-payment of rent, and that, while

(1) 64 L. J. (Ch.) 451.
(2) 97 U. S. 13.
(3) 10 H. L. C. 191.
(4) 134 U. S. 296.
(5) 1 Can. S. C. R. 586.
(6) 21 N. B. 549.
(7) 3 All. 143.
(8) 2 U. C. Q. B. 224.
(9) 15 U. C. C. P. 125.

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in the disposition of the government, they were issued to him. If a forfeiture had taken place, the notice with which Kingman was affected, would prevent him from postponing our title to his. The leases were not forfeited. When the rent was paid by Kingman, the leases were in force, and the payment enured to the benefit of the Mineral Products Company and their mortgagee. The payment was made for that company, and the receipt of the Crown Land office so treats it. Before a forfeiture could take place, the mortgagee should have had notice that the rent was in arrears. See *The General Mining Act*, C. S. 1903, c. 30, s. 138. Otherwise a very obvious opportunity for fraud would exist. See *Griffin* v. *Kent* (1). There the holder of a prospecting license over mining areas entitling him at any time prior to its expiration, on payment of certain fees, to a lease of areas for a term of years, gave a mortgage of his rights. He then allowed the license to expire, and his right to a lease to become forfeited. The areas were then taken up by a third person, with money supplied by the original license, and transferred to the latter's son. It was held that the transfer was fraudulent and void, and that the mortgage attached to the new title. Here, if the leases lapsed, they did so through the conspiracy of Sayles, acting for the Mineral Products Company, and Kingman.

W. Pugsley, A.-G. (*W. A. Ewing* with him), for the defendants, the Electro-Manganese Company:—

The right of Sayles to obtain a judgment against the Mineral Products Company, does not admit of question. His assignee's right ought to be equally undeniable. Had the sale of the mining leases been under a judgment recovered by Sayles, a charge of fraud could not have been raised. Neither can it be raised in proceedings by Kingman. The assignment of Sayles' claim to Kingman was made in good faith, and was free of reservations in Sayles' favor. There was nothing clandestine in the proceedings in Kingman's action. A writ for service abroad

(1) 31 N. S. 528.

would have served his purpose equally as well as a writ for service within the jurisdiction. Time was not regarded as important, for while the writ was served in January, judgment was not signed until April. No defence was put in to the action, for the reason that there was none. It is complained that the plaintiffs should have had notice of the action. Either their mortgage includes the mining leases, or it does not. If it does, they are not prejudiced by Kingman's judgment. If it does not, they could not have improved their position after rights of creditors had intervened. It was the duty of the plaintiffs to have notified the Crown Land office of their mortgage. See *The General Mining Act*, C. S. 1903, c. 30, s. 125. Kingman was under no such duty. His interests were in conflict with the plaintiffs. Under his contention, that the plaintiffs had no property in the mining leases, he would deny their right to give such notice. *Griffin* v. *Kent* (1), is wholly unlike the present case. Kingman was a *bona fide* purchaser of the leases at Sheriff's sale, without collusion with the lessee. In taking out new leases in his own name, he was exercising an unquestionable right. The plaintiffs' mortgage did not include the leases; in the Nova Scotia case the mortgage did. In the absence of notice of the plaintiffs' claim, the Crown Land office could not have done otherwise than it did. The plaintiffs' mortgage was one of bargain and sale, and conveyed no interest beyond that which the Mineral Products Company then had. Subsequently acquired property would only pass if the mortgage had contained a warranty of title.

[*Hazen*, K. C.: — The mortgage contains a covenant for further assurance, which is equal to a covenant of title.]

Effect can only be given to such covenant by a suit for specific performance. The present is not such a suit. Nor if it were, would it prevail against previously acquired rights of a third party. The shareholders of the company authorized a mortgage on lands they then owned. This

(1) 31 N. S. Rep. 528.

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did not authorize a mortgage on minerals not then belonging to them. The resolution of the shareholders being set out in the mortgage, the plaintiffs cannot plead ignorance of its terms. The rule that a person dealing with a company is not bound to inquire into the regularity of its internal proceedings, does not apply where he has notice of the irregularity. See *Howard* v. *Patent Ivory Co* (1); *Irvine* v. *Union Bank of Australia* (2).

Hazen, K. C., in reply.

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As originally framed, the bill in this suit prayed for an ordinary decree of foreclosure, and under it for a sale, of certain premises conveyed by way of mortgage by the defendants, the Mineral Products Company, a corporation created under the laws of the State of New York, to the plaintiffs, a corporation also created under the same laws, in trust to secure the payment of an issue of bonds amounting to $80,000, which mortgage is dated February 10, 1897, and is duly registered in the County of Albert, where the lands conveyed by it are situated. The defendant Kingman, was made a party by reason of his having a memorial of judgment against the Mineral Products Company for the sum of $187,875.51, registered May 2, 1902, upon which an execution had issued to the Sheriff of Albert, under which he had seized and sold to Kingman the equity of redemption in the mortgaged premises, and two mining leases and a quantity of ore, which the plaintiffs contend are subject to their mortgage. This sale actually took place on the 11th September, 1902, though the deed from the Sheriff to Kingman was not made until November 26, 1902. Before the cause came on for hearing the defendants, the Electro-Manganese Company, who are a corporation under the Joint Stock Companies Act of this Province, and who were not then parties to the suit, petitioned to be made defendants on the ground that they

(1) 38 Ch. D. 156. (2) 2 App. Cas. 336.

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had acquired by purchase from Kingman all his rights in the property. An order was accordingly made adding the Electro-Manganese Company as a defendant, and giving the plaintiffs liberty to make such amendments to their bill as they might deem necessary. They did amend their bill by adding allegations that the judgment obtained by Kingman was obtained by fraud, and was therefore void. In effect the charge is that Kingman and the others, who had to do with obtaining the judgment, and having the two licenses sold and new ones issued in their place by the Government, acted in concert with the fraudulent intention in some way of defeating the plaintiffs' claim to the two mining leases, which represent, as the evidence shews, the principal, I think I may say, substantially, the whole value of the mortgaged premises. At the date of the plaintiffs' mortgage—February 10, 1897—the Mineral Products Company had no title to the minerals in the lands conveyed by the mortgage. It was admitted that in the original grants of those lands the mines and minerals had been reserved by the Crown, and the property in them was still in the Crown. (See *The General Mining Act*, C. S. 1903, c. 30, s. 4.) On the 14th June, 1898, the Mineral Products Company obtained from the Government of this Province a number of mining leases, two of which have reference to the mortgaged lands. These are numbered 40 and 41—both giving the right to mine and carry away manganese for ten years, with rights for renewals up to forty years—one covering an area of 460 acres, and the other an area of 248 acres. Besides these two leases, Nos. 40 and 41, there were six others, numbered 33, 34, 35, 36, 37, and 38, covering lands in Albert County, issued to the Mineral Products Company at the same time; and when Kingman, who had purchased at Sheriff's sale the Mineral Products Company's interest in all these leases, went to the Crown Land office to have himself registered as the assignee, it was found that the Mineral Products Company were in arrears of rent on them in the sum of about $125, and the registry was refused

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until that sum was paid. Mr. Tweedie, who was acting for Kingman, then paid the rent, and subsequently by an arrangement with the Surveyor-General, confirmed by an order in Council, these leases were all terminated and new ones in Kingman's own name as lessee, substituted in their place. The new series and the old are alike, except as to the name of the lessee, and I think in the term. Lease No. 84 corresponds to lease 40, and covers the same area, and lease No. 85 corresponds to lease 41, and covers the same area. These later leases are dated November 12, 1902; they were afterwards, and since this suit was commenced, assigned by Kingman to the Electro-Manganese Company, of which company he is president, and they hold them, as the plaintiffs claim, as trustees for them to the extent of their mortgage interest. This is the point involved in this suit.

The mortgage recites as follows: "Whereas, it has become necessary for the party of the first part to borrow the sum of $80,000 for the purpose of purchasing the real property upon which it is carrying on business, and intends to carry on business, in the said town of Hillsborough, County of Albert, Province of New Brunswick, and for other lawful purposes; and whereas, at a meeting of the stockholders of the party of the first part, held on the tenth day of February, A. D. 1897, which said meeting was duly called according to law, and according to the by-laws, for the special purpose of considering and authorizing the issue of bonds and the execution of this mortgage or deed of trust, resolutions were duly adopted, of which the following are correct copies." Then follows a resolution to borrow the $80,000 for the purpose of purchasing the property in Hillsborough, a resolution to issue bonds to the amount of $80,000, and a third resolution authorizing a mortgage to the present plaintiffs, bearing date with the bonds, "duly executed as required by law upon all and singular the lands and tenements situated in the County of Albert, in the Province of New Brunswick, and the Dominion of Canada, now owned by this Company," etc.

It is contended that, without the consent of the requisite proportion of the shareholders, the plaintiffs'

mortgage could not be made at all; in other words, that the company's authority to mortgage its property is, by the law of the State of New York, limited both as to amount and as to the property to be mortgaged, by the consent of "two-thirds of the capital stock," by which I presume is meant the consent of the holders of not less than two-thirds of the capital stock as distinguished from two-thirds of the shareholders. The law governing this is as follows: "Every such mortgage, except purchase money mortgages, and mortgages authorized by contract made prior to May 1, 1891, shall be consented to by the resolution of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by a special meeting of the stockholders called for that purpose." I do not understand from this, or from anything in evidence, that whatever might be the effect of it as between the shareholders—that is, the company itself and its directors or officers who might, without consent, execute a mortgage—the mortgage would be void or illegal. On the contrary, a witness, Mr. Harrison, in his evidence, says the consent can be filed after the mortgage is made, ratifying, as he says, the action of the directors. The defendants do not, in their answers, set up that the mortgage in its present form was not assented to; they raise no such question. Their defence goes to the effect of the mortgage, not its validity. No fraud or illegality in the mortgage is charged, and as Willes, J., says in *Agar* v. *The Official Manager of Athenaeum Life Assurance Society* (1), the general rule is that a corporation is bound by deed under its common seal, unless fraud or illegality can be established. Apart from this, the evidence shews, and the resolutions themselves shew, that this was a case of a mortgage given on a purchase of property for carrying on the company's business—a transaction which seems to me excepted from the law referred to, and therefore not requiring consent at all. There is, however, to my mind, abundant evidence that the mortgage, in its present form, was

(1) 4 Jur. (N. S.) 214.

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not only assented to, but that it is expressly authorized by the resolutions themselves. It is more than probable to me that the mortgage—unexecuted, of course—was itself at the meeting of shareholders, and that it was in reference to that particular document that the resolutions were passed. The recital says that the meeting was called for the special purpose of considering and authorizing the execution of this mortgage. What mortgage, unless this one? The resolutions do, however, authorize a mortgage on the company's lands and tenements then owned by them in Albert County. What did they include in the words "lands and tenements," as applied to a mortgage? We have it in evidence that in New York a conveyance of the land carries with it the right to the minerals. They are not reserved to the State, as in this Province they are to the Crown. It must be assumed, I think, that where a body of business men, interested as shareholders in a business company, meet together to authorize a mortgage as security for $80,000 on a property whose real value lies in the minerals which it contains, intend to include the valuable part as well as the worthless part; and that when, in the words of a general resolution, they assent to a mortgage on their lands, they thereby intend to assent to a mortgage on what, in their view, would in such a case be included in the word "lands." The effect of the mortgage is an entirely different thing; but that it had in its present form the assent of the shareholders, and that it professes to convey precisely what they intended it should, I have no doubt whatever; and I think this conclusion is easily deducible from the resolutions and documents themselves, viewed in the light of the surrounding circumstances, to which one has a right to look for the purpose. The next question is, what is the effect of the mortgage, and what are its provisions as bearing upon the point in dispute? In the mortgage, after a description of the properties, is added the following words: "And also all and singular the coal, albertite, albertite and bituminous coal, shale, cannellite, petroleum, asphalt, asphalt rock, oil and oil producing substances, gypsum or plaster of paris, and all other

minerals whatsoever, which can or shall or may be found in or upon the herein particularly described premises." Later on follows this covenant: "And the party of the first part, for itself, its successors and assigns, does hereby covenant, grant and agree to and with the party of the second part, and to and with the respective persons and corporations who shall at any time become holders of the said bonds hereby secured, or any of them, that the party of the first part, its successors and assigns, shall and will at any time, and from time to time hereafter, upon request, make, do, execute and deliver, all such further and other acts, deeds and things as shall be reasonably advised or required to effectuate the intention of these presents, and to secure and confirm to the party of the second part, or its successors, all and singular the property and estate, real and personal, hereinbefore described and hereby intended to be granted, and so as to render the same available for the security and satisfaction of the said bonds, according to the intent and purposes herein expressed." We have here clear evidence of a contract to convey the minerals, and an express covenant to execute all further deeds which may be necessary to carry into effect the intention of the parties. It was upon that security these bondholders lent the company the money to buy their land with which to carry on their business, and which has never been repaid to them. It turned out that the company had no title in these minerals; the word "lands," by New Brunswick law had a less comprehensive meaning than it had in New York; and therefore the mortgage, so far as the minerals were concerned, was inoperative at law, because the company had no title. The title was in the Crown. The effect in equity, however, was to make the company a trustee for the plaintiffs as to their mortgage interest as to the minerals so soon as they acquired the title which, by the mortgage, they professed to convey; and this Court would, on a bill filed for the purpose, have compelled such assignment as might be necessary to secure to the plaintiffs their lien. In *Watson's* Compendium (1), it is said:

(1) Vol. 2, p. 1084.

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"And if an estate purports to be conveyed, to which the vendor at the time of the conveyance had no title, but afterwards acquired one, he must convey the estate again." And this is so irrespective of any covenant for further assurance. In *Noel* v. *Bewley* (1), the Vice-Chancellor says: "But I do not place much reliance upon the covenant for further assurance; because I take the law to be this, that if a person has conveyed a defective title, and he afterwards acquires a good title, this Court will make the good title available to make the conveyance effectual." In *Jones* v. *Kearney* (2), Lord Chancellor Sugden, speaking of the decision in *Noel* v. *Bewley*, says: "It appears therefore clear that if a man sells an estate (and the principle is just the same if the contract be for a mortgage or annuity), and the title he had at the time he made the mortgage is defective, there arises an equity out of the original contract to pursue any new title which the mortgagor may acquire, so as to make that new title a substitution for the original title, the infirmity of which prevented the contract from being carried into execution. In this case the contract is not between the parties, but the same principle applies as to that of a purchaser taking subject to a charge."

See also *Smith* v. *Baker* (3); and *McQueen* v. *The Queen* (4), where Strong, J., lays down and applies the same doctrine.

Were this a contest simply between mortgagor and mortgagee, I should have no doubt that the mortgagee's equity must prevail, and the rights acquired under the leases would be decreed as subject to the mortgage. Is the case any different by reason of Kingman's rights having intervened as a result of the Sheriff's sale? I think not. There is no doubt that Kingman knew all about the plaintiffs' mortgage even before Sayles assigned to him the debt upon which he obtained his judgment. What he has done

(1) 3 Sim. 116.
(2) 1 Conn. & Taw, 34; S. C., 1 D. & W. 134.
(3) 1 Y. & C. C. 223. (4) 16 Can. S. C. R. 72.

has been done with full notice and knowledge. But even without that the result would, in my opinion, be the same.

I take it as long since settled that a purchaser at a Sheriff's sale under an execution stands in no better or different position as to the property than the execution debtor did. In *Wickham* v. *The New Brunswick & Canada Railway Co.* (1), Lord Chelmsford says: "There is no doubt upon principle as well as on the authority of the cases cited in the argument at the Bar, that the right of a judgment creditor under an execution is to take the precise interest, and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the Sheriff with all the charges and incumbrances, legal and equitable, to which it was subject in the hands of the debtor." See also *Eyre* v. *McDowell* (2); *Whitworth* v. *Gaugain* (3): per Strong, J., in *Miller* v. *Duggan* (4); *Trueman* v. *Woodworth* (5).

The effect of the Sheriff's deed was simply to substitute Kingman in the place of the Mineral Products Company, as to this property, and Kingman, as a result of his purchase, became in equity, so far as these two leases are concerned, owner of the equity of redemption, the same as the company had been. He is not a purchaser for value. He took, through the medium of an officer of the law, precisely the interest which his debtor had in the property, and no more, and in that way equity considers his conscience bound in like manner as that of the company was. The issue of new leases and the cancellation of the old ones, it is said, has altered the aspect of things, and the rights of the parties. And I presume it was to meet some such contention that Kingman has been charged with fraud, not only in obtaining his judgment, but also in procuring new leases to be substituted for the old ones. In my view of the case this question of fraud is altogether irrelevant, but if it were otherwise, I should feel compelled to find the charges of

(1) L. R. 1 P. C. 64. (2) 9 H. L. C. 619. (3) 3 Hare, 416.
(4) 21 Can. S. C. R. 33. (5) 1 N. B. Eq. 83.

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fraud unsustained by the evidence. It is abundantly proved that the indebtedness of the company to Sayles, which was the subject-matter of Kingman's judgment, was a *bona fide* one, and that there was no objection to Kingman's recovery as his assignee. The evidence seems to shew that the company had no defence to the action; at all events none was set up. Neither can I see in what took place between Kingman and the Surveyor-General's department any evidence of fraud. The plaintiffs complain that they were not notified of what was being done; but, if they were in any case entitled to notice, for which I see no reason whatever, I do not think they can very well complain, as they neither registered their mortgage in the Crown Land office nor in any other way notified the department of their claim upon the leases. I think it but right to the parties who have been charged with fraud to say that in my opinion the charges have not been proved, even though I think the plaintiffs' claim can be sustained without any reference to the question of fraud one way or the other.

We come now to the position of the Electro-Manganese Company, who have acquired their rights *pendente lite*. It is clear, in fact it is not disputed, that when they took over from Kingman, who was their president, the leases 84 and 85, as well as the ore which had been mined, they knew all about the plaintiffs' mortgage and the claim now set up by the plaintiffs under it. It was to protect their interests which they thought were being invaded by this suit that led them to be made parties to it. In their answer they admit knowledge of the mortgage; they do not set up as a defence that they were purchasers for value without notice; the defence which they set up is precisely the same as that set up by Kingman and the Mineral Products Company. All these defendants unite in saying that these original leases 40 and 41 were forfeited, but I do not think this was the fact. We must look to the substance of the transaction, and not sacrifice substance to mere form. When Mr. Tweedie as solicitor of Kingman, applied to the Crown Land department after the Sheriff's transfer had

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been made, or at least after the sale had taken place, he applied to have Kingman registered as assignee of these leases. He had not bought forfeited leases, neither did he pay the $125 as rent due on forfeited leases. He paid it, as he tells us, because he could not have Kingman registered as the assignee until the overdue rent was paid. It is true that the Mineral Products Company did not pay the rent, but it was their rent that was in fact paid, and it is impossible to say that the Surveyor-General, having in his pocket all the rent due, could forfeit the leases for non-payment of rent. There was in fact no intention of forfeiting the leases, and there is no record in the office shewing any such action. By the terms of the leases which are prescribed by the Mining Act, it is provided that when the Surveyor-General or three or more of the Executive Council shall have adjudged or declared the lessee in default, then the lease shall become void; but nothing of this kind was done. What was in fact done appears by the order in Council, which bears date the 13th November, 1902, and is as follows: "The Surveyor-General reports, for the information of the Executive Council, that he has had under consideration the application of Barton E. Kingman of New York, for a transfer of mining leases from 33 to 41, held by the Mineral Products Company; and the grounds upon which he bases his application are, that in the month of April last he the said Barton E. Kingman recovered judgment" etc. Then follows a statement of the sale by the Sheriff, and the purchase by Kingman, and it then proceeds: "And the said Barton E. Kingman having paid all the arrears that were due upon the said licenses, and it appearing to the Surveyor-General that it would be advisable, instead of assigning the old licenses to the said Barton E. Kingman, that new licenses should be issued to him in his own name over the said property covered by the said licenses, he recommends that he be authorized to issue said licenses to said Barton E. Kingman as requested. And the committee of Council concurring in such recommendation it is accordingly so ordered." It is clear that the idea of forfeiture never entered into the mind of anyone who was a party to the

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transaction, but that, as a convenient method of arranging the matter, the old leases were given up by Kingman whom all parties regarded as the only person interested, and new ones were substituted in their place. The position of Kingman to the plaintiffs was in no way altered to their prejudice. He could not, while holding the leases as trustee for the plaintiffs for their mortgage interest, by any such device if he had wished, divest himself of his fiduciary position, or free the property from the trust to which, while in his hands, it was subject. See *Pilgrem* v. *Pilgrem* (1); *Mill* v. *Hill* (2); *Leigh* v. *Burnett* (3).

In my opinion the transaction did not alter the plaintiffs' rights or Kingman's position a particle, and as the Electro-Manganese Company purchased with full knowledge and notice of the trust they can be in no better position. There must, therefore, be a declaration that the two mining leases, Nos. 84 and 85, dated November 12, 1902, are subject to the plaintiffs' mortgage.

As to the ore, I think the parties occupy a somewhat different position. It was clearly the intention of the parties to the mortgage that the Products Company were to have possession so as to go on and mine the manganese, with full power of selling it. That was their business, and, unless they had that power, the business could not go on, and the land was of no value. It necessarily follows that the property in the ore would pass to the purchaser free from any right or interest in it in the plaintiffs, subject only to the liability of the company to account for the 50 cents per ton, or whatever the rate might be under the mortgage, which sum the plaintiffs were to have as a redemption fund for the benefit of the bondholders. It is admitted that two-thirds of the total quantity of ore was taken out by the Mineral Products Company, and one-third by the Electro-Manganese Company under the new lease, and they will be liable to account and pay to the plaintiffs the tonnage rate in these proportions. I presume the parties can agree, not only as to this sum, but also as

(1) 18 Ch. D. 93. (2) 3 H. L. C. 828. (3) 29 Ch. D. 231.

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to the precise amount due upon the bond, otherwise there must be a reference to ascertain these amounts.

As to the costs, I shall only make the usual order in mortgagee's suits. The plaintiffs have made allegations of fraud, which I think were not sustained by their evidence, and the costs of which they should pay. On the other hand the defendants have set up a defence which they have failed in establishing, and the costs of which they should pay. I shall let the one set of costs offset the other.

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Deed—Mistake—Rectification.

The plaintiff, intending to sell the whole of a piece of land, sold it under a verbal contract describing it as the D. lot. The deed to the purchaser followed the description in the vendor's deed. After the vendee's death, and about ten years after the contract of sale was made, the vendor sought to have the deed rectified on the ground that it contained more land than that known as the D. lot. The evidence did not shew that the D. lot did not embrace the whole of the land conveyed:—

Held, that the bill should be dismissed.

Principles upon which the Court proceeds in reforming deeds, considered.

Bill by vendor to rectify a conveyance for mistake in the quantity of land therein comprised. The facts are fully stated in the judgment of the Court.

Argument was heard July 12, 1904.

A. A. Stockton, K.C., for the plaintiff:—

Mistake in a written instrument may be established by parol evidence. See *Lackersteen* v. *Lackersteen* (1); *Tomlison* v. *Leigh* (2). Nor is it necessary that the mistake should have been mutual: *Harris* v. *Pepperell* (3), where the plan in the deed comprising a piece of land not intended by the vendor to be included, a decree of rectification was made. Because the defendant denies the existence of a mistake is not a reason for the Court staying its hand. See *Douglas* v. *Sansom* (4). The mistake here was mutual. The vendor and vendee contracted with respect to the Donnelly lot, and not with respect to the larger piece of land contained in the deed. Both parties were in error as to what the description in the deed comprised.

(1) 6 Jur. (N. S.) 1111.
(2) 11 Jur. (N. S.) 962.
(3) L. R. 5 Eq. 1.
(4) 1 N. B. Eq. 122, 124.

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H. H. McLean, K.C., for the defendant:—

There is no evidence of mutual mistake, and there is even wanting evidence of mistake by the plaintiff. The deed carried out the intention of both parties. The plaintiff intended to sell the whole of the property, and did not have it in mind that the Donnelly lot embraced less than the whole of the property owned by her. As a matter of fact, the whole lot was known as the Donnelly lot. See *McNeill* v. *Haines* (1).

Stockton, K.C., in reply.

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In April, 1889, one Leverett D. Carman for a nominal consideration conveyed to his niece, the plaintiff, Amy V. Carman, a small piece of land in the parish of Musquash, described as, "All that certain piece or portion of the lot number two (2) of land granted to the late John Mount by the Crown, and devised by will by the late Eliza A. V. Carman to the said Leverett D. Carman, which said lot, piece or parcel of land is described and bounded as follows: on the north by the east branch of the Musquash river; on the east by lands known as the 'Lancaster Mills lands;' on the south by road leading to 'Still water,' so called; and on the west by the 'Lancaster Mills lands,' containing one acre, more or less." Eliza A. V. Carman was the mother of Leverett D. Carman and the grandmother of the plaintiff. Some thirty or forty years ago, the precise time is not proved, old Mrs. Carman, who was then the owner of the property, permitted one Catherine Donnelly to occupy the lot, or at all events a portion of it. She and her son John continued to live on the premises until probably about 1883 or 1884—the precise time is not proved—when they moved away and transferred, or in some other way gave over their possession to one John E. W. Smith, who is spoken of by the witnesses as Woolford Smith. The Donnellys, during their occupation, built first a log house,

(1) 17 O.R. 479.

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and afterwards a larger and better house, and cultivated all of the lot that was capable of cultivation. I should judge from Donnelly's evidence, though his memory on some matters does not seem very exact, that Smith occupied the premises as tenant to him for two or three years. Whether that is really so or not I cannot say, but by a conveyance dated November 7, 1885, John Donnelly released and quit-claimed to Smith his interest in the house, which is described in the conveyance as follows:—"A certain messuage now in the seizin and possession of the said John E. W. Smith, situate in the parish of Musquash, City and County of St. John, and Province of New Brunswick, on lands belonging to the Carman estate, and known and distinguished as the house erected by the said John Donnelly and one Joseph Miller. The consideration mentioned in this conveyance is $40, though Donnelly says Smith paid him $50 for the house. Smith continued his occupation of the house and land down to the time of his death, May 18, 1899, and his sister, the present defendant, has continued in possession ever since. Some years before Smith's death, the plaintiff is unable to fix the time more definitely, she agreed to sell to him what she speaks of as the "Donnelly lot," for the sum of $80, which sum was to be paid in instalments. This sum was paid in full, but at what time the last instalment was paid does not appear. The plaintiff who is the only living person who can speak of it, says that it was not as long as six years before Smith's death, but it would be two or three years as nearly as she could remember. At all events when the last instalment was paid, the plaintiff sent Smith her deed from her uncle so that he might have a conveyance prepared from her to him in completion of the sale. From some unexplained cause the matter was not completed; nothing whatever was done or said about it, and the plaintiff's deed remained in Smith's possession up to the time of his death. The defendant is a sister of Woolford Smith and lived with him on these premises for some twenty years. It is not disputed that she, on the death of her brother, became entitled to the benefit of the purchase; and accordingly

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she applied to the plaintiff to execute a conveyance to her. A conveyance was accordingly prepared from the plaintiff's deed, the description of the property being the same in both. This conveyance is dated August 5, 1899; it was executed in presence of the late Hon. Thomas R. Jones; it was registered on the 19th of August, 1899, and was prepared by Mr. W. B. Wallace, who was apparently acting as solicitor for both parties. The plaintiff's case is that in the summer of 1902 she discovered that she had made a mistake in this conveyance to Smith—that she had only agreed to sell the "Donnelly lot," whereas the deed conveyed much more than the Donnelly lot, and that she had executed the deed under the erroneous impression that the deed from her uncle to her conveyed only the "Donnelly lot," whereas it really conveyed a much larger piece of land. It is in order to have this alleged mistake rectified that the plaintiff has filed this bill, in which she avers that the mistake is mutual, as Smith understood the contract precisely as she did, and that the conveyance does not carry it out as it was intended. What led the plaintiff to discover this so-called mistake she has not told us.

A very large proportion of the cases in which a question of mistake is involved between vendor and purchaser, are cases in which suits were instituted by vendors, either for a specific performance of the contract of sale or for a rectification of the conveyance. The cases are extremely rare in which the vendor, who is presumed to know all about his own property and what it is he has agreed to sell, finds himself in the position of having, as the present plaintiff alleges she has done, conveyed in completion of his contract of sale more land than he actually sold or than the purchaser bought. Even in the more usual cases the rule of the Court requires as a condition of its interference on the ground of mistake, either by way of rectifying the instrument if the mistake be mutual, or by way of rescinding it if the mistake be only unilateral, that the evidence should be so strong and convincing as to leave no reasonable doubt that the mistake has been made. There seem to me to be difficulties in the present case almost insur-

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mountable, even if the evidence of the mistake were much stronger, much more exact and much clearer than it is. The contract was the result of a proposal made by the plaintiff herself; it was not in writing; neither is there any written memorandum of any kind which is any evidence of the contract, except the conveyance itself which is adverse to the plaintiff's contention. The only evidence of the alleged contract, and therefore of the mistake, is that of the plaintiff herself, and it is entirely unsupported by surrounding circumstances. I do not say that would of itself be a conclusive answer to her case, though the cases of *Lackersteen* v. *Lackersteen* (1), and *Tomlison* v. *Leigh* (2), cited by Mr. Stockton, are very different cases from this. It does, however, render the plaintiff's case weak where the onus of shewing that there was a mistake and precisely what the mistake is rests upon her. In addition to this, the mistake does not seem to have been discovered until some ten years after the contract was made; some six years after the purchase money was paid, and some three years after the conveyance was executed, and about the same time after the vendee's death.

In *Mortimer* v. *Shortall* (3), which was a case involving the rectification of leases, the Lord Chancellor said: "As to the rule of law, I adhere to what I have already laid down in *Alexander* v. *Crosbie* (4). There is no objection to correct a deed by parol evidence, when you have anything in writing beyond the parol evidence to go by. But where there is nothing but the recollection of witnesses, and the defendant by his answer denies the case set up by the plaintiff, the plaintiff appears to be without a remedy. Here I am not acting upon parol evidence alone; the documents in the cause, and the subsequent transactions, corroborate the parol evidence and leave no doubt in my mind as to a mistake having been made." When speaking of a defendant denying the existence of the error, the Lord Chancellor was probably speaking of a defendant who was a party to the contract, in which case it would not conclude the present plaintiff,

(1) 6 Jur. (N. S.) 1111. (2) 11 Jur. (N. S.) 962. (3) 2 D. & W. 363.
(4) Lloyd & G. Ca. temp. Sugden, 145.

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because Smith being dead and the defendant having no personal knowledge of the terms of the contract, is not in a position to say whether there was or was not a mistake. The stringency of the rule which governs each case is also shown by *Beaumont* v. *Bramley* (1), which was a case like the present, in which the vendor sought to have his conveyance rectified because it passed too much. The Lord Chancellor says: "In cases of this nature, great weight must be given to what is reasonably and properly sworn on the part of a defendant, because it must be a very strong case that would even in a recent transaction operate to overturn or vary a solemn instrument, and after the lapse of so long a time it must be a case that leaves no reasonable doubt, a case that must satisfy the conscience of the Court, or of a jury, if it goes to a jury, but it is only after great consideration that such a case should be sent to a jury." The Lord Chancellor says that such a case is one of great difficulty, and Courts should proceed with great caution.

The first question to be settled is, what was in fact the contract, and then comes the other one, does the contract carry out the intention of the parties? Because if it does there is of course an end to the case. This Court cannot make a new contract for the parties, though it may reform a conveyance intended to carry out a contract, but which, from some mistake in it, does not do so. This Court does not act simply because a plaintiff swears that he has made a mistake. The error which entitles the party to relief must be as to some material matter, and it must be one which is not attributable to the unreasonable or negligent conduct of the complainant himself. The evidence as I view it fails in establishing any mistake which the Court can notice, or in reality any mistake at all. The alleged contract was the result of a conversation between the plaintiff and Smith, in which she made a proposal of sale to him. She gives the conversation as follows:

(1) T. & R. 41.

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"Q. What was the conversation? A. Well, he made the arrangement. I wanted him to buy the property, the Donnelly lot, before we left Musquash, and he made an arrangement. He was to pay me so much in instalments, and I told him that after he paid me I would hand him in the deed, and so after we came to St. John and had been here for some years he paid me the last instalment, and I sent him the deed I had.

"Q. Of the whole of the property you got from your uncle? A. Yes, that deed, and it was understood between him and me that he would buy the Donnelly lot.

"Q. What was said that he would buy? A. He said the Donnelly lot.

"Q. Who was keeping this piece of land at that time? A. Mr. Smith.

"Q. For $80. A. Yes."

Meagre and unsatisfactory as this evidence is, and perhaps it is not to be wondered at after a lapse of some twelve years, it seems to me to indicate, what I have no doubt of from the rest of the evidence in the case, the fact that when the plaintiff spoke of the property which she wished Smith to buy, and which she describes as the Donnelly lot, she had in her mind the property described in the deed from her uncle which she said she would send to him after he had paid the purchase money, so that he might get a conveyance to himself prepared. But that deed afforded no assistance to a person commissioned to draw a conveyance of that part of the lot now said to have then been occupied by Smith included within the fences, the location of which the plaintiff could scarcely have known anything about at the time, and which Donnelly and the other witnesses were unable to fix with any exactness. It is clear from all the evidence that what the plaintiff had in her mind to sell was the land described in the deed from her uncle; it was upon that that the price of $80 was fixed—not for one-half of it—and it was that which she intended to convey. She may have been under the impression that Donnelly occupied the whole lot described in the deed, or to put it the other way, that her deed con-

veyed to her only what Donnelly occupied. She did not know, except from the terms of the deed, what Donnelly occupied, and she did know what her deed gave her and what were the boundaries of the lot conveyed by it, and it was that which she in reality intended to sell, though she may have erroneously called it the "Donnelly lot." If the verbal contract just as the plaintiff says it was made were put into writing with her understanding of the meaning of the term "Donnelly lot," which without explanation means nothing, it would read thus: "I agree to sell to Smith, and he agrees to buy from me, for the sum of $80, the Donnelly lot, which I understand to be the land described in a deed to me from Leverett D. Carman," etc. That is reducing into writing precisely the plaintiff's understanding of the contract. After making a conveyance accordingly, would this Court rectify it on the ground that she had made a mistake in her understanding? I think not. At most she has only sold a lot of land which comprises more than she thought it did, which is not a mistake capable of rectification.

In *Tamplin* v. *James* (1), the plaintiffs who were vendors filed a bill to compel specific performance, and the defence was, a mistake on the purchaser's part in thinking that the property agreed to be sold comprised more than it really did; but that was held to be no answer. James, L. J., says: "The vendors did nothing to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the tithe map, and this was quite correct. The purchaser says that the tithe map is on so small a scale as not to give sufficient information, but he never looked at it. He must be presumed to have looked at it and at the particulars of sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the whole of what was in the occupation of the tenants, but he asked no question about it. If a man will not take reasonable care to ascertain what he is buying he must

(1) 15 Ch. D. 215.

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take the consequences. The defence on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, 'I thought the farm sold contained twelve fields, which I knew, and I find it does not include them all,' or, 'I thought it contained 100 acres and it only contains 80.' It would open the door to fraud if such a defence was to be allowed." These remarks apply still more strongly to a vendor, because he ought to know what he is selling, and he ought to know the boundaries of his own land and the occupation of his own tenants. See *Humphries* v. *Horne* (1); *Okill* v. *Whittaker* (2).

In the report of this last case in 2 Ph. 338, Lord Cottenham says: "Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres,' and the price was fixed on that supposition, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm on payment of the difference? Clearly not, the only equity being that the thing turns out more valuable than either of the parties supposed; and whether the additional value consists in a longer term or a larger acreage is immaterial." In addition to what I have already said I think there is ample evidence to warrant me in concluding that the Donnelly lot as understood, was in fact the lot conveyed to the plaintiff by her uncle, and was in no way limited to the particular part fenced in as is contended. Perhaps it is sufficient for the purposes of this case if the plaintiff so regarded it, but the facts and circumstances all point to that conclusion. Leverett Carman speaks of the Donnellys and Smith being tenants, but if so they cannot have been more than tenants at will or at sufferance. None of them ever had a lease, and so far as the evidence goes they never paid any rent. Donnelly in answer to a question as to what rent he or his mother paid, said: "We did'nt pay him any rent; he made it a present. We were poor and mother paid no rent, and Mrs. Carman kind of gave her the ground."

(1) 3 Hare, 277. (2) 11 Jur. 141, and on appeal, 681.

"Q. Just let her put up her house and live in it without rent? A. Yes.

"Q. Never paid any rent? A. No, sir."

Neither the Donnellys nor Smith had any title to the lot until Smith bought from the plaintiff. They had no leases, verbal or otherwise, and they paid no rent, or at all events Donnelly did not. How any one knowing these facts as the Plaintiff did, and as Smith must also have known, could attach any other meaning to the term "Donnelly lot" than merely "the lot of Mrs. Carman upon which or where Donnelly lived," I am unable to see. This, it must be recollected, was but a small isolated lot in a country parish and separate from any other of the Carman property. It is spoken of in the deed prepared under the directions of Leverett Carman, as containing an acre, more or less. Hanson, by actual survey, found the area to be 1 acre, 68 square rods, and the piece inside of the fence, as described by Mr. Cloves Carman, to be 3 roods and 20 perches. Mr. Carman makes it nearly double this size, but Hanson's survey corresponds very closely with Leverett Carman's estimate when he made the conveyance to the plaintiff. There is no suggestion that $80 was not a full price for the whole lot. Indeed it is proved by all the witnesses that all that part of the lot which is capable of cultivation, was cultivated by Donnelly and by Smith, and was surrounded in part at all events by fences. The only part outside the fences is a gravel bank, which has never been used, and is of no value so far as is known. The Carmans have never used the lot in any way; they owned it of course; but, irrespective of the fences altogether, Donnelly and Smith used the gravel-bank and that portion of it which was unfenced and led down to the river, just as freely as they required, and occupied it just as much as the rest of the lot, except that one was of value and therefore in constant use, while the other was of little value and therefore seldom used. It is true that fences of some kind were built along the top of the bank and other places; and their is some evidence to support the contention put forward by the plaintiff's Counsel, that these were put

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up to indicate the limits of Donnelly's occupation; and the "Donnelly lot," so called, could be defined in that way. The evidence as to the precise location of these fences, as I have already stated, was anything but satisfactory. Leverett Carman, who I think was not well when examined under a Judge's order, was not able to tell. Cloves Carman was able to point out where he found remnants of old fences, and Donnelly could only describe them in a general way. In a case like this, where a rectification of a written instrument is sought on the ground of mistake, it is the duty of the plaintiff not only to shew that there has been a mistake and what it is, but to inform the Court what the contract should have contained, instead of what it did in fact contain. To meet this the plaintiff set out in her bill a description of the lot really sold to Smith, and as she contends it should be in the conveyance. Although the bill in that state was sworn to by the plaintiff for the purpose of an injunction, her Counsel felt compelled at the hearing to amend this description. One distance is lessened by ten feet and another by fifty feet. One of these fences is made a boundary by the amendment, while as originally prepared, the description says nothing about the fences at all. I must confess that the evidence led me to think that the real object in erecting the fences was, as some if not all of the witnesses practically admitted, to protect the crops from being destroyed by cows which were liable to stray on the lot. That is a sensible and practical reason; but to put up fences to define the occupation of parties situated as these were, who were occupying the whole lot and cultivating all that was capable of cultivation and the real owners assenting to it, does not seem to me so reasonable a view as the other. I shall allude to but one more circumstance which seems to shew that, with the Carman family themselves, and the plaintiff among the number, by the term "Donnelly lot" was meant this whole lot and nothing else. On the plaintiff's examination she was interrogated as to the interview between herself and the defendant when the plaintiff applied to her to rectify the deed, apparently with a view of shewing how

her brother had understood the bargain. I quote from the evidence as follows:

"Q. Did she (defendant) say anything about your grandmother (that is, the plaintiff's grandmother)? A. Yes, he (that is, Smith) said this was the land she wished I should have (that is, Smith the person with whom the plaintiff contracted, told the defendant that the land which the plaintiff was to convey to him was the land plaintiff's grandmother, old Mrs. Carman, wished her, that is the plaintiff, to have).

"Q. What piece was that? A. The Donnelly lot." Later the plaintiff was asked whether she went to Smith to purchase or he came to her. Her answer was: "I went to him and I told him it was this lot of land that grandmother had wished me to have."

Now when you find that this lot was devised by Mrs. Carman to Leverett Carman, and that her wishes in reference to it were carried out by his conveying this lot as the Donnelly lot to the plaintiff, the identity of the two is placed beyond doubt. Leverett Carman did not carry out his mother's wishes that the plaintiff should have the "Donnelly lot" by conveying what was between the fences. Such a thing, very naturally as I think, never occurred to him.

In *Okill* v. *Whittaker* (1), Knight Bruce, V.-C., in dealing with a case somewhat similar to this, says: Now from all this, the just and inevitable conclusion I think will be, that the thing which the vendors intended to sell, and the purchaser intended to buy, was not a term of eight or nine years, but was the lease of 1755, as it affected this property, erroneously supposed to have a shorter time to run than in fact it had. That being so, it must be impossible I think to give the plaintiffs relief in this case upon any other footing than that of rescinding the contract wholly, or from the outset rescinding the contract. Under what circumstances is that sought in a case where, I repeat, there is a total absence of unfairness and where the peculiar

(1) 11 Jur. 141.

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doctrines of specific performance are entirely beside the question? The purchase was, as I have stated, complete in the month of August, 1836. The purchaser lived until 1842, when he died, and therefore those who have to administer justice between the parties are deprived of all the assistance and all the information which he, if living, might have afforded, and it is not until two or three years after his death, and some eight or nine years after the purchase, that this bill is filed, which must be treated as a bill for the purpose of rescinding the contract, that being the only ground upon which it could be reasonably suggested that a bill could be sustained. The ground alleged is mistake. Now, how it should happen that the vendors could make such a mistake, it is difficult to comprehend. Certainly it is not stating too much to say, that it was their duty to know what was the state and condition of the property which they had to sell. How it came or under what circumstances this mistake was made, and how it happened that they were in this strange state of ignorance or error or both, is undemonstrated and unexplained. But there is a still greater lack of explanation, because it is also not shown when nor how, by what means, or by what persons the supposed mistake was discovered. When the truth reached the minds of the vendors or the minds of the purchasers—all that is left in obscurity and darkness. In such a case as this, after all that has occurred, the Court is asked to rescind the contract. I am of opinion that such a bill must be dismissed, with costs."

So in the present case while I think the evidence shews that there was in reality no mistake, or at all events none which would sustain this bill, it is also I think demonstrated by the plaintiff's own evidence that the lot of land which she had in her mind when she made the contract, was the lot described in her deed from her uncle, which she knew all about; it was that lot for which the price was fixed by her, it was that lot she evidently intended to convey, and it was that lot she did convey in completion of her contract for sale. I think under the circumstances the bill must be dismissed, and with costs.

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1904.
October 7.

Practice — Payment into Court — Surplus of mortgage sale — Competing claimants to fund — Costs.

A mortgage sale under power yielded a surplus of $320.29, out of which the mortgagee applied to pay into Court $246.89, being amount of a judgment against the mortgagor, which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mortgage:—

Held, that on the mortgagee paying into Court the whole surplus, less the costs of his appearance and application, his name should be struck out of the suit.

Motion by the defendant Henry B. Robinson on notice, for leave to pay money into Court to the credit of the suit. The facts fully appear in the judgment of the Court.

Argument was heard September 30, 1904.

M. G. Teed, K. C., in support of the motion.

C. N. Skinner, K. C., for the plaintiff.

A. A. Wilson, K. C., for the defendant Thurston.

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It appears by the plaintiff's bill that on the 22nd July, 1892, one John M. Taylor gave a mortgage on some land in St. John to one C. F. Kinnear, to secure the sum of $500 and interest. On November 30, 1903, Manchester, Robertson & Allison Co., Limited, recovered a judgment in the St. John County Court against Taylor for $238.21, a memorial of which was filed in the St. John registry office on the same day. On the 5th December, 1903, Taylor and wife conveyed their equity of redemption in the mortgaged premises to the defendant Thurston. On the 3rd May, 1904, Kinnear, the mortgagee, assigned the mortgage to the

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defendant Robinson, and on the 31st May, 1904, Manchester, Robertson & Allison Co., Limited, assigned the judgment against Taylor to the present plaintiff. Robinson, under a power of sale contained in the mortgage, sold the premises at auction on the 16th July, 1904, for the sum of $950, which was paid to him. After deducting for himself the amount due on his mortgage and expenses there remains a balance of $320.29 in his hands in trust for the mortgagor or his assigns. As the sale by the mortgagee prevented the plaintiff from realizing on his judgment by a sale of the land under execution he has, as I understand the case, filed this bill to enforce payment out of the surplus proceeds in the hands of Robinson as representing the land, and he has demanded from him payment of the amount due on his judgment, which Robinson refused; not that he claims any interest in the fund, but because the defendant Thurston claims the whole balance. The bill asks for payment of the amount due on the judgment, which, at the commencement of the suit, seems to have been $246.89, and for an injunction restraining Robinson from paying the balance or any part of it to Thurston, or anyone else than himself. This present application is made by Robinson for an order permitting him to pay into Court, to the credit of this cause, the sum of $246.89, and directing that upon such payment his name should be struck out as a defendant, and that his costs of his appearance in this suit and of this application should be paid out of the $246.89.

It is difficult to see why the applicant wishes to retain any part of this fund in his hands. He disclaims all interest in it, and by paying it into Court to the credit of a cause to which the competitors for the fund are parties, he would be protected by any decree made for its distribution. No objections have been made to the form of this application, but the plaintiff contends that before Robinson's name can be struck from the record he must pay the whole amount into Court, or at least that sum less the amount of his costs, and in my opinion that contention must prevail. I think substantially the same principle should govern this

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application as though the applicant had filed a bill of interpleader, in which case the bill must allege that the money has been paid into Court, or that the plaintiff is willing and ready to do so; and the almost invariable rule seems, in the absence of consent to the contrary, to be that the fund in dispute should be so dealt with. *Prudential Assurance Company* v. *Thomas* (1) is an authority for holding that if Thurston had not been a party to this bill, Robinson could have filed a bill of interpleader and obtained an injunction restraining this action, and the reason, or at all events the principal reason, is that he could not with safety pay the fund into Court to the credit of a cause to which all persons interested in or claiming the fund in whole or in part, were not parties before the Court. The rule is laid down as I have stated it, in *Mitford* on Pleading (2). Lord Redesdale there says: "As the sole ground on which the jurisdiction of the Court in this case is supported is the danger of injury to the plaintiff from the doubtful titles of the defendants, the Court will not permit the proceeding to be used collusively to give an advantage to either party, nor will it permit the plaintiff to delay the payment of money due from him by suggesting a doubt to whom it is due; therefore, to a bill of interpleader, the plaintiff must annex an affidavit that there is no collusion between him and any of the parties; and, if any money is due from him he must bring it into Court, or at least offer to do so by his bill." The applicant here seeks to get rid of this suit by paying into Court the sum now due on the plaintiff's judgment, and says that is the only part of the fund about which there is any dispute, as the balance of $74.45 admittedly belongs to the defendant Thurston. While I am unable to see why Robinson should raise any such question, I do not think the position is tenable from the standpoint of Thurston. He acquired the property subject to the two liens; and, if the plaintiff is able to establish a charge upon this fund in place of the lien which he had on the land, and co-extensive with it, as

(1) L. R. 3 Ch. 74.

(2) P. 49.

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he seeks to do by this bill, one would think that his lien would be good, not only for the additional interest which might accrue on the judgment, but, also for the costs of realizing his security, which in this case would certainly absorb the balance. At all events the plaintiff ought not to be deprived of all chance of reaping the fruits of his claim if he is able to establish it, by handing over the balance of this fund to Thurston (for that would be practically the effect of the order asked for), whose claim is altogether subject to that of the plaintiff. *Robinson* v. *Hedger* (1), and also in 14 Jur. 784, is a somewhat similar case. In that case the plaintiff had a judgment for £800, and he filed a bill against the mortgagee and the mortgagor's assignees in insolvency, praying a declaration that the amount due on his judgment was a charge in equity on the £5,000, the proceeds of a sale by the mortgagee under a power of sale, and then in their hands subject to the charge created by the mortgage, and asking for an injunction restraining the mortgagee and assignee from parting with the money. The Court granted the injunction, not for £800, but for £1,000. See also *Thornton* v. *Finch* (2); *Jones* v. *Thomas* (3).

There will be an order that on the payment by the defendant Robinson into Court to the credit of this cause of the sum of $320.29, less his taxed costs of this application and his appearance in this suit, on or before the 21st day of October instant, his name as a defendant be struck out of the record, and the title of this suit be amended accordingly. And in default of such payment this application do stand dismissed with costs.

(1) 13 Jur. 846. (2) 4 Giff. 515. (3) 2 Sm. & G. 186.

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October 18.

—No. 2. See ante, p. 1.

Mortgage—Foreclosure—Fetter on equity of redemption—Bonus —Collateral advantage.

The proviso for redemption in a mortgage dated August 30, 1902, to secure an advance of £3,500, was the payment on November 11, of £6,000 and the transfer of £5,000 in shares in a company to be promoted by the mortgagor. The principal money advanced was applied in purchasing the mortgaged premises, the value of which was speculative, being practically comprised in undeveloped salt springs which the proposed company were to work. In a suit for foreclosure:—

Held, that the proviso for redemption should not be relieved against.

This was a suit for the foreclosure of a mortgage dated August 30, 1902, given by the defendant William Harvie to the plaintiff Albert Buchanan, both of London, England, of lands situate in King's County. The mortgage was to secure an advance of £3,500 by the plaintiff to the defendant Harvie, to enable the latter to purchase the mortgaged premises. The mortgaged property consisted of about 1,450 acres, and contained salt springs which the defendant proposed to develop through a company to be organized by him, and to be known as the New Brunswick Salt and Alkali Works, Limited. The price paid by the defendant for the property was £3,200. The value of the property exclusive of the salt springs would not exceed $2,500. The springs had not been opened up to an extent sufficient to determine their value, or whether salt existed in large and paying quantities. Their natural flow yielded salt of a very superior quality. Of the £3,500 advanced by the plaintiff, £50 was applied to cover expenses of an examination of the property by him, and the remaining £250 was retained by the defendant. The proviso for redemption in the mortgage was that the mortgagor should on or before the eleventh day of November, in the year one thousand nine hundred

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and two, pay or cause to be paid to the mortgagee the sum of £6,000, and should, on or before the said eleventh day of November, transfer or cause to be transferred to the mortgagee, fully paid-up shares of the company, to be promoted and organized by the mortgagor, and in the mortgage referred to as the New Brunswick Salt and Alkali Works, Limited, to the nominal face or par value of £5,000. The defendant Frederick Garside, by notice dated February 7, 1903, notified the plaintiff that by an agreement dated August 27, 1902, the defendant William Harvie charged in his favor the property described in the plaintiff's mortgage, to secure the repayment of £500 and interest. The plaintiff's mortgage was registered in the registry office of King's County, on October 7, 1902. The plaintiff prayed to be paid the sum of £6,000, and that a transfer be made to him of fully paid-up shares of the New Brunswick Salt and Alkali Works, Limited, of the nominal face or par value of £5,000, and to be paid costs of suit; that an account might be taken or a decree made of the amount due the plaintiff; that the defendants might be decreed to pay the amount found or decreed to be due, by a day to be appointed; or in default thereof, that the defendants might be debarred and foreclosed of and from all right, title, interest and equity of redemption in and to the mortgaged premises, and that in the order for foreclosure absolute delivery up of possession might be decreed to the plaintiff. The plaintiff had been in possession of the mortgaged premises since February 9, 1904, by an agent, and by his bill submitted to account as mortgagee in possession. At the hearing evidence of the fair rental value of the property, with which to charge the plaintiff, was given. The bill was taken *pro confesso* against the defendant Garside.

Argument was heard September 20, 1904.

E. G. Kaye, for the defendant Harvie:—

The mortgage is oppressive and unconscionable. A mortgagee cannot stipulate for any advantage beyond principal, interest, and costs, if any. If a collateral advan-

tage is sought, it is a clog upon the equity of redemption. *Jennings* v. *Ward* (1) is a distinct authority that a mortgagee shall not have interest for his money and an additional advantage for the loan of it. In *Chambers* v. *Goldwin* (2), Lord Eldon says that it is clear that a mortgagee cannot originally contract for a collateral advantage, or any advantage beyond interest. See also *Broad* v. *Selfe* (3). These authorities were upheld in *Mainland* v. *Upjohn* (4). If a collateral advantage will be allowed, it must be fair and reasonable: *Biggs* v. *Hoddinott* (5). Otherwise the equity to redeem is fettered. See *Noakes & Co., Limited* v. *Rice* (6), and *Bradley* v. *Carritt* (7). The repeal of the usury laws does not leave parties free to make an oppressive and unconscionable bargain.

W. H. Trueman, for the plaintiff:—

The question, if any, in dispute is not as to the equitable doctrine that equity will not suffer a fetter on the right to redeem. The right to redeem is in no wise fettered here. The stipulations in the mortgage for the benefit of the mortgagee are part of the mortgage transaction, and the condition upon which the loan was made. They cannot be a clog on the equity of redemption, for the equity of redemption does not arise until the performance of the stipulations. On the payment of £6,000 and a transfer of shares in the proposed company, the security comes to an end. If it were the rule that a mortgagee cannot reserve to himself a collateral advantage, this case would not come within it. The mortgage does not provide for the payment of interest. Instead, the mortgagee is to have, in addition to the return of his loan, the sum of £2,500 and shares in the proposed company to the value of £5,000. This may be described as a high rate of interest. It is only interest in another form. It cannot be described as a collateral advantage. If it can be so described, there is no principle against it. See *Mainland* v. *Upjohn* (4); *Biggs* v.

(1) 2 Vern. 520.
(2) 9 Ves. 254.
(3) 9 Jur. (N. S.) 885.
(4) 41 Ch. D. 126.
(5) [1898] 2 Ch. 307.
(6) [1902] A. C. 24.
(7) [1903] A. C. 253.

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Hoddinott (1); *Santley* v. *Wilde* (2); *Noakes & Co., Limited* v. *Rice* (3). In *Potter* v. *Edwards* (4), the mortgage was expressed to be to secure £1,000 with interest at 5 per cent. In fact, only £700 was advanced, the remaining £300 being a bonus. It was held that the mortgagor could not redeem except upon payment of the £1,000. The bargain there stood for the very good reason that the mortgagor obtained the loan on the footing and faith of the contract. If there was fraud or overreaching, or perhaps hard bargaining such as to be unconscionable, in the present case, relief would be given, but no suggestion of that can be made. The parties dealt at arm's length. The defendant expected to make large profits from the floating and working of the proposed company, and was willing to pay liberally for the loan. Unless he had been he could not have obtained it. The plaintiff was supplying all the money at risk in the enterprise, which was of a highly speculative nature, and was entitled to remuneration commensurate with the hazard he assumed.

1904. October 18. BARKER, J.:—

The sole question involved in this suit is whether the provisions of the mortgage in question create a clog upon the redemption, so as to entitle the plaintiff to nothing more than the sum actually advanced, with interest and costs. There is no suggestion that the contract was in any way the result of oppression, or unfair dealing or surprise. It was a fair, open, well-understood bargain between two business men, who were in all respects competent to contract. The one was desirous of borrowing £3,500 for the purpose of buying the property described in this mortgage, with the intention of forming a company to utilize it in the manufacture of salt. The plaintiff agreed to lend the money on certain specified terms, which the defendant accepted, but which he now seeks to alter to his advantage, so as to escape by the payment of the actual money advanced and interest. *Samuel* v. *Jarrah Timber and*

(1) [1898] 2 Ch. 307.
(2) [1899] 2 Ch. 474.
(3) [1902] A. C. 24.
(4) 26 L. J. (Ch.) 468.

Wood-Paving Corporation (1), is an express authority that, however unreasonable it may seem that this Court should interfere with the rights of parties as secured to them by a contract made under such circumstances, the old doctrine, "Once a mortgage, always a mortgage," is still alive; and, therefore, if there is any condition or agreement in the mortgage transaction which fetters the right to redeem, that condition cannot be enforced. There is, however, a distinction between a clog upon redemption and a collateral advantage to the mortgagee, which in no way fetters the right to redeem. It is admitted here that, though the mortgage is to secure the payment of £6,000 and the transfer of certain shares in the company which the defendant was about organizing, the plaintiff in fact only advanced £3,500, of which £50 went to pay the expenses of his son in coming to this Province to examine the property before the bargain was completed. The premises, by the express terms of the mortgage, were redeemable on the payment of the £6,000 and transfer of the shares, but only upon these terms. The land outside of its mineral value does not seem to be worth the price paid for it, so that the plaintiff was getting a risky security for his money, and naturally expected a large bonus by way of remuneration. The company does not seem to have been organized; and the shares were, therefore, never assigned to the plaintiff. His £6,000 were never paid, but the defendant is willing, as he says, to repay the £3,500 with interest, on having his property re-conveyed to him.

I am unable to distinguish this case from *Potter* v. *Edwards* (2), where on a loan of £700, a mortgage to secure £1,000 was held a valid security for the larger sum. *Mainland* v. *Upjohn* (3); *Noakes & Co., Limited* v. *Rice* (4); *Biggs* v. *Hoddinott* (5), are all to the same effect. In *Noakes & Co., Limited* v. *Rice*, Lord Davey, after alluding to the rule which prevailed while the usury laws were in force, by which Courts of Equity declared void every stipu-

(1) [1904] A. C. 323.
(2) 26 L. J. (Ch.) 468.
(3) 41 Ch. D. 126.
(4) [1902] A. C. 24.
(5) [1898] 2 Ch. 307.

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lation by a mortgagee for a collateral advantage which made his total remuneration for the loan indirectly exceed the legal interest, says: "I think it will be found that every case under this head of equity was decided either on this ground, or on the ground that the bargain was oppressive and unconscionable. The abolition of the usury laws has made an alteration in the view the Court should take on this subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee." And he expresses his approval of the decision in *Biggs* v. *Hoddinott*, while disapproving of the decision in *Santley* v. *Wilde* (1). Lord Davey, in the case just cited, approves of the definition of the term, "clog or fetter on the right of redemption," given by the Master of the Rolls in *Santley* v. *Wilde*, and adds, "I think it must be security for the principal, interest and costs, and, I will add, for any advantages in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage. There are two elements in the conception of a mortgage: first, security for the money advanced; and secondly, remuneration for the use of the money." In the same case the Lord Chancellor cites with approval the definition of the Master of the Rolls to which I have referred, and which, so far as it relates to the present case, is as follows: "Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this that, once a mortgage always a mortgage, but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation, the payment or performance of which is to be secured, is a clog or fetter within the rule."

Between these cases and the present there seems to be no difference in the principle applicable to them. The remuneration which the defendant agreed to pay for a

(1) [1899] 2 Ch. 474.

loan of £3,500, for a specified time without interest, was a cash payment of £6,000 and a transfer of certain shares in the company which the defendant was about to organize, and which represented a possible, but unascertained, value in addition. The difference between the sum loaned and the sum secured may, and, in fact, does seem large even where the security is as speculative as the evidence shews this was. And, if the validity of the transaction were being impeached on the ground of oppression or surprise, or any similar ground, this difference would be an important factor in the determination of that question. But no such defence is set up here, and, if it were, there is no sufficient evidence whatever to support it.

There must be a decree of foreclosure.

The decree *nisi* was as follows:

Order that the damages for principal on the mortgage set forth in the plaintiff's bill be assessed at the sum of £5,974 up to the first day of April, A. D. 1905; and that the plaintiff shall be allowed his taxed costs of suit, the same to be added to the said principal; and the Court doth further order that, upon the defendants, or any of them, paying to the plaintiff said principal, together with his costs of this suit, and transferring to the plaintiff fully paid-up shares of the New Brunswick Salt and Alkali Works, Limited, to the nominal face or par value of £5,000, on the first day of April, A. D. 1905, between the hours of twelve o'clock in the forenoon and two o'clock in the afternoon of said day, to the plaintiff, at his residence or place of abode, 364 Camden Road, in the County of Middlesex, Great Britain, the plaintiff do execute and give a written discharge and satisfaction of the indenture of mortgage comprised in the bill of complaint, and of all sums due or payable thereunder, said discharge to be executed and acknowledged in accordance with the registry laws of the Province of New Brunswick, and do deliver up said indenture of mortgage and all deeds and writings in the custody and power of the plaintiff relating to said indenture of mortgage, or the loan secured thereby, to the said defendants, or such of them as shall redeem, or to whom they or such of them shall appoint; but it is ordered that, in default of the defendants paying unto the plaintiff such principal and transferring said shares and costs as aforesaid, the defendants shall stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises comprised in the said indenture of mortgage.

[The damages were assessed in this suit up to April 1, 1905, the date fixed for redemption, in order to charge the plaintiff, who was in possession of the mortgaged premises, with a fair occupation rental up to that date. Otherwise the plaintiff would not be entitled to an order absolute without opening the account, and obtaining a new day for redemption. See *Prees* v. *Coke*, L. R. 6 Ch. 645; *Allen* v. *Edwards*, 42 L. J. (Ch.) 455; *Garlick* v. *Jackson*, 4 Beav. 154; *Scott* v. *McDonell*, 1 Ch. Ch. 193—Rep.]

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LEIGHTON v. HALE.

Partnership — Purchase of property — Re-sale — Agreement to divide profits — Consideration — Declaration of trust.

Upon information supplied by the plaintiff, the defendant purchased certain property held by a bank as security for advances to the plaintiff's father, which upon re-sale yielded a surplus after meeting a liability the defendant had assumed for the benefit of plaintiff's father. The defendant promised the plaintiff that in the event of there being a surplus it should belong to him :—

Held, that the plaintiff and defendant were not partners, entitling the plaintiff to share in the profits from the re-sale of the property, and that the defendant's promise, which was not a declaration of trust, was *nudum pactum*.

Bill for the winding up of a partnership alleged to have existed between the plaintiff and defendant, and for the usual accounts. The facts sufficiently appear in the judgment of the Court.

Argument was heard September 8, 1904.

F. B. Carvell, for the plaintiff.

J. C. Hartley, for the defendant.

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This bill was filed for the winding up of a partnership alleged to have existed between the parties, and for the usual account to be taken. The defendant denies the existence of any partnership, or any liability to account in any way, and it is this question which I now have to decide. It seems that on the 25th of May, 1892, one John S. Leighton, the plaintiff's father, who had been doing business at Woodstock, made an assignment for the benefit of his creditors. He was then indebted to the Saint Stephen bank in the sum of $7,295 for moneys advanced, and there were current at that time some eight or nine

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promissory notes for $2,500 or $3,000 (the exact amount is disputed) made by Leighton in favor of the defendant, and endorsed by him for Leighton's accommodation, all of which the defendant afterwards paid. The property assigned by Leighton realized nothing for the general body of creditors, as the proceeds were not sufficient to pay the preferred claims. The defendant had no security for his liability, but the bank held, as a security for its claim, the following properties, that is to say:—A leasehold property, known as the Dalling property, in Woodstock; a mortgage on the Craig property, also in Woodstock; a property at Debec; another in Houlton, and a policy of insurance on Leighton's life for $5,000. The plaintiff, who was then, and for several years prior to that had been, the deputy of his father as Registrar of Deeds for Carleton County, having heard that the bank would likely part with its securities for a sum less than the amount due on them, went to Saint Stephen and ascertained from Mr. Stevens, the bank's solicitor, that the securities could be purchased for $6,000 cash. He then went to the defendant; told him about these properties, and that they could be purchased for $6,000, and said that if he (the defendant) could buy them for that sum he could realize out of them sufficient to repay him the purchase money, and also the amount which he had lost by his (the plaintiff's) father, and which was spoken of then, in round numbers, as $2,500. The result was that the defendant and plaintiff went to Saint Stephen to see the bank officials. The defendant refused to give the $6,000, but the result of the negotiations between the defendant and the bank was that later on the defendant purchased the securities for $5,500, and they were assigned to him on the 27th of June, 1892. They have all since that date been realized; and the plaintiff's case is that after paying the defendant the $5,500 and interest, and the $2,500 and interest, with other charges upon the fund, there remains a surplus which, by the terms of the agreement made between him and the plaintiff at the time of the purchase, belongs to him. This is the agreement upon which the plaintiff relies as having created

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a partnership between the parties. He also puts forward in his bill, and he gave some evidence in support of it, that it was a part of the original arrangement that he was not only to have this balance, but that in stating it the defendant was to throw off $500 from the amount coming to him. I think the evidence altogether fails in proving a partnership between these parties. It does shew a voluntary and gratuitous offer or promise by the defendant to pay to the plaintiff whatever balance there might be after payment of the $5,500, the amount of the Leighton notes, together with interest and other charges. This the defendant admits. There was nothing however that I can discover in what took place between the parties either before or after the purchase to indicate an intention on the part of either of them to create those mutual rights and obligations upon which partnerships are based, and which are necessary to their existence. The transaction, as stated by the plaintiff himself, may be stated thus:—A. says to B. "You have lost $2,500 by my father's failure. I happen to know that C. is willing to sell certain properties which he holds, for $6,000. If you can purchase them at that price you will be able to realize out of them enough to repay you the purchase money and the $2,500 and interest, and have a surplus." B. says "If I can buy them at a figure to suit me, I will purchase, and if there is any balance left after I get my money and interest, I will give it to you." B. does purchase for $5,500, and there is a balance. According to my view of the evidence that represents in fact and substance the whole arrangement under which the defendant purchased these securities, as the plaintiff himself proves it. But can it be said that a partnership was thereby created? The plaintiff paid no money, incurred no liability, ran no risks, did not agree to contribute anything in work, money, or in any other way; he had no authority to deal with the property except as the defendant permitted, and he was not liable for losses. He had only this offer or promise that whatever balance there might be should go to him as a gratuity. It may be true that without a right to participate in profits there can be no partnership, but it certainly

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is true that such a right does not of itself create a partnership: *Cox* v. *Hickman* (1); *Stocker* v. *Brockelbank* (2); *Badeley* v. *Consolidated Bank* (3); *Mollwo, March & Co.* v. *Court of Wards* (4).

There was a generality and inexactness in many of the plaintiff's statements as to the details of this transaction, due probably to the length of time which has elapsed since it took place, but which were liable to mislead one all the same. He put forward the idea that the bank was willing to lose the $1,600 which they did lose as a kind of concession to his father, and that the defendant, as the plaintiff's nominee, could buy, and in fact did buy, the property at a reduced rate in view of the plaintiff and his family deriving some benefit from it; and that this was a kind of contribution by him to the purchase money. This seemed to me so unlikely a story that I was not surprised to find it altogether disproved by Mr. Stevens, the bank's solicitor, who negotiated the sale, and was conversant with all the facts. Importance was attached to the fact that the plaintiff negotiated the sale of the Debec farm to Grant; that he collected some of the rents, and in some other less important ways assisted in the management of the property, thereby shewing, as he contended, that he had an interest in it, which was recognized by the defendant. It is true that he made a written agreement in May, 1894, with Grant for the purchase of the Debec property, and that he signed that agreement himself, and as agent for the defendant. The defendant says he had no authority to do this, and the plaintiff states in his bill that he negotiated this sale and the defendant afterwards ratified it. He does not pretend that he was acting as a partner as agent of the partnership in any way; but professing to act as the defendant's agent he made the agreement, which required the defendant's ratification to make it binding. It is also true that the plaintiff paid five premiums of insurance on the life policy; paid for some stock which passed to Grant on the sale of the farm; collected some rents, and gave

(1) 8 H. L. C. 268.
(2) 3 MacN. & G. 263.
(3) 38 Ch. D. 239.
(4) L. R. 4 P. C. 419.

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some minor services, all of which enured to the defendant's benefit, and which it is said are only consistent with the view that the plaintiff was interested in the property as a partner. If a partnership actually existed, then I admit such acts would be consistent with that state of things; but such acts would not create a partnership, nor are they inconsistent with the existence of a different state of things altogether. It must be remembered that these things were all done voluntarily by the plaintiff. He was under no obligation to pay the premiums of insurance, or render any of the services which he did, because it was no part of the original arrangement that he was to do so. What he did was entirely in his own interest. If the premiums which he paid had been paid by Hale, the amount would have been chargeable to the fund with interest, and the balance would have been reduced accordingly. If the stock had not gone to Grant the purchase money would have been reduced, and the amount to go to the credit of the fund reduced also, and it is the same as to the services; if they had been rendered by some one else, the expense would have come out of the fund. It does not alter the facts that the plaintiff is without a legal remedy. He anticipated a balance from the outset—he claims that there is in fact a large balance—he had the defendant's promise to account to him for it, and he had a right to expect, and no doubt he did expect, and I think he still has a right to expect, that this promise will be faithfully carried out. All that the plaintiff did is fully explained in view of these facts, and is entirely consistent with them. The same may be said as to the account kept by Hartley & Carvell of this property in the plaintiff's name. It is quite consistent with the view that a partnership existed, but the mere fact of such an account being kept will not create a partnership. It is equally consistent with the mere fact that the balance was going to the plaintiff by any arrangement whatever, for this was a convenient and independent method of keeping the account and ascertaining the balance. The plaintiff's Counsel also attached great importance to the fact that neither party was to

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charge for services. The defendant denies that there was any such arrangement, but if there was, it was certainly not made until long after the purchase took place, for the plaintiff himself admitted that on cross-examination. It was an arrangement doubly in his interest as affecting his balance. As to the $500 which the plaintiff says was abandoned by the defendant when the original arrangement was made; it is, in my view of the case, immaterial when the offer was in fact made. I cannot, however, accept the plaintiff's evidence that it was made before or at the time of the purchase, or that it had anything whatever to do with the purchase or the disposal of the property as originally agreed upon. It seems altogether unreasonable that the defendant should, without being asked, of his own accord, agree to give away $500, when at some personal inconvenience he was paying out $5,500 in a speculation, the sole object of which was to recoup himself in a loss of which this $500 was a substantial part. I can easily understand why, later on, when the only part of the property undisposed of was the life policy, which involved an annual expenditure for premiums for an indefinite period to keep it alive, the defendant should have offered, as he said he did do, to throw off $500 from his claim to induce the plaintiff to buy the policy and close up the transaction. That is a sensible, reasonable proposal, but the other is neither the one nor the other. As the evidence entirely fails in establishing a partnership, the bill should, I think, be dismissed, because the only case set up is one of partnership, and the only account asked for is one to be made up on the footing that a partnership existed. In fact I did not understand the plaintiff's Counsel to rest his case upon any other ground. The defendant, however, denies all liability to account either as a partner or in any other capacity. His position is two-fold — first, that no binding trust could be created as to this property except by some writing signed by the defendant; and second, the evidence does not shew any parol declaration, or any act by the defendant which would constitute him a trustee even of personal property. I shall not stop to con-

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sider whether it is open to the plaintiff, without amending his bill, to set up any such case. He has stated the facts on the record which he says create a partnership, and it is possible that if he were wrong in his conclusion, as I think he is, that he might be entitled to a different relief, if the facts warranted it. I do not think the evidence shews any trust as to the property or the balance. In dealing with the other branch of the case, I, for the most part, took the plaintiff's own evidence, but it is necessary to see what the facts really are. There is no doubt that if the defendant, either by a sufficient declaration, or by acts sufficient for the purpose, declared himself a trustee of this property, or any part of it, for the plaintiff, the fact that the plaintiff is a mere volunteer, would not prevent him from enforcing the trust. See *Jones* v. *Lock* (1); *Richards* v. *Delbridge* (2).

It is clear, I think, that no declaration or creation of any trust in lands is valid unless it be in writing, signed by the party entitled to declare or create the trust. Section 9 of the *Statute of Frauds* expressly provides this, except in two cases not involved here. In the original *Statute of Frauds* passed in this Province, 26th Geo. III., chap. 14, the corresponding section to section 9 was copied from the English Act, and only required that the creation of the trust, or the declaration of it, must be manifested and proved by some writing. A parol trust as to lands could be created, but you could not prove it except by writing. See *Randall* v. *Morgan* (3); *Wilde* v. *Wilde* (4); *Bank of Montreal* v. *Stewart* (5); *Smith* v. *Matthews* (6). The section was changed to its present form by the revisors in 1854, and has so continued ever since. As it is admitted that there is no writing in any way in reference to the so-called trust, it follows as I think from the *Statute of Frauds*, that if a parol trust were shewn it would be of no validity so far as it related to lands. The insurance policy is, however, personal property, and a parol declaration of trust as to that would be good. Whether it

(1) L. R. 1 Ch. 25.
(2) L. R. 18 Eq. 11.
(3) 12 Ves. 74.
(4) 20 Gr. 521.
(5) 14 O. R. 482.
(6) 3 DeG., F. & J. 139.

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could be separated from the other property or not I shall not stop to discuss, because I think the evidence shews that no trust was declared. In the bill it is alleged that by the agreement under which the property was bought "the balance of the said estate, whatever it might be, was to become the property of the plaintiff." And in his evidence he says that it was a part of the original agreement that "anything that was left was to come to him." The defendant admits that he promised to give the balance, but he denies that this had anything to do with the purchase, or was made until long after the purchase had been completed. He says that it was a voluntary offer on his part to the plaintiff, who had offered to assist him in saving him from loss by his father. It is, perhaps, immaterial when the promise was made, but I think the defendant's version is much the more reasonable. It seems altogether improbable that these parties should make this arrangement as to the balance of the property, not only before it was bought, but before it was known that it would be bought at all, because the defendant never consented to purchase at $6,000. In either case I think there was no trust created or declared—neither was there any intention on the defendant's part to constitute himself a trustee, and it is clear that the plaintiff cannot so have considered it, because he relies on it for an altogether different purpose—that is, to shew what was his share in the profits of a partnership created at the time, and which he now seeks to have wound up. The offer or promise is at most a mere promise without consideration, and not enforceable either at law or in equity. In *Wilkinson* v. *Wilkinson* (1), it appeared that in a voluntary settlement the settlor covenanted to transfer property (if any) which he might thereafter acquire, if of a certain value. Property within the terms of the covenant was acquired which the settlor refused to convey, and a bill was filed to have it declared that this property, by virtue of the covenant, was bound by the trusts of the settlement. The Vice-Chancellor refused so to hold, and pointed out that the settlor

(1) 4 Jur. (N. S.) 47.

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intended to make himself liable on his covenant, but that this was an entirely different thing from making the property subject to the trusts of the settlement as a result of the covenant to convey. In *Dipple* v. *Corles* (1), it appeared that a testator having nine children, by his will gave all his property to one of them, who, at the funeral, said he would divide the property equally between his brothers and sisters and himself, and that the whole should be sold that it might not be said he had taken any more than the others. He subsequently acted in respect of a portion of the property, according to the intention then expressed. It was held that the expressions of the devisee were no more than a promise to give and divide the property among the brothers and sisters; and that as such promise it was *nudum pactum*, and did not amount to a declaration of trust in their favor. The Vice-Chancellor says: — "It appears to me that a clear expression of intention should be found before the Court, in a case like the present, can hold that a party intended to subject himself to all the consequences of the liability to account and inquiry which is involved in the position of a trustee. This defendant, being honorably minded to do what was right between himself and his brothers and sisters, told them that he would make such a division of the property as they might conceive their father ought to have made; and if I were to hold that this declaration of his intentions subjected him to all the consequences of a declaration of trust of the property, the distinction between the position of a trustee and that of a person subject to the imperfect obligation created by what the law considers as only *nudum pactum*, would be obliterated." See also *Maguire* v. *Dodd* (2); *Re Glover Trusts* (3). As to the defence set up that the plaintiff had abandoned all claim to the property by an arrangement made with the defendant, in consequence of which he had after that time kept no account of the property, I think it is not sustained by the evidence. The defendant and his son said that after the Craig building was burnt, the plain-

(1) 11 Hare, 183. (2) 9 Ir. Ch. R. 456. (3) 2 J. & H. 186.

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tiff said that there would be nothing for him in the property now, and he would abandon the whole business and not bother with it any more, or something to that effect. This is denied by the plaintiff, but if it were not, I should not hold that loose expressions of that kind, made under the circumstances which then existed, could fairly be construed as shewing a deliberate intention to abandon any claim which he had. They amount to nothing more than an expression of opinion that by reason of the destruction of a portion of the property there would be no balance coming to him. There was no intimation then or since by the defendant that he concurred in the plaintiff's intention to abandon, and accepted what he said as releasing him from any promise he had made. I think that defence is not sustained.

The bill must be dismissed with costs, except the costs of the plea of abandonment of claim, which the defendant must pay the plaintiff. They will, when taxed, be deducted from the defendant's costs, and the plaintiff will pay the balance as certified by the Clerk.

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December 20.

ROBERTSON v. MILLER.

Restitution — Execution — Appeal — Reversal of decree — Measure of damages.

Where goods of the defendant were sold under a decree subsequently reversed for error, he was held to be entitled to the sum the goods sold for, and not to their value or to damages.

Petition for restitution to the defendant John Miller, of goods sold under an execution upon a decree of this Court, or for the payment of the value thereof, and for damages. The facts are sufficiently stated in the judgment of the Court.

Argument was heard November 25, 1904.

F. R. Taylor, in support of the motion:—

The defendant is entitled to an order for restitution, and to damages. If the goods cannot be returned, the plaintiff should be allowed their value, and not the amount for which they were sold. This can be determined on the present affidavits, or on an issue to a jury. In *Westerne* v. *Creswick* (1), it is laid down that where judgment is reversed, after execution levied, the plaintiff, on restitution of the goods being awarded, cannot pay either to the defendant or into Court, the money for which the goods were sold, for if the defendant brought an action of trespass he would recover the full value. See also Vol. 18 *Amer. & Eng. Ency. Pl. & Pr.*, Tit. "Restitution," p. 871; *Freeman* on Executions (2).

M. G. Teed, K.C., *contra*:—

A specific return of the goods will not be ordered, for though the Sheriff had them, his possession was not that of the plaintiff. The plaintiff is accountable only for the

(1) 4 Mod. 161. (2) 3rd ed., p. 120.

value of the goods, and their value is what they sold for. The judgment under which the execution issued and the levy was made, was reversed for error, and not for irregularity. It would only be in the latter event that trespass would lie, and that the defendant could recover his real damages. Where process is set aside for error, the person causing it to issue is not responsible for anything done under it. Relying upon the judgment of the Court, he is protected. In *Williams* v. *Smith* (1) an attachment issued for neglecting to obey an order of the Court of Chancery to deliver up papers. The attachment being set aside, trespass was brought. Williams, J., said: "If the attachment in this case had been set aside on the ground of irregularity, or that it was issued in bad faith, or in any other way equivalent to irregularity, I should have thought that both attorney and client would be liable for any imprisonment which took place under it;" and after stating that the facts shewed that the judgment was not set aside for irregularity, he proceeded: "That brings the case within that class of cases where it has been held that the party causing process to be issued, is not responsible for anything done under it where the process is afterwards set aside, not for irregularity, but for error." The restitution consequently must be limited to the money levied. See *Tidd*, p. 1033. At page 1186, *Tidd* says: "If a man recover damages, and have execution by *fieri facias*, and upon the *fieri facias* the sheriff sell to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself; because the sheriff has sold it by command of the *fieri facias*." See also *Goodyer* v. *Junce* (2); *Brockhurst* v. *Mayo* (3); *Eyre* v. *Woodfine* (4); *Westerne* v. *Creswick* (5). If defendant was unwilling that his property should be sold he had it in his power to prevent it by staying the execution pending appeal. See *McGrath* v. *Franke*, and notes (6).

(1) 14 C. B. (N. S.) 596.
(2) Yelv. 179.
(3) 1 Rolle's Abr. 778.
(4) Cro. Eliz. 278.
(5) 4 Med. 161.
(6) N. B. Eq. Cas. 97.

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Taylor, in reply:—

The defendant was not able to comply with the terms usually imposed on staying proceedings. See C. S. 1903, c. 112, s. 133. As an appeal had been taken, plaintiff proceeded with his execution at the peril of making good to the defendant the full measure of his damages, in event of the decree being reversed.

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A decree was made in this suit on the 21st April, 1903, by which the defendant was ordered to pay to the plaintiff his costs, which were afterwards taxed at $691.11. The amount not having been paid, an execution of *fi. fa.* was issued to enforce the decree on the 28th August, 1903, under which the Sheriff of Gloucester, to whom it was directed, seized a quantity of chattels, some of which he afterwards sold for the sum of $22.20. Out of this sum the Sheriff retained for expenses $4.20, and in September, 1903, he remitted the balance of $18 to the plaintiff's solicitor, Mr. Teed, to whom the costs were coming. Neither the plaintiff nor his solicitor purchased any of the property or has any of it in his possession. An appeal from this decree to the Supreme Court of Canada was allowed *per saltum* on the 10th June, 1903, and that Court, on the 27th April, 1904, made an order allowing the appeal, reversing the decree and dismissing the plaintiff's bill. That judgment was then entered and made the judgment of this Court. This application is made on behalf of the defendant for an order for restitution. No stay of execution was obtained. The plaintiff admits his liability to return the $18, and he has always been willing to pay it back, but the defendant claims some $800 as the value of the goods seized, and damages in addition. I think under these admitted facts the plaintiff is only liable to restore the $18 he actually received.

So far as a remedy by action at law is concerned, where goods have been seized under an execution issued on a judgment afterwards set aside the authorities recognize

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a distinction between cases where the judgment is vacated for irregularity, or as having been obtained against good faith, and a judgment which is reversed for error on appeal, as in this case. In the one case the judgment is considered as having been always bad, while in the other it is good until the reversal actually takes place. See *Prentice* v. *Harrison* (1). In *Brown* v. *Jones* (2), Alderson, B., says: "In *Prentice* v. *Harrison* (1) the replication to a similar plea alleged that the writ was set aside by order of a judge, and it was held bad for not alleging that it was set aside for irregularity; for the Court said there were cases in which it might have been set aside as erroneous, and in that case the defendants could not be liable." These were cases where the party had been arrested on a *ca. sa.* In *Williams* v. *Smith* (3) it appeared that the party had been arrested under an attachment issued out of the Court of Chancery for disobedience of an order of that Court, which attachment was afterwards set aside on appeal as having been erroneously made. It was held that neither the solicitor who issued the attachment nor his client was liable in an action. Williams, J., said: "That brings the case within the class of cases where it has been held that the party causing process to be issued is not responsible for anything that is done under it where the process is afterwards set aside, not for irregularity, but for error." Willes, J., said: "Where an execution is set aside on the ground of an erroneous judgment, the plaintiff or his attorney is no more liable to an action than the sheriff who executes the process is. Where a judgment is set aside for error, the proper course is not to bring an action, but to proceed by writ of restitution or by the course which the modern practice has substituted for it. * * * This is one of that numerous class of cases where the acts of the Court, if erroneous, cannot be made the foundation of an action for damages. If it were otherwise, suitors would incur responsibilities which it would be fearful to contemplate."

(1) 4 Q. B. 852. (2) 15 M. & W. 191.
(3) 14 C. B. (N. S.) 596.

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It is obvious that when Willes, J., speaks of "responsibilities fearful to contemplate" he does not allude simply to responsibilities which cannot be enforced by an action at law but may be by some other means, but to responsibilities which do not exist at all.

In Bacon's Ab., Tit. "Error" (M. 3), it is said:—"If a man recovers damages, and has execution by *fi. fa.*, and upon the *fi. ta.* the sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself; because the sheriff had sold it by the command of the writ of *fi. fa.*" See also *Tidd's* Practice, p. 1186. In the old writ of restitution issued after judgment reversed the original recovery is recited, the reversal, the recovery of the damages by execution, and then restitution of the damages is ordered, and in case of non-payment a levy on the person's goods for the amount. I can find nothing to indicate any liability in such a case to restore more than the sheriff's sale realized to the execution creditor.

In cases of appeals from this Court to the Court in Term, this Court has ample authority to stay the enforcement of its decrees, and in such cases it imposes such conditions as the particular circumstances may require in order to do justice between the parties. I have not been able to find any case where an execution has issued before an application to stay the proceedings has been made, and the sale was permitted to be completed, that security has been required for anything beyond the sum realized. And the practice seems to be, in the absence of special provisions such as those relating to appeals to the Supreme Court of Canada, that when the sheriff has made a seizure before stay of proceedings, he shall complete the sale and bring the money into Court to be dealt with after the appeal is determined. See *Gilmour* v. *Hall* (1); *Meriton* v. *Stevens* (2). In *Morgan* v. *Elford* (3), it appeared that execution had issued for costs and goods had been seized under it, but the undertaking which the solicitor had to give on the money being paid was to return it if

(1) 10 U. C. Q. B. 508. (2) Willes, 271. (3) 4 Ch. D. 352.

the appeal succeeded. There was no undertaking as to damages for the seizure. *Wilson* v. *Church* (1) and many other cases may be cited, where the same practice was followed. Where a decree has been made by this Court for the payment of money, or the doing of any specific act, the party against whom the decree was made, is bound to obey it, and if he does not do so he is in contempt. The Court has various ways of enforcing its decrees. Until recently neither a *ca. sa.*, nor a *fi. fa.*, could issue without first obtaining an order for that purpose. A stay of execution pending appeal, has always been regarded in the nature of an indulgence except where statutory provisions have made it otherwise. The party directed to pay the costs, if he wishes to avoid the effects of an execution, can obey the order of the Court by paying the money; but if he refuses to do that, or cannot do so, his default cannot neutralize the whole effect of the decree. See *Gamble* v. *Howland* (2). There will be an order for the payment of the $18, and nothing more. This sum the defendant could have had at any time — in fact it was offered to his solicitors—but a very much larger sum was demanded. There will be no order as to costs. I cannot but express some surprise at the statements in the defendant's petition as to the goods sold and their value. He specifies them in detail, and gives their values as amounting in all to some $788, and then states that they were all sold for $22.20, although they were worth, as he says, nearly if not quite $800. On the 3rd day of September last he made an affidavit verifying the above statements in the petition. The fact was that at his own instance, and on his own application, a large portion, and as is said the most valuable portion, of the chattels seized was never sold at all, but the defendant was allowed to retain it, and has it now. A year before that he gave the Sheriff a bond with two sureties for their return if the appeal failed. If there were no other ground for not giving the petitioner the costs of this application, this fact would amply justify that course.

(1) 12 Ch. D. 457.

(2) 3 Gr. 281.

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Deed—Incapacity of grantor—Absence of consideration—Conflict of evidence—Relief.

Where at the time of the execution of a deed of conveyance the grantor was 70 years of age, was sick and in feeble health, and it was the opinion of some witnesses, though not of others, that he did not understand the nature of his act; and the effect of the deed was to deprive him of means of support, and the evidence was uncertain respecting the existence of adequate consideration for the deed, and favored the view that it was intended as a gift, the deed was set aside.

Bill to set aside conveyances. The facts fully appear in the judgment of the Court.

Argument was heard October 19, 1904.

W. A. Trueman, for the plaintiff:—

It is submitted that the grantor at the time he executed the deed, was not of sound mind. If this is stating his condition too strongly, and it is assumed that he was of sufficient capacity to dispose of his property, yet at his age and in his ill-health, he should have had independent professional advice as to the nature of his act. It should particularly have been explained to and understood by him that he was depriving himself immediately of all his means of subsistence. See *Anderson* v. *Elsworth* (1); *Longmate* v. *Ledger* (2); *Baker* v. *Monk* (3). There was no consideration—certainly no adequate consideration—for the conveyance. Mrs. McKay pressed her alleged claim upon the grantor at a time when his health was admittedly weak and precarious, and he was unable to withstand her influence. A bargain made under such circumstances is always narrowly scrutinized, and where they are as suspicious as here, it is not permitted to stand.

(1) 3 Giff. 154. (2) 2 Giff. 157. (3) 33 Beav. 419.

M. B. Dixon, K. C., for the defendant:—

The fact that the grantor was upwards of seventy years of age, and in feeble health, would not vitiate the transaction if he was competent to form an independent judgment in the matter, and was aware of its nature and effect. See *Curson* v. *Belworthy* (1); *M'Neill* v. *Cahill* (2). There was no fiduciary relation between the grantor and grantee placing the onus upon the defendants to establish the fairness of the bargain: *Harrison* v. *Guest* (3). In that case the vendor was a bed-ridden man of seventy-one years of age, who had acted without professional advice, and he had conveyed a property worth £400, in consideration of board and lodging for life, which lasted only six weeks after the conveyance; but the Court refused, in the absence of any fraud, to set aside the transaction. Buchanan was fully in possession of his faculties when he directed the deed to be drawn and when he executed it. That is made incontrovertibly clear by the evidence of Powers and Allen. Where there was consideration for the deed, it should not be set aside unless the evidence convincingly establishes that the grantor was mentally incapable and the grantee had knowledge of his condition.

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This suit was commenced sometime in November, 1903, by one John Buchanan for the purpose of setting aside two conveyances of a house and farm in Albert County—one, dated March 12, 1903, made by Buchanan to the defendant, Catherine McKay; and the other dated October 21, 1903, made by Mrs. McKay to the defendant Angus McKenzie, her son-in-law. The consideration mentioned in both conveyances is the same—"one dollar and other valuable considerations." Both conveyances were made and executed in Boston; the first one was registered April 1, 1903, and the other November 6, 1903. They were both drawn and witnessed by the same solicitor in Boston—

(1) 3 H. L. C. 742. (2) 2 Bligh, 228.
(3) 6 DeG., M. & G. 424.

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E. B. Powers—and they were both acknowledged before the same notary—Claud L. Allen. Buchanan died intestate in June, 1904, in the poor house in Albert, leaving him surviving his widow and one child, the present plaintiff, E. Blanche Winslowe, both of whom reside in Boston, where they have been living for many years past. Buchanan was about 70 years of age when the conveyances in question were executed. He acquired the property and some wood land from his father in January, 1882, the consideration for which, as stated in the conveyance, was $1,000, but the evidence shews that the wood lot is now of comparatively little value. Mr. Trueman, as agent for Buchanan for several years before his death, had the management of the property, and he states that the house and land conveyed to Mrs. McKay by Buchanan was unencumbered and worth $1,000 outside of the widow's right of dower. The evidence shews that Buchanan, who was a carpenter by trade, removed from Albert County to Boston about 35 years ago, and that he continued to live there up to October, 1903, when he returned, apparently for the purpose of instituting these proceedings. He and his wife, for reasons which the evidence does not disclose, did not live together for many years previous to his death, and I infer from the evidence that he had never seen his daughter, the present plaintiff, until she came to see him when taken ill, a few days before the conveyance in question was executed. He had two brothers, who also lived in Boston, but with these he does not seem to have been on very intimate terms, though they were friendly. The ground upon which the plaintiff seeks to set aside this conveyance (I refer to the first one) is that its execution was procured by Mrs. McKay when Buchanan was in a hospital, and so enfeebled by illness as to be altogether unable to understand the nature and effect of the act. And it is also contended that there was no consideration for the conveyance, or at all events the consideration was altogether inadequate. Beside denying the incompetency of Buchanan, the defendants say that he was indebted in a large sum to Mrs. McKay for board and lodging, and that

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the property was conveyed to her in satisfaction of this indebtedness, in pursuance of an agreement made some time before, either to convey her this property or to leave it to her by will; it is not clear which.

This is one of a class of cases each one of which must be determined upon its own particular facts. In this particular case, by consent of parties, all the evidence, except that of Mr. Trueman as to value, was taken under commission. I have not seen the witnesses or heard them give their testimony. Neither have I been able to examine them myself upon some points which seem to me material, and which are left in uncertainty. My experience in this Court has convinced me that in cases involving questions of fraud, it is impossible to overestimate the value of having the witnesses examined in open Court, where the Judge can test their credibility not only by the evidence which they give but by the manner in which they give it, and by their appearance and demeanor under examination.

The bill does not allege, neither do I think the evidence shews, that any fiduciary or confidential relation existed between the parties which would, if the conveyance is to be considered as a voluntary one, throw upon the defendants the onus of satisfying the Court that the transaction is all right. The onus is, I think, upon the plaintiff to shew that the transaction is of that nature which this Court, in view of all the facts and circumstances, will not permit to stand.

The evidence shews that Buchanan went to live with Mrs. McKay some time in 1894, and that, with the exception of some few months, he continued to live in her house up to October, 1903, when he left Boston to return to Albert, in all a period of say nine years. The family at that time consisted of McKay, the husband, who died about five years ago, and two daughters, who are still living, and gave evidence in this suit. Mrs. McKay is an illiterate person, unable to write, and she does not seem to have had any means of support beyond what she derived from the board of a few lodgers. It would be difficult upon the

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evidence before me, to reach any satisfactory conclusion as to the precise terms upon which Buchanan originally went to live with McKay or the terms upon which he continued to remain there. That he was to make compensation in some form or another seems to be admitted, for he swears that he had paid her in full, and owed her nothing when the conveyance was made, while she swears that he owed her a large amount at that time. That question is only important in determining whether or not there was an adequate consideration for the conveyance; a fact which is unimportant if at the time Buchanan was incompetent by reason of mental incapacity, even though the conveyance might be in accord with a previously expressed intention on Buchanan's part. It seems that during the winter and early spring of 1903 Buchanan was quite ill — unable to work — and for a part of the time at least, receiving medical treatment at a dispensary. He, however, became so much worse that on the 11th of March of that year he went to the Boston City Hospital, where he remained until the 6th of April — about four weeks — when he was discharged. Mrs. McKay says that Buchanan was frequently sick during the nine years he lived in her house, and she also says — and in this I think there is no contradiction — that he was a man of intemperate habits, and would — to use her own expression — "drink all the money he earned." The two physicians, under whose care Buchanan was while in the hospital, were examined. Dr. Sise, a graduate of Harvard, with three years' experience, and house physician on the first medical service at the hospital, said that he saw Buchanan the day he was admitted, and that he was suffering from "*arteriosclerosis*, or hardening of the arteries, combined with degeneration of the heart muscle." A few days later he had become so untidy in his habits, and he so disturbed the other patients by his mutterings, that he was removed into another ward, where delirious and untidy patients were treated. His examination proceeds as follows:—

"Q. Will you tell us what these actions on his part indicated as regards his mental condition? A. To me it

indicated that he was not mentally sound — by that I mean that he did not realize the importance of things, and did not realize the condition he was in, or what he was doing.

"Q. Was or was not his actions, such as defiling the bed, the result of physical weakness such as he could not help? A. That was impossible to say definitely, but I think not.

"Q. Did his condition, in a way that you have stated, shew itself from his first admission? A. To the best of my recollection it did.

"When he was admitted after the first day or two was he, in your opinion, in a fit condition mentally to do business, and realize fully what he was doing? A. He was not."

On his cross-examination he was asked as follows:—

"Q. Now, Doctor, let me ask if you consider that the disease from which he suffered at the hospital would affect his mental capacity? A. I do. *Arteriosclerosis* is one of the commonest causes of what is known as 'softening of the brain.'

"Q. Did he improve in his condition while he was at the hospital? A. He improved somewhat during the very last part of his stay there.

"Q. From the time he entered the hospital till the last part did he grow worse? A. He did."

Dr. Wood, the other house physician, is also a Harvard graduate, and has had about the same experience as Dr. Sise. He corroborates Dr. Sise's description of Buchanan's condition, and says that when he first saw him he considered him dangerously ill, and thought that he would probably die in four or five days. He says that his mental condition at first was one of "indifference to surroundings"—that later on it produced uncleanly habits, low talking to himself, and occasional attempts to get out of bed, and that in consequence of that he was removed from the quiet ward to what was called the delirious ward. His examination then proceeds:—

"Q. In your opinion was the patient, when you first

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knew him, and for some days afterwards, in full possession of his reasoning faculties? A. I should say he was not.

"Q. Should you say that he was so in possession of his mental faculties as to understand fully what was going on, and to be mentally capable of transacting business as a prudent man would do? A. I should say he was not."

Dr. Wood also says that when Buchanan was discharged on the 6th April, his condition was one of continued indifference, poor memory, and a tendency to mutter to himself, though he was better than when he went to the hospital—that for the first four or five days his condition grew worse, and that his mental condition at that time was an acute mild delirium due to his very weak, critical physical condition, and that he was too sick to be troubled with business matters, and that he was not then, in his opinion, capable of transacting business. At another part of Dr. Wood's examination he says as follows:—

"Q. Were you in the Boston City Hospital when Mr. Buchanan was discharged? A. Yes.

"Q. What was his condition then as compared to his condition when he was admitted—I mean mentally? A. Continued indifference, tendency to mutter to himself, and poor memory.

"Q. What I meant was, was he worse or better? A. I should say that the improvement was only slight. There was an improvement.

"Q. Now, doctor, when he left the hospital, should you think that he was capable of managing his affairs in any way? A. I should think he was. I should say that then his physical condition interfered with his doing business rather than his mental.

"Q. Would not that be the case all the time while he was in the hospital, that his physical condition was rather against him than his mental? A. I should say that his mental condition grew worse for about the six days of his stay in the hospital, then it slowly improved up to the time he was discharged.

"Q. And you say that his improvement was only slight even then? A. Yes.

"Q. Now, in your opinion, was his mental condition as good when he left the hospital as when he went in? A. I can't say. He did not remember having seen me the first seven days of his stay.

"Q. How do you know that? A. In conversation with him after he was transferred to the other ward I learned it."

The opinions of these two medical gentlemen, entirely disinterested as they are, are of course entitled to every consideration. At the same time they are in no sense conclusive, and the value of these opinions cannot be determined without some regard to the limited professional experience of those who have expressed them, and the facts upon which they are based. I have read this medical testimony most carefully more than once, and it has not impressed me as making out of itself alone, a very strong case for the plaintiff. Dr. Wood says that Buchanan continued to grow worse from his admission to the hospital until the seventh day, and both he and Dr. Sise base their opinions as to his want of capacity on the fact that during that time he mumbled to himself, was filthy as to his person, walked down the corridor in his night clothes, refused for a few hours to take medicine, and expressed a desire to dress and go home when he was unable to do so. I should hesitate before holding a person necessarily incompetent to execute a conveyance for these causes alone. The evacuations in the bed furnish the only substantial reason for such a conclusion, but as to these the doctor refused to say that they were not, or at least might not be, due solely to physical causes and in no way indicative of mental weakness. Besides this the conveyance was executed and the instructions for it given on the 12th March, some days before Buchanan was removed into the delirious ward, and at least a day or two before his illness had developed the symptoms upon which the physicians have based their opinions. In addition to this he was discharged on the 6th April, and at that time the doctors say he was only slightly improved, that is, slightly better than when he went to the hospital four weeks before. Buchanan corroborates this.

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In answer to the question, "Did your health improve while you were in the hospital?" he said: "My breathing improved, but I was no better otherwise; my discharge said I was improved." Buchanan, in his examination, swore that he has no recollection whatever of the execution of the conveyance or of any one coming to the hospital about the property either in connection with his making a deed or a will. His memory, he says, as to the first week he was in the hospital is an entire blank, and he knew nothing whatever about the conveyance until after he had left and gone back to Mrs. McKay's. Buchanan's two brothers visited him frequently while he was in the hospital, and they describe him as being in a dull, stupid, sleepy condition during the earlier part of his illness, though he recognized them; and one of them says he "talked rationally." In answer to this evidence the defendants have produced as witnesses the solicitor in Boston who drew the conveyance and the notary who witnessed its execution, both of whom appear to have been strangers to the parties. Erastus B. Powers is a lawyer who has been in practice for thirty-seven years, and for twenty-one of them he practiced in Boston. On the morning of the 12th March, in consequence of a telephone message, he went to the shop of the defendant McKenzie, whose firm have a jewelry store on Washington street, where he met Mrs. McKay, whom he had never met before. They went to the hospital, and what took place there he describes as follows:

"Q. Did you see any person there, and whom? A. I saw a man there and asked him his name. I asked him rather if he was of a certain name.

"Q. Was this man a patient in the wards? A. He was.

"Q. And was he pointed out to you by Mrs. McKay as a certain man? A. I am not certain as she pointed him out; I think he roused up and spoke to her.

"Q. What did he say in reply to your inquiry? A. He said that he was Mr. Buchanan. I said to Mr. Buchanan, 'I am informed that you wish to see me to do some business for you.' He asked, 'Are you a lawyer?' I said 'Yes.' He said, 'Do you correspond with an English

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barrister?' I said, 'Substantially, only in this respect, that we have no distinction between barrister and attorney.' He said, 'Then I wish you to convey to this woman,' pointing to Mrs. McKay, 'certain real estate that I own in New Brunswick.' I asked him, 'Do you wish that done by will or by deed?' He said, 'By deed.' I asked him, 'What was the consideration?' He replied, 'I owe her a large sum of money for board and room.' I said, 'Of course I shall need the description somewhat minute if you are going to give a deed.' He replied that he had the original deed with him. He then took out a paper from under his pillow.

"Q. Is that the paper he produced? A. Yes.

"Q. Go on. A. He handed the deed to me. I commenced to read the deed; he interrupted me and said: 'I have two pieces of land, and I wish one piece of land deeded to my illegitimate son Havelock Stevens.' I then read over from the pencil marks that I then made description of the deed, asking him as I read on if that was what he intended to convey. He said that he did. He turned to Mrs. McKay and said, 'Piece of land I have given you is enough to pay you,' and then I think she assented to it. I do not recollect her words. I said to Mr. Buchanan, 'I cannot draw these deeds here—no facilities for writing and no paper.' He said, 'Well, then, go to your office and make them and return here as soon as you can.' I went to my office, had the two deeds made, and then returned to the City Hospital, having with me Mr. Allen, who is a notary public. When we returned to the hospital the attendant said that he would not admit us until he could ascertain whether Mr. Buchanan wished to see us. The attendant returned and said that Mr. Buchanan did wish to see me. We went into the ward, and either Mr. Allen or I—I think it was myself—handed Mr. Buchanan the deeds. He read them in whole or in part. I don't think he had time to read them in whole. He said they were just what he wished, and pointed out to us a foot rest to be put upon the bed upon which he could sign it. He signed the deed.

"Q. Is that the deed? A. Yes, that is one of the

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deeds. He signed the deeds. Mr. Allen took his acknowledgment. He then said to me, 'Mrs. McKay is not acquainted with these matters; I wish you would send the deed down to New Brunswick and have it recorded, and mail to Mr. Stevens the deed that I have made in his favor.' That was the close of the conversation.

"Q. In your conversations with Mr. Buchanan, either the first or second occasion at the hospital, did you notice any wanderings or incoherence in his talk? A. Not the slightest.

"Q. And as far as you know or could notice he thoroughly understood what he was doing? A. I know he did."

On his cross-examination he was asked this question: "Now, Mr. Powers, if two physicians have stated here under oath that at that time the patient was not of mental capacity to transact business with full understanding of what he was doing, are you prepared to say that they are incorrect or mistaken? A. I am prepared to say that the opinion of these physicians, so far as it pertains to the 12th day of March, 1903, was mistaken and erroneous."

Mr. Allen, the notary, is also a lawyer, and has been in practice some four years in Boston. When he and Mr. Powers went up to have the deeds executed Mrs. McKay was not present. Mr. Allen describes what took place as follows: "Mr. Buchanan looked at the deeds and I glanced around, as he was in bed, for something to sign the deed on. Mr. Buchanan called my attention to a foot-stool across the room, which as I recall it was upholstered on the top. Then he said, 'Turn that over and I can write on that.' I brought the foot-stool, turned it over, took out my fountain pen and handed it to Mr. Buchanan; took one of the deeds—don't recall which one first—stated that this was a deed from him to Mr. Stevens or Mrs. McKay, as the case may be, and administered the acknowledgment to him; the exact words I used I cannot recall, but I followed the language of the deed, as the Canadian form varies slightly from ours.

"Q. And did Mr. Buchanan sign the deeds? A. He did. (Shews witness deeds). That is the first deed, because

he started his name—the first name did not suit him. I think he finished the whole name, then wanted to know if he could not rewrite his first name. I told him he could, and he rewrote it over the other. I stated a moment ago that I handed Mr. Buchanan my fountain pen. He did not sign his name with this pen; he applied it to the paper and made some remark derogatory to the pen, and suggested that I procure pen and ink from the attendant, which I did, and which he used in signing."

Mr. Allen also states that he saw nothing in Buchanan's actions or conversation that led him to believe he was not in a fit condition mentally to execute these deeds. I shall not attempt to reconcile these widely different opinions as to the mental condition of Buchanan any more than I shall try to reconcile the contradictory statements of Buchanan and some of the other witnesses upon other points in dispute, for I think the case may be determined upon other grounds. They are important as shewing in what an unsatisfactory condition the case is left by the evidence. There is no doubt that Buchanan was, at the time these conveyances were made, an old man of seventy, confined to his bed in a hospital, weak and feeble from an incurable disease — so feeble and sick in fact that the physicians anticipated his death within a very few days. He had no independent advice, or advice of any kind. The solicitor who drew the conveyance was not of his selection, nor was he acting for him. The parties did not meet upon equal terms, and any conveyance made under such circumstances must necessarily excite suspicion, especially where the contract was so improvident a one as this was; for by it Buchanan, without making any arrangement for the future, denuded himself of all his property of every kind, and left himself destitute, thus paving his way to the poor house, where he ended his days a few months later. As to the consideration for this conveyance, if there was any at all, the evidence leaves the matter in great uncertainty. The account given by Buchanan, and that given by Mrs. McKay, as to the terms upon which they lived, are so entirely contradictory that one would scarcely be safe in

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accepting either as altogether accurate. Buchanan says that he became acquainted with McKay (the husband) a fortnight or so before he went to his house in 1894, and he says that he was induced to go there and make it his home. No terms were agreed upon, but he was to square up every week, and that he did so. Buchanan now swears that he owed Mrs. McKay nothing when the deed was made; and several of the witnesses say that he always met Mrs. McKay's applications for money by the remark that he owed her nothing. It seems strange that if the conveyance was made, as the defendants allege, in satisfaction of a debt for board that he should have so suddenly changed his mind and transferred a valuable property in payment of a debt which he had always repudiated. Mrs. McKay says that Buchanan came first to her house on a Saturday evening, and on the following Monday he paid her $1.50; that she was keeping boarders at the time; that he wished to remain, and she shewed him a room with which he expressed himself satisfied. She was then asked:—

"Q. Did you make any agreement with him as to what you would charge him? A. Yes.

"Q. What was it? A. I told him it would be $1.25 by the week.

"Q. Would that be the room alone or board? A. That was room alone; $4.50 for room and board.

"Q. Did he agree to that? A. He did not say a word."

Buchanan and Mrs. McKay agree that the actual cash paid during the nine years was $40 and this $1.50. Mrs. McKay says that in addition he brought in a bag of flour. Now, nine years' board, at $4.50 per week, amounts to say $1,900, after deducting the payments and making an ample allowance for the months spent elsewhere. Mrs. McKay also swears that this $40 was not paid until about five years had elapsed. It seems to me absurd to suppose that Buchanan, who was a stranger to McKay, with no claim upon him in any way, would have been permitted to remain there as a boarder year after year, rolling up this

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large indebtedness. McKay's family were poor. McKenzie, their son-in-law, assisted them, and Buchanan says that he did also. It must be remembered that Buchanan was not a person unable to pay. From September, 1894, to March, 1903, Mr. Trueman sent him in cash $427, revenues from this very property; $335 of which was rent during the last three of these years, and $200 of that sum in one remittance in 1900. So that making allowance for intemperate habits and want of employment, the evidence goes to shew that whether Buchanan actually did or did not provide supplies for the house as he says he did in payment of his board, he must at least have had the means of doing so to some extent. Upon this question I express no opinion, for I do not wish to embarrass the free discussion of that question hereafter by the parties if they choose to do so. I do, however, conclude from the evidence of the defendants and their witnesses that the conveyance — assuming Buchanan's mental capacity and his entire understanding of the nature of the transaction — was not given in satisfaction of any indebtedness for board and lodging, or at all events not solely for that, but as a remuneration for trouble and attentions bestowed upon him in the home furnished for him, altogether outside of any contract for board. I allude to the attention and nursing while he was sick at different times; to the care given him when he was unable to look after himself, and other services of a similar character, which a fair consideration of the evidence leads me to think Mrs. McKay rendered Buchanan during these nine years, creating precisely that description of obligation which appeals so forcibly to one in the condition in which Buchanan undoubtedly was on that 12th of March, and which was almost sure of being recognized if pressed on his notice by the woman who had befriended him. When Mr. Powers asked Buchanan what the consideration was for the conveyance, the reply was, "I owe her a large sum of money for board and room." Nothing more was asked. This is not the consideration stated in the deed; and it does seem to me somewhat strange that if, as Mrs. McKay says, this conveyance was made by Buchanan and accepted

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by her in satisfaction of this large indebtedness and that was the only consideration for it, some indication to that effect should not have appeared on the face of the conveyance. On the contrary I find that the consideration in the deed to Mrs. McKay, and that to Stevens, are precisely the same. The latter transaction was admittedly one of gift. Mrs. McKay's evidence differs from that of Mr. Powers. She says that Buchanan told the lawyer (i. e., Powers) that he wanted to give the property to Mrs. McKay "for my trouble," and if he had more that he would give it to her. This does not seem to me the language of a man who is paying a legal debt, but rather the language of one making a gift; it may be in recognition of some kindness or attention, but a gift nevertheless. The evidence does not, I think, shew any previous agreement of any kind by Buchanan to convey the property in payment of the board. Nor does it, in my opinion, sustain the defendants' contention that the conveyance was given in satisfaction of this debt. I am disposed to think it was not so intended by either party; but if any such indebtedness existed, it was not, in my opinion, sufficient to form an adequate consideration for the conveyance, or such a consideration as should, in view of all the facts and circumstances of this case, prevent this Court from affording the plaintiff the relief she asks. I do not wish to express an opinion as to whether Buchanan did or did not owe Mrs. McKay anything for board when this conveyance was made, beyond what is necessary in determining this particular case. I wish to leave the parties entirely free to try out that question if they desire to do so hereafter. The only point now for determination is whether in view of all the facts the transaction should be set aside. In my opinion it should be. It is one of that class of cases where this Court should throw around the weak its protection against the strong, where the parties to the contract were on unequal terms, and an improvident bargain for an inadequate consideration has been made. See *Allore* v. *Jewell* (1);

(1) 94 U. S. 506.

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Harding v. *Handy* (1); *Clark* v. *Malpas* (2); *Hagarty* v. *Bateman* (3); *McCaffrey* v. *McCaffrey* (4).

The defendants do not claim this property otherwise than as having been conveyed to Mrs. McKay in satisfaction of this alleged indebtedness. If that indebtedness does not in fact exist, as the plaintiff claims, or it is altogether too small in amount to form an adequate consideration for the conveyance, to allow the transaction to stand would be to permit the defendants to retain a valuable property to which, on their own shewing, they have no right whatever. On the contrary, if any such indebtedness does exist, the amount of it can be established in an action at law by Mrs. McKay against the representative of Buchanan's estate, and the property in question made available for the payment of the amount recovered. The interference of this Court in setting aside the conveyances cannot work any material injury to the defendants.

The defendant McKenzie sets up no claim superior to that of McKay or different from it. The conveyance to him was made on or about the day Buchanan left Mrs. McKay's house to come to Albert in order to take these proceedings, and that this was his object seems to have been well known. McKenzie admits that he knew that the legality of the transaction was questioned, and the only consideration from him to Mrs. McKay was some small sums of money which from time to time he had given her to help her along in her poor circumstances, the amount of which is not stated. They were considered mere gratuities, and never expected to be repaid.

There will be a decree, therefore, setting aside the two conveyances, but in consideration of the peculiar circumstances, the conflict of evidence and the absence of proof of any actual fraud, there will be no order as to costs.

(1) 11 Wheat. 103.
(2) 31 Beav. 82.
(3) 19 O. R. 381.
(4) 18 A. R. 599.

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Interrogatories—Answer—Reference to answer of co-defendant—Exceptions.

To an interrogatory to set out particulars of a claim of debt by the defendant against the defendant company, the defendant answered that he believed that schedules (which contained the information sought) attached to the answer of the defendant company were true :—

Held, allowing an exception for insufficiency, that the interrogatory relating to a matter within the defendant's knowledge, he should have made positive oath of the correctness of the schedules, or that they were correct to the best of his knowledge, information and belief, accounting for his inability to swear positively to their correctness.

Exceptions for insufficiency to answers of the defendant John C. Calhoun. The facts sufficiently appear in the judgment of the Court.

Argument was heard December 20, 1904.

W. B. Chandler, K.C., in support of exceptions.

F. R. Taylor, contra.

1905. February 21. BARKER, J.:—

The plaintiff, who is a resident of New Brunswick, is the holder of a large number of shares of the capital stock of the defendant company, The Baltimore Coal Mining and Railway Company, has filed this bill on behalf of himself and the other shareholders who may come in and become parties to the suit, to set aside a certain judgment for $38,834 recovered in the Supreme Court of this Province, and signed on the 12th October, 1903, by the defendant Calhoun against the defendant company, as having been obtained collusively between Calhoun, the principal shareholder of the company, its president and principal manager, and the company, to the detriment of the plaintiff and a minority of those interested. Calhoun is a resident of New York. Though the

defendant company was incorporated under a Provincial Act, and the lands of which it owns mining leases are situate within the Province, it apparently transacts its business and its directors hold their meetings in New York. I mention these facts because the nature and object of the suit are sometimes important in determining as to the substantiality and *bona fides* of a defendant's answer. And where the contents of books or documents are asked for, it is a reason for not relaxing the rule by which a plaintiff is entitled to discovery by answer that these books or documents are beyond the jurisdiction of the Court, and therefore not easily available under an order for inspection. The amount for which the judgment was obtained, Calhoun says, is made up of moneys advanced by him to the company and amounts due him for salary. The fifth section of the bill, out of which the first exception arises, alleges that at the annual meeting of the company, held in May, 1901, at which the plaintiff was present, a claim of Calhoun for some $21,000 was laid before the shareholders, but that no information was given to him as to the details of the claim, and he alleges that he has never been able to procure the information, though he has frequently endeavored to do so.

1st Exception. That the defendant Calhoun did not set forth, to the best of his knowledge, information and belief, what information or explanation as to the claim was given at the meeting, to whom it was given and by whom. It appears by the minutes of that meeting that it was held in St. John, and that Calhoun was not present, though he was represented by proxy. In his answer to this section Calhoun states that, at the meeting referred to, itemized particulars of the claim and vouchers for the payments were on the table for the information of the shareholders, and that the plaintiff was then informed that he was at liberty to fully examine the particulars of the account and vouchers. The language of this part of the answer is possibly open to two meanings, but as I understand it in connection with the interrogatory, I think the

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defendant did not intend to convey the idea that any information as to his claim was given or required beyond that afforded by an examination of the papers themselves then laid on the table for the information of the shareholders, and to which the plaintiff's attention was distinctly directed. Calhoun was not present, and it does not appear that any one was present to give explanations on his behalf by which he would be bound.

I think this exception must be overruled.

2nd Exception. That Calhoun did not state whether, to the best of his knowledge, information and belief, a meeting of the directors was held in New York on March 30, 1901, as to which he was interrogated in paragraph six.

I think this exception must also be overruled. It is true that the defendant does not in this answer (though it was stated that he had done so in his first answer put in, and which is still on file), say anything about a meeting in March, but he goes on to speak of a directors' meeting held in May. It is obvious to any one reading the interrogatories that nothing whatever turned upon the date of the meeting; the important part was the business transacted at it, and as to that the defendant answered fully.

3rd Exception. I think the interrogatory out of which this exception arises has been substantially answered. It appears that before Calhoun's claim was submitted, as he says, to the meeting of shareholders held in May, 1901, it had been submitted to the directors, who had referred it for audit to Messrs. Brown and Logan, two of their number. On their report the directors authorized a note of the company to be given for the sum then due, with interest. The objection to the answer is that Calhoun did not state to the best of his knowledge, information and belief who were present at the examination of the account submitted to the directors, what took place at the meeting, and what was the nature of the examination. The answer gives very full information as to what took place. If the plaintiff wished more definite information as to the nature of the examination, or what took place at the meeting, he

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should have been more definite in his questions. The answer states that he (Calhoun) was unable to state what took place at the examination further than that it was a full and complete one, and that the items were compared with the vouchers and were found to correspond, and that information was given to the committee as to the work done, the services performed, and also the expenditures.

This exception will be overruled.

4th Exception. The defendant was required to set out in detail the advances made by him to the company included in the note for $21,337.63, with items and dates in full, giving the date of each advance, the amount, the purpose for which such advance was made, and also the application of the money in each instance. In response to a similar requirement made of the company, it had filed an answer to which were attached voluminous schedules containing the information asked for, and the defendant Calhoun, instead of duplicating these schedules, very properly incorporated them by reference into his answer. These schedules, he says, he believes to be true and correct, and it is objected that this is not sufficient. These interrogatories are directed to an important part of the plaintiff's case, and they relate altogether to matters within the knowledge of the defendant himself. I think that in such a case the plaintiff was entitled to the positive oath of the fulness and correctness of the information contained in the schedules, or a satisfactory reason why that could not be given, and in that case that the schedules were correct and true to the best of his knowledge, information and belief; in other words, the best information which he could under the circumstances offer. In *Drake* v. *Symes* (1), Wood, V.-C., had under consideration exceptions to an answer for insufficiency because the defendant had not fully set out certain particulars as to some life policies. The information, if given literally as asked for, would have been oppressive, and it was therefore given by reference to the company's books, which were offered to the plaintiff for

(1) 6 Jur. (N. S.) 318.

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inspection. The Vice-Chancellor says: "I apprehend the rule of practice is to be found in *White* v. *Williams* (1). I have always understood it to be this—that if questions are asked by which you are required to set out lists in this somewhat oppressive character, and which would be oppressive if you answered them literally, then the defendant is justified if he says, 'All the accounts that you ask for are contained in certain books which are in my possession; all these books are full and true; they contain the best account I can give you of the matters, and you shall have full access to them.' This is what Lord Eldon says he must pledge himself to." The present defendant has not brought himself within this rule.

This exception is allowed.

5th Exception. This exception is founded on the omission by Calhoun in his answer to set out, as he was required to do, a copy of the authority given by the company to him to make the advances sued for, which authority, it seems, was contained in a resolution of the board passed at a meeting held May 15, 1900. This record must have been easily accessible to the defendant Calhoun, as it was practically under his control. No reason is given for not setting it out, and I think the answer is in that respect insufficient.

This exception is allowed.

6th Exception. This is directed to the fact that Calhoun had not fully answered as to the nature of the advances, the dates, the purposes for which they were made, and how the moneys were applied. The defendant answered as before by adopting and incorporating as part of his answer certain other schedules annexed to the company's answer and forming a part of it. The objection is that in doing so he had not himself verified the schedules. The point is the same as that which comes up under the 4th exception, and for the reasons given in reference to that, I think this exception must also be allowed.

(1) 8 Ves. 193.

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Exceptions 1, 2 and 3 will be overruled, and exceptions 4, 5 and 6 allowed.

Each party having succeeded as to three of the exceptions, there will be no costs to either.

The defendant will have thirty days after settlement of the order hereunder within which to file an amended answer.

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1905. *Partition — Previous sale of land — Title of vendor confirmed —*
February 21. *Costs of vendee — Evidence — Ancient documents.*

Where a suit for partition of lands sold previously to the commencement of the suit established the exclusive title of the vendor, and the suit was not caused by any fault of his, the vendee made a party to the suit was held not to be entitled to deduct his costs from the purchase money.

Where a document, of date 1831, purporting to have been executed by father and son, was produced from the custody of a grandson of the former, and as having been kept, with title papers, in a box formerly in the custody of the grandson's brother, and now in the custody of the grandson, and where a document, of date 1840, purporting to be a will, was produced from the custody of a nephew of a person purporting to have signed it as a witness, and as having been kept by him with other papers in a chest now in the nephew's custody, both documents were held admissible in evidence without proof of execution.

Bill for partition. The facts are fully stated in the judgment of the Court.

Argument was heard January 17, 1905.

L. P. D. Tilley, for the plaintiffs.

L. A. Currey, K.C., and *E. T. C. Knowles*, for the defendants John C. Patterson and William Floyd.

C. N. Skinner, K.C., for the defendants the O'Neill Lumber Co.

S. A. M. Skinner, for the defendant Elizabeth Patterson.

1905. February 21. BARKER, J.:—

This is a partition suit to which there appear to be seventy-five parties, thirteen of whom have joined as plaintiffs. The land sought to be partitioned was granted to one George Patterson on December 5, 1825, and consists, according to the description in the grant, of two tracts, one numbered 35 lying on the south side of the road from Loch Lomond to Quaco, in the parish of St. Martins, and the other immediately opposite on the northern side of the

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same road, numbered 35 and 36, the two tracts containing 300 acres and being described as wilderness land. George Patterson the grantee seems to have gone into possession under his grant; he built a house and mill on the part lying north of the road, and he continued to live there up to the time of his death, which took place on the 17th March, 1847, some 56 years before this suit was commenced. The plaintiff's case is that George Patterson died intestate, leaving him surviving a widow and four children, John, James, and George, and one daughter, Elizabeth, and that all the other parties to this suit are tenants in common of this 300 acre tract of land, which is now estimated to be worth some $10,000. The substantial, in fact the only, defence set up, is that of John C. Patterson and William H. Floyd as executors of the last will and testament of Samuel Patterson, and the O'Neill Lumber Company who claim as purchaser under them. John Patterson, son of George Patterson, died April 5, 1875, leaving a will, dated October 29, 1874, of which letters testamentary were granted April 8, 1875. He devised this land, or at all events what he called "his farm," to his son Samuel Patterson, who occupied it until his death, which took place on May 2, 1903. Samuel left a will by which he devised all this property to the defendants, John C. Patterson and Floyd, his executors, upon certain trusts which have no bearing upon this case. The defence set up by them is that no such tenancy in common exists as the plaintiffs seek to establish. On the contrary they say that their testator Samuel Patterson had long before his death acquired an absolute title to the land in question, both by adverse possession and by virtue of an unregistered will of George Patterson, the grantee, and another document, to which I shall refer later on, by which John Patterson became entitled absolutely. These two lines of defence I shall deal with separately. The evidence in my opinion shews an exclusive, continuous and undisputed possession of the whole of this land for about 28 years in John Patterson, and 28 more in Samuel his son. There is not a particle of evidence to shew that any one during those 56 years pretended to dispute John Patterson's

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title up to the time of his death in 1875, or that of Samuel Patterson from that time on, until his death in 1903. They lived in the house built by George and known as the homestead; they died there; they cultivated the land, operated the mill, cut the lumber, and exercised every act of ownership in reference to it which an undisputed owner could do, even to selling portions of it, as the evidence shews that Samuel Patterson did some time before his death. Mr. Tilley seemed to think that possession of the lot south of the road was not made out. It is true that the acts of possession or ownership, in reference to that part, were fewer in number than those which were proved as to the remainder of the tract. But acts of possession or ownership must necessarily vary in their nature according to the particular description of property in question, and the purpose for which an owner would ordinarily use it. The southern lot was principally woodland, upon which a small piece, an acre or thereabouts, had been cleared and cultivated. But the Pattersons cut wood there as they chose, and the hay or crops, if there were any, raised on this acre which had been cleared many years before, went into John Patterson's barn, when he lived there, and into Samuel's barn afterwards. Let us assume for the purpose of the argument, that the plaintiffs' contention is right, and that George Patterson died in possession and intestate. There is no doubt that his son John succeeded him in the possession, and remained in the exclusive and uninterrupted possession until his death. As heir-at-law he would have been in that case entitled, as the law I believe stood in 1847, to two shares—at all events to a share—in this land. He and his sister and brothers would have held it as tenants in common, and the exclusive possession of John would have been an exclusive possession of the whole tract: *Doe d. M'Kay* v. *Allen* (1). This continued for 28 years without interruption or question by any one, and at that time the *Statute of Limitations* had become a complete bar to the rights of the co-tenants. That would, in my opinion,

(1) 3 All. 191.

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give John Patterson a complete and good statutory title. He then made a will, under which his son Samuel claims. I understand it to be argued that the devise to Samuel by this will only includes the land to the north of the road. The words are these, "I bequeath to my son Samuel the farm on which I reside, with all the appurtenances thereof." At another place is the following clause, "I direct that my sons George and William shall have an equal share with Samuel of the lumber on the farm, and an equal share of the privileges of the mill, so long as they wish to remain in partnership." I should not myself think there was much doubt that the whole tract on both sides of the road passed under the word "farm," taken in connection with the surrounding circumstances and read in the light of the clause to which I have referred. The whole tract had been used and occupied from 1825, when it was granted, down to 1874, when John Patterson's will was made, as one farm. He had so used it and occupied it, certainly from 1847, for a period of about 27 years. And it is clear that he intended to pass the mill, mill privilege and the land with lumber on it, because he gave a share of the lumber and of the mill privilege to his two other sons—Samuel's share in these having necessarily passed as part of the farm. Besides all this, unless the land to the south of the road passed under this devise, it was not disposed of at all, and as to it there was an intestacy. We all know that Courts, if possible, avoid a construction which involves a partial intestacy. But if I am wrong in this, and the devise in the will of the farm only carries the land to the north of the road, and leaves that to the south undisposed of, in what way are these plaintiffs benefited? The effect would simply be that John's children would be tenants in common of the land south of the road. Samuel, one of these tenants in common, went into possession of it, and remained in its exclusive and uninterrupted possession for 28 years, and that would bar the rights of his co-tenants, and give him a good statutory title to that piece. The result is the same in either case, that is, to create in Samuel at the time of his death, a good title to the whole lot on both sides of the road. I shall only refer

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briefly to the evidence as to the possession of John and Samuel Patterson. Samuel Shanklin, who is sixty years old, has for many years lived on and owned lot 34, which adjoins the property to the west, on the north side of the road. He knew John and Samuel Patterson all his life, was their nearest neighbor, and knew all about the lines of the lots and their occupation. Margaret Jane Patterson, who is one of the defendants, 75 years old, and a grand-daughter of George, the original grantee, being a daughter of his daughter Elizabeth, lived on the adjoining lot to the east. She recollects her grandfather and grandmother, who, she says, lived with John Patterson on the premises for some time before his death. Charlotte Patterson, aged 79 years, a daughter of John; George B. Patterson, 76 years, a son of John; John C. Patterson, 71 years old, also a son of John, and W. H. Ellis, an old man of 91 and a witness produced by the plaintiffs, all gave testimony proving the possession of John and Samuel to this land as I have outlined it, in a clear and positive manner. The only evidence to the contrary, if evidence it can be considered, is that of Carson, who said that on one occasion when speaking to Samuel Patterson as to a proposed sale of the lot below the road, Patterson said that he did not know whether he could give a good title to it or not. If there was no other evidence, I should think the plaintiffs had altogether failed in making out a case for partition. But there is other evidence upon which the executors of Samuel Patterson rely as strengthening their testator's title to this land. They have produced two documents which have been put in evidence as ancient documents, though there is some evidence of their execution. The older document is dated July 1, 1831, and in order to distinguish it from the other, I shall refer to it as a "conveyance." It is as follows:

"Be it known to all men that on this first day of July, in the year of our Lord one thousand eight hundred and thirty-one, I, George Patterson, farmer, situate and living in the Parish of Saint Martins, in the County of Saint John, and Province of New Brunswick, doth on this day as above written, give and bequeath, and by these presents

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doth demise and make over unto my son, John Patterson, and his heirs for ever as my last will and testament. And this, my last will and testament, is to make known to all men that I have on this day given, bequeathed, demised and set over for ever unto John Patterson, my son, and his heirs, all that certain piece or parcel of land situate, lying and being in the Parish of Saint Martins, in the County of Saint John, Province of New Brunswick, and on the road from Saint John to Quaco, and distinguished as lots number thirty-five and thirty-six, more fully described in the original grant, being on the north side of the road, with all the improvements and appurtenances, as a free and indefeasible inheritance for ever. Nevertheless these presents are upon this express condition, that is to say: The above described John Patterson, his heirs or assigns, do engage to furnish the said George Patterson and Mary Patterson, his father and mother, with a decent and sufficient support during their natural lives, and to see them respectably interred should they die before the said John Patterson or his heirs. Also as witness our hands the day and year above written.

(Signed) "GEORGE PATTERSON. [L.S.]
(") "JOHN PATTERSON. [L.S.]

"Sealed and delivered in presence of } (Signed) "DANIEL SMITH.
(") "ROBERT ELLIS."

"It is further agreed by and between the said John Patterson and George Patterson that the within described John Patterson is to keep a cow summer and winter for the only use of the said George Patterson and Mary Patterson, his wife, for their only use so long as they shall live, both or either of them; and that the said George Patterson doth by these presents appoint Robert Ellis, of Tynemouth Creek, as his guardian and executor."

(Signed) "JOHN PATTERSON. [L.S.]
(") "GEORGE PATTERSON. [L.S.]

"Sealed and delivered in the presence of } (Signed) "DANIEL SMITH.
(") "ROBERT ELLIS."

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The other document is a will of George Patterson, the grantee, dated March 18th, 1840. Omitting the introductory part, it is as follows: "I do give and bequeath as follows: To my son John I do leave and bequeath the farm which he and I now occupy, being lot No. 35 on the south side of the new Quaco road, in the Parish of St. Martins." The remainder of the will is unimportaut. It is signed and sealed by George Patterson, and William Ruddick and John Smith are the witnesses. All the parties to both these documents, including the witnesses, are dead. John C. Patterson says that he heard of both of these papers—one before his grandfather's death, which I presume was the conveyance, and the other soon after his death. He also says that he had frequently seen his grandfather write, and while, after the lapse of so many years, he could not swear positively that he had ever seen him sign his name, he had no doubt, from his knowledge of his writing, that the signatures purporting to be the signatures of his grandfather to both documents, were genuine. He also proved the signature of his father, John Patterson, to the conveyance. Dr. Ruddick, of St. Martins, one of the witnesses to the will, died in 1883, at the age of 66 years. His signature is proved by his son, Robert C. Ruddick. There was some evidence of the signature of Robert Ellis, one of the witnesses to the conveyance. There cannot, I think, be any doubt as to the authenticity of these documents. As to their custody, it appears by the evidence of John C. Patterson that his father had a small tin box, which he produced in Court, and which was used for keeping papers relating to land; that this box came into the possession of his brother Samuel on his father's death, and that he got it from Samuel's widow. He also says that not long before his brother's death he had occasion to examine the papers in this box in reference to some business of his brother, aud that in it, with other deeds and papers, was this conveyance, also the original grant and the probate of his father's will. He came into possession of all these papers as executor of his brother's estate, and has had them in his custody ever since. As to the custody of the will,

George Smith, who is 78 years old, and has lived all his life in St. Martins, says that he lived with his two uncles, John and Daniel, who were unmarried, until they died. John, who is witness to the will, died in 1860, and Daniel in 1849. He says that he found the will among some papers of his uncle John in a chest which came into his possession on his uncle's death, and which he has had ever since in his own personal use for keeping papers and money in. He says that he kept it locked and kept money in it, and when he heard of this suit he told a Mrs. Brown about the paper, and in that way Floyd, it is said, heard of it. I think the evidence accounts satisfactorily for the custody of both papers, and that they are admissible, without proof, as ancient documents. See *Doe d. Neale* v. *Samples* (1).

The existence of these documents was not altogether unknown. Besides John C. Patterson, whose evidence on that point I have already mentioned, Samuel Shanklin says he heard of an agreement between John and his father, and Margaret Jane Patterson says she heard, about the time of her grandfather's death, that he had made a will. Ellis and Margaret Patterson speak of George Patterson and his wife living with their son John, and his taking care of them for some time before their death. This is entirely consistent with the terms of the conveyance, by which it was agreed that John was to support his father and mother for the remainder of their lives. Whether this conveyance would operate as a transfer of the land on the northern side of the road, in which case livery of seizin might be inferred after this lapse of time, or whether it is testamentary in its character and intended to operate as an absolute assignment of the property on George Patterson's death, it is not necessary for the determination of this case to decide. The instrument, however, carries on its face an obvious intention to transfer to John Patterson the immediate use and possession of the land from which, and apparently upon which, he was thenceforth to maintain his parents during their lives, and a further intention that

(1) 8 A. & E. 151.

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either then, or on George Patterson's death, John should, by virtue of that instrument by whatever name you call it, acquire the land described in it "as a free and indefeasible inheritance for ever," and which he then declared "he gave and made over unto John and his heirs for ever." See *Doe d. Wilt* v. *Jardine* (1); *Wortman* v. *Ayles* (2); *Hadden* v. *White* (3). As to the will made in 1840, there can be no doubt that by it John Patterson acquired the land on the south side of the road, which the testator calls "the farm which he and I now occupy."

The plaintiffs, in my opinion, have failed in establishing any tenancy in common in this property, or that they have any interest in it at all. The evidence, I think, shews a perfectly good title to the whole tract in Samuel Patterson at the time of his death, and in his executors under his will. The bill must therefore be dismissed.

As to the costs. This is not a case upon which section 218 of the Equity Act, chap. 112, C.S. 1903, has any bearing. First, as to the costs of the O'Neill Lumber Company. They had purchased the land on the north side of the road for $6,100 from the executors of Samuel Patterson, and received a conveyance before this suit was commenced. They were made defendants, and notice of motion for an injunction against them was given with a view of restraining them from cutting the lumber. Before the motion was made an agreement was arrived at by which the conveyance to that company was confirmed by consent of Counsel who represented different parties, and the $6,100 was deposited in the Bank of New Brunswick in the name of Mr. Knowles, subject to the order of the Court, to be dealt with as representing the land. The company appeared and answered and now ask that their costs should be paid by the executors, or, in other words, deducted from this fund. I am really unable to see any reason for making such an order. The company purchased in the ordinary way, and the executors are in no way responsible for this litigation. They were forced into it by the plaintiffs on the same

(1) Bert. 142. (2) 1 Han. 63. (3) 2 Kerr, 634.

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ground that Samuel Patterson's executors were. The plaintiffs must pay the costs of Patterson and Floyd, executors of Samuel Patterson, and also of the O'Neill Lumber Company. As to the other parties, they either supported the plaintiffs in their contention or were willing to participate in any personal advantage which that contention, if successful, might bring them. There will be no order as to costs as to them. The money in the hands of Mr. Knowles, with any accumulations, will be paid by him over to Patterson and Floyd as executors of Samuel Patterson.

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WOOD v. LeBLANC.

Interlocutory injunction — Undertaking as to damages — Order for assessment.

Claims for small damages by some defendants ordered to be included in an order for assessment of damages of other defendants under an undertaking given on obtaining an interlocutory injunction, where they arose from the restraint of acts the injunction was obtained to prevent from being done.

An injunction order was granted in this suit restraining the defendants, and also other persons who were residents of Memramcook East, and claimed title to certain lots of land described in the bill, situate in Westmorland County, and comprising several thousand acres, from cutting down any trees, timber, logs, wood or poles thereon, and from taking, hauling, carrying away or interfering with any logs, lumber, trees, wood or poles then cut and lying upon said lots of land, or any or either of them. The injunction order was granted *ex parte* on February 6, 1902, and dissolved on December 16 following, with costs. See report of case (1). An undertaking given on obtaining the order was as follows: "Plaintiff by his Counsel hereby undertakes to abide by any order this Court may make as to damages in case the Court shall be of opinion that the defendants or others hereby restrained, have sustained any by reason of this order which the plaintiff ought to pay." The bill having been dismissed, application was now made on affidavits on behalf of the defendants, and others not parties to the suit, for an assessment of their damages alleged to have been sustained by reason of the order. The affidavit of Henry S. LeBlanc stated that at the time of the service upon him of the injunction order he was engaged in cutting logs, firewood and poles on one of the lots of land in question in the suit, and that he immediately ceased work, leaving on the ground the logs

(1) 2 N. B. Eq. 427.

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and wood he had then cut; that sixty of these logs were removed by the plaintiff's workmen, acting as he believed under the plaintiff's orders, and that their value was $15; that the deponent and his father had made arrangements to log on the lot during the winter of 1902; that they were then in a position to have cut and handled three hundred more logs, from which they would have made $45; that they had swamped roads on the lot, and had made arrangements to haul fifty cords of wood during the winter; that they had three horses and had lost work for them the rest of the winter; that the wood would have been worth $3.50 a cord, and could have been got out at a cost of less than $30; that the deponent had five hundred and thirty logs on another lot in question, which he had been prevented from removing by the injunction order; and that while he could have sold them for $15 per hundred at the time of the service of the order, their value when the order was dissolved was but $8 per hundred; that he and his father required for their farm for fencing about five hundred poles and that these they had been prevented from cutting and getting out. On behalf of himself and his father he claimed $350 damages. Raphael P. LeBlanc stated that at the time of the granting of the order, he was cutting wood on one of the lots in question, for household use, and for sale; that he was compelled to purchase three cords of wood for his own use; and that by reason of the order he was unable to use his horse during the winter in getting out wood; he estimated his damages at $30. Andrew Dupuis and Samuel A. Dupuis stated that the latter at the time of the granting of the order was cutting and hauling logs, firewood and poles on one of the lots in question; that he had contracted to sell a quantity of firewood, which he was prevented by the order from delivering; that about twelve spruce trees which he had cut were removed by the plaintiff's agents; that both deponents by being prevented from getting out poles, had been unable to fence in their land during the spring and summer of 1902, as they had intended doing, and that the want of fencing had deprived them of pasture for their cows. They estimated their damages at $60. Aimable Sonier stated

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that he and his son were, at the time of the granting of the injunction order, getting out wood, poles and logs on two of the lots in question, and that by reason of the order, they practically lost their work for the remainder of the winter, from which they usually made about $60; that being prevented from getting out poles during the winter, he and his son had not been able to protect their crops by fencing during the ensuing summer, and had sustained damages from this cause to about the sum of $10; and that they had worked for three days with a horse in swamping roads for the purpose of logging on the two lots in question. The deponent estimated the damages of himself and son at $125. Charles Breau stated that at the time of the granting of the order he was cutting and hauling poles on one of the lots in question; that he, his son and his son-in-law had spent two days in swamping roads for the purpose of getting out wood for sale; that he had contracted for the sale of fifty cords of wood at $2 per cord, upon which he could have made $1 per cord; that by reason of the order he had lost the winter's work for himself, two men and horses; that at the time of the service of the order, he had fifteen hundred poles cut and split on said lot, which he was prevented from using by the order, and that in consequence he had to buy wire for fencing at a cost of $10; that the poles by lying on the ground had been lessened in value. He claimed $65 damages. Jude Gaudet stated that at the time of the granting of the order, he and his son, with three employees, were cutting and hauling logs and cordwood on one of the lots in question; that he had at the time seven hundred logs yarded on the lot, and about one hundred logs lying on the ground; that he had about forty cords of wood cut on the lot and ready for market, and that it was his intention to cut and get out logs and wood on the lot during the rest of the winter; that the logs, which had been worth $25 per hundred, had depreciated one-half in value; that the cordwood had depreciated a dollar per cord from lying in the woods; that he had lost the winter's work for five horses, and that he estimated the damages to himself and

son at $350. Henry Dupuis stated that at the time of the granting of the injunction order he was cutting wood, logs and poles on one of the lots in question; that he intended having logs manufactured into lumber for his own use, and of getting out and selling 300 others, for which he expected to receive $18 to $20 per hundred; that he had made arrangements to get out cordwood for himself and for sale; that he had swamped roads; that he had two sons working with him; that the three of them lost their winter's work; that he had also lost the winter's work for a team of horses; that he had about one hundred poles cut upon the lot, and intended cutting about one thousand more for use on his farm, and that by reason of not having them he had been unable to provide pasture for his stock. He estimated his damages at $75. Henry G. Breau and Maurice G. Breau stated that at the time of the granting of the order they were cutting and hauling wood and logs for their own use on two of the lots in question; that they had contracted with other owners of the lots to haul wood off the lots for them; that they had been prevented from obtaining poles for fencing, whereby their farms had suffered, and they estimated their damages at $30. Ferdinand Gould stated that at the time of the service of the injunction order he and his two sons were cutting wood on one of the lots in question for their own use and for sale, and in cutting timber for the frame of a house; that they had cut about ninety logs, and that they had suffered considerable inconvenience from want of firewood. He estimated his damages at $13. Frank J. Landry stated that at the time of the service of the injunction order he was having firewood for himself cut off one of the lots in question, and that he was obliged to get it elsewhere at an extra cost of $10. Docithe L. LeBlanc stated that at the time of the granting of the injunction order he had on one of the lots in question fifteen logs of the value of $18, which, while the injunction was in force, were removed by the plaintiff's agents; that he had been prevented from cutting firewood and poles; that he had had to buy two cords of firewood at a cost of $2, and also to buy some poles, for which he

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paid $1; and that he had sustained $21 damages. Amos J. LeBlanc stated that at the time of the granting of the injunction order he was having firewood for himself cut on one of the lots in question, and that by reason of the order he was compelled to purchase the firewood at an extra cost of $4.20; that he intended cutting five hundred poles during the winter for fencing-in a field for oats, but was prevented by the order from doing so, and that his profits from the oats would have been $20. He claimed $25 damages.

Argument was heard January 17, 1905.

M. G. Teed, K.C., for the plaintiff:—

The motion is based upon several affidavits, each constituting a separate claim. Many of them fail to shew a *prima facie* case of damage. In respect to them an order for assessment should not be made. The damages claimed under them are remote and trivial. The rule is very clear that damages will only be allowed that are proximate and natural, and that if they are remote, speculative and trivial, an inquiry will not be directed. See *Smith* v. *Day* (1).

W. Pugsley, A.-G., and *James Friel*, in support of the motion:—

It is not a reason for refusing the assessment of a claim, that it is small. An inquiry having to be made, it should include all the claims. In the event of a claim turning out to be too trivial for assessment, costs can be given against the applicant.

1905. February 21. BARKER, J.:—

The plaintiff does not deny that he is equally as liable under his undertaking given to the Court on obtaining the injunction order in the suit to the outside persons affected by the order as he is to the defendants themselves. As to a certain class of damage alleged to have been sustained by

(1) 21 Ch. D. 421.

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the claimants he admits a liability, but as to some of the claimants he contends that the damages claimed by them are altogether too remote or too trivial, or both, and that as to these no order for assessment should be made.

In *Smith* v. *Day* (1), Jessel, M.R., says that the Court has a discretion as to when and under what circumstances an order of this kind will be made. He adds: "Then again the Court must have regard to the amount of damage; if it be trifling or remote, the Court would not be justified in directing an inquiry as to damages, though the inquiry might not be so remote that an action would not lie." Brett, L.J., in the same case, says that damages under an undertaking should be assessed by the same rule as laid down in *Hadley* v. *Baxendale* (2) in reference to contracts between parties, and that the measure of damage in such cases is the loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction had notice. See also *DeMattos* v. *Gibson* (3) as to the allowance of profits lost by non-user of property in consequence of an injunction. It is true in the present case that as to some of the applicants the damage sustained, according to their own estimate, is small and perhaps out of proportion to the costs incident to any proceeding for its assessment, but I cannot see, in a case like this, that such a consideration should necessarily relieve the plaintiff from a liability which he voluntarily assumed in his own interest, more especially where there must be an inquiry as to some of the claims. It must be remembered that the plaintiff, when he obtained this injunction, knew that he was embarking in a somewhat speculative litigation; the title to the property was known to be in doubt, and unusual means were taken to stop by the injunction those very acts out of which many of these claims arise. It may turn out on investigation that the damages sought to be recovered are too remote, but at this stage of the inquiry I can see no special circumstances which should lead me to narrow its scope. I shall there-

(1) 21 Ch. D. 425. (2) 9 Ex. 341. (3) 7 Jur. (N. S.) 282.

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fore order this case to be set down at the regular sittings in Dorchester to be held on the last Tuesday in May next, for the purpose of assessing the damages in the case of the following claimants: Henry S. LeBlanc and Sylvang P. C. LeBlanc, $350; Aimable Sonier and Amos Sonier, $125; Frank J. Landry, $10; Andrew Dupuis and Samuel A. Dupuis, $60; Charles Breau, $63; Henry George Breau and Maurice George Breau, $30; Jude Gaudet, $350; and Henry Dupuis, $75. As to the other claims there will be no order.

THE GAULT BROTHERS COMPANY, LIMITED v. MORRELL.

1905.

February 17.

Injunction — Assignment for benefit of creditors — Prejudice of creditor — Varying injunction order — Title of cause in order.

Where an *ex parte* injunction order restrained a trader, who had obtained goods from the plaintiffs under an agreement that the property therein was to remain in them, with liberty to them to take possession, from, *inter alia*, making an assignment for the general benefit of his creditors, it was ordered to be discharged in that respect.

It is not a ground for setting aside the service of an *ex parte* injunction order that the order is not entitled in the cause, where the defendant has not been misled.

The defendants, J. Otty Morrell and J. Leishman Sutherland, in 1898 commenced carrying on a dry goods business in co-partnership at the City of St. John, under the firm name of Morrell and Sutherland. The plaintiffs agreed to supply them with goods under an agreement which, among other provisions, provided that all goods supplied by the plaintiffs should belong to them and remain their property until paid for, and that should the plaintiffs at any time consider that the defendants' business was not being conducted in a proper way, or to the plaintiffs' satisfaction, or that the agreement was being in any way disregarded, the plaintiffs should be at full liberty to take possession of the defendants' stock, book debts and other assets, and dispose of the same without let or hindrance of the defendants, and that after payment in full of any amount then owing to plaintiffs, whether due or to become due, and any expenses incurred in the realization of such assets, the balance of the proceeds then remaining in plaintiffs' hands should be handed to the defendants, together with any securities held by plaintiffs. The bill alleged that under and by virtue of this agreement the plaintiffs from time to time supplied goods to the defendants; that there was due the plaintiffs the sum of $9,486.16, and that of the goods supplied by the

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plaintiffs a quantity of the value of $6,000, or thereabouts, remained on hand in defendants' stock. It was also alleged that the defendants had a total stock-in-trade of the value of about $15,000, and were possessed of other assets of the value of about $4,000; that they were in insolvent circumstances, and that their liabilities amounted to $20,000 and upwards. The plaintiffs notified the defendants that they were dissatisfied with the state and conduct of the business, and that it was their desire and intention to take possession of the stock-in-trade and other assets in the defendants' possession. The defendants replied refusing possession. The bill alleged that the plaintiffs were apprehensive and believed that the defendants intended to sell or assign their stock-in-trade and other assets, and they prayed for an injunction restraining them from selling, assigning, transferring or encumbering any of the goods, stock-in-trade, book debts or assets contained in the defendants' store, and from making or executing any bill of sale or transfer thereof, and from stopping or in any way interfering with the plaintiffs taking possession thereof; that it might be declared that the plaintiffs were entitled to the same, or to a lien thereon, and for a declaration of the plaintiffs' rights, and for a decree for specific performance by the defendants of the agreement. By an *ex parte* injunction order granted by Mr. Justice *Barker* on February 2, 1905, the defendants were restrained until February 21 from selling, assigning, transferring or encumbering, or removing any of the goods, stock-in-trade, book debts and assets contained in their store, and from making or executing any bill of sale, assignment or transfer thereof, and also from collecting any of the said book debts; the plaintiffs to be at liberty, upon notice, to move to continue the injunction until the hearing. Motion was now made by the defendants, on notice, to dissolve or to vary the order, and also to set aside the service thereof. Affidavits by the defendants set up that previous to the commencement of the suit the defendants proposed to the plaintiffs' agent that they should make an assignment for the benefit of all their creditors; that this was assented to

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by him, and that arrangements for that purpose were made; but that subsequently he withdrew his assent. The defendants denied that they had ever intended to make other than a general assignment for the benefit of all their creditors, and stated that they were now desirous of making such an assignment. The injunction order was not entitled in the cause.

February 16, 1905.

A. O. Earle, K. C., and *J. B. M. Baxter*, in support of the motion:—

The bill and affidavits suppressed the fact that the defendants desired to make a general assignment, and conveyed the impression that they planned to give a bill of sale or to make a preferential disposition of their property. Had this information been disclosed the injunction would have been made in terms so limited as not to prevent the defendants from making a general assignment. The plaintiffs' rights, if any, under their agreement with the defendants would not be prejudiced by an assignment. See *Thibaudeau* v. *Paul* (1), and *Burland* v. *Moffatt* (2). The service of the injunction should be set aside, neither the original nor copy served being entitled in the cause.

M. G. Teed, K. C., *contra*:—

It is not altogether certain that an assignment would not have the effect of prejudicing the plaintiffs' rights. The agreement gives us possibly nothing more than a right to seize instead of a legal or equitable title. This right might be lost if the assets were taken over by an assignee. There was no suppression of material facts on the application for the injunction. In our view the injunction should have been granted to prevent a general assignment, and our case for an injunction would have been strengthened if we had stated that defendants contemplated making such assignment. The absence in the injunction order of title of the

(1) 26 O. R. 385. (2) 11 Can. S. C. R. 76

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cause is waived by motion to dissolve or vary the order on grounds of substance.*

[*Baxter*:—The motion includes a motion to set aside the service of the order.]

[*Barker*, J.:—The defendants have not been misled by the defect. I think it is immaterial.]

Earle, K. C., in reply.

1905. February 17. BARKER, J.:—

It is objected that certain facts shewing that the defendants were desirous of assigning for the general benefit of their creditors were not placed before me, and that if they had been the injunction would not have been granted, or would have been granted in a modified form. In view of the nature of the question involved in the suit, I cannot regard the failure to place me in possession of the information as material. It would be a matter for argument whether an assignment might not defeat plaintiffs' rights under their agreement, and therefore it would be proper that an injunction should be granted to prevent an assignment until the parties could be heard on a motion either to dissolve or vary, or to continue the injunction. Had the information, which it is complained was withheld, been presented to me, I would have made the interim order in its present form. I do not see that I should restrain the defendants from making a general assignment. The rights of the plaintiffs will not be affected by it, as the assignee will take the assets subject to any equities that existed against them while in the hands of the defendants. There will be an order varying the injunction so as to permit the defendants making an assignment for the general benefit of their creditors.

Reserve question of costs.

* In *Berton* v. *Mayor, etc., of St. John*, N. B. Eq. Cas. 150, 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 Chap. 49, C. S. 1876, was ordered to be varied in that respect.—REP.

PETERS v. THE AGRICULTURAL SOCIETY, DISTRICT No. 34.

1905.
March 9.

Agreement — Consideration — Public exhibition — Competition for medal — Competition instituted by manager of exhibition — Scope of duties.

Three proprietors of blends of tea exhibiting their teas at a public exhibition held by the defendant society allowed their teas to be judged by a committee appointed by the society, in competition for a gold medal offered by the society. During the exhibition each of the competitors served the public gratuitously with samples of made tea, and tea was served by them to the committee in the same way that it was served to the public. The committee having awarded the medal to the plaintiff, a competitor:—

Held, that there was consideration for the offer, entitling the plaintiff to the medal.

Where the executive of the above society adopted a resolution to award medals to all displays of merit or excellence of goods on exhibition, the awards to be made by regularly appointed judges; and the general manager of the exhibition, who was vice-president of the executive, and a member of a committee of three to appoint judges, thereupon arranged the above competition, and with a co-member of the committee to select judges, named the judges for the competition, it was held that the competition must be taken to have been instituted by the society.

The Agricultural Society, District No. 34, incorporated under *The Agricultural Act, 1888*, held at Fredericton from the 21st to the 26th day of September, 1903, inclusive, a public exhibition of stock, products of the soil, and of arts and manufactures. The plaintiff, doing business under the name of Baird & Peters, hired floor space in the exhibition from the society, and placed on exhibition in a booth a tea blended and owned by him, and known and labelled under a registered trade-mark as "Vim Tea." Teas advertised and known as "Tea Rose Blend" and "Blue Ribbon Tea," belonging respectively to J. J. McGaffigan, Limited, and The Blue Ribbon Tea Company, Limited, were shewn at the same exhibition. Each of the exhibitors made and drew tea on the premises and served it gratuitously to the public. On September 24th a resolution was

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adopted by the executive of the society to award medals to all displays of merit or excellence of goods on exhibition, the awards to be made by regularly appointed judges. Mr. F. S. Hilyard, general superintendent of the exhibition, a member of the executive, and vice-president of the society, thereupon informed the agents in charge of the tea exhibits that judges would be appointed to award a prize for the best tea, and for them to hold themselves in readiness for the competition. The evidence of the plaintiff's agent was that Mr. Hilyard told him that the prize was to be a gold medal. A committee of three ladies was appointed by Mr. Hilyard and Mr. W. S. Hooper, a member of the executive and also its secretary, to judge the teas, and they, after tasting and testing the three teas on exhibition, rendered an award in writing in favor of the plaintiff's tea. Tea was served to them by the competitors in the same manner that it was served to the public. Mr. Hilyard and Mr. Hooper had power as a committee to appoint judges, but their right to institute competitions was denied by the society. Mr. J. J. McGaffigan, the owner of "Tea Rose Blend," subsequently to the award, advised the society that he had not placed his tea in competition, and he protested against a medal being awarded to the plaintiff. Default having been made by the society in delivering a medal to the plaintiff, and the society having proposed to deliver a medal to each of the exhibitors, the plaintiff by his bill prayed that the society might be restrained from issuing or giving a medal to either of the other exhibitors, and from withholding the gold medal so awarded to him, and he asked for damages. At the hearing the bill was taken *pro confesso* against the defendants, J. J. McGaffigan, Limited, and The Blue Ribbon Tea Company, Limited. Motion was made by the defendant society at the conclusion of the plaintiff's case, to dismiss the bill.

1905. March 8.

G. W. Allen, K.C. (*R. W. McLellan*, with him), in support of the motion:—

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The evidence fails to connect the society with the competition. Mr. Hilyard has been shewn to have possessed no authority from it to institute the contest. The resolution of the executive passed on 24th September, under which he assumed to have the power, did not authorize it. Nor would he derive the power from his position as a member of the committee to name judges.

[Barker, J.:—Would not the society be bound by his act, where the plaintiff had no knowledge that it was not authorized by the executive?]

It is submitted that in the absence of authority in fact the society would not be bound. If he had authority in this matter he would have authority to institute any number of competitions involving the society in an enormous liability.

[Barker, J.:—The question is not one to be proved by extreme cases. Mr. Hilyard was vice-president, general superintendent and manager, and a member of the executive.]

Mr. Hilyard acted beyond the scope of his duties. Where a person deals with an agent he takes the risk that the agent is not exceeding his powers. Another officer had alone power to institute the contest.

[Barker, J.:—The plaintiff had no knowledge of that.]

It is also submitted that the evidence fails to support the allegation in the bill that the competition was for a gold medal. Mr. Hilyard's evidence is conclusive that it was for a prize, and that it was left open what form it should take. A contract of such vagueness and uncertainty will not be enforced. Then the promise would be unenforceable for want of consideration. The plaintiff did no act, on the strength of the offer, benefiting the society, and suffered no loss, detriment or inconvenience from entering the contest. His tea was served to the judges in the same way that it was served to the public on the plaintiff's invitation. Whatever advantage was to be derived from having it brought to their notice he got. It cannot therefore be

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pretended that serving them with tea would form a consideration for the promise.

L. A. Currey, K.C., and *W. A. Ewing*, for the plaintiff, were not heard.

Barker, J.:—I think if a society of this kind offers to give a prize, and a member of the public acts upon it and takes steps to compete for it, it is bound. I do not think it is *nudum pactum*. I will not dismiss the bill.

Evidence was then given by the defendant society, upon the conclusion of which reference was made for the plaintiff to *Carlill* v. *Carbolic Smoke Ball Co.* (1) and *Dunham* v. *St. Croix Soap Manufacturing Co.* (2), upon the question of consideration. It was also submitted that the plaintiff was entitled to damages. The medal would have been valuable to him in placing the merit of his tea before the public.

Allen, K.C., for the defendant society:—

It is further contended by us, in addition to the arguments made on the motion to dismiss the bill, that even were it shewn that the offer made by MR. Hilyard was authorized by the society, it would be in excess of the society's powers and could not bind it. The society is restricted to awarding prizes to exhibits grown or produced in the Maritime Provinces. The objects of the society do not extend to giving encouragement to the products of foreign countries or to advertising the wares of rival merchants. If the plaintiff is entitled to a decree, it should be without damages. The evidence as to loss sustained by the plaintiff in withholding the medal from him was not definite and precise enough to furnish a basis for an assessment of damages.

The Court having intimated that there should be a decree for the plaintiff, inquired whether a settlement could

(1) [1893] 1 Q. B. 256. (2) 34 N. B. 243.

not be made which would relieve the society of the full effect of a decree against them.

Currey, K.C., said that the society, being formed for the advancement of public objects, the plaintiff was willing to waive any claim he might have for damages, and would bear such a proportion of the taxed costs against the society as the Court would name.

1905. March 9.

Barker, J.:—Declare the plaintiff is entitled to receive from the defendant society the medal awarded to the successful competitor in the competition mentioned in the plaintiff's bill. It is ordered that the defendant society do deliver such medal to the plaintiff on demand, and that they be perpetually restrained from delivering or permitting to be delivered to the defendants, J. J. McGaffigan, Limited, and The Blue Ribbon Tea Company, Limited, as competitors in such competition, a duplicate of such medal or any other prize or award; that the plaintiff's costs as between party and party be taxed by the Clerk, and that the defendant society pay to the plaintiff two-thirds of such taxed costs, the amount to be certified by the Clerk. There will be no further order as to costs or damages.

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March 21.

DUGUAY v. LANTEIGNE.

Deed — Maintenance bond — Lien.

Where land was conveyed in consideration of a bond by the grantee to maintain the grantor and his wife for life, but the consideration was not expressed in the deed, a decree was made charging the land with a lien for the performance of the agreement in the bond.

Bill for a declaration of lien upon land conveyed by the plaintiff to the defendant, and to enforce the same. The facts are fully stated in the judgment of the Court.

Argument was heard January 18, 1905.

L. A. Currey, K.C., and *J. P. Byrne*, for the defendant:—

The bill should be dismissed. There has been no breach of the agreement contained in the bond. If there had been it would give rise to an action for damages, and not to the relief sought here, since the bond is not incorporated in the deed.

M. G. Teed, K.C., for the plaintiffs:—

The plaintiffs are entitled to a decree charging the land with a lien in their favor, even if they have failed in establishing a breach of the agreement under which the land was conveyed to the defendant.

[Barker, J.:—Is the support here to be given on the property conveyed? If so, the plaintiffs would clearly be entitled to a lien. In *Cunningham* v. *Moore* (1), the support covenanted to be given was upon the land conveyed. The bond here is silent in that respect.]

A lien should be declared on the same principle that a vendor is entitled to a lien for unpaid purchase money or

(1) 1 N. B. Eq. 116.

where the consideration for the conveyance fails. It is plain that maintenance here was intended to be on the land conveyed. The plaintiffs continued to reside there after the defendant removed to it, and their dealings with each other thereafter was upon the footing that that was the arrangement between them.

1905. March 21. BARKER, J.:—

On November 12th, 1902, the plaintiff Pierre B. Duguay by deed poll conveyed to the defendant all his interest in a lot of land in the County of Gloucester for an expressed consideration of $500. On the same day, and as a part of the same transaction, the plaintiff conveyed some furniture, farming implements and other chattels to the defendant by a bill of sale which contains the following clause: "The conditions of the above sale are that the said Solomon Lanteigne (defendant) besides the amount of $50 of lawful money of the Dominion of Canada, which he has paid to me, and for which I acknowledge receipt, is obliged in accordance of a bond which he has signed to-day of the amount of $500, to furnish me, the said Pierre B. Duguay and my lawful wife during our natural lives with lodging, clothing, victuals, fuels, and all the necessaries of life, &c." This instrument is signed by both Duguay and Lanteigne. The bond referred to in the bill of sale is for $500, and contains the following condition: "The condition of this obligation is such that if the above bonded Solomon Lanteigne do, or cause to be, furnished the said Pierre B. Duguay and his wife, during their natural life, with good and sufficient lodging, fuels, victuals and clothing and care according and suitable to their condition then this obligation to be null and void."

The bill alleges, and the evidence shews, that the defendant on obtaining the conveyance of this land went into possession of it and has been living there ever since with his wife and family. The plaintiffs also lived with them until sometime in April, 1903, when they left, as they say, on account of cruel treatment received from the defendant, who also, as they allege, threatened them with

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bodily injury. They now file this bill by which they claim to have a lien on the land for the support and maintenance secured to them by the bond, and that such lien should be enforced so as to realize to them the value of such support which the defendant has not furnished them since they went away. All parties agree that whatever may appear to the contrary on the face of the conveyance, the real and only consideration for it was the support to be furnished the plaintiffs as secured by the defendant's bond. That being so, I think the plaintiff has a lien, as he contends, upon the same principle as governs cases of unpaid purchase money. I acted upon that doctrine in *Cunningham* v. *Moore* (1), where the cases on the subject are collected. In *Ward* v. *Wilbur* (2), the principle was extended in its application. The defendant does not dispute this fact, but his defence is simply that up to the time the plaintiffs left the premises, they had been fully provided with all they were entitled to under the arrangement, and that they had no sufficient reason for leaving as they did. As to the support furnished up to April when they left the defendant's house, the plaintiffs make no complaint. So the sole question of fact in dispute really is this: were the plaintiffs justified in leaving the defendant's house and premises where both parties seem to agree the maintenance was to be furnished. Two incidents are relied on as a justification for the plaintiffs going away. The first one occurred some time in January, 1903, a little over two months after the arrangement for living together had been made. According to the plaintiffs' account, the defendant on the occasion referred to, came home one evening under the influence of liquor; and after the plaintiff and his wife had gone to bed, the defendant went to their room with a bottle containing liquor of some kind and invited the plaintiff to have a drink. This he declined, but it is not very clear whether he did so because the time and place were not altogether opportune for the purpose, or because he had at an earlier part of the evening accepted the defendant's hospitality at least on two occasions. I have no doubt that the defend-

(1) 1 N. B. Eq. 116. (2) 25 A. R. 262.

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ant was somewhat hilarious on the evening referred to. I have no doubt that he was unusually talkative, and I think it not improbable that his gesticulations were more vehement than the occasion really called for. The defendant himself denies that he went to the room at all, but, accepting the plaintiffs' account as accurate, there is nothing like violence or cruelty suggested by it. However indefensible the defendant's action may have been, it was not repeated. Nothing much was said about it at the time, or appears to have been thought about it afterward. The defendant, on the following morning, expressed his regret at his unbecoming conduct, so the plaintiff says, and nothing more was heard of it until this trial. All parties lived together until the following April without any differences; and when the final separation took place, this was not assigned as a reason. In April, 1903, the female plaintiff, while her husband was away, and without his knowledge, left the defendant's home and went to her son's house not far away, where she has been living since. The reason she assigned was a somewhat childish discussion between her and the defendant as to who was "boss" of the place. The difference seems to have arisen out of some trivial matter about some rope, the particulars of which are not very clear. I agree in thinking that the defendant had charge and control of the house and property. I have only the defendant's account of this incident. He denies that he ordered her to leave the place, and says she went without any cause at all. When her husband returned some days afterwards he found his wife at her son's, and he joined her there and they never returned. Those who denude themselves of their property, as these plaintiffs have done, in order to secure in return support for themselves for the remainder of their lives, should remember that they are parting with all right of control and management, and that as inmates of another's family they are likely to encounter much that is not to their liking. But this does not necessarily justify their leaving the home provided for them, and where they have themselves stipulated their support is to be furnished them. It is equally important that the conduct of those

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who acquire property under an arrangement of this kind should be closely watched, because they have strong temptations to treat the beneficiaries with little consideration, and they have the power of doing so without themselves incurring additional liability. In this present case there is no complaint that up to April, when the plaintiffs went away, the defendant did not do all that he had agreed to do. The evidence shews that during that period, beside board and lodging, the defendant in the payment of plaintiff's debts and in furnishing him with clothing and necessaries, expended about $50. The 9th and 10th sections of the bill set out the grounds upon which the plaintiff relied as a justification for leaving the premises and seeking elsewhere support and maintenance at the defendant's expense. The 9th section alleges that since the date of the bond the defendant "has refused to give lodging and fuel, and to furnish victuals and clothing to the plaintiff and his wife, and in consequence thereof the plaintiff and his wife are not now living on the premises aforesaid, and are supporting, lodging, boarding and maintaining themselves as best they can, and without any assistance or help from the defendant, who refuses such lodging, fuel, victuals and clothing to the plaintiff and his wife." The 10th section alleges that the defendant had been cruel to the plaintiffs, and at different times threatened them with bodily injury, making it impossible, with safety, to live with him. Each of these plaintiffs made an affidavit of the truth of these allegations to support an application for an *ex parte* injunction at the commencement of this suit, and upon them Mr. Justice *Landry* did grant an order restraining the defendant from transferring this property. These are the only reasons put forth by the plaintiffs in their bill for their leaving the defendant's house. The evidence of the plaintiff, Peter Duguay, does not, I think, sustain either of them, while that of the defendant (and there are only these two witnesses in the case), is clear, not only as to the sufficiency of the maintenance up to the time the plaintiff went away in April, but also as to his willingness and ability to furnish it after that time in accordance with

his contract. The plaintiffs have not, in my view, shewn themselves entitled to the relief which was the principal object of this suit. They are entitled, however, I think, to a declaratory decree that the plaintiff, Peter Duguay, has a lien on the land for their support. The true consideration for the conveyance does not appear on its face, and I think they are entitled to a decree declaring the true consideration and the lien which, when registered, would be a notice to subsequent purchasers. As the existence of the lien was not the real matter in contest, I cannot give the plaintiff costs.

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There will be a decree declaring that as between the plaintiff and the defendant, and all persons claiming under him, the plaintiff, Peter Duguay, is entitled to a lien on the land for the support and maintenance of himself and wife so long as they live.

Each party will pay his own costs.

1905. THE CARLETON WOOLLEN COMPANY, LIMITED v. THE TOWN OF WOODSTOCK.

May 16.

Municipal by-law — Exemption to company — Taxation — Discrimination — Ultra vires — Bill — Pleading — Judicial notice of statute.

By Act, the council of the town of Woodstock are empowered from time to time, at their discretion, to give encouragement to manufacturing enterprises within the town by exempting the property thereof from taxation for a period of not more than ten years :—

Held, that a by-law of the council exempting any company establishing a woollen mill in the town from taxation for a period of ten years was *ultra vires*, being a discrimination in favor of a company as against private persons engaged in the same business.

A bill alleging that plaintiffs were entitled to exemption from taxation under a by-law passed by the defendants, held sufficient on demurrer without alleging that the by-law was authorized by statute.

Demurrer to bill. The facts and grounds of demurrer sufficiently appear in the judgment of the Court.

Argument was heard April 18, 1905.

D. McLeod Vince, in support of the demurrer :—

The exemption provided for in the council's resolution was to a company establishing a woollen mill. A company purchasing the property of a company that had established a woollen mill under the by-law would not be entitled to the exemption. The exemption could only be by sanction of legislative enactment. If there is statutory authority it should have been set out in the bill.

[BARKER, J. :—Surely I may take judicial notice of the Act ?]

In *Bailey* v. *Birkenhead Railway Co.* (1), counsel proposed to read clauses in the Act not set out in the bill,

(1) 12 Beav. 433, 443.

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alleging that in the Act it was enacted that it should "be a public Act, and should be judicially taken notice of as such." The Master of the Rolls said: "It has been determined that you cannot go out of the record, and that even if the Act were inaccurately stated in the bill, you must take it upon demurrer as it is stated." See also *Nabob of the Carnatic* v. *East India Co.* (1) and *Kiely* v. *Kiely* (2).

[BARKER, J.:—Are you not estopped from setting up that you had no authority to pass the resolution?]

It is submitted that it is part of the plaintiffs' case to shew that we had authority.

F. B. Carvell, contra:—

The resolution is applicable to a company succeeding to the interests of the original company. The exemption is not limited to the original company while it continues under a specified name or management. The exemption was for ten years to the mill, if it should so long exist, no matter what changes might be made in its ownership. The exemption was not for the benefit of the particular persons establishing the mill, but to induce its establishment and to favor it for a period of time, in order that it might be kept up. On the other hand, if we are to be regarded as a new company, we are entitled to exemption. The plaintiffs are estopped from urging that there was no authority of law for their resolution.

[BARKER, J.:—That contention would not apply to the case of a municipal corporation, however true it might be of a private body.]

The Court will take judicial notice of the Act authorizing the exemption. See Act 36 Vict. c. 81, s. 1.

1905. May 16. BARKER, J.:—

The object of this suit is to restrain the defendants from proceeding to sell certain property of the plaintiffs

(1) 1 Ves. Jr. 371, 393. (2) 3 A. R. 438.

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seized by a town marshal under an execution for taxes assessed on the plaintiffs' milling property in Woodstock. It appears that the plaintiffs were taxed on this property in the sum of $35.10 for the year 1902, $40.50 for the year 1903, and $88 for the year 1904, and that the execution in question was issued to enforce payment of the first two sums. The plaintiffs claim to be exempt from taxation by virtue of a resolution of the Town Council, passed June 22, 1892, under the authority of Act 36 Vict., c. 81, s. 1. This section, which relates to the method of assessment within the town, contains the following proviso: "Provided also, that the Council may from time to time, at their discretion, give encouragement to manufacturing enterprises within said town by exempting the property thereof from taxation for a period of not more than ten years by a resolution declaring such exemption." This authority does not seem to have been acted upon until the resolution which I have mentioned was passed in 1892. That resolution is as follows: "That any company establishing a woollen mill in the Town of Woodstock be exempted from taxation for a period of ten years." The bill alleges that the plaintiffs established a woollen mill in the town in the year 1899, and that they have operated it ever since, employing from twenty to twenty-five persons. It also appears by the bill that in the year 1893 a company known as the "Woodstock Woollen Mills Company, Limited," established a woollen mill business on the site now owned by the plaintiffs, and continued its business until July, 1899. Its property was then sold at sheriff's sale, and eventually came into the hands of the present plaintiffs, who made some additions to it, and they allege that they then in this way established their business. One of the grounds of demurrer is that these allegations do not shew that the plaintiffs established a business, so as to bring them within the terms of the resolution. That is a question upon which I do not feel called upon to express an opinion at this stage of the case.*

* See *Polson* v. *Town of Owen Sound*, 31 O. R. 6.—REP.

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It can better be disposed of at the hearing, when the evidence will shew precisely what took place. The principal ground of demurrer relied upon and argued by the defendants' Counsel was that the bill does not allege that the Town Council were authorized by law to exempt from taxation; or, in other words, to pass the resolution which they did, and that for want of such allegation I could not look at the Act I have mentioned. Two cases were cited in support of this contention: *Bailey* v. *Birkenhead Railway Co.* (1), and *Nabob of the Carnatic* v. *East India Co.* (2). These two cases, however, arose under private Acts of Parliament. It is true that they both contained provisions by which they were to be regarded as public statutes, but that seems to have reference merely to the mode of proof: *Beaumont* v. *Mountain* (3); *Woodward* v. *Cotton* (4). All Acts of the Legislature of this Province are by law deemed to be public Acts of which Judges are required to take judicial notice without their being specially pleaded. See Con. Stat., 1903, c. 1, s. 6. In *Henderson* v. *Mayor, &c., of St. John* (5), on a motion in arrest of judgment, the Court held that the Act confirming the charter of the city was a matter of public law of which Courts were bound to take notice. *Rex* v. *Mayor, &c., of St. John* (6) is to the same effect. So also is *Kiely* v. *Kiely* (7), cited by Mr. Vince on the argument.

As to the questions argued before me on the hearing of this demurrer, I should have been prepared to give judgment in the plaintiffs' favor. There is, however, a point involved in the case which, though not mentioned by Counsel, I think I should mention, because if I am correct in my view, it is fatal to the plaintiffs' claim. Ordinarily I should not think it within my province, or at all events necessarily a part of my duty to do more than dispose of the questions which Counsel suggest and argue. But as the Supreme Court of Canada has recently decided in *Miller*

(1) 12 Beav. 443.
(2) 1 Ves. Jr. 393.
(3) 10 Bing. 404.
(4) 1 C. M. & R. 44.
(5) 1 Pug. 197.
(6) Chip. MSS. 155.
(7) 3 A. R. 438.

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v. *Robertson* (1), which was an appeal *per saltum* from this Court, that a decree would be reversed, and the plaintiff's bill dismissed, upon a ground not suggested in the Court below, I think it better in the present case to express my opinion, though I do so without having heard the matter argued. If I am wrong I can be set right on appeal, and if I am right the parties may be saved some expense.

I think this resolution was not warranted by the Act, as it unfairly discriminates between companies establishing woollen mills and private individuals engaging in the same business, giving the exemption to the one and not to the other. The principle upon which municipal aid to manufacturing enterprises, either directly by way of bonus or indirectly by way of exemption from taxation, is justified, is that the municipal taxpayers as a whole will be benefited by the establishment of an industry which, in its prosecution, will involve a large expenditure of capital and a large employment of labor. These and similar considerations have moved legislative bodies, from time to time, to impose upon the general body of the taxpayers the burthen of contributing to the town's revenues the amount of the bonus or the exempted tax. The theory of all municipal taxation is that it shall be imposed equally and uniformly, and it follows, therefore, that those who claim exemption must accept the onus of shewing clearly that they are entitled to it. "The exemption should be denied to exist unless it is so clearly granted as to be free from fair doubt. Such statutes will be construed most strongly against those claiming the exception:" *Dillon* (2). See also *Rex* v. *Barnby Dun* (3). In *Jonas* v. *Gilbert* (4), it was held that the city of St. John, under a statutory authority to fix by by-law a license fee for persons using any trade or occupation, etc., had no power to discriminate between residents and non-residents, making one class pay a fee of $40 and the other one-half that sum. Ritchie, C. J., says: "The legislature never could, I think, have intended that the corporation of

(1) 35 Can. S. C. R. 80.
(2) Mun. Corp., 4th ed., s. 776.
(3) 2 A. & E. 551.
(4) 5 Can. S. C. R. 356.

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St. John should have the arbitrary power of burthening one man, or one class of men, in favor of another, whereby the one might possibly be enabled to carry on a prosperous business at the expense of the other, but must have contemplated that the burthen should be fairly and impartially borne. . . . Uniformity and impartiality in the imposition of taxes may in many cases be very difficult; still, in construing Acts of Parliament imposing burthens of this description, I think we must assume, in the absence of any provision clearly indicating the contrary, that the legislature intended the Act to be construed on the principle of uniformity and impartiality; and in this case I think it never could have been the intention of the legislature, not only to discourage the transaction of business in the city of St. John, but to do injustice to those seeking to do business there, by granting to any one person or class pecuniary advantages over other persons or classes in the same line of business; in other words, to restrain the right of any particular individual or class to do business in the city by enabling the corporation to favor, by the imposition of a license tax, one individual or class at the expense of other individuals or classes transacting the same business, thereby enabling certain individuals or classes to do business on more favourable terms in the one case than the other."

In *Pirie and The Corporation of Dundas* (1), a case very similar in its facts to the present one, Wilson, J., says: "No council has power to give any person an exclusive right of exercising within the municipality any trade or calling, or to impose a special tax on any person exercising the same, unless authorized or required by statute so to do; and that taxes, when no other express provision has been made in this respect, must be levied equally upon the whole ratable property of the municipality, according to the assessed value, and not upon any one or more kinds of property in particular or in different proportions." The provision in the statute there under consideration was as

(1) 29 U. C. Q. B. 401.

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follows: "Every municipality shall have the power of exempting from taxation for any period not longer than five years, manufacturers of woollens, cottons, glass, paper, and such other commodities of the like nature." The by-law providing for the exemption had reference solely to new enterprises and not to those already established, and it was mainly upon that ground that its validity was questioned. Wilson, J., says: "The by-law, however, provides that every person, firm or corporation who shall thereafter commence and proceed to carry on any new manufacture of the nature contemplated by the statute, shall be exempt, etc. It appears to me this is clearly bad, as it is giving a benefit to new businesses over prior-established businesses of the same kind. I do not think it would be against the statute to provide that all cotton manufacturers should be exempt from taxation, because it places all persons of the same line of business on the same footing, without giving any advantages or privileges to one or more of that trade over the others. Nor do I think it would be bad because it gave cotton manufacturers some advantage over woollen or other manufacturers, for the statute did not intend that every kind of manufacture should be exempted or that none of them should, but that all or any of them should be exempted as the Council should deem advisable, as there might be special reasons which might induce them to cultivate and encourage one or more branches of trade that did not apply to other branches. But in no case is A. of the cotton or any other particular trade, to get a benefit which B. of the same trade is not to get also. For this is a monopoly of the worst description, and it cannot be necessary either for the proper stimulus of the trade, though it may stimulate A. very wonderfully in that trade, but then only at the expense of B."

In *Reg.* v. *Pipe* (1), a by-law which discriminated against residents of the town as to use of waggons unless the tires were of a specified width, was held bad.

In *Re Nash and McCracken* (2), a by-law which prohibited the keeping of a slaughter house within the city

(1) 1 O. R. 43. (2) 33 U. C. Q. B. 181.

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of Hamilton without the special resolution of the Council, was held bad because it permitted favoritism and might be exercised in restraint of trade or used to grant a monopoly; and all persons were not placed, or might not be placed, on the same footing who followed or desired to follow the same trade.

In *Reg.* v. *Johnston* (1), a by-law providing that no persons other than the three chimney inspectors appointed by the Council should sweep chimneys for gain, was held bad as being in restraint of trade. See also *Reg.* v. *Flory* (2); *Peoples' Milling Co.* v. *Meaford* (3); *Rossi* v. *Edinburgh Corporation* (4); *Municipal Corporation of Toronto* v. *Virgo* (5).

The provision under consideration in this case, which seems to have been smuggled into a section with the general object of which it has no immediate connection, is somewhat clumsily worded. It appears, however, plain that the Town Council were in the exercise of the power conferred upon them, in some way to exercise a discretion, and that the object of the provision was to give encouragement to manufacturing enterprises of a certain kind in the town of Woodstock by exempting their property from taxation for ten years, by which I understand the property owned and used in carrying on the particular manufactory. It cannot be said that the discretion to be exercised has any reference to the manufacturer so as to extend the exemption to one and withhold it from another in the same business. That is not in my view the true construction. It would be at variance with the principles I have spoken of and place in the hands of the Council the power of creating a monopoly—precisely the objection which was considered fatal in *Re Nash and McCracken*, above cited. Neither is that the construction placed upon the clause by the Town Council, because no such discretion has ever been exercised as to the plaintiffs or any one else. The dis-

(1) 38 U. C. Q. B. 549.
(2) 17 O. R. 715.
(3) 10 O. R. 413.
(4) [1905] A. C. 21.
(5) [1896] A. C. 88.

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cretion to be exercised is as to the particular kind of enterprise which the Council might consider most useful to the town to foster; and it is, I think, in that view that the standing offer embodied in the resolution has been made. Having exercised their discretion for the present, at all events, in favor of the manufacture of woollen goods, how can they restrict the privilege to companies and exclude private individuals? Such a discrimination is, in my opinion, entirely opposed to principle as well as the cases to which I have referred. Why should the individual manufacturer be thus handicapped in carrying on his business because his trade competitor happens to be a company? The benefit to the town, the benefit to the other taxpayers who have to bear the burthen of the exempted tax, is as great in the one case as the other. Not only is the individual compelled to pay his own taxes, but he is compelled to contribute his share of the taxes for which the property of his rival in business would have been assessed except for the exemption. The probable result of such a discrimination would be to cripple the individual enterprise and leave the company with a monopoly of that particular business in the town. I think the resolution as passed is not warranted by the Act, and that the town should not be restrained from collecting the taxes.

The demurrer will be allowed with costs of demurrer and of the suit.

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August 15.

Evidence—Marriage register—Legitimacy—Pedigree—Declarations by deceased parent and by members of family ante litem motam.

A. was married at St. Paul's Church, Halifax, in 1809. In the entry of the marriage in the church's marriage register his name appears with the addition "batr"—a contraction for bachelor. There was nothing to shew by whom the entry of the addition was made, or that it was made in pursuance of a duty prescribed by statute:—

Held, that the register, while admissible in proof of the marriage, could not be received as evidence that A. had previously not been married.

To prove that C. was the legitimate son of A. by an alleged previous marriage, it was shewn that he resided for two or three years at A.'s home previous to departing to learn a trade, and also at a subsequent time for a few months; that he addressed him as "father," was treated as a member of the family, was recognized and treated by A.'s wife as his son, and by children by her as their brother; that after removal to the United States he wrote letters to A., in one of which he informed him of his (C.'s) marriage; and that in an oral declaration by A. in the hearing of a witness, who was a neighbour of the family, he referred to the Christian name of his former wife, and to her personal appearance:—

Held, that C.'s legitimacy had been proved.

Quære, whether declarations in letters written *ante litem motam*, between D., a son of A., and G., a son of C., in which D. recognized C.'s relationship to him, were admissible in D.'s lifetime; but,

Semble, that where *prima facie* evidence of C.'s legitimacy had been given, declarations in G.'s letters, he being dead, were admissible.

Bill for the administration of the estate of Margaret A. Hazen, deceased. The facts fully appear in the judgment of the Court.

Argument was heard May 11, 1905.

J. R. Armstrong, K. C., and *W. B. Naylor* (of the Wisconsin bar), for the next of kin of Charles George Anderson:—

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There is no contradiction of the evidence that Charles George Anderson lived with and was treated by Colonel Anderson as a son, and that he was so regarded and spoken of by Colonel Anderson's second wife and the children by the second marriage. He addressed Colonel Anderson as his father; he resided in the home until he was old enough to be apprenticed at a trade, and he is shewn to have subsequently returned to the home and to have resided there for a few months. Afterwards, when living in the States, he wrote frequently to Colonel Anderson, and in one of the letters informed him of his marriage. Later David Anderson obtained Charles' address from his father and wrote inquiring of him. Mrs. Latta's evidence was very clear that he was considered by her and the other children of the second marriage as their half-brother. Colonel Anderson's admissions to Miss Carman prove that he was previously married. In *Berkeley Peerage Case* (1) it is said by Lord Mansfield that if the father is proved to have brought up a child as his legitimate son, it is sufficient evidence of legitimacy, and indeed amounts to a daily assertion that the son is legitimate. It is not necessary that a witness who deposes to declarations on the subject of pedigree should be a member of the family: *Essex* v. *Hodgson* (2). What is required is that they should be made by a member of the family and *ante litem motam*. They may be in the form of oral statements and in family correspondence. Letters from David to George B. Anderson, a son of Charles, written before any controversy as to legitimacy had arisen, indicate that there was no question in David's mind that Charles was his half-brother. Evidence of general reputation in a family is admissible in questions of pedigree: *Haines* v. *Guthrie* (3); and such evidence has been admitted to prove marriage: *Shedden* v. *Patrick* (4). In *Berkeley Peerage Case* (1), Lord Mansfield says: "In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declara-

(1) 4 Camp. 401.
(2) 15 W. R. 900.
(3) 13 Q. B. D. 818.
(4) 2 Sw. & Tr. 170.

tions of deceased members of the family are admitted; but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and family transactions among the relations of the parties. Therefore what is thus dropped in conversation upon such subjects may be presumed to be true." At this length of time it would be unreasonable to insist upon proof of Colonel Anderson's first marriage by production of the record of it. As well might proof be asked of publication of banns, or of the fact of a grant of a license. No one can say where such evidence could be found. To have sought it out would probably have been a fruitless task, pursued at an expense we could not reasonably be expected to incur. The description of Colonel Anderson as bachelor in the registry of his marriage at Halifax in 1809, and in the indorsement on the bond, does not disprove a previous marriage. To do so it would have to be shown that it was made by the direction or knowledge of Colonel Anderson, or that whoever entered it did it under prescription of statute. See *Huntley* v. *Donovan* (1); *Rex* v. *Clapham* (2). In the latter case it was held that where a parish register of baptisms stated that the person baptized was born on a particular day, it was not evidence of the date of his birth.* Official registers are admissible in proof of the facts recorded, when (1) the book is required by law to be kept for public information or reference; and (2) the entry has been made promptly and by the proper officer. The principle upon which entries in a register are received depends on the public duty of the person who keeps the register to make such entries after satisfying himself of

* In *In re Goodrich* [1904] P. 138, a certified copy of an entry in a register of births, made pursuant to the statute 6 & 7 Will. 4, c. 86, was held to be evidence not merely of the fact of birth before the date of registration, but of the actual date of birth.—REP.

(1) 15 Q. B. 96.

(2) 4 C. & P. 29.

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their truth; it is not that the writer makes them contemporaneously, or of his own knowledge, for no person in a private capacity can make such entries. There must be a duty to keep the register for the benefit or information of the public: *Phipson* (1). At page 317 the same writer says: "It is doubtful how far a register can be received to prove incidental particulars concerning the main transaction, even where these are required by law to be included in the entry. If such particulars are necessarily within the knowledge of the registering officer they will doubtless be admissible; otherwise they seem to be evidence only when expressly made so by statute." It has not been shewn that the marriage registry was required by law to be kept, or by whom the entries in it were made. Were it even proved that the description of Colonel Anderson as bachelor was authorized by him, it would not have any significance, for a widower might very aptly so describe himself.

J. Roy Campbell, for the plaintiffs:—

Charles George Anderson cannot be said to have been dealt with by his father as a legitimate son. He seems only to have been at the home for three or four months, and then to have been used by his father with little civility and much unkindness. Within a few days after he went to the States his name was never mentioned in the family, and Miss Carman has no recollection of ever hearing Colonel Anderson refer to him again. David H. Anderson says he never heard his father speak of a previous marriage, or that Charles was his son. The children, as a whole, seem to have been absolutely ignorant of a previous marriage. While the evidence shews that Charles while he resided with the family was treated by the children as a brother, it must be remembered that they were then too young to make any distinction between him and themselves. The correspondence between David H. and George B. Anderson is not admissible in David's life time. The register of

(1) 2nd ed. 314.

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Colonel Anderson's marriage at Halifax, and the indorsement on the bond establish that he had not been previously married. The description must have been given by him, and he could not have been unconscious of its inaccuracy were he a widower. No evidence whatever has been given of the fact of a previous marriage, or that antecedent requirements had been complied with, though if the fact of marriage had been established, its validity would be presumed under the maxim, "*Omnia præsumuntur rite esse acta.*"

A. O. Earle, K.C., on the same side:—

The onus is on the next of kin of Charles George Anderson to prove that he was the son of Colonel Anderson. Nothing further has been shewn than that he resided in the family a few months, and called Colonel Anderson his father. That does not prove that he was a legitimate son. There is no evidence that Colonel Anderson ever acknowledged him as such. Miss Carman alone has given evidence of there having been a previous wife. Her recollection at this long lapse of time, of a declaration made by Colonel Anderson to her when she was a mere child, cannot be depended upon in a matter of so much moment. Objection was properly taken to its admissibility. That an effort has not been made to discover the register of the alleged marriage is most extraordinary.

The costs of opening up the suit and holding the present inquiry should be borne by David H. Anderson in event of the heirship of Charles' next of kin not being established.

S. Alward, K. C., for Sarah H. Latta:—

David H. Anderson's evidence is worthless. In his petition to the Probate Court for letters of administration of his sister's estate, he set out names of her next of kin, and made no mention of Charles' children. It is strange that he forgot them then and remembered them a little later. He had corresponded with one of Charles' children but a short time

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before. His failure to include them in the petition, and in his answer to the bill in this suit, is only explicable upon the view that he did not regard Charles as a legitimate child. It cannot be attributed to oversight. His silence corresponds with his information to Dr. Currey that Charles was illegitimate. The family Bible, while containing entries in Colonel Anderson's handwriting relating to his children, contained no mention of Charles.

L. A. Currey, K.C., for George M. Anderson: —

The evidence cannot be accepted as establishing a previous marriage by Colonel Anderson, and that Charles was lawful issue of it. Some secondary evidence has been offered of the marriage, which however was not admissible until the absence of the marriage registry was satisfactorily explained. That could only be done by proving that a search, without avail, was made for it in places where it might reasonably be expected to be found. Miss Carman says Charles was treated as a son and a brother, but she gives no details enabling us to judge of the accuracy of her opinion. She was too young at the time to really have any or a reliable judgment in the matter. David says his father was cross with Charles, drove him away and made no reply to the several letters Charles wrote to him. It is very extraordinary if the father had been previously married, and Charles was issue of it, that no entry of name of first wife and of Charles was made in the family Bible. There is also his failure to even speak to his family of a first marriage, or that Charles was his son, and his description of himself as a bachelor.

C. N. Skinner, K.C. (*S. A. M. Skinner* with him), for David H. Anderson: —

There is no reason for placing costs of this inquiry upon my client. If the next of kin of Charles Anderson had been at the outset parties to the suit, there would have been a contest as to their heirship. At the utmost he should only be condemned to pay whatever costs have been

incurred between the time he put in his answer and the time he gave information as to the Western claimants. Being descendants by the half-blood he had not thought of them as heirs. In his answer to interrogatories he did not say there were no other heirs, or next of kin, of Margaret Hazen, and there was no interrogatory to bring the matter to his mind.

W. Pugsley, A.-G., for Margaret T. O'Brien; *A. A. Stockton*, K. C., for J. D. Hazen, administrator of estate of Margaret A. Hazen; *A. I. Trueman*, K. C., for Violet C. Wiggins; and *W. B. Wallace*, K. C., for Nellie Anderson, were not heard.

1905. August 15. BARKER, J.:—

This is a suit brought for the administration of the estate of the late Margaret A. Hazen, who died intestate at the city of Saint John, on the 8th December, 1902, without issue. She was a daughter of the late Colonel George Anderson, and, as originally framed, the parties to the suit as the next of kin were Mrs. Hazen's two brothers, David and George, Mrs. Latta, a sister, and the representatives of two other sisters who had died many years before. Some questions arose as to the disposal of some debentures which were claimed by three nieces of Mrs. Hazen as having been given them by way of *donationes mortis causa*, and some questions also arose between David and George Anderson as to some real estate to which they professed to have some claim. After some negotiations these questions were settled between the parties, and on the 22nd day of March, 1903, an agreement embodying the terms of settlement, signed by Counsel for all parties, was filed in Court, and upon this a decree was to be made by consent. By this settlement certain conveyances were to be made by David and George Anderson; the debentures were to be delivered by Mr. J. D. Hazen, the administrator of the estate, to the three nieces, and a fixed sum was to be paid to Mr. C. N. Skinner, the solicitor in this suit for David H.

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Anderson. This was all done, and as then understood there only remained for determination a question between the defendants, Margaret O'Brien and Violet C. Wiggins, as to the share represented by them, in which dispute the other parties had no interest. Not long after this, application was made to me, on behalf of certain parties residing in Wisconsin, that they should be made parties to this suit on the ground that they were the next of kin of one Charles George Anderson, who was, as they alleged, a half-brother of Mrs. Hazen, and as such were entitled to a share of her estate. The matter was accordingly opened up, the applicants were made parties to this suit; they voluntarily undertaking not to disturb the settlement so far as it had been acted upon. The only question now to be determined is whether this claim can be sustained. The case set up is that Colonel Anderson was married twice, and that this Charles Anderson, through whom they claim, was the sole issue of the former marriage. There is no dispute as to Colonel Anderson's marriage to Elizabeth Chisholm at Halifax in 1809, nor is there any question as to the issue of that marriage. In the order of seniority they are as follows, omitting those who died in infancy: Eliza (Mrs. Johnston), David, Charlotte (Mrs. Magee), Margaret (Mrs. Hazen), George, and Henrietta (Mrs. Barrett). All of these are dead except David, who is 89 years old; George, who is 81; and Mrs. Latta, who was born in 1822. These three were examined, the first two in open Court, and Mrs. Latta under a commission taken out by the plaintiffs and executed at Burlington, in the State of New Jersey, where she has resided for many years. Colonel Anderson died February 18th, 1864, and his wife on the 19th October, 1845. The precise date of Colonel Anderson's birth is not given, but David says that he understood him to be 96 years old when he died, so that he would have been born in 1768, and would have been 41 years old when he was married in Halifax. There is no direct evidence of this alleged first marriage. The story is that it took place in the Isle of Wight, when Colonel Anderson was there as a non-commissioned officer in the Eighth Regiment, and that his wife

died on her way to England from Egypt, or actually in Egypt, where she had accompanied her husband, who was there on active service. There is, however, no evidence of the date of her death or the date of the marriage. With the exception of some documentary evidence to which I shall refer later on, the question in dispute depends upon the testimony of the three witnesses I have mentioned and that of Miss Carman, who is now about 82 years of age, and seems to have been a neighbour of the Anderson family for very many years, and on terms of intimacy with them all her life, or at all events the early part of it. David Anderson says that his father told him that he was in battle in Egypt; that he landed in Aboukir Bay on the 8th March, 1801. He says that he first remembers Charles, when he (David) was about four or five years old, when they were living at Dipper Harbor; that Charles then appeared to be eight or ten years older than he was; that he lived in the family and was treated as a member of the family like the others; that he addressed Colonel Anderson as "Father;" that he was recognized in the family as a son by his father's first wife; and that he was spoken of and treated as such by the family. David also says that Charles remained with them two or three years at Dipper Harbor, and he then went to St. John to learn a trade, and was employed for that purpose by Nesbitt, a cabinet-maker. He also says that later on, and after the family had moved to Musquash, Charles came back again and remained at the home for a few months, but he is unable to fix the date. He (Charles) then went to the States, and they never saw him afterwards. David further says that later on his father received letters from Charles, one of which, dated at Belfast, Maine, he himself saw, and in it he mentioned his marriage. He says that so far as he knew, his father did not answer these letters; that he was not much of a letter writer. He also says that his father was not very kind to Charles, for some reason which he did not know. David further says that, later on, after speaking to his father, he himself wrote to Belfast, Maine, inquiring as to Charles, and a reply came from a

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man by the name of Morse, that Charles was dead. He says he heard nothing more about him until some ten or eleven years ago, when he received a letter from one George B. Anderson, making inquiries as to the family. On his cross-examination, David admitted that his father was not so kind to Charles as he was to the others; that he never heard his father, or mother, or Charles, or any member of the family speak of Charles' mother, or of his father's first marriage. What he did hear on this subject he seems to have heard principally, if not altogether, from a Mrs. Haley, who, though an inmate of the family for a time, in some capacity, was not a member of it so as to render her declaration admissible in evidence. George Anderson says that he can only recollect of having seen Charles but once, and that was while they were living at Musquash. He never heard anything of him afterwards. His evidence was unimportant, except as proving that Charles was at the Anderson home. Mrs. Latta, who is only a year or two older than her brother George, seems to have known more of Charles. She says she recollects his living at her father's house; that he was treated by her brothers and sisters as a brother, and by her father as a son, and he was understood by her to be a son of her father by his first wife. Her evidence which seems somewhat emphatic on this point, is as follows: —

"Q. You understood he was a son of the first wife? A. Yes. Oh, yes.

"Q. That would make him a half-brother of yours? A. Yes.

"Q. Have you any doubt about his being a half-brother of yours? A. No; I hav'nt any doubt.

"Q. You say he was thought as such by the whole family? A. Yes."

Mrs. Latta, however, says that on no occasion which she can recall since Charles left her father's house to learn his trade was he made the subject of conversation in the family. Miss Carman says she had known the Anderson family all her life; had lived near them and had been on

friendly and visiting terms with them. After giving a somewhat detailed account of the family, and other events of no special value, unless to show a somewhat exact and retentive memory, she says as follows: —

"Q. Did Colonel Anderson ever refer to his former wife? A. Yes.

"Q. What was her name? A. He said her name was Maria.

"Q. Did he speak of his previous wife? A. I never remember of hearing him but the once. I had a sister Maria, and he was at our house one day and he said to my sister that his wife's name was Maria, and spoke of her personal appearance—that she was very neat. That is all I ever remember.

"Q. Was that when he had a second wife? A. Oh, it must have been long years after his first wife died.

"Q. Did he tell this when he had a second wife? A. Oh! I didn't know him when he hadn't.

"Q. Your sister's name was Maria? A. My sister's name was Maria, and he said that his wife's name was Maria, and that she was very neat in her personal appearance.

"Q. Did he ever say he had been in the army? A. Oh, yes. I often heard him speak of being in the army and some things that happened, and some regulations in the army."

Miss Carman only recollects of seeing Charles once, on which occasion he came to the schoolhouse.

These are the only witnesses produced who speak of Charles Anderson from personal knowledge, or who are able to give Colonel Anderson's own declarations in reference to him. Miss Carman is an entirely disinterested witness, and the evidence of the others is opposed to their interest. Is this evidence of itself sufficient to sustain the claim put forward by these next of kin of Charles Anderson? In my opinion it is. And in coming to that conclusion I have expressly excluded from consideration all

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doubtful evidence, such as the declarations of others than Colonel Anderson spoken of by Cassius Anderson, and the general repute of the neighbourhood spoken of by Miss Carman.

In *Hubbuck*, Ev. of Succ. 243, it is said: "Reputation of marriage may be proved by the testimony of living witnesses speaking to the existence of that reputation by the declarations of the parties or their relatives, if deceased; and by the conduct of the parties themselves and of third persons towards them, or by other facts or circumstances indicative of belief and understanding on the subject. The declarations of the contracting parties and their relatives are, however, also admissible on the independent ground of being hearsay evidence of a matter of pedigree within the rule which admits such evidence of such matters."

In *Reed* v. *Passer* (1), Lord Kenyon held evidence of the declaration of parties that they had been married was sufficient proof of the marriage to establish the legitimacy of the issue. In *Bridger* v. *Huett* (2), it was held in an action of ejectment that evidence by an intimate friend of the family that he had known them for twenty years, and had always known the plaintiff as his father's eldest son, was evidence of heirship; Wightman, J., adding: "It was enough, even in a pedigree case."

In *Evans* v. *Morgan* (3), the only evidence of the marriage of the two defendants, Morris and his wife, was that of a person who did not appear to be related to them or to live near them or know them intimately; and he proved only that he knew the defendant, Jane Morris, when she was Jane Rees, and that he had heard that she had since married Morris. This was held sufficient *prima facie* evidence of marriage; Bayley, B., saying: "It goes to shew the reputation of the neighbourhood."

In *Smith* v. *Tebbitt* (4), it appeared that in a deed executed by the party whose estate was in question making a provision for the defendant, who was said to be illegi-

(1) Peake's N. P. Cas. 303.
(2) 2 F. & F. 35.
(3) 2 C. & J. 453.
(4) L. R. 1 P. & D. 354.

timate, the defendant was described as "her sister." Sir J. P. Wilde, in speaking of this evidence, says: "Now, one of the rules of evidence that govern courts of law—and it is very familiar as a rule of evidence in pedigree cases—is, that the statement of a deceased relative of the family is evidence of pedigree. That rule is subject to some conditions. The first condition is, that the statement must have been made *ante litem motam*. Another condition is, that the person making the statement must be a person who is dead; but a prior condition to both of these is, that it should be proved, and by some source of evidence independent of the statement itself, that the person making the statement was related to the family about which she spoke. . . . It seems to me, therefore, that there is in that deed a piece of evidence which is perfectly legitimate for the proving of the defendant to be the sister of the deceased. And I may go further at once and say that it is not only legitimate evidence for the purpose, but that it entirely satisfies me of the fact. But then it is suggested she may have been the illegitimate sister, and that the sister says nothing in the deed about legitimacy. That is quite true; but I think that that is a fault or a vice in the statement, which would probably apply to almost all the statements that have been admitted at all times under this head of evidence, because when people speak of a man or woman as their brother or sister, son or daughter, unless they say something to the contrary, I think the meaning is the legitimate son or daughter, brother or sister, and therefore I think that objection fails."

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In *Power* v. *Howie* (1), the only evidence of marriage or heirship was this. A witness was called who stated that he had known the late Isaac Allen, and also knew his son and daughters, whom he named, and that Mrs. Kenah was one of the daughters. This witness was in no way connected with the family, and it was objected that there was no evidence of Isaac Allen's marriage. Ritchie, J., says: "If there was sufficient evidence to go to the jury

(1) 6 All. 210.

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that Mrs. Kenah was the daughter of Isaac Allen, was it not also sufficient to prove his marriage, because, in the eye of the law, he could not have a daughter unless he was married." Carter, C. J., says: "There was evidence that he had a daughter, and that means a legitimate daughter in the absence of any proof to the contrary."

It is however contended that this evidence is either disproved by other testimony, or at all events rendered so doubtful that this Court ought not to act upon it. The testimony alluded to is as follows. In the first place there is the family Bible kept in Colonel Anderson's family, of which secondary evidence was given, the Bible itself having been destroyed by a fire which occurred some years ago. It appears that in this record there is no entry either of this so-called first marriage, nor of Charles Anderson, though the entries, such as they are, were all in Colonel Anderson's own writing. There is, however, no entry of any marriage, nor are the names of all the children entered. George Anderson, who gave the evidence of the contents, says that there were only the names of six of the children entered there. Two of the sisters were not mentioned, and apparently none of those who died in infancy. The record is admittedly imperfect and incomplete, and of no value one way or the other. The most important piece of evidence, relied on as defeating the claim of the Wisconsin heirs, is the registry of Colonel Anderson's marriage which took place at Halifax in 1809. As to the fact of the marriage itself there is no question; the registry is not offered in proof of that, but to shew that at that time Colonel Anderson said that he was, or held himself out to be, a bachelor. The original record was produced by Rev. Mr. Armitage, the present rector of St. Paul's Parish, in Halifax, probably the oldest Church of England parish in Nova Scotia, the records going back prior to the last century. The book containing the entry is labelled "St. Paul's Church, Halifax, Marriages, 1791-1816," and on the title page is written the following: "Register of Marriages, Parish of St. Paul, Halifax, N. S., Robert Stanger, Rector." The entry is as follows: "August the 10th, 1809, George

Anderson, Batr. and Elizabeth Chisholm, Spinr;" and over it is written, "By Lic." It may, I think, be assumed that this is an abbreviation for the words "by license," and that "Batr." is a contraction for "bachelor." No license could be found, but an examined copy of the bond, given on procuring the license, on file in the Provincial Secretary's Office of Nova Scotia, was also put in evidence. It is dated August 10, 1809. In the bond itself there is no mention of Colonel Anderson being a bachelor; in fact his name is only mentioned once, and then without addition or words of description of any kind, but these words are endorsed on it, "George Anderson, Br. and Elizabeth Chisholm, Spr., 10th August, 1809." The entry in the register is not signed by any one, and there is no evidence of the handwriting. There is no evidence as to the law of Nova Scotia in reference to their registers in 1809; what they were obliged to record, or anything about them. So far as one may infer from an inspection of the book produced at the hearing, and which covered a period of about twenty-five years, the usage at that time at St. Paul's, was to register marriages in the same form as the one now produced. Objection was taken not only to the reception of the register, but specifically to its reception as evidence of any fact but the marriage itself. So far as the entry is concerned, I think it was admissible to prove the marriage. An entry of a similar character from the register book of Trinity Church, New York, made in 1764, was admitted in evidence as proof of marriage in *Lauderdale Peerage Case* (1) by the House of Lords. Neither the entry in the register, nor the marriage certificate in that case contains any description of the persons married. In *Sturla* v. *Freccia* (2), (reported before the Court of Appeal in 12 Ch. D. 411, *sub nom. Polini* v. *Gray*), the admissibility as well as the effect of public documents was very exhaustively discussed. At page 644, Lord Blackburn is thus reported: "In many cases, entries in the parish register, of births, marriages and deaths, and other entries of that kind, before

(1) 10 App. Cas. 692, (2) 5 App. Cas. 623.

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there were any statutes relating to them, were admissible, and they were public then, because the common law of England making it an express duty to keep the register, made it a public document in that sense, kept by a public officer for the purpose of a register, and so made it admissible." In *Bacon's* Ab., Evidence, "F," (1) it is said of marriage registers: "A copy is sufficient and is proof of a marriage in fact between two persons describing themselves by such and such names and places of abode, though it does not prove the identity." It is, however, the effect of the registry or the weight to be attached to it, rather than its admissibility, which is the important question here. Is this Court to accept it as any evidence at all, that Colonel Anderson had never been married before his marriage at Halifax in 1809? It may be said that if the registry is admissible in evidence the whole of it may be looked at, *valeat quantum*. That phase of the question I shall discuss later on. To apply the principle upon which entries from public registers are admissible as evidence to this present case, it may be said that if it was the duty of the rector of St. Paul's, in marrying these persons, to make a record of it in accordance with the extract from *Bacon* which I have just cited, and if in discharge of that duty he did make the entry, the register is evidence of the fact which it was his duty to record in it. That fact is, the marriage of the parties; not whether the man was a bachelor or a widower. That is a collateral statement, unimportant so far as the act of marriage which the rector was to perform under the license is concerned, and of which he was to make an entry in the register. In *Polini* v. *Gray*, already cited, James, L. J., says the principle is this, "that it must be an entry, not of something that was said, not of something that was learned, not of something that was ascertained, by the person making the entry, but an entry of a business transaction done by him, or to him, of which he makes a contemporaneous entry. For nothing else was it admissible, and it was received only because it was the

(1) P. 574.

person's duty to make that entry at the time when the transaction took place. The exception is entirely confined to that." In *Smith* v. *Blakey* (1), Blackburn, J., says: "The duty must be to do the very thing to which the entry relates, and then to make a report or record of it." If the duty of the official included the entry of some fact not within his personal knowledge, but which must necessarily be ascertained by inquiry, then the entry of that fact would also be evidence, as the presumption, in the absence of evidence to the contrary, would be that the official properly discharged his duty in making the inquiry: *Doe* v. *Andrews* (2). In *Chambers* v. *Bernasconi* (3), we have a clear illustration of the principle. It was sought to prove the place at which a party had been arrested, and for that purpose a certificate of the sheriff's officer who made the arrest, and who was then dead, was offered in evidence. The certificate was made as an official act by the officer, and in discharge of his duty, and it stated the fact of the arrest and the time and place. It was rejected because the duty of the officer was only to record the fact of the arrest with the date. Lord Denman, in delivering the judgment of the Court, says: "We are all of opinion that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting, then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both of which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done." The officer there was certifying a fact within his knowledge, but as Park, J., says in *Poole* v. *Dicas* (4), the

(1) L. R. 2 Q. B. 326, 333.
(2) 15 Q. B. 756.
(3) 1 C. M. & R. 347.
(4) 1 Bing. N. C. 655.

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officer was going beyond the sphere of his duty when he made an entry of the place of arrest, and such an entry, therefore, had no claim to be received as evidence of that fact.

It is upon this principle that Courts have rejected entries in baptismal registers of the date of childbirth as evidence of age. In *Wihen* v. *Law* (1) evidence of that kind was rejected because it was nothing more than something told to the clergyman at the time of the christening concerning which he had no power by law to make an entry in the register; he had neither the authority nor the means of making the entry.

In *Doe dem. Wollaston* v. *Barnes* (2), decided in 1834, a marriage register was offered to prove the date of a marriage in an action between strangers. Lord Denman held the evidence admissible, and he points out the distinction between the case of the baptismal register not being evidence of age and the marriage register being evidence of the date; as in the latter case the fact was within the personal knowledge of the clergyman, while in the other the fact must have been ascertained by an inquiry which the clergyman had no authority to make. In the present case there is no evidence before me to shew that the entry in question was made in pursuance of any authority or requirement of any statute in force in Nova Scotia. I must assume that there is none, because the fact, if otherwise, could have been so easily proved. There does not seem to have been any such duty at common law. I have the fact that for twenty-five years entries of a similar character were made in the St. Paul's parish register, but that is no evidence of any law authorizing it or requiring it. Besides this the entry relates to a fact about which the clergyman himself knew nothing whatever. No word such as "bachelor" or "widower," indicating the condition of the man, is in the register in the *Lauderdale Peerage Case*, or in that in evidence in *Piers* v. *Piers* (3), and which came from Newcastle parish. Neither is it any part of the certificate of mar-

(1) 3 Stark. 63. (2) 1 M. & R. 389.
(3) 2 H. L. C. 331.

riage provided by the statutes of this Province, and which is practically the same as was first established in 1812 by Act 52 Geo. III., cap. 21. Neither is it any part of the rubrical form of publication of banns, nor was it in fact in the bond for the license in this present case. There seem instances of its use in the Fleet registers, but that is not where one should look for a precedent, as those registers were not received in evidence for any purpose: *Doe dem. Davies* v. *Gatacre* (1). There are three other cases at least which may be cited as leading to a different conclusion. In *Morris* v. *Davies* (2) the following entry from a baptismal register was received in evidence without opposition: "Evan Williams, a base child, baptized January 11th, 1793," and a note was added in the rector's hand: "Supposed of Austin, a weaver of this town's son." Upon what ground it was admitted as evidence of the illegitimacy does not appear, because no objection was raised to the evidence. In *Cope* v. *Cope* (3) the following entry from a baptismal register was received in evidence by Alderson, B., in proof of illegitimacy. "1794, December 7, Willis, illegitimate son of Elizabeth Cope." The evidence was received on the authority of *Morris* v. *Davies*, the Judge saying that he should receive the evidence, but the degree of weight which it ought to have with the jury was, of course, a very different point. In summing up to the jury the Judge told them that the statement in the baptismal register could only be treated as evidence of the reputation in the village. It was not proved on what ground, or by whose procurement, the entry had been made; and it was to be recollected that if the entry had been made by the procurement of the mother it would not be admissible evidence at all, any more than her declaration. The jury found against the entry. The other case is *In re Turner* (4), a decision of Chitty, J., in 1885. It was a case like the present, involving the legitimacy of one claiming as next of kin. A baptismal certificate was put in evidence in which

(1) 8 C. & P. 578.
(2) 5 C. & F. 163.
(3) 1 M. & R. 269.
(4) 29 Ch. D. 985

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the date of birth was stated. Objection was taken to it as being inadmissible to prove that fact, it being no part of the official duty of the rector at the time (1825) to insert the date of birth. On the authority of *Morris* v. *Davies* and *Cope* v. *Cope*, the Judge received the evidence, holding that as the certificate had been put in by the claimant he might look at the whole document. At the same time he seemed unable to give any reason why the document should be admissible in proof of illegitimacy, the fact being proved by other evidence if the date of birth was correctly stated in the certificate. In that case Chitty, J., held in view of the two cases I have mentioned, and that the case was one of pedigree, in which the strict rules of evidence are somewhat relaxed, that while the certificate was inadmissible the statement of the date of birth was not to be regarded of much weight, unless supported by other evidence. *Robinson* v. *Buccleuch* (1), a later case, is in accordance with the older cases. I myself entertain a strong opinion that as the evidence in this case stands, the entry when offered solely in proof of the illegitimacy of Charles Anderson, is not admissible; but assuming that I am wrong and that the objection goes simply to the value of the evidence, what weight should I attach to it? Am I to treat it as Baron Alderson told the jury in *Cope* v. *Cope*, "as evidence of the reputation in the village?" Obviously that would be nonsense as applied to the circumstances of this case, even if illegitimacy could ever be proved by such evidence. The only reasonable ground upon which the evidence may be treated as of any value, is that it may be inferred that the statement recorded is that of the party himself. To my mind that is by no means a necessary inference, neither do I think it at all likely to be the fact. I think it much more probable that the rector got the information from the license. The procurement of the license which was the rector's authority to solemnize the marriage was the initial step, and if the entry of the word "bachelor" was the result of inquiry at all, I should think

(1) 3 T. L. R. 472.

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it highly probable that the inquiry was made by the clerk in the Provincial Secretary's office, who filled in the bond when issuing the license. Colonel Anderson is not a party to the bond, there is nothing to shew that he was present when it was obtained, and we all know that the issue of a marriage license is not attended with any great formality. Courts do not go out of their way to pronounce people illegitimate, and even though the onus be upon these claimants to prove their right to a portion of the estate, it is in my opinion impossible to treat the evidence adduced by them in support of their claim as being to any material extent weakened by the loose and uncertain evidence afforded by this register. For if the evidence is to be believed, Colonel Anderson himself at one time for a period of two or three years, and at another for a period of several months, had Charles Anderson, who bore his name and who called him "father," as an inmate and member of his own family, eating at his own table, and the companion and playmate of his own children,—conduct amounting, as Lord Mansfield said in the *Berkeley Peerage Case* (1), "to a daily assertion that the son was legitimate."

It is said, however, that David H. Anderson has been so repeatedly contradicted by other witnesses that he is altogether unworthy of credit. The first charge made against him is that he deliberately swore, in a petition made by him and his brother to the Judge of Probates for letters of administration to Mrs. Hazen's estate, that she left no other next of kin than those who were originally parties to this suit—that is, himself, his brother, Mrs. Latta, and the representatives of the other sisters, making no mention of Charles. That this was deliberately made it is said is proved by certain correspondence which took place in 1893, only nine years before that, between David and one George B. Anderson, a son of Charles Anderson, in which the whole family history is given, and from which David must have known, and in fact did know, that if Charles was legitimate he had left children, who would be

(1) 4 Camp. 416.

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entitled as next of kin of the half-blood. This correspondence consists of five letters, commencing with one from George to David, dated October 11, 1893. It is clear from this correspondence that both David and his nephew George were satisfied of the relationship existing between them; that is, that Charles was the half-brother of the one and the father of the other. It must be recollected that the objection rests altogether upon the fact that David, in 1893, long before any controversy had arisen, put it forward as a fact that Charles was his half-brother, because without that the misstatement would not be deliberate. David's explanation is that he never thought anything about Charles when he signed the petition—that in fact it only occurred to him some time after this suit was commenced, and when he was ill in bed, that perhaps Charles' children might have an interest, but that even then he did not know whether they would or not. When he was able to go out he consulted some one and found out that the half-blood were entitled. I venture to assert that this explanation would, in nine cases out of ten, be accepted as reasonable and satisfactory. It is to be regretted that when David Anderson discovered that Charles' children were interested he did not make the facts known to the administrator of the estate or the plaintiffs' solicitors, so that they might have taken steps, if they thought necessary, to have these claimants made parties. Instead of that, he himself opened up a correspondence with them, the object of which seems to have been to secure the conduct and prosecution of their claim with a view of participating in the proceeds. The course pursued may possibly have increased the costs of this suit, and his object, if I have rightly divined it, was not creditable either to himself or his advisers; but beyond that it does not seem to have much bearing on the case. If the only object of David Anderson was to benefit himself, it might have been much more easily accomplished by remaining quiet as to the Western heirs; for he was, according to what the others say, the only person who knew anything about them; the estate would have been settled and that would have been

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the end of it. To bring them into the controversy meant that, in the event of their claim being sustained, the settlement would be set aside, and David, instead of getting one-fifth of the residue as his share, would only get one-sixth. There were some other contradictions to which it is unnecessary to refer, for they do not seem to me of much importance one way or the other. For instance, the plaintiffs and some others go on the stand and say that they never saw or heard of this 1893 correspondence, while David says he told them of it or thinks he did. If he is mistaken in that, there is no reason for saying he was perjuring himself. The fact remains that the correspondence did take place. Its value in this case, if it has any, does not consist in its having been shewn to other members of the family. This correspondence was objected to on several grounds, and it was admitted contrary to my own opinion expressed at the time. If it was improperly admitted, then the ground upon which the truth of David Anderson's statement in the petition to the Judge of Probates is challenged, is gone. It occurred to me that, so far as David Anderson's letters were concerned, they could not be received as general evidence in the suit as declarations of a member of the family, for he was alive and had been actually a witness. And as to George B. Anderson's letters, though he was dead he could not be considered a member of the family so as to make his declarations evidence, except on the assumption that Charles Anderson, his father, was legitimate, which was the question in dispute. As to the latter point I think I was wrong. In such cases it seems to be the rule that before such evidence is admitted there is a preliminary question to be determined by the Judge; that is, whether there is *prima facie* evidence of legitimacy If there is, then the evidence is admissible; its weight is a different thing: *Doe dem. Jenkins* v. *Davies* (1); *Hitchins* v. *Eardley* (2). When this evidence was tendered, David Anderson, Mrs. Latta and Miss Carman had been examined, and their evidence, in my opinion, was ample to make out

(1) 10 Q. B. 314. (2) L. R. 2 P. & D. 248.

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a *prima facie* case, so that if there is no other objection to the evidence, it was properly admitted. That correspondence may, perhaps, be admissible in a case of this kind as shewing that the evidence of David is not now manufactured for a purpose. It is a well-established rule that declarations of deceased members of the family must be made before any controversy arose to render them admissible. In *Crouch* v. *Hooper* (1), the Master of the Rolls makes some lengthened observations on this class of evidence, and in a paragraph mentioned in the note on page 188 of the report he says: "I must repeat an observation I have lately made, that in cases of this description mere parol declarations recorded or remembered after the contest has arisen, by persons interested in the result of the litigation, have very little weight with me." This correspondence in 1893 shews conclusively that long before this controversy arose, David's statements as to the family and as to Charles' legitimacy do not differ from those now made. There seem to be some serious objections to some of the declarations of this George B. Anderson as given in evidence by his nephew, the defendant Cassius L. Anderson. I do not refer to his declaration of facts within his own knowledge, but to other matters in reference to which there is nothing to shew that the information was not derived from strangers to the family altogether. It could not have been derived from his father, that is, Charles Anderson himself, because he died a short time before George B. Anderson, his son, was born.

Upon these matters I do not deem it necessary to express any opinion, because without this correspondence of 1893, and apart from the evidence of George B. Anderson's declarations, I have arrived at the conclusion that the claim of Charles Anderson's legitimacy is sustained by the evidence. If the other evidence is admissible it would only strengthen that conclusion. There must be a declaration to that effect.

As to the costs, I do not feel disposed to interfere with the agreement made by the parties. It was argued that

(1) 16 Beav. 182.

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by reason of the course pursued by David Anderson, he should be made to pay costs. At most I could only make him pay his own costs of the present contest. I have already expressed my view as to the course which I think he should have pursued. The question, however, is how has the estate been injured by the course which he actually did pursue? If he had communicated the facts when he learned of their relevancy to this suit, to the administrator or to the plaintiffs, who have the conduct of these proceedings, they would have been compelled to apply to have these Western heirs made parties for the protection of the administrator and those to whom the real estate would descend. The cost of such a proceeding might possibly have been less than that entailed upon the estate by the course which has been taken. That is, however, not capable of demonstration, and if it were, the difference is not an ascertainable quantity which the Clerk could tax. I think there is no sufficient ground for treating David Anderson in any different way as to his costs of this part of the litigation than was conceded to him and all parties by the agreement made between them. The costs of all parties will therefore be paid out of the estate as agreed upon.

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July 14.

RE GLADYS JULIA FREEZE.

Infant—Guardian—Married woman.

A married woman will not be appointed sole guardian of the person and estate of an infant.

Petition by Annie M. Pugsley, wife of Robert D. Pugsley, for the appointment of herself as guardian of the person and estate of Gladys Julia Freeze, an infant, and for leave to sell lands belonging to her. It appeared that the petitioner is the aunt of the infant.

July 14, 1905.

W. B. Jonah, for the petitioner.

BARKER, J.:—It is not the practice of the Court to appoint a married woman as sole guardian. You may withdraw the application.*

*See *In re Kaye*, L. R. 1 Ch. 387, and *Re Eliza Gough Estate* [1902] 3 O. R. 206.—REP.

THE GAULT BROTHERS COMPANY, LIMITED v. MORRELL.

1905.
August 17.

—No. 2. See ante, p. 123.

Practice—Parties—Striking out and adding names—Suit by creditor—Assignment for benefit of creditors.

Where after a suit was brought for a declaration that stock-in-trade in possession of defendants belonged to plaintiffs, the defendants made an assignment for the benefit of their creditors, and their assets were insufficient to pay their liabilities, the names of the defendants were ordered to be struck out and that of the assignee added.

The defendants, J. Otty Morrell and J. Leishman Sutherland, were co-partners and carried on a dry goods business at St. John, under the firm name of Morrell and Sutherland. The bill in this suit was filed for an injunction to restrain them from selling, assigning, transferring or incumbering any of the stock-in-trade, book debts or assets of the business, or from interfering with the plaintiffs from taking possession thereof, and for a declaration of the rights of the plaintiffs therein. The bill set out that the plaintiffs supplied the defendants with goods under an agreement by which they were to remain the property of the plaintiffs until paid for, with liberty to the plaintiffs to take possession of the stock-in-trade, book debts and other assets of the defendants' business, and providing that after realizing upon the same, payment out of the proceeds should be made to the plaintiffs of the amount of the defendants' indebtedness to them. By an *ex parte* injunction order, granted by Mr. Justice *Barker*, the defendants were restrained from, *inter alia*, making an assignment of the stock-in-trade and assets of their business. Subsequently Mr. Justice *Barker* ordered the injunction to be varied so as to permit the defendants to make an assignment for the general benefit of their creditors. See *ante*, page 123. The defendants thereupon executed to Thomas H. Somerville and Frederick W. Roach, an assignment of all their real and personal estate in favor of their creditors.

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The assignees took possession of the stock-in-trade and assets of the business, including goods supplied by the plaintiffs. On March 3rd, 1905, at a creditors' meeting, it was agreed that Robert R. Ritchie, High Sheriff of Saint John, should be appointed an additional assignee under the assignment, and that the stock-in-trade of the business should be sold and the proceeds held subject to the order of this Court. A sale was accordingly held, realizing $6,785.74. Motion was now made, on notice, for an order to amend the bill and all proceedings in the cause by striking out the names of Messrs. Morrell and Sutherland as parties in the suit, and to add the name of Robert R. Ritchie as a party defendant. Messrs. Somerville and Roach had previously been made defendants. It was shewn that the assets in the hands of the assignees would not prove sufficient to meet the firm's liabilities in full.

The motion was heard August 17, 1905.

M. G. Teed, K.C., in suport of the motion.

J. B. M. Baxter, contra:—

Morrell and Sutherland should remain in the suit to contest the question raised by the bill as it is prejudicial to the interests of the other creditors. The assignees are under no duty to dispute the plaintiffs' contention, and may not see fit to resist it.

[BARKER, J.:—The matter is entirely one for the creditors. I can not see how it can be of any concern to you.]

If the plaintiffs' bill is sustained they will be paid in full, or in priority to the other creditors. We are interested in having the assets distributed on a *pro rata* basis.

J. King Kelley, for the defendant Frederick W. Roach, was not heard.

BARKER, J.:—I will allow the application. Costs of application to be costs in the cause. Costs of defendants, Morrell and Sutherland, to be reserved until further order.

PORT WARDENS OF SAINT JOHN v. McLAUGHLAN.

1905.

September 19.

Port wardens—Fees of office—Competition—Account.

Port wardens appointed by the City of Saint John have no exclusive right to examine hatches of incoming vessels, so as to entitle them to fees for the service paid to an outside person.

Bill by the port wardens of Saint John, and the City of Saint John, to restrain the defendant, Charles McLaughlan, fron examining hatches of steamers and ships arriving at the port of Saint John, and for an account of fees received by him in holding such examinations and granting certificates thereof. The charter of the city authorizes and empowers the Common Council to appoint two or more wardens of the port. By a by-law of the city, adopted May 14, 1875, it was provided that a board of not more than ten wardens, to be appointed from time to time by the Council, and to hold office during the Council's pleasure, should be established; that the board should have an office at which a secretary should be in attendance; that the wardens should attend to their duties in rotation; that each warden should, before performing the duties of the office, take out a warrant of his appointment, for which a fee of ten dollars should be paid; and that a record should be kept at the board's office of all certificates granted by the wardens, and that the same should be open to public inspection. The by-law prescribes a scale of fees for certain services, including for a survey of hatches, a fee of $1.50 to each warden acting; for every certificate, a fee of $5.00, and for each copy, a fee of $2.50. Provision is made for the recovery of all monies payable under the by-law, in the name of the Chamberlain before the Police Magistrate. Acting under the by-law, and immediately after its adoption, the port wardens organized themselves into a board, which they have maintained ever since. The bill alleged that the board has an office and a secretary in accordance with

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the requirements of the by-law, and that the wardens have always performed and have ever been ready to perform the duties pertaining to their position. Examinations of hatches of steamers arriving at the port for the purpose of determining whether they were properly covered and secured and inspecting the condition of cargoes, were always up to about June 1, 1904, made exclusively by the wardens as coming within their duties. Since that date such work has almost entirely been done by the defendant, who is Lloyds' agent at the port, at the request of either the owners of the steamers or underwriters of cargoes. The defendant issued certificates of his examinations, and made charges for his services in connection therewith. It was claimed that the port wardens had by the defendant's action been deprived of upwards of $1,000 in fees.

Argument was heard August 5, 1905.

C. N. Skinner, K. C., for the plaintiffs:—

The charter of the city empowers the Common Council to license or appoint wardens of the port. The Legislature has at different times recognized their status as a public body. See Act 26 Geo. III., c. 51; R. S. N. B., 1854, c. 122, and C. S. N. B., 1876, p. 1053, providing for surveys by port wardens of sea-damaged goods. Their appointment is regulated by by-law of the city, which also fixes their fees for certain services. An exclusive franchise or office has consequently been vested in them. The effect of the defendant's competition is to deprive the plaintiffs of the most profitable part of their work. In fact, the office of port warden without it cannot be kept up. A port warden is a quasi-judicial officer. His surveys and reports have an official standing, entitling them to recognition abroad. Officials with corresponding duties are to be found at every seaport throughout the world. The interests of the port and of maritime traffic will be prejudiced if the office becomes extinct.

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[*Earle*, K. C.:—Why is the city a party to the suit?] Because the port wardens are appointed by the city, and pay to the city a license fee.

A. O. Earle, K. C., and *J. R. Armstrong*, K. C., for the defendant:—

The plaintiffs are claiming a monopoly contrary to common law, and unsupported by any words of grant in either the charter of the city or in an Act of the legislature. The matter between the plaintiffs and defendant is purely one of fair competition in which the defendant is free to engage. The plaintiffs do not hold an office which the defendant is usurping. The by-law under which plaintiffs are appointed is *ultra vires* as being legislation on the subject of navigation and shipping. See *Reg.* v. *Peters* (1). If underwriters or cargo owners prefer to have examinations of hatches made by the defendant rather than by the plaintiffs, it is their concern, just as it would be their affair if they saw fit to have no examinations by any one.

Skinner, K. C., in reply.

1905. September 19. BARKER, J.:—

The nine wardens of the port of Saint John and the City of Saint John have joined as plaintiffs in filing a bill by which they seek to compel the defendant to account to them for certain fees which he has received for examining and certifying as to the condition of the hatches of a number of steamers on their arrival at Saint John. The defendant acts as Lloyds' agent at Saint John and some of the other ports in the Bay of Fundy, and it seems that for the last year or two he has, on the application of the agents of certain lines of steamers, been holding these surveys and receiving fees for the service. It is in evidence that previous to the defendant's employment this work had been done by the port wardens, though there is no record of any city regulation or by-law on the subject previous to

(1) H. T. 1873; Stev. Dig. 137.

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May, 1875. By by-laws then passed by the Common Council the city was authorized to appoint a board of wardens for the port of Saint John, composed of not more than ten port wardens, to be appointed from time to time by the Common Council; each to hold office during the pleasure of the Council. No provision is made prescribing the duties of the wardens, but certain fees are fixed to which they are entitled for certain services. Among these fees is one of $1.50 for every survey on hatches to each warden acting, and a fee of $5.00 for every certificate. These fees are payable by the person requiring the services to be performed, and they can be recovered before the Police Magistrate in the name of the Chamberlain. The whole contention involved in the suit is that the port wardens, whether requested to hold surveys of this kind or not, have the exclusive right of doing so, and that the fees for such services belong as of right to them as fees of office, no matter by whom the services may have actually been rendered. Mr. Skinner was not able to refer me to any authority sustaining his position, nor have I been able to find any. I cannot discover any ground upon which the suit can be maintained. The validity of the by-laws has been questioned, and the joinder of the city as a plaintiff has been objected to, but apart from these and other objections which may be suggested, I do not think the plaintiffs can succeed. Mr. Skinner expressly disclaimed all idea of fixing a liability on the defendant, on the ground that he had usurped the office of port warden. Admittedly in what he did the defendant did not pretend to be a port warden, or to act as such in any way. That a port warden, if requested, could have performed the same service, and recovered a fee for it, is quite true, but how does that entitle him to the fees earned by the defendant for his work? Such a liability can only be supported on the theory that the defendant was in fact invading the plaintiffs' office. They can have no possible ground of complaint otherwise. The money can only belong to them because it represents fees paid to the defendant for services which they as wardens had the exclusive right of rendering.

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When you fail in establishing that right you fail altogether. There are cases, of course, where for the prevention of frauds on underwriters or other causes, the intervention of port wardens is required by statute. The case of a sale of sea-damaged goods furnishes an illustration. See 26 Geo. III., c. 51; R. S. N. B., 1854, c. 122; R. S. C., c. 85, s. 17. In such cases the statute expressly requires certain things to be done under the direction of wardens, but there is no statute or other law which makes it unlawful for a survey of hatches to be made by any person other than a port warden. The office of port warden is not a permanent office. The wardens have no estate in the office; the appointees are merely servants of the city, removeable at pleasure. And if the defendant had actually assumed to act as a port warden, an information in the nature of a *quo warranto* would not lie. See *Ex parte Langen* (1); *Darley* v. *The Queen* (2). And if the remedy by *quo warranto* would be open to the plaintiffs, then this Court would not interfere: *Attorney-General* v. *Miller* (3). The simple fact seems to be that the owners or underwriters required, for their purposes, an examination of steamers' hatches to be made on arrival, and I assume they chose to select the defendant for the purpose, because they wished his judgment in the matter. They did not require the judgment of any of the wardens, and therefore they did not request them to act. In other words they wanted the defendant's certificate and not that of a port warden. I know of no reason why they should not have it, or why the defendant, who performed the work, should be obliged to pay the fee to some one else.

The bill will be dismissed with costs.

(1) 3 All. 135. (2) 12 C. & F. 520.
(3) 2 N. B. Eq. 28.

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October 20.

THE EASTERN TRUST COMPANY v. JACKSON.

Donatio mortis causâ—Evidence—Delivery for safe-keeping.

A person on his death-bed handed to his wife out of a satchel which he kept in a closet of his bedroom $2,000 in bonds and $1,550 in cash, telling her to "take them and put them away; wrap them up and lock them up in your trunk." At the same time he handed to her a pocket book containing $150, saying that it was for present expenses. A few minutes later he handed to his business partner the remaining contents of the satchel, consisting of $1,000 belonging to the firm. Subsequently he made a will bequeathing to his wife $3,000, a horse, two carriages, and all his household effects; to his partner his interest in partnership property; to two grand-nephews $500 each; and to nieces and nephews the residue of his estate. His private estate was worth $7,500. When giving directions for the drafting of his will, on the amount of the legacies to his wife and grand nephews being counted up, he said, "there is more than that":—

Held, that there was not a *donatio mortis causa* to the wife, the deceased intending no more than a delivery for safe-keeping.

Bill for the administration of the estate of George R. Jackson, deceased. The facts fully appear in the judgment of the Court.

Argument was heard August 23, 1905.

A. O. Earle, K.C., for legatees, except Mrs. Jackson:—

A *donatio mortis causa* will not be supported on the uncorroborated evidence of the donee when such evidence is not clear and satisfactory. See *Ward* v. *Turner* (1). Such gifts are not favored in law. They lack the formalities and safeguards which exist in the case of wills, and they create a strong temptation to the commission of fraud and perjury. In *Ward* v. *Turner*, Lord Hardwicke expressed regret that the *Statute of Frauds*, which sought the prevention of perjury, did not invalidate such gifts. He points out that Justinian was so justly apprehensive of

(1) 1 W. & T. L. C. (7th ed.) 390.

fraud with respect to them, that he required them to be made in the presence of five witnesses.* In this case there is not only no corroboration, but the surrounding circumstances dispel the notion that a gift was intended. If a gift had taken place, the testator would not a few hours later have directed a will to be drawn up at variance with it. Had there been a gift he would have told the draftsman of his will of it, and that what was to be given by the will to his wife was in addition to it. A man of his careful habits would not invite the doubt and confusion that arise where there is an uncorroborated claim of a *donatio mortis causa*, and bequests by will to the claimant. If the testator had left nothing to her by will there would be good reason for believing that a gift was intended. Death being imminent, he had to place the money and bonds in somebody's hands. The firm's money he gave to his partner. That of his private estate, and in which she was to share, he naturally committed to her for safe-keeping. No words of gift were used. The particular directions he gave about wrapping the money and bonds up, and to lock them up in her trunk, indicate that all that he sought was to have them put in a secure place under her control. She says her husband told Wetmore, when he was about to take down the directions for making the will, that he wanted to provide for her. That would mean that he had not up to then made any provision for her. After the testator's death, the subject-matter of the alleged gift is found to have remained in his possession. If he never parted with the possession there could have been no gift, whatever were the words he used.

J. A. Gregory, K.C., for the defendant, Mrs. Jackson :—

The deceased's words were those of gift. Handing his wife the bonds and money, he said they were for herself; that "it is yours, your own personal property; I give it to

*In *In re Reid* [1903] 6 O. R. 423, Street, J., says: "I confess it appears to me that it would have been better to require as high a degree of evidence to prove a *donatio mortis causa* as to prove a will."—REP.

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you for your own personal property." It is idle to say they were merely placed with her for safe-keeping. If that was his purpose he would have entrusted to her the $1,000 bill belonging to the firm that he at the same time placed in Clark's hands, or he would have handed everything to Clark. Unless he had given the money and bonds to her, there is no explanation of the small provision for her in his will. The gift was complete when the money and bonds were delivered into the donee's hands with the intention of vesting the property therein in her. To divest her title it would have to be shewn that he revoked the gift and resumed possession. Mrs. Jackson swears she put the money and bonds in her trunk and locked it. If that is so, then they were removed to the position in which they were found by some one's theft. Whether she placed them in the trunk or left them in the satchel in the closet is immaterial. There is no rule that the evidence of a person claiming a *donatio mortis causa* should be corroborated. See *In re Garnett* (1); *In re Hodgson* (2); *Rawlinson* v. *Scholes* (3).

J. A. Belyea, K. C., for the plaintiffs, took no part.

1905. October 20. BARKER, J.:—

This suit is brought for the administration of the estate of the testator, George R. Jackson, but the only question involved arises out of a donation *mortis causa* of some money and Saint John city debentures alleged to have been made by the testator to his wife, the defendant, Frances Amelia Jackson, a few days before his death. The testator was taken ill on Sunday, the 16th October, 1904; on Thursday, the 20th October, the doctor told him there was no chance of his recovery, and advised him to settle such of his business matters as required his attention. The alleged gift was made on that day, about noon, after the doctor had announced his opinion. Between nine and ten o'clock of the forenoon of Sunday, the 23rd Octo-

(1) 31 Ch. D. 9. (2) 31 Ch. D. 183. (3) 79 L. T. 350.

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ber, the testator executed a will, and between one and two o'clock of the afternoon of the same day he died. He left him surviving his widow but no children, and, so far as the evidence shews, no nearer relatives than nephews and nieces. For some years before his death he had been carrying on a weir-fishing business at Letang in partnership with the defendant, Sutton Clark, a nephew. By his will the testator gave his widow $3,000, a horse and two carriages and all his household effects. To the said Sutton Clark, he gave all his interest in the partnership property, which comprised whatever real estate he had; to a son of Sutton Clark he gave $500; and a like sum to a son of Clarence Clark, another nephew. The remainder of his personal property he divided equally among his sisters' children residing in Halifax, of whom there seem to have been ten, all of whom are parties to this suit. So far as I can gather from the evidence, the testator's personal property, outside of furniture and household effects, which were given by the will to Mrs. Jackson, consisted at or shortly before his death of the following:

Savings Bank account, ...	$1,900
Cash in satchel—one package, ...	1,000
" " "	550
" in pocket book, ...	150
Four City of St. John debentures, $500 each, .	2,000
Balance due by Jackson & Clark, ...	917
Dominion Stock, ...	1,000
Mowbray note, ...	300
	$7,817

These figures are not exact, but sufficiently so to illustrate an argument based upon them which will be mentioned later. The alleged gift included the cash in the satchel, the $150 in the pocket book, and the debentures, representing in all $3,700. The Mowbray note was not considered of any value by the testator, though there seems at present some chance of collecting it. Deducting the amount of the gift and this note, the balance of his personal estate was at the time the testator made his will not

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quite $4,000. Mrs. Jackson had a savings bank account shewing a balance of some $1,200, which was money inherited from her mother. All parties agree that the testator was a very exact and methodical man in his business affairs, and economical in his personal expenses. He kept the books of the firm, always had possession of the safe key, and retained it up to three days before his death. Mr. Robinson, a witness, says the firm's books were accurately kept, and when he, on behalf of the executors, looked them over, they balanced to a cent. The testator seems to have been reticent as to his affairs, and his wife does not appear to have known much about them.

The contention made on the part of the residuary legatees against the validity of the gift is that the evidence altogether fails in establishing it; that it rests solely upon the uncorroborated testimony of the donee, and that this testimony is at all events of too uncertain and doubtful a character to support a donation *mortis causa* in view of the rule by which Courts consider themselves bound when dealing with claims made by living persons against the estates of deceased ones. That rule, as recognized at the present day, I take from the opinion of the Court as expressed in *In re Hodgson* (1). Sir J. Hannen there says: "Now, it is said on behalf of the defendants that this evidence is not to be accepted by the Court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons, there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to

(1) 31 Ch. D. 177.

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try the question, then there is no rule of law which prevents that conviction being acted upon." In *Rawlinson* v. *Scholes* (1), the late Lord Chief Justice Russell, in speaking of the Judge's duty in such cases, says: "I accept as good law the doctrine laid down by Sir James Hannen in *Re Hodgson*. He ought to examine that evidence with care, even with suspicion, but if after that he felt that it was evidence of truth, he should act upon it. He ought to be completely satisfied before allowing the claim; but he ought not to disallow it, satisfied or not, merely because the evidence was not corroborated."

In *In re Dillon* (2), a *donatio mortis causa* was supported on the evidence of the donee. Cotton, L. J., says: "It was urged that her evidence was not corroborated, and that the Court will not establish a claim against the estate of a deceased person on the evidence of the claimant alone unless it is corroborated. I do not think that this proposition is now law. Where a claimant's case depends entirely on his own evidence, the Judge ought to sift that evidence very carefully; but if the claimant gives evidence which is not shewn to be inaccurate in any material point, and which satisfies the Judge of its truthfulness, he ought, I think, to act upon it, though it be not corroborated."

I have not been able to find anything in the evidence which can in any way be considered as corroborative of Mrs. Jackson's evidence as to the alleged gift. In fact the circumstances under which it was made were of a character almost to preclude the possibility of such a thing. The transaction, whatever it really amounted to, took place when no one was present except the two parties to it. It was stipulated at the time that nothing should be said about it. There is no suggestion that Mr. Jackson ever mentioned it, and Mrs. Jackson says positively that she never mentioned it until she told her sister on the Monday evening some thirty hours after her husband had died. The gift, if supported at all, must be sustained by the evidence of Mrs. Jackson alone, and it is therefore necessary

(1) 79 L. T. 350.

(2) 44 Ch. D. 76.

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to see precisely what that is. The house which Mr. and Mrs. Jackson occupied at Letang was directly across the street from the store in which his firm carried on their business. At night, however, they occupied apartments which Mr. Jackson had fitted up for the purpose over the store proper. These apartments consisted of, I think, three rooms opening into each other; and off the one in which the bed was there was a small closet devoted exclusively to Mr. Jackson's own use. This closet was kept locked, and Mr. Jackson carried the key in his pocket. It was in this bedroom Mr. Jackson spent the week of his illness; it was there he died, and it was there the alleged gift was made. When he was taken ill Mr. and Mrs. Sutton Clark came from St. George, where they live, to Letang, so that he might not only look after their business there, but also be on hand to assist, if necessary, in looking after his uncle. During the week they occupied Mr. Jackson's house, Mrs. Jackson remaining with her husband and nursing him night and day during his illness. What took place on the Thursday when the alleged gift was made Mrs. Jackson tells in the following extract from her testimony:

"Q. During your husband's last illness I think you allege he made a gift to you of some money and bonds? A. Yes.

"Q. On what day was that? A. That was Thursday, the 20th; the day the physician told him he could not recover, and if he had any business to attend to, he had better do so at once.

"Q. Who was the physician? A. Dr. Taylor.

"Q. Did you hear him make that statement to your husband? A. Yes, I did; and I had a letter from the doctor saying it was that day.

"Q. That is since then? A. Yes.

"Q. On Thursday, the 20th October, you heard the doctor tell your husband if he had any business to attend to he better do so at once? A. Yes.

"Q. Did your husband make any communication to you then? A. He asked me to leave him for an hour, so he could think.

"Q. Did you do so? A. Yes.

"Q. Where did you go? A. I went out in the other room.

"Q. In the adjoining room? A. Yes. Well, it wanted five minutes of the hour.

"Q. At the expiration of the hour you returned to his bedroom? A. I did.

"Q. What, if any, communication did your husband make to you then? A. He said, 'When you see Sutton go home to dinner tell me.'

"Q. Meaning Mr. Sutton Clark? A. Yes.

"Q. Where would Sutton Clark be at that time? A. In the store.

"Q. Under in the building? A. Yes.

"Q. Where would he go to get his dinner? A. Across to the house; he and his wife occupied the house during my husband's illness.

"Q. And he said, when you saw Sutton go to dinner to tell him? A. Yes, he told me that.

"Q. Did you tell him? A. Yes, I said 'He is going home.'

"Q. Did your husband address any further words to you? A. He said, 'Hand me my satchel out of the closet.'

"Q. Do you recognize the satchel in Court as the satchel? A. I think that is the satchel. It was a satchel very like it. (Looking.) Yes, I think that is the same satchel.

"Q. Had your husband had that satchel for any time? A. Yes, he had it for some years.

"Q. You were familiar with the sight of it? A. Yes.

"Q. Where was this closet? A. Right across, in that direction, so he could see it all the time when he was in bed.

"Q. Was the closet kept locked? A. It was locked; the key was in the door while he was in bed, but otherwise he kept the key in his pocket.

"Q. The closet was locked with the key in the door at that time? A. Yes.

"Q. When he was well he carried the key of that closet himself? A. Yes.

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"Q. What did he keep in it? A. Kept his satchel and his clothing—nothing belonging to anyone but himself.

"Q. Nothing but his own personal belongings? A. Nothing.

"Q. Where did you keep your own personal belongings? A. In the house.

"Q. He told you to hand him the satchel? A. Yes.

"Q. You did so? A. I did so.

"Q. Proceed and tell us what took place. A. He sat up in bed and took the satchel in his hand and opened the satchel.

"Q. Was it locked or not? A. No, it was fastened with those catches—not locked any more than it is now. He sat up in bed and took out of his satchel a long blue paper and said, 'These are bonds.'

"Q. Do you mean an envelope? A. An envelope such as would hold bonds, and said, 'These are bonds,' and took out a roll of money with a thousand dollars marked on it. He said, 'Here are bonds and money.'

"Q. How was this money done up? A. Why, it was—you mean in the roll? Well, between each hundred dollars there was a strip of paper.

"Q. But that was afterwards. What was the appearance of the package of money at that time? What was it wrapped in? A. Wrapped in a piece of newspaper.

"Q. Were there any words written on the newspaper? A. A thousand dollars was marked on it.

"Q. In figures? A. Yes.

"Q. Was there anything on it about 'Weirs, 1904'? A. No, just '$1000.'

"Q. How marked? A. One and cyphers.

"Q. In lead pencil or ink? A. Lead pencil.

"Q. What did he say in regard to it? A. He said: 'Here are bonds and money,' and he gave me a big parcel and said this was for present expenses. 'Take them and put them away; wrap them up in something and take them over and lock them up in your trunk.'

"Q. Was there any other package beside this blue envelope containing the bonds and the parcel marked with

$1,000? A. Well, to the best of my recollection I think there was an envelope with some money, but I would not swear to it; but it was—

"Q. You think there was an envelope also with some money in it? A. Yes; and there was a photograph of myself that we could not find that was in with these papers.

"Q. Is that the photograph (indicating)? A. Yes; we could not find it; it was in the case with his bank books, and he took it out and gave it to me.

"Q. You say he also took out a red leather pocket book? A. Yes.

"Q. What did he say in regard to that? A. He said that was for present expenses.

"Q. What did you do with the articles he gave you—all he gave you; did he take them all out of the valise? A. Yes. I got the outside leaves of a magazine called 'Good Literature,' and a red cotton handkerchief, and wrapped them up in it.

"Q. Do you recognize that (the paper)? A. Yes, that is it.

"Q. A paper called 'Good Literature,' and issued in October, 1904. A. Yes.

"Q. Is that a periodical you take? A. Yes, I did at that time.

"Q. Had been taking it for some time? A. Yes.

"Q. Was that the last issue of it? A. I think so; yes. And then I brought in that white box and laid these things all on the bed alongside my husband, and took the money up and wrapped it into it, and tied it in the handkerchief and put it in a box and set it outside the door on the table.

"Q. Do you recognize this handkerchief? (indicating). A. Yes, I recognize the handkerchief; he had no other like it.

"Q. He had no other like it? A. No other with the same marks on it.

"Q. Is that the red pocket book in which you saw—? A. Yes, that is the pocket book (indicating).

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"Q. (The Court). You wrapped those up, and what did you do then? You laid them on the bed alongside your husband? A. Yes, and then got the things and wrapped that up.

"Q. Wrapped them first in what? A. In that—the whole of the things—everything, pocket book and all.

"Q. In this red handkerchief? A. In that handkerchief, on the photograph; and I asked him if that would do, and he said 'Yes, nicely.'

"Q. Do you recognize this box? A. Yes.

"Q. What did you then do with them? A. I took the box up and set it up on a little table outside the door of the bedroom.

"Q. In the adjoining room? A. Yes, in the adjoining room. There are three rooms up stairs; go in one and go through a door and go into another next the bedroom and the next was the bedroom; and I put it in the adjoining room on a box we used as a table, and as I did so I heard Mr. Sutton Clark coming up stairs, and I said, 'George, Sutton is coming up,' and he still sat in his bed with the valise in his hand, and when he came up he took out a thousand dollar roll. He said, 'Here is a thousand dollars, Sutton.'

"Q. How was it wrapped up? A. In a piece of newspaper, the same as that I had, with '$1000' marked on it, and he said, 'Here, Sutton, is a thousand dollars,' and I could not swear whether he said it belonged to the firm or to the estate; but he said one of the two words.

"Q. And handed it to Mr. Sutton Clark? A. Yes, in my presence.

"Q. While that was going on where was the box containing the handkerchief and paper and money? A. On the little table just outside the door.

"Q. What did you do with it, if anything, after that? A. My husband closed his satchel and handed it to me and asked me to put it in the closet, and I put it there.

"Q, Could you see in the satchel? A. Yes, and there was no more money in the satchel, but the two bank books, mine and his.

"Q. Were there any papers? A. Oh, yes, a number of papers; I do not know what they were.

"Q. You returned the satchel to the closet? A. To the closet, and turned the key to the door, and that is the last I saw of it.

"Q. What did you do with the box containing the money and things your husband had given you? A. I took the box in my hand, went over to the house and shut my door and got into the kitchen, and took the key and unlocked the bureau, and took the bunch of keys and went up stairs and unlocked my trunk and took out the tray and put the box under the tray and locked the trunk and went down stairs and put the key in the bureau.

"Q. Who was in the house when you did that? A. Mrs. Clark.

"Q. Was Mrs. Clark in a position to see you do this? A. Well, she could if she had a mind.

"Q. Was she in the kitchen when you came in? A. Yes.

"Q. And this bureau from which you got the key of your trunk was in the kitchen, too? A. In the kitchen.

"Q. And you took the keys of your trunk out? A. Yes.

"Q. And took the box up with you to put in your trunk? A. Yes.

"Q. And returned the keys to your bureau drawer in the kitchen? A. Yes.

"Q. Mrs. Clark remained in the kitchen? A. Yes, was there all the time, but whether she saw me with the box or not I could not say.

"Q. She had opportunity to see it? A. Oh, yes.

"Q. You put it in your trunk on Thursday, the 20th October? A. Thursday.

This somewhat lengthy and minute examination contains Mrs. Jackson's account of what took place between her husband and herself, and which it is contended, constituted and was intended to constitute a gift *causa mortis* of these monies and bonds to her. If, however, you eliminate

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from the extract I have given, all except what was said by the parties, and actually done by them, the account is confined to comparatively a few words. The testator opened the satchel and "took out of it a roll marked $1,000, and an envelope, and said, 'Here are bonds and money,' and he gave Mrs. Jackson a big parcel and said this was for present expenses, and he told her to take them and put them away; wrap them up in something and take them over and lock them up in her trunk." Mrs. Jackson says she took the bonds and money and put them in her trunk, as she was directed. There are, of course, outside circumstances which must be considered in deciding as to what the transaction really amounted to; but what I have just quoted is the only evidence having direct reference to the act of gift itself. Except as to the pocket book, which was found to contain $150, and which the testator said he gave to his wife for present expenses, there is not a word indicating an intention to give away anything. If he were making a provision for his wife one would naturally expect something to be said indicative of that intention, but there is absolutely nothing of the kind. He did not even state the amount of money or the value of the bonds; and although Mrs. Jackson says she wrapped up and carried away the package marked $600, and now claims it as part of the property given her, she was not prepared to swear that there was any such package there at the time. No doubt it actually was there, and that what Mr. Jackson said had reference as well to the $600 package as to the $1,000 one. It is, however, clear from Mrs. Jackson's account, that her husband did not take the $600 package out of the satchel. All that Mr. Jackson had in view, was, in my opinion, simply to remove this money and the bonds to a place of safety so that they could be handed over intact, after his death, to the proper persons. He knew perfectly well how liable to loss they would be, if left in such an exposed place at a time such as that he had in mind. Except as to the money in the pocket book, I do not think he had any idea of making a gift at all. As to that he accompanied the delivery of it with clear words of gift, and assigned a very reasonable and sensible reason

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for doing so. That was, I think, an absolute gift, to enable her to meet immediate expenses and to supply her with money until whatever she might be entitled to get from his estate would be available for her use. The evidence shews that there was no bank at Letang, and that Jackson & Clark had only a small strong box, or something of that kind, in their store, in which they kept money or valuables. This is what they called their safe. Mrs. Jackson says that her husband, before he was taken ill, said that he had too much money to keep in the safe; that he had so much money in the safe he was afraid to keep it there. And Mr. Clark says that when he got the key of the safe from Mr. Jackson, he found in it $1,115, in addition to the $1,000 handed to him by Mr. Jackson, a day or two before he died. At the time this alleged gift was made, he had in this satchel, locked up in this closet, immediately under his own eye, no less than $2,700 in money and $2,000 in bonds, which he knew perfectly well must, unless sent to a place of safety, be liable to exposure and perhaps loss. No person except himself seems to have known what really was in the satchel. Neither Mrs. Jackson nor Mr. Clark knew anything about it. Mr. Jackson seems to have kept his own affairs closely to himself, and it was quite natural that he should provide some place of safety for property so easily lost, so easily stolen, and so difficult of recovery or identification as bank bills and city bonds are. He handed over to Mr. Clark a package of $1,000, which from the evidence seems really to have belonged to the firm. He knew that with the money then in the safe there would then be in it over $2,000 in cash, a much larger sum than Mr. Jackson had ever considered prudent to have there. Mr. Jackson was admittedly not making a gift of this money to Clark, yet he uses precisely the same expression, "Here, Sutton, is a thousand dollars." Mrs. Jackson says she cannot swear whether he added that it belonged to the firm or to the estate, but that he did actually say one or the other. If he said that it belonged to the firm, he was clearly not making any gift. If he said it belonged to the estate (by which I understand Mrs. Jackson to mean her husband's

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estate, though he was not then dead), it would be clear that he was handing it over to Clark for safe-keeping only. It is, I think, very evident that Mr. Jackson's sole object in sleeping over the store instead of in his own home was to protect what was valuable in the store. Now what does he say as to the money and bonds? "Here are bonds and money." That does not necessarily mean anything more than this: "In this satchel are bonds and money," producing or taking in his hand an envelope containing bonds, or a package containing money. There was no necessity for his taking up the $600 package, because he was simply in a general way calling her attention to the fact that she was being entrusted with something valuable, and his object was attained without that. He then does not say, "I give this to you," as he did about the pocket book, but he tells her to take them and put them away—to wrap them up in something and take them over and lock them up in her trunk. Safety was the object he had in view; not a gift of the property. Mrs. Jackson says that after she had wrapped the packages up she said to her husband: "Will that do, George?" to which he replied, "Yes, nicely." And in one account of the interview she adds: "Then (that is after all the other things had been wrapped up) he handed me the pocket book and said: 'This is for present expenses.'" If she were really taking these things to keep them safely for a short period, to be accounted for to some one else, it is natural that she should have turned to him to see whether the way in which she had wrapped them was satisfactory or not, because the property was still his. But if he had relinquished his property in it, and given it away to his wife for her own use absolutely, all these minute directions as to wrapping it up seem unnatural. There are two other pieces of evidence which seem to me to sustain this view of the transaction. Mrs. Jackson says that her husband told her at the time not to tell anyone, as appears by one part of her evidence, or, as she states it in another, not to tell Mr. and Mrs. Clark anything about what he had done; and that in accordance with that direction she did not mention it to any one until she told her

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sister on the Monday evening. One is at a loss to suggest any sensible reason for a man situated as Mr. Jackson was to enjoin secrecy in reference to a gift of property to his wife. In such cases and at such times secrecy is rather to be avoided than otherwise. I can, however, well understand that if Mrs. Jackson was being made simply the custodian of this property for a short time, to account for it to her husband's representative after his death, he might well have cautioned her against giving publicity to the fact that, alone and unprotected as she was, she had so much valuable property in her possession. Mrs. Jackson's evidence also shews that on the Monday morning when Mr. Clark asked her if "Uncle George had given her any money," she says she did not give any answer. He repeated the question, and she then said, yes, that he had given her money for personal expenses. If my conclusion is the correct one, Mrs. Jackson's answer was absolutely true; if her contention is correct, the answer was a deliberate evasion. It cannot even be defended, as she attempts, on the ground that she had promised her husband not to tell Clark, for if there was any such promise, it referred as much to the pocket book and the $150 in it as to the bonds and other monies.

It is true that in the three or four repetitions of this part of Mrs. Jackson's evidence, she varied somewhat the language. One of them is important. In that, she says her husband when taking the bonds and money out of the satchel said, "Here are bonds and money for yourself," an expression which would indicate an intention to give. She also states that after locking the money and bonds up in her own trunk, she returned to her husband's room, and she then said to him, "George, if I should not live long, is there anyone to whom you would like to have me leave this money;" he said "No, I have given it to you as your own personal property, to do as you see fit." At another place in her examination she says that when she returned, she said, "George, if I should not live long is there anyone to whom you would like to have me leave this money," and he said, "No, it is yours, your own personal property, I give it to you for your own personal property." As to this question

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which Mrs. Jackson says she asked her husband on returning to his bedside, I must confess that it seems to me improbable that the conversation ever took place as it is given. What is meant by the words, "If I should not live long," as applied to the object of the question? What point have they? It is true that if she referred, in using the words, "this money," to the money in the pocket book, the amount of which she did not then know, there might be some point in using the words, "If I should live long," because she might have inferred that if she did, it would all be used up. To adopt that view would perhaps be nothing more than attempting to explain one improbability by suggesting another. But if Mrs. Jackson was alluding not only to the monies, but the bonds also, as I understand her to put forward, I can only say that I am unable to see how Mr. Jackson's wish as to the ultimate disposal of this property by Mrs. Jackson on her death could in any way depend upon the duration of her life. We have two versions of the answer to the question. The first is declaratory of a gift already made. "No, I have given it to you," &c. The second is in terms of a gift then being made. "I give it to you as your own personal property." It may be argued that either form of expression is sufficiently precise to sustain the gift, and that any discussion as to which is the true version is therefore of no practical use. That might be so if we were discussing two separate conversations, because in such a case both answers might have, in fact, been given. But we are not; we are dealing with two versions of one and the same answer which materially differ. Which am I to accept? One is no more likely to be true than the other. This evidence, as well as the different versions given by Mrs. Jackson of what took place between her and her husband, when she says he handed the property over to her, simply affords another illustration that that kind of testimony, in cases like this, Courts as a result of long experience, have found it prudent not to act upon. Such a rule does not necessarily suggest that those who have given the testimony, have been in any way guilty of fraud or wrong-doing, but it does recognize

how unreliable human memory often is, and it therefore throws upon those who set up an ownership to property, acquired as it is contended this was, the *onus* of proving a title by clear and satisfactory evidence.

There are two or three other pieces of testimony to which Counsel called my attention. It is obvious, I think, that Mr. Jackson fully intended making a will. He was endeavoring to communicate with Mr. Belyea at Saint John on Saturday for that purpose, and it is, I think, clear that his intention of making the distribution of his property which he did was not formed on the spur of the moment. It is said to be a highly improbable thing for a man situate as Mr. Jackson was to give away to his wife about one-third of his whole estate in expectation of his death, and in fact when his death was imminent, and a day or two later make a will giving her a large portion of what was left. Mrs. Jackson is very positive that when her husband gave instructions to Mr. Wetmore for his will, the first thing he said was: "I want to provide for my wife." Mr. Wetmore and Mr. Clark, who were both present, contradict Mrs. Jackson, and say that he did not use the word "provide." It is argued that if he did use that word it would go to prove that he had not before made any provision for her. Another argument used was this: It appears from the evidence of Mr. Wetmore and Mr. Clark that when Mr. Jackson was giving the instructions for the will, after he had mentioned the legacy of $3,000, etc., to his wife, and the two $500 legacies to his nephews' sons, he said "How much is that?" to which Mr. Wetmore replied, "Four thousand dollars." Mr. Jackson said, "There is more than that," and then directed the balance to go to his sisters' children. It is said that if the alleged gifts are deducted from the total personal property, as I have already given it, there would not remain any balance for distribution after deducting the $4,000 in legacies. In which case it is contended that Mr. Jackson, when he said "There is more than that," must have included the monies and bonds now claimed by his wife. Mrs. Jackson says that when she heard the will read in the evening of the day of the funeral, the contents

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of which she already knew all about, she pronounced it a most cruel will If she took under the will $3,000, a horse, two carriages, and all the household effects, in addition to the $3,700 she had received three days before, the will could scarcely be called "cruel," in view of the total estate. Before closing what I have to say on this part of the evidence, I must mention one other circumstance, an account of which I take from Mrs. Jackson's cross-examination.

"Q. He was ill then, was he? (that is, when the bonds and money were handed over). A. He was ill, and he was very low.

"Q. And spoke very low? A. Yes.

"Q. And you are a little hard of hearing? A. Yes.

"Q. It is possible that you have not got the exact words. A. Perhaps so.

"Q. He might have said things that would give one impression to your mind that he did not say, and he might have said things you did not hear? A. Yes."

We have therefore not only to deal with evidence uncorroborated and inexact in material points, but it is the evidence of a person whose power of hearing was impaired in regard to a conversation between herself and a man who was ill and very low, and who naturally spoke in a very low tone of voice—conditions in every respect favorable to mistake and misunderstanding.

Lord Chelmsford, in delivering the opinion of the Judicial Committee of the Privy Council in *Casnahan* v. *Grice* (1), a case similar to the present, says: "Cases of this kind demand the strictest scrutiny. So many opportunities and such strong temptations present themselves to unscrupulous persons to pretend these death-bed donations, that there is always danger of having an entirely fabricated case set up; and, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and by a slight change of

(1) 15 Moo. P. C. 215.

words to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail unless it is supported by evidence of the clearest and most unequivocal character." It appeared in that case as in this that the alleged gift was made when the donor was contemplating making a will. In reference to this Lord Chelmsford says: "Now, it certainly is most unaccountable that the deceased, who was thus contemplating the disposition of her property by will, should, at the very moment when she must actually have given instructions for it, have been making a loose and informal gift of almost the whole of her personal estate." After commenting upon the evidence, Lord Chelmsford says: "This summary of the different accounts which have been given from time to time is not offered with any view of disparaging the witnesses, or of imputing to them any intentional misrepresentation, but merely to shew the uncertainty which prevails over a transaction in which clearness and precision are essentially requisite." See also *Hall* v. *Hall* (1); affirmed on appeal (2).

The facts and circumstances which have forced upon my mind the conclusion which I have already announced, may possibly not carry the same conviction to the minds of others. But if I am mistaken in my view, there is certainly in the evidence an absence of that clearness and precision without which gifts of this kind cannot be supported.

There is another chapter in the history of this transaction, which surrounds it with a still greater mystery. There is evidence which shews beyond all reasonable doubt, that these very bonds and money were all in the possession and under the control of the testator when he died—that is to say, that they were at that time actually in the satchel in the closet, which was locked. Mrs. Jackson says that she did not go to her trunk in which she had locked up the bonds and money on Thursday, until the following Monday evening, when she and her sister, Mrs. Street, went to see if it was all safe. She unlocked the trunk, but found that the

(1) 20 O. R. 684. (2) 19 A. R. 292.

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money, bonds and everything, except the paper box, had been taken away. It seems that on the Sunday evening, as Mr. Clark says, or on the Monday morning, as Mrs. Jackson says, Mr. Clark had handed her this satchel, which she had taken and placed in a bedroom in her own home, which she had that day prepared for the use of Mr. and Mrs. Street, who were coming down to be present at the funeral. Finding that the property had been taken from the trunk, they searched the satchel and in it found, apparently undisturbed, the bonds, packages of money and other articles, which, according to Mrs. Jackson's account, had all been handed to her on the Thursday previous, taken away and locked up in her trunk. It contained not only these, but the two savings bank books, the Mowbray note and other papers which appear to have been in the satchel on the Thursday, but which Mrs. Jackson did not take away. In other words, it seemed then to contain everything that was in it when Mrs. Jackson first got it from the closet, except the $1,000 delivered to Mr. Clark, about which there seems to be no question. Mrs. Street entirely confirms Mrs. Jackson's statement as to what took place at that time. Mr. Wetmore, who is an entirely disinterested witness, was called in on the Sunday morning, in the absence of a solicitor, to draw the will. After it had been executed, Mr. Wetmore remained there until after Mr. Jackson's death. Mrs. Jackson seems to have gone over to her own home immediately after. Wetmore's evidence on this point is as follows:

"Q. Were you there when he died? A. No.

"Q. How long after? A. Within fifteen or twenty minutes after.

"Q. (The Court). Nine or ten in the morning or evening? A. It was nine or ten in the morning the will was written, and between one and two in the afternoon when he died.

"Q. Who was there when you came back again in the afternoon? A. Dr. Taylor and Mr. Clark, and Mr. Clark's bookkeeper, a Mr. Milligan, and Mr. Austin, who

drove down with the doctor, and I cannot say whether Mrs. Jackson was there. I know she was there in the forenoon.

"Q. Was there an undertaker? A. The undertaker did not come down till the evening. The doctor and Mr. Austin, who was with him, laid Mr. Jackson out.

"Q. Who got the clothes? A. The doctor and I both looked in the closet for clothes, and the doctor looked in the trunk for clothes, and some clothes came over from the house. I know there was a suit brought over.

"Q. Did you see Mr. Sutton Clark looking in the closet for the clothes? A. I cannot say for certain, but I think he was looking the same as the rest.

"Q. Did you notice a valise in the closet? A. No, I did not.

"Q. How long did you remain there—tell what hour? A. After his death? Oh, well, I suppose it was an hour after his death we drove to St. George, Mr. Clark and I.

"Q. When did you return again to the place? A. It would be perhaps six o'clock. We saw the undertaker, and I also went to the telephone and telephoned to Mr. Belyea.

"Q. The body was taken over to the house? A. Taken over to the house that evening. The undertaker came down after tea. I know he was not there when I went to tea, but the body was over when I came back again.

"Q. Was any examination made as to property that evening? A. Yes, Mr. Clark said to me that day, driving to town, 'Uncle George keeps some of his papers, valuables, in the satchel.'

"Q. As to what was found? Q. (Mr. Gregory). At what time? A. At about eight o'clock, I should think, in the evening.

"Q. What did you find in it? A. We found one package, rolled up in newspaper, marked $1,000.

"Q. Where did the valise come from? A. Mr. Clark brought it out of his closet in the bedroom, out in to the outer room, and there was a package tied up in a red handkerchief. Mr. Clark untied the package and turned the papers over. I saw two bank books and three bonds, city of St. John bonds.

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"Q. In what shape did you find them, in an envelope, or folded up? A. No, they were not in anything. Mr. Clark picked them up in his hand like that.

"Q. Were they tied together? A. No, not so far as I know. I was standing holding the lamp while he turned them over. I noticed the city of St. John bond, and said, 'That is a city of St. John bond.'

"Q. Did you examine enough to know if there was another folded in? A. No, I did not, but I saw three. There was an envelope marked for $600, and among the papers was a note of Mr. Mowbray; Mr. Clark held out the paper and said, 'That is uncle Tom's note.'

"Q. Where did he get it from? A. He got it out of that bag.

"Q. What cash was there? A. One parcel was marked $1,000, and an envelope was marked $600.

"Q. Did you count the $1,000? A. No, sir, I counted nothing.

"Q. After this examination what was done with the contents? A. Mr. Clark locked up the satchel and took it back and put it in the closet.

"Q. Did he put the things back in the satchel? A. He put the things back in the satchel.

"Q. You went down stairs? A. He went down stairs and he talked about what disposition had better be made of the satchel. He said it was not safe to be left up there, and said, 'I have a great mind to take it over and give it to Aunt Fanny.' I told him probably that was the best thing he could do. He went up stairs, brought down the satchel and took it over."

Mr. Clark's evidence is a little more circumstantial. He describes how the satchel was open when he went with the doctor to look for clothes, and that he then saw it contained valuables; that he mentioned it to Mr. Wetmore on their way to St. George, and met him by appointment at about eight in the evening, when he and Mr. Wetmore examined the contents of the satchel, as Mr. Wetmore described, and that he then took it over that same evening to

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his aunt in her home, giving it to her, saying, "Aunt Fanny, that is yours; take care of it till the trust company comes." To this he says she made no reply. She swears that he did not give her the satchel until the following morning, and that he said nothing about the trust company at all. If these accounts contain a true and full statement of what took place, the appearance of the money and bonds in the satchel at the time of Mr. Jackson's death, and apparently in his possession at that time, can only be accounted for on one of two theories; one is that Mrs. Jackson never took the things away at all, as she says, and the other is that some one stole them out of her trunk, and broke it open for that purpose. I am at loss to say which is the more improbable suggestion of the two. Mr. Clark is the only person upon whom any suggestion of suspicion can rest. But he knew nothing of the gift to Mrs. Jackson, or of her having the property, until after Mr. Jackson's death—a day after, certainly. I cannot see any possible motive for an act so sure of detection, and what is more important his character, so far as anything I have before me, quite precludes the possibility of such a thing. He had been for years a trusted partner of Mr. Jackson. He was, as Mrs. Jackson herself said, "to her like her own son," and that she could not think either Mr. or Mrs. Clark could be guilty of breaking into a bureau, box or trunk. Mr. Jackson had, within a few hours of his death, testified to his esteem for him by giving him by will a substantial legacy and another to his son. I agree with Mr. Gregory in thinking that if the gift was once complete, and a delivery made of the property with a view to transferring it to Mrs. Jackson by way of a *donatio mortis causa*, it would not be defeated by the property being returned to the donor's possession through no act of his and fraudulently as against the donee. I think it may be assumed that if Mrs. Jackson ever took the property away she never returned it. The only question is whether or not the evidence as it stands throws any doubt on the fact of the delivery having been made. Entertaining the opinion which I have expressed, it is unnecessary to decide this

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mysterious question. It but adds to the doubts with which the case is surrounded, and increases the difficulties in the way of arriving at a clear or positive idea of its true history.

I think there must be a decree that Mrs. Jackson must account to the plaintiffs for the debentures, and the money, except the $150—that is, the $1,550 in cash, and the four debentures which will be delivered to the plaintiffs.

As to the costs, I shall follow the order made in *Hall* v. *Hall*, already cited, and for the reasons there stated.

All parties will have their costs out of the estate; the plaintiffs' costs as between solicitor and client.

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Deed—Maintenance—Enforcement of agreement—Breach—Onus of proof.

In a suit to enforce a lien upon land conveyed to the defendant by the plaintiffs, husband and wife, in consideration of an agreement by defendant to support them, the onus of proving a breach of the agreement is upon the plaintiffs.

Bill to enforce a lien upon land conveyed to defendant by the plaintiffs, husband and wife, in consideration of an agreement by the defendant to support them. The facts fully appear in the judgment of the Court.

Argument was heard July 18, 1905.

A. B. Connell, K. C., and *W. F. Kertson*, for the plaintiffs.

F. LaForest, for the defendant.

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This litigation arises out of an arrangement by which the plaintiffs, husband and wife, conveyed to the defendant all their real, and substantially all their personal, property in consideration of support and maintenance to be furnished them during the remainder of their lives. The bill was filed to enforce the lien created by the agreement in order to secure its performance. A cross bill was filed to compel a conveyance of a portion of the land included in the agreement, but which was omitted from the conveyance by oversight.

The conveyance, which is dated July 5, 1902, purports to have been made in consideration of $1, and of certain covenants and agreements contained therein, to be performed by the defendant. These covenants are as follows:—

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"And the said Leon LeBel, for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said Martial Ouilette and Anna, his wife, and the survivor of them, that he, the said Leon LeBel, his heirs, executors and administrators shall and will at all times hereafter maintain, keep, support and provide the said Martial Ouilette and his said wife Anna, and the survivor of them, for and during the term of their and each of their natural lives, with good and sufficient house-room, to be not less than four rooms for their exclusive use, either upon the said premises or two rooms in some other suitable place within the said Parish of Drummond, and with meat, drink, washing, clothing, fuel, light, and in addition to all such other necessaries as persons in their situation of life and of their age, reasonably require, and shall provide them annually with the following specific articles, namely: to them jointly, one gallon of gin, one gallon of wine, and the sum of five dollars in money; to the survivor of them, one-half of the said quantities of liquor, and the full sum of five dollars in money; and further, that he the said Leon LeBel, his heirs, etc., shall and will at the costs and charges of him or them, upon the demise of them, the said Martial Ouilette and Anna his wife, provide for each of them, decent Christian burial, and shall cause to be said or had proper requiem masses or services at their respective deaths; and also at the expiration of one year thereafter, according to the rites and ceremonies of the Roman Catholic Church." There was also a similar covenant by which the defendant agreed that he would, during the remainder of the plaintiffs' lives, provide them "each with a suitable seat in the Roman Catholic Church in the said Parish of Drummond," and should also, "whenever requested, furnish and provide the said Martial Ouilette and Anna, his wife, for their pleasure and convenience, a suitable horse and vehicle," and should also, "in case the said Martial Ouilette and his wife Anna, so desire, provide and advance to them sufficient means to defray the expenses of a trip to Fall River, Mass. and return, provided such a trip is made within two years from the date hereof."

The defendant further agreed to pay, on request, the following amounts owing by the plaintiff, that is to say: Frank Goudreau, $3.21; John Taylor, $3.25, a note due the Peoples' Bank for $30, and a note for $50 due Powers. It was also stipulated that the real estate should not be sold or encumbered without the plaintiffs' written consent, and that the land and premises were to stand "charged with the support and maintenance." At the same time the plaintiff Ouilette conveyed for the same consideration by bill of sale to the defendant all his stock and personal property, except some household furniture. Although these conveyances were not made until July, 1902, the actual agreement was settled upon in the previous May, and at that time the defendant with his family moved to the premises, and he then entered into the occupation and possession of the property intended to be conveyed, including the omitted strip of land, and he has continued in such possession from that time. The property conveyed was probably worth $1,500. The house contained four rooms on the ground flat; it is 16 x 32 feet in size, with a small bed-room upstairs. The plaintiff Martial Ouilette is 68 years old, and his wife 45, and they both seem vigorous and in a good state of health.

The plaintiffs continued to live with the defendant from May, 1902, up to the end of 1903, a period of say, twenty months. During that period they spent between two and three months in a visit to Quebec. At Christmas, 1903, they went to visit some friends for a day or two; they returned two or three days before New Year's, remained a day, and on the 29th or 30th December, 1903, they left without any notice to the defendant, and never returned. Before going they locked up the four rooms which they occupied, also the cellar, and took with them a horse, pung and harness. They still retain possession of the rooms and cellar, and have never returned the horse, pung and harness. The case set up by the plaintiffs is that they have not been provided with the support, maintenance and specific articles, to which by agreement they were entitled. In reference to the money required to meet the expenses of the trip to Fall River, it is admitted that it

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was not provided, but as to all the other matters, I understand that the defendant asserts that he actually provided all that was required, or was ready and willing to do so at the house where the plaintiffs had themselves elected to have them supplied; and that if the plaintiffs did not choose to avail themselves of what was provided for them, it was their own fault. As I read these covenants which seem to have been drawn with care and with the very proper view of safe-guarding the plaintiffs' interests, they provide for two cases—one where the support is furnished at the defendant's house, in which case the plaintiffs were to have the exclusive right of four rooms, which was practically the whole house; the other was where the support was furnished at some other house in the Parish of Drummond, in which case they were to have but two rooms. In both cases, the meat, drink, washing, fuel and light, and which I shall for convenience sake speak of as support, were to be furnished at the place of residence and not elsewhere. The clothing and the specific articles, that is, the gin, wine, money, seats in church, etc., in my opinion stand in a different position. There may be some question as to the horse and carriage, but as to the others, I think the defendant is bound to supply them altogether irrespective of any question of residence. That is to say, if the plaintiffs failed in establishing their claim to compensation for support, because they left the house where it was to be furnished them without sufficient cause, that would not interfere with their right to the specific articles. The defendant's house is the place of residence selected, and even if the plaintiffs had the right to change it, they have not done so. On the contrary they still hold the exclusive possession of the four rooms, and in my opinion their claim for support must rest upon their right to have it supplied there and not elsewhere. This renders it necessary to review the evidence as to the disputes and differences which took place between the parties, and upon which the plaintiffs now rely as having justified them in going away. The last and by all means the most serious trouble took place in December, 1903, and only a few days before they

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went away. It seems that the plaintiffs had the idea, rightly or wrongly, that they were entitled to go into the stable and take a horse and carriage out for their own use, without consulting any one, and quite irrespective of the requirements of the defendant for his work. This had given rise to some friction on one or two occasions, but what took place at this time I take from the cross-examination of the plaintiff Martial Ouilette.

"Q. What did you go there for? (that is, to the stable). A. To get my horse.

"Q. Did you ask Mr. LeBel to give you a horse? A. Yes.

"Q. What did he say? A. I told Mr. LeBel that horse was harnessed up since morning, and I wanted the horse to go to the Falls to confession, me and my wife, and Mr. LeBel answered that he would unharness the horse when he was through with it.

"Q. What time of day was this, the forenoon? A. Yes.

"Q. You were telling him you would want the horse for the afternoon? A. Yes.

"Q. And he answered, when he was through with him he would harness him for you. What did you say to that? A. No, he told me I would get the horse when he was through.

"Q. He said as soon as he would get through you would have him? A. Yes

"Q. What did you say? A. I told Mr. LeBel it was not I was supposed to furnish the horse, it was Mr. LeBel was supposed to furnish me the horse.

"Q. And the reason you told him that was you thought that his horse was yours, and Mr. LeBel should not be using it? A. No, he worked the horse all he wanted, and I never told him a word.

"Q. What do you mean by saying you told Mr. LeBel it was not for you to furnish the horse to him? A. It was my horse and he had reserved with his horse and wagon.

"Q. Then it was because you thought you had reserved this horse and sleigh that Mr. LeBel should not be using it? A. No, I did not think that.

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"Q. What did LeBel say when you told him it was not for you to furnish the horse for him? A. Mr. LeBel said I had nothing there, no horse, no harness, no pung, no house, no farm or nothing.

"Q. What did you say to that? A. I told Mr. Lebel if he was home once that it was me that put him there.

"Q. What did he say to that? A. We exchanged quite a few words, bad language.

"Q. Did not you say as much to him of bad language as he said to you? A. Yes. I knew more about Mr. LeBel than LeBel knew about me.

"Q. And that gave you a chance to say more to LeBel than he to you? A. I was not very interested in that.

"Q. Did not LeBel at that time tell you to take one of the mares there? A. No.

"Q. Was not that the time you told LeBel that his mare was a cow like himself? A. Yes.

"Q. Was it not when he told you take one of the mares, you said that? A. No, he never; either one of his mares LeBel did not like to give it, and I did not like to drive them.

"Q. This was the first bad language used between you. You told him his mare was a cow and just like himself? A. I told LeBel, why did you not take your mare? He says it is eight days that we did not use her out. He said, LeBel tell me his mare was sick. I answer Lebel, his mare was a cow like him.

"Q. And it was then that he struck you? A. Yes. Then I went for Mr. LeBel right off.

"Q. Did you not blacken LeBel's eyes that time? A. Yes.

"Q. Did not LeBel get the worst of it? A. LeBel stood up. I do not know who got the best of it, LeBel had black eyes, and I did not have any black eyes or scratches.

"Q. When you came back, before New Year's, you made up your mind to leave, did you not, you and your wife? A. Not me, but my wife.

"Q. It was your wife wanted to go? A. Wanted to go.

"Q. You did not want to go? A. No.

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"Q. But you went? A. I went.

"Q. Did you speak to LeBel before going and tell him you were going away? A. I left the day before New Year's, and we began to talk about this trouble.

"Q. Who began to talk about it? A. Me and my wife.

"Q. Did you speak to LeBel and notify him of your intention of leaving? A. No, I did not think of going.

"Q. Then the reason you did not speak to LeBel before leaving was you did not think you were leaving for good when you went away? A. I did not know it; I thought I was coming back.

"Q. How long after that did you make up your mind not to come back? A. When we were going away, right after we left."

Mrs. Ouilette says that this fight, as she calls it, ended with the third blow. If its importance is to be measured by results, the plaintiffs have not much ground for complaint. In order, however, to understand the full significance of the incident, one should know that the property transferred included two horses, and that the defendant himself had two which he took with him when he moved. It is also necessary to explain that the evidence of the plaintiffs, and all the other important witnesses, was given in French, and that the word which the interpreter translated "cow" conveys a meaning by no means complimentary to those to whom it is applied, as the word is understood by the French inhabitants of that part of the Province. It is no doubt difficult for those who transfer all their property, in order to secure a maintenance for life, to realize how entirely they thereby alter their condition. They are apt to forget that they no longer have the control of affairs, and that where they were masters in their own house they are now but lodgers in the house of another. Especially does this seem to have been the case with this plaintiff. He was constantly assuming an authority which he did not possess, and asserting an ownership of the property to which he had no claim. Not only did he do this, but his manner of doing it would have irritated a much milder dispositioned man than the defendant is. And I cannot but

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think that the most of the disputes which the plaintiff now puts forward as a justification for leaving the house owe their origin to his unnecessarily meddling with the defendant's business and his coarse language and intemperate manner. Take, for instance, the incident I have just mentioned. The plaintiff requires the use of a horse and carriage in the afternoon. In the forenoon, when he went to ask for it, instead of simply doing that and going away, he begins by lecturing the defendant for keeping the horse so long in harness. A horse had always been placed at his disposal when he wanted one. He had actually had one for the two or three months he was in Quebec. One thing appears quite plain, that when the plaintiffs a few days later left the house, Ouilette himself had no thought of remaining away permanently. He expected to come back. It does not seem to have ever been suggested to him by anything which had taken place that there was any reason for either himself or his wife leaving and going elsewhere to live. It seems to have been altogether out of deference to his wife's wishes that he changed his mind. An examination of her evidence does not shew that she had much ground for complaint. Besides the trouble in December, 1903, just before the plaintiffs went away, she only speaks of one occasion when anything like rough language was used to her by the defendant. This was fifteen months before they went away, and no importance seems to have been attached to it. Mrs. Ouilette's account of what took place at that time is as follows:

"Q. Did Mr. LeBel ever use any abusive language towards you or attempt to strike you? A. Yes, when Mr. Ouilette asked him for a hat Mr. LeBel told Ouilette that that hat was not for his age or for his means or for his position.

"Q. Did he tell him anything else? A. Yes; LeBel told Ouilette that he had promised to help him out in the crop, and that he had not done it. Then I told LeBel: 'No, to count him as dead, that he would not work; he had given his property.' Then that made LeBel mad, and he

took me by the arm and said, 'Go away, go away,' and he walked towards me and told me to 'Shut up my mouth, you cursed old hag.'

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"Q. Was there any other occasion on which he struck you? A. Afterwards he told me he would strike me with his fist on the forehead. I did not pay any attention to it.

"Q. Did you get along more pleasantly during the summer of 1903 than before? A. It always went wrong.

"Q. Did matters improve during the fall of 1903? A. We went away.

"Q. When? A. The 28th of December.

"Q. Did you return after that? A. Yes, we came back and went away again the day before New Year.

"Q. And did you return after that again? A. No, never went back in the house afterwards.

"Q. Why did you not go back? A. We did not go back, because every time Ouilette would get there they would have some words, and LeBel had promised me a licking and I was scared."

Mrs. Ouilette here gives the two reasons why she and her husband refused to return to the house. The first is the apparent impossibility of these two quarrelsome men living together without constant disputes, though she does not attribute more fault to the one than to the other; and the second is a reasonable apprehension on her part of violent treatment to herself by LeBel, by which, to use her own expression, "she was scared." From her cross-examination it is clear that she bases her apprehension of violence not upon anything either said or done to her personally by the defendant, but upon something, as she says, told to her by the witness Baptiste Theriault, who seems to be a very meddlesome man, and upon a statement of the witness Rioux, who seems to be a different kind of a man altogether. Rioux speaks of bad language, as he terms it, between LeBel and Ouilette, whom he seems to think equally at fault, but he does not say a word as to any threats to Mrs. Ouilette. As for Theriault, it is true that he does speak of LeBel threatening to strike Mrs. Ouilette,

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but where it was or why he should do it does not appear. It does, however, appear that Theriault was, as usual, meddling with other people's business, and evidently trying to get up a fight or disturbance between these people. I do not think his evidence is worth considering at all. I think it altogether improbable that when Mrs. Ouilette went away in December, 1903, she had any idea of not returning. Any fears of personal violence, if she had any, would naturally have been known to her husband. I do not think she had any, or that she was scared in the least. Neither do I think there was any ground for her being so, or for her apprehending any violence of any kind. It is significant that Rioux, who gave these people excellent advice as to the settlement of their disputes, which I regret they did not follow, in speaking of the defendant's threats, says that what the defendant did say was that, "If Ouilette did not quit bothering him he would put him in his place."

There is evidence of some other disputes more or less trivial in their character; one about the loan of a butter tub, which commenced by Ouilette giving Mrs. LeBel some advice as to taking care of her things, and ended by Ouilette, according to his account, ordering the defendant and family out of the house. Another as to some tobacco which, so far as I can see, the defendant was under no obligation to supply, but which he seems to have supplied, and on this particular occasion Ouilette called Mrs. LeBel "a cow." It is, however, unnecessary to go more minutely into these differences, because I am convinced, as a general result of the whole evidence, the surrounding circumstances and the manner of the witnesses under examination, that the plaintiffs were not justified by the circumstances in leaving as they did. I do not for a moment say that the defendant has been by any means free from blame. He is evidently an excitable man with a temper, which he himself described as "not too sweet." I cannot, however, find anything in the evidence to shew that he did not intend honestly to carry out his agreement. He spent a considerable sum in building a house and making other improvements on the farm. He seems also to have paid quite a

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sum on the plaintiffs' account for which he was in no way liable, and no objection has been suggested to the support actually furnished either as to its quantity or its quality. The plaintiffs, of course, had the right to complain if they were not being supplied with what they were entitled to under the agreement, but any interference beyond that could scarcely result in any other way than in making trouble. So far as the plaintiffs' claim for compensation for support is concerned, the onus is, I think, upon them to shew that they were justified in leaving the premises where the support was to be furnished. I have already indicated that in my opinion the fair result of the evidence is that the troubles were mainly attributable to the actions of the plaintiffs themselves, for which they had no real excuse. But if a view more favorable to the plaintiffs be taken, and it be thought the plaintiffs and defendant were equally at fault, the plaintiffs would not in that case have discharged the onus of proof upon them. I hope that these people will have the good sense to recognize how impossible it is for two persons, each with excitable and inflammatory dispositions as theirs, to live harmoniously together as one family in the same house, and that some settlement of their disputes may be agreed upon which will end this litigation and prevent any in the future.

There will be a reference to settle the amount due under the agreement according to the terms I have indicated.

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December 19.

EVANS v. EVANS.

Husband and wife — Purchase in wife's name — Gift.

Where property purchased by a husband as a home for himself and wife was by his direction conveyed to her, so that the title might be in her in case of his death, it was held that a gift was intended, to take effect upon his death if she should survive him.

Land situate in Queen's County belonging to one James Vincent, a brother of the defendant, was conveyed to the defendant under the circumstances set out in the judgment of the Court. The bill prayed for a declaration that the defendant holds the land in trust for the plaintiff, and that she might be ordered to convey the same to him, or, in the alternative, for a declaration that the plaintiff is entitled to a lien or charge upon the land for an amount advanced by him in paying off a mortgage thereon.

Argument was heard October 19, 1905.

A. I. Trueman, K.C., and *W. H. Trueman*, for the plaintiff: —

The mortgage was paid by the plaintiff's money. The money used for the purpose, taken from the savings bank account, was his. It is unreasonable to suppose that he made a gift to his wife of the amount put on deposit. A person in his circumstances would not part with so considerable a share of his earnings. In handing the money to her he impressed upon her that she was to deposit it in their joint names. During his life it would be his, though upon his death it might, under such an arrangement, possibly pass to her. A present gift to the exclusion of all title in himself certainly will not be intended. See *Marshal* v. *Crutwell* (1). A part of the money used in paying off the mortgage came directly from him, and no gift in respect of it can be set up

(1) L. R. 20 Eq. 328.

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by the defendant. The plaintiff carried on the whole of the negotiations with both Vincent and Murray in respect to the property and carrying the mortgage. If the money was the defendant's he would have left the matter to her, and would not have dealt with the money as his own. The only point in the case is whether the property is hers by reason of the deed being put in her name at his direction. Such a question is one of fact. There is no presumption that a gift was intended. See *Gibbons* v. *Tomlinson* (1), and *Ex parte Cooper* (2). It must be shewn by the wife, either by direct evidence or by a course of dealing between her husband and herself, that a gift was intended. See *Re Curtis* (3), and *Elliott* v. *Bussell* (4). The plaintiff gave as the reason for putting the property in the defendant's name, that in case of his death there would be no trouble. That could only be a gift to take effect on his death. In the meantime he was free to revoke it. Clearly she would not be entitled to deal with it in his lifetime as her own. He expressly declared that it was to be a home for them when he was old or unfit for work. If the plaintiff is not entitled to have the property conveyed to him, he is entitled, at least, to a declaration of joint tenancy. See *Re Ryan* (5); *Gosling* v. *Gosling* (6).

W. B. Wallace, K.C. (*E. S. Ritchie* with him), for the defendant:—

The money used in paying off the mortgage was the wife's. Part of it was birthday and Christmas presents. The plaintiff agreed with her that anything she should save in managing the household should be hers. If he did not intend the money to be hers, it is singular that after learning that the account was in her name he continued placing money in her hands to be deposited in the same way. Even if the property could be said to have been

(1) 21 O. R. 489
(2) [1882] W. N. 96.
(3) 52 L. T. 244.
(4) 19 O. R. 413.
(5) 32 O. R. 224.
(6) 3 Drew. 335.

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purchased with the husband's money, the presumption is that a gift was intended. See *DeBury* v. *DeBury* (1). The evidence, so far from rebutting this presumption, shews he did intend the property to be hers.

1905. December 19. BARKER, J.:—

This is a suit brought by one Beverley W. Evans against Sarah E. Evans, his wife, for a declaration that she holds a certain piece of land, the legal title to which is in her name, in trust for him. The property in question was conveyed to the defendant by one James Vincent, her brother, by deed bearing date September 29, 1898, duly registered on the 15th day of October of the same year. The defendant is described in it as "Sarah E. Evans, of the City of Saint John, wife of Beverley Evans," and the consideration mentioned is $300. The property was subject to a mortgage to secure $230 and interest, made by Vincent to one Murray, in 1881. In 1898, in consequence of a large amount of interest which had accumulated on this mortgage, it was placed in the hands of a solicitor for collection. This led to negotiations between Vincent and the plaintiff and defendant, which ended in an agreement being made with Vincent and Murray, by which Vincent was to assign his equity of redemption to the defendant, and Murray was to give the parties two years to pay the amount due, which was some $360—one payment of $150 to be made at the time. The deed to the defendant was made as I have mentioned—the $150 was paid on October 11, 1896, and the balance as agreed upon—the last payment having been made in September, 1900, when the mortgage was cancelled. In 1898, when this transaction took place, the parties had been married some twelve years, they had no children, and the plaintiff was in poor health. He was a machinist and engineer by occupation, and for several years was in the employ of Tapley Bros., as an engineer on a tug. It is admitted on all sides that the money with which this property was purchased was the plaintiff's money, earned

(1) 2 N. B. Eq. 348.

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by him; the defendant had neither money nor property when she married, and if she acquired either afterwards, it came to her from her husband. The case set up by the defendant is, that the money used in the purchase was largely made up of monies given to her by her husband, as presents or otherwise, which she from to time deposited in the post office savings bank, in her own name, and in proof of this, by consent of Counsel, an authenticated copy of this bank account has been put in evidence, the original pass book having been given up when the account was closed in March, 1902, the balance withdrawn at that time being $152.63. This account was opened by a deposit of $55, made in June, 1891, and on the 2nd October, 1893, it was closed by a withdrawal of the balance, which with interest, amounted to $107.22. In July, 1894, a new account was opened in the defendant's name, by a deposit of $90. Other deposits were made, amounting in all to $350, and the balance of this account was withdrawn in March, 1902. The total amount deposited to the credit of this account is $450, and from this there is no doubt that the first payment on the mortgage, of $150, was made, and also a payment to the plaintiff of $50 when the account was closed in 1902. The balance of the monies paid to Murray—some $215—it is clear, I think, from the evidence and from this account, was money of the plaintiff, to which, so far as the evidence goes, the defendant had no special claim by gift or otherwise. It is true that the plaintiff says that he directed the monies to be deposited in the savings bank in the names of himself and wife. In my view this is, however, not important, for reasons which I shall briefly state.

In *DeBury* v. *DeBury* (1), I had occasion to consider a similar question, and as that decision was affirmed on appeal I am bound by it. If a husband purchases property with his own money, and procures the conveyance to be made in the name of his wife, there is a legal presumption that a gift to the wife was intended. That is of course a presumption which may be rebutted by the evidence of the parties

(1) 2 N. B. Eq. 353.

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where such evidence can be procured, or by the facts and circumstances surrounding the transaction when such evidence cannot be procured. Acting on that principle it was held that a lot of land so purchased was a gift to the wife, but as she acquired it from her husband during coverture, and such property was expressly excepted from the operation of the *Married Women's Property Act*, it remained subject to common law rights; the wife could not make a conveyance of it, and the husband's common law marital rights in reference to it existed. In *Owen* v. *Kennedy* (1), Strong, V.-C., says: "The evidence establishes that the money with which the property in question in this cause was purchased by Lewis Burwell, was in point of law at the time of the purchase, his own money. It is indeed shewn to have been provided, in part at least, by the labor of his wife and daughters; but that it was his money at the time of the purchase, either by loan or gift of so much of it as belonged originally to his daughters, and by virtue of his marital right as to the portion which had been acquired by his wife, there can, I think, be no room for doubting. I consider the case to stand as if it were a purchase by a man with money which he had borrowed for the purpose, in which event it is clear that he would be treated as having purchased with his own money for his own benefit. The land having thus been bought with the money of Lewis Burwell, and the conveyance having been made to his wife, there would, in the absence of proof to the contrary, be a presumption arising from the relationship of husband and wife, sufficient to counteract the trust which ordinarily results when property is purchased and paid for with the money of a person other than that one to whom the conveyance is made."

It is, I think, equally clear in this case, that the money with which this property was purchased, was in law and in fact the plaintiff's money. It is also not disputed that the conveyance to the defendant was made either by his express directions, or by his full assent. That being so, I must hold

(1) 20 Gr. 163.

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it to be a gift to her, unless the evidence shews an altogether different intention sufficient to rebut any legal presumption arising from the conveyance being to the wife. In *Marshal* v. *Crutwell* (1), Sir George Jessel states the rule as laid down in *Fowkes* v. *Pascoe* (2), as follows: "The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock, is not sufficient to rebut a resulting trust in favor of the purchaser, if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So in the case of a stranger, you may take surrounding circumstances into consideration so as to say that a purchase in his name is a gift, not a trust." The question then is whether or not the facts and circumstances shew affirmatively that the plaintiff did not intend to make any provision for his wife, but that there exists a trust as to the property in his favor. I have come to the conclusion, on the evidence of the plaintiff himself, that a gift to the wife was intended. In the first place, whatever may have occurred since, these parties were living together at the time this transaction took place happily enough. They had been married several years and had no family. The plaintiff was in poor health, and so far as the evidence shews, the savings invested in this purchase were substantially all the property the plaintiff had. This is what the plaintiff himself says on this point:—

"Q. Did you say anything to your wife about the deed—in whose name it should be put? A. I did.

"Q. Where was that conversation? A. Home, I think, at Indiantown.

"Q. What was said to that? A. She said, 'What name are you going to take, a mortgage or a deed?' This was when she was going up to pay the $106. I think it was that time. Said I, 'You better take a deed of the

(1) L.R. 20 Eq. 328. (2) L. R. 10 Ch. 343.

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place; in case anything happens to me there will be no lawsuit over the thing.' So she went up and paid it off.

"Q. Just what were the words you did use to her about taking the deed? A. I said, 'Take a deed of the place, and if anything happens to me (I was not very well at the time), there will be no trouble, no lawsuit, and Mr. Murray will make no trouble over the thing.'

"Q. While you were making these payments did you and your wife have any conversation about the property? A. Well, I said, as I told Mr. Murray, that it would be a home for us by and by, when I could not work in a machine shop; when I would not be able to earn a living it would be a home.

"Q. Did you say that before any payment had been made to Murray? A. No, I think not.

"Q. What you said was what you have already told us, that there would be no trouble about it in case of your death? A. Yes, I was not very well at the time, and I thought that was probably the best way to do it and save trouble in Court may be.

"Q. When was it you told her these words, 'it would be a home for us?' A. That is after I started in to pay the money."

I cannot interpret the plaintiff's action in any other way than as indicating a clear intention of benefiting his wife and making a provision for her. The place was to be a home for them during his life, if his health failed him and he was unable to work, and on his death the property would be hers without any will or trouble. That seems to me to be precisely what a man of small means, in ill health and situated as the plaintiff was, with full confidence in his wife, would do. This evidence, I think, so far from rebutting the legal presumption, sustains it. The property could not be sold without the husband joining in the sale. He had all his marital rights in reference to it during life—possession; a right to the rents and profits—but he did, I think, wish to benefit his wife by giving her the property

to be hers should she survive him, an event which was very clearly in his mind as likely to happen.

I think the plaintiff is entitled to a decree declaring that the property in question was acquired by the defendant by way of gift from the plaintiff, her husband, after their marriage and during coverture, and that she be restrained during his life from making or attempting to make any sale, conveyance, or charge upon the same without the plaintiff joining in the same and assenting thereto.

I think, under the peculiar circumstances of the case, there should be no order as to costs.

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DUNCAN v. THE TOWN OF CAMPBELLTON.

Arbitration—Injunction—Jurisdiction.

An injunction will not be granted to restrain a party from proceeding with an arbitration where the result of the arbitration will be merely futile and of no injury to the party seeking the injunction.

An injunction to restrain an arbitration to determine the value of land of the plaintiff taken by the defendants on the ground that a condition precedent to the taking of the land had not been complied with, refused.

Motion to continue an interim injunction granted November 8, 1905, by Mr. Justice *Barker*. The facts fully appear in the judgment of the Court.

Argument was heard November 21, 1905.

A. S. White, K. C., and *H. F. McLatchy*, for the defendants:—

Act 60 Vict., c. 58, empowers the Town Council of the Town of Campbellton to provide, *inter alia*, a water system for the town. Power is vested in the Council to purchase the lands, property, etc., of the Campbellton Water Supply Company, and in event of their failing to agree upon the purchase price, provision is made that the value should be determined by arbitration. By section 12 it is provided that the provisions of the Act respecting the powers of the Town Council to purchase or expropriate the property of the Campbellton Water Supply Company should apply to all lands, etc., of any description within the Town of Campbellton of any other company or corporation. Section 6 authorizes the Council to build dams and reservoirs, acquire lands and works, and to do all things necessary for the purpose of providing the town with an adequate water supply. Section 37 enacts that "before the Town Council shall proceed to exercise the powers hereinbefore granted, either for the purchase or expropriation of the lands, build-

ings, pipes, reservoirs, hydrants, works, plant, water system and franchises of the Campbellton Water Supply Company, or for the purchase or expropriation of the property, plant, rights and franchises of any other company, or for the construction of any of the works authorized by this Act, such action in each case, respectively, shall be approved by the ratepayers of the town, to whom the Town Council shall submit the question of the desirability of their taking such action," etc. A vote of the ratepayers was taken authorizing the Town Council to acquire the lands, etc., of the Campbellton Water Supply Company, and to install a water system for the town The lands of the plaintiff are sought to be expropriated by the defendants for the purpose of enlarging the reservoir acquired from the company. The plaintiff has taken the view that before this can be done another vote of the ratepayers is necessary under section 37. The defendants submit that the vote already taken is sufficient. If the plaintiff is right that a further vote is necessary, then the arbitration proceedings which the defendants have initiated for the purpose of determining the value of his property cannot hurt him, and he stands in no need of an injunction. If the arbitrators have no jurisdiction, the award cannot be set up by the defendants in an action for trespass by the plaintiff. An injunction is only granted to prevent the commission of an irreparable injury. If the arbitration is futile and useless, no wrong will have been done to the plaintiff. In *North London Railway Co.* v. *Great Northern Railway Co.* (1), an agreement between plaintiffs and defendants provided that any question or difference arising under the agreement should be referred to arbitrators. The defendants having claimed that differences had arisen between themselves and the plaintiffs, sought to have the dispute determined by arbitration under the arbitration clause in the agreement. They appointed an arbitrator, and the plaintiffs, under protest, appointed a second arbitrator. Subsequently the plaintiffs applied to the Queen's Bench Division

(1) 11 Q. B. D. 30.

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for an injunction to restrain the defendants from proceeding further with the injunction, and an injunction was granted. An appeal was taken, and it was held that the injunction was improperly granted, though the arbitration was in a matter beyond the agreement to refer, and would be futile and vexatious. In the course of his judgment, Brett, L. J., said: "The respondents (defendants) contend that they have the right to maintain the injunction, because they say it is clear that the subject-matter of dispute is not one within the arbitration clause in the agreement, and that therefore the arbitrators have no jurisdiction to proceed so as to bind the respondents, and if the arbitration is allowed to proceed the proceedings will be futile and vexatious and cause delay. On the other side, it is said that if the subject-matter of arbitration is beyond the jurisdiction of the arbitrators, then the respondents may stay away, and then, though it may be true that the arbitration will be futile, it will do no injury to the respondents and put them to no expense, nor stop them from proceeding in due course with the present action, and if it be vexatious, it is not a vexation of which the law can take notice. The question is whether, under those circumstances, the Court can issue an injunction. Now the cases before the *Judicature Act* would seem to shew that no Court would have issued an injunction in a case where, if the thing went on, there would be no legal injury. It is obvious, as it seems to me, that where, as it is here assumed, the whole matter is beyond the jurisdiction of the arbitrators, the fact of the appellants going on with that futile arbitration is no legal injury. Suppose an award was made the respondents could not bring an action on that account against the appellants. It would not be a cause of action known to the law. If they could not bring an action for it after the award they certainly could not bring an action before the award. Therefore, it seems to me, that before the *Judicature Act* neither the Court of Chancery nor any Common Law Court would have had any jurisdiction to issue an injunction to enjoin the appellants from proceeding with this futile arbitration, and I doubt whether under the

circumstances of this case any Court before the *Judicature Act* would have had any right to put the appellants to an election." See also *Farrar* v. *Cooper* (1), and *London Railway Co.* v. *Cross* (2).

W. A. Mott, for the plaintiff:—

Until the provisions of section 37 are complied with, the town has no power to expropriate the plaintiff's land, or to take any step in connection with an addition to the town's water system. The defendants are, at the present time, merely trespassers, and there is nothing to submit to arbitration. They are no more entitled to go upon the plaintiff's land than any stranger to the title would be. See *White* v. *Sandon* (3). The authority to the Town Council is a statutory one and must be strictly pursued.

1905. December 19. BARKER, J.:—

This is an application to continue an interim injunction granted by me on the 8th November last, whereby the defendants were restrained from appointing an arbitrator on behalf of the plaintiff for determining the value of certain property taken by the defendants from the plaintiff under and by virtue of the powers conferred on the town by Act 60 Vict., c. 58. The bill states that the defendants had, without the plaintiff's leave, taken possession of the property in question for purposes in connection with the water works system of the town, and that the town had never paid any compensation for it. The bill further alleges that such possession was taken in September, 1904, and that the defendants have built on the property in question a dam and reservoir of large proportions, in order to obtain for the town a good and sufficient supply of water for domestic and other purposes. It also appears that on or about the 7th day of October, 1905, in pursuance of a resolution of the Town Council, an offer by the town to pay $825 for the land was served on the plaintiff, and that he refused to

(1) 44 Ch. D. 323. (2) 31 Ch. D. 354.
(3) 10 B. C. 361

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accept this sum. The defendants thereupon, on the 27th day of October, 1905, caused a notice, signed by the mayor and town clerk and under the corporate seal of the town, to be served on the plaintiff, whereby, after reciting the taking of the said land, and the offer and refusal made to pay the $825 as compensation, the town requested the plaintiff to appoint an arbitrator to act with two other arbitrators to be appointed as provided by Act 60 Vict., c. 58, s. 9, to determine the value of the land in question. The bill then goes on to allege that the defendants had never submitted the question of the desirability of their taking "such action" (by which I understand the taking of the property and building the dam and reservoir thereon) to the ratepayers of the town, and the defendants' action in so constructing the dam and reservoir and taking possession of the property had never been approved by the ratepayers. The bill further alleges that the defendants were proceeding to expropriate the property under the provisions of Act 60 Vict., c. 58, and for that purpose they had appointed an arbitrator, and at their request the Governor in Council had appointed a third arbitrator. The plaintiff alleging that the proceedings were illegal because the vote of the ratepayers was a condition precedent to the right to arbitrate, applied for the injunction, and an interim order was granted on that ground.

The Act in question, 60 Vict., c. 58, seems to have been intended to accomplish three objects—(1) a general water system for the Town of Campbellton; (2) a lighting system; (3) a sewerage system. The first was to be carried out by the purchase of the existing works of "The Campbellton Water Supply Company," at a price to be agreed upon by the parties, or in case of disagreement, at a price to be fixed by arbitrators to be named as provided for in the Act. The Act contains, in addition to this power of acquiring the existing water system and property, a general power to provide a water supply for the town (sect. 6) and it makes provision for the expropriation of the property necessary for the purpose. It was, however, provided that the Campbellton Water Supply Company should be bought

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out, or its property acquired before the town could proceed to exercise the general powers conferred by section 6. See section 4. Section 37 is as follows: "Before the town council shall proceed to exercise the powers hereinbefore granted, either for the purchase or expropriation of the lands, buildings, pipes, reservoirs, hydrants, works, plant, water system and franchises of the Campbellton Water Supply Company, or for the purchase or expropriation of the property, plant, rights and franchises of any other company, or for the construction of any of the works authorized by this Act, such action in each case respectively shall be approved by the ratepayers of the town, to whom the town council shall submit the question of the desirability of their taking such action," etc. This vote is therefore a condition precedent to any action of the town in the way of exercising any of the powers conferred by the Act. Strange to say it no where appears in the papers before me, whether in fact any vote was ever taken under the section I have just quoted, or not, or if such a vote were taken, what was the particular action of the town under the Act which the vote authorized. Was it confined to the acquisition of the Campbellton Water Supply Company's property, or did it include the acquisition of property not owned by them under the general powers given to the town for establishing a water system. It does appear that the town did expropriate and now own the original water system, and the works and property of the company which introduced it; and if I were at liberty to assume anything as to the popular vote, I might perhaps with safety assume that there had been, in fact, a vote of the ratepayers taken under section 37, authorizing the town to acquire this property. It is not, however, in my opinion, necessary for the purpose of this motion that I should discuss this question of notice, because for other reasons the motion to continue the injunction must be refused. It is admitted that the property now in question is not included in the property acquired from this Campbellton Water Supply Company. It is an enlargement of a reservoir owned by them, and for that purpose the defendants have taken the plaintiff's property under the

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Act, and they are seeking by means of the procedure provided by the Act to have the amount of compensation established, that the sum may be paid. It is not the practice of this Court to restrain proceedings, the validity of which depends upon a condition precedent which has not been performed. Except, therefore, in cases of misconduct in an arbitrator, or corruption, or some such exceptional circumstance, this Court would not restrain arbitrators named in expropriation proceedings under an Act like this from making an award, simply because the award would be valueless, by reason of the whole proceeding being invalid for want of the requisite popular vote. The plaintiff has already recovered in one action, and it seems that he has others pending, for continued trespass upon his property by the town. If his position as to the want of notice is tenable, I presume he will continue to recover until some remedy is provided. If on the contrary he is wrong in his position, this Court ought not to restrain the town from setting the machinery in motion, which the Legislature has provided for ascertaining the compensation to which he is entitled. I cannot see that any injury can arise to the plaintiff by proceedings, which according to his contention are wholly illegal, and which therefore must turn out to be entirely useless. The cases which were cited on the argument, I think, fully support this view: *North London Railway Co.* v. *Great Northern Railway Co.* (1); *Farrar* v. *Cooper* (2); *London Railway Co.* v. *Cross* (3).

The motion will be refused and the injunction order discharged with costs.

(1) 11 Q. B. D. 30. (2) 44 Ch. D. 323.
(3) 31 Ch. D. 354.

In re THE CUSHING SULPHITE FIBRE COMPANY, LIMITED. 1906. *March 9.*

Practice—Judge's order—Power to Vary—Mistake—Application for leave to appeal.

A company against which a winding-up order had been made obtained at the instance of the large majority of its shareholders and holders of its bonds an order in an action by it against C., granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this Province confirming a judgment of the Supreme Court in Equity, and entrusting the conduct of the appeal to the company's solicitors. Subsequently the liquidators of the company moved to vary the order by adding a direction that the case on appeal should not be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of this Province refusing to set aside the winding-up order was determined, and that the company's solicitors on the appeal in the action against C. should act therein only on instructions of the liquidators or their solicitor:—

Held, that as there was no error or omission in the order resulting from mistake or inadvertence, and the order expressed the intention of the Judge who made it, the motion should be refused.

Principles upon which applications by shareholders of a company in liquidation for leave to appeal are to be dealt with, considered.

Summons to vary an order made by Mr. Justice *McLeod*. The facts fully appear in the judgment of the Court.

Argument was heard February 24, 27, 1906.

J. D. Hazen, K. C., for the application.

M. G. Teed, K. C., *contra*.

1906. March 9. BARKER, J.:—

On the 20th of February last Mr. Justice *McLeod*, under whose directions these winding-up proceedings are being taken, granted a summons returnable before me, and which he had requested me to hear, calling upon the company and George S. Cushing to shew cause why an

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order made by him in this matter on January 12, 1906, in reference to the appeal in the case of The Cushing Sulphite Fibre Company, Limited v. Cushing should not be varied. It seems that the company and a large number of shareholders and holders of the company's bonds applied to Mr. Justice *McLeod*, in November last, for leave to appeal to the Privy Council from the judgment of the Supreme Court of this Province which affirmed the decree made in that suit by the Court of Equity, and as part of their application they asked that the carriage and prosecution of such appeal should be entrusted to Messrs. Hanington, Teed & Hanington as solicitors for the appellants. On the hearing of the summons which was then granted, the learned Judge refused to give leave to appeal to the Privy Council, but stated that he would give leave to appeal to the Supreme Court of Canada. On the 12th January last he made the following order:—

IN THE SUPREME COURT.

IN THE MATTER OF THE CUSHING SULPHITE FIBRE COMPANY, LIMITED, AND ITS WINDING-UP, UNDER "THE WINDING-UP ACT," AND AMENDING ACTS.

Upon reading the affidavit of Mariner G. Teed, K. C., and hearing said Mr. Teed on behalf of the appellants hereinafter mentioned, I do order that an appeal may be taken and prosecuted to the Supreme Court of Canada in the name of the said, The Cushing Sulphite Fibre Company, Limited, from the order, rule or decision of the Supreme Court of New Brunswick, made and pronounced on the twenty-fourth day of November last, whereby an appeal by the said, The Cushing Sulphite Fibre Company, Limited, as appellants, against George S. Cushing, as respondent, taken from the decree of the Supreme Court in Equity of New Brunswick, dated the nineteenth day of January, A. D. 1904, made in a certain suit in said Supreme Court in Equity, wherein the said, The Cushing Sulphite Fibre Company, Limited, was plaintiff, and said George S. Cushing was defendant, was dismissed with costs; and I do further order that such appeal to the Supreme Court of Canada may be prosecuted by Messrs. Hanington, Teed &

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Hanington on behalf of the liquidators of the said company, and as solicitor for the appellants therein.

Dated this twelfth day of January, A. D. 1906.

(Signed) E. McLEOD.

Acting under this order, the solicitors gave notice of appeal and obtained an extension of the time to settle the appeal, and the defendant, George S. Cushing, at the same time applied for and obtained a similar extension as to his cross appeal. The present summons calls upon the company and Cushing to shew cause "why the said order above recited should not be varied so as to order the settling of the said case on appeal to be postponed until after judgment is given by the Supreme Court of Canada on an appeal to the said Court from the judgment of the Supreme Court of New Brunswick dismissing an appeal from the winding-up order made in this matter on condition that the defendant, George S. Cushing, agrees to all necessary postponements for that purpose, and also authorizing that Messrs. Hanington, Teed & Hanington should act therein only on instructions of the liquidators of the said company or J. Douglas Hazen, their solicitor." This summons was granted on the petition of the liquidators presented by Mr. Hazen as their solicitor. I cannot find anything in the petition or any of the affidavits which would lead me to suppose that Mr. Justice *McLeod*, in making the order in question, omitted anything or inserted anything by mistake, or that the order which he made differs in any particular from what he actually intended to make. If he did so, there is nothing in the papers before me to indicate it. It does appear by section 10 of the petition that the Judge had instructed Mr. Hazen, whom he had appointed to act as solicitor for the liquidators in the winding-up, to examine into the case on appeal and advise the liquidators as to whether or not the appeal should be prosecuted. It is further alleged in section 10 that the Judge stated that he would not allow the appeal to proceed in the meantime, that is, until Mr. Hazen's opinion was obtained, but would

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merely make an order extending the time to settle the case on appeal so that the plaintiffs would not be out of Court. That intimation was acted upon by the extension of the time, as I have already mentioned. Section 12 of the petition states that Mr. Hazen has advised the liquidators that he has carefully considered the judgments delivered by the Judges on appeal and their reasons, and after such examination and consideration he has advised them that the appeal will not be successful. This is, therefore, not a case of correcting an error or omission resulting from mistake or inadvertence which is made right as of course,* but the variation now asked for will, if granted, render the order valueless to the appellants. Mr. Teed on behalf of his clients applied for leave to appeal to His Majesty-in-Council, and for the carriage and control of the proceedings. Mr. Justice *McLeod* said: "I will not grant you that, but I will allow you, on behalf of your clients, to appeal in the name of the company to the Supreme Court of Canada," and the order which he made for that purpose, gave their solicitors control of the proceedings, as no doubt it was intended to do, for without that the order would be of very little use to the appellants. The change in the order which is now asked for converts it from an order giving Partington and his associates, who really own about nine-tenths of the assets of the company and its stock, leave to carry on this appeal in the name of the company, and to control these proceedings, into one giving the liquidators control over them, to be stopped or proceeded with as they may choose to direct. The change in the order would, to my mind, render it perfectly useless to Partington and those who wish the appeal to proceed, especially as Mr. Hazen has already advised the liquidators that the appeal cannot succeed, and thus placed them in a position in which they cannot very well take the risk of going on with it. I dare say Mr. Hazen is right in his view; it is, at all events, in accord with that of a majority of the Judges, myself among the number, but that

* See *Preston Banking Co.* v. *Allsup* [1895] 1 Ch. 141; *Ainsworth* v. *Wilding* [1896] 1 Ch. 673.—REP.

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is not the only consideration in a matter of this kind. It would be a very good reason for not allowing an appeal at all, or at all events without the liquidators being indemnified against costs, but this application is not made for either of these objects. This appeal involves questions by no means free of difficulty; it involves a claim of some $40,000 of which the decree only gives the plaintiffs between $2,000 and $3,000. If the appeal is successful that money would be recovered by the company for the benefit of creditors and shareholders. Why should liquidators who represent these shareholders and creditors throw obstacles in the way of an appeal, involving as it does the possibility of so large an addition to the company's assets? I confess I cannot see. The judgment of this Court was not unanimous, two Judges dissented and according to their view the plaintiffs were entitled to thousands of dollars more than they were allowed by the original decree. In one of the applications in this matter before me recently, Mr. Hazen stated that Mr. Justice *Davies*, in disposing of an application for leave to appeal, said, that the Court was divided in opinion, and therefore, as a rule, the leave was given as a matter of course, because no one could say the case was not arguable. That was an appeal in an interlocutory matter of no great importance. Why should not the principle apply to a final decree involving so large a sum as that does? In *Montreal Street Railway* v. *Montreal City* (1), it appeared that the case had been before the Superior Court and Court of King's Bench in Quebec, and the Supreme Court of Canada, and in the result six Judges favored one view and five a contrary one. The Judicial Committee said: "Under these circumstances their Lordships had no hesitation in humbly advising His Majesty to allow special leave to appeal to the King-in-Council."

In *In re Armstrong* (2), the Divisional Court refused leave to appeal from their decision, but leave was granted by the Queen's Bench Division. Lord Esher says: "The

(1) [1906] A. C. 100. (2) 17 Q. B. D. 521.

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jurisdiction which the Judges of the Division Court have to give or to refuse leave to appeal from their own decision is a very delicate one. Merely to say that they are satisfied their decision is right is not, I venture to suggest, a sufficient reason for refusing leave to appeal, when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case." Of course there may be other considerations entering into the question where a company is in liquidation, as here. Take this present case as an illustration. These liquidators may not feel justified, after being advised as they have been, in prosecuting an appeal likely to fail, although it is from a decision of a divided Court and the amount at stake is large. Or they might, in view of the uncertainty of their own position, hesitate in accepting the responsibility of either going on with the appeal or refusing to do so. But where the parties, as in this case, are the shareholders and creditors of the company, and represent so large a majority of those interested in it, simply ask leave to carry on an appeal in the name of the company, not only at their own expense and for the company's benefit, but are willing to indemnify the liquidators against loss or expense, the objections which I have mentioned are no longer of weight, because the company, if the appeal is successful, will naturally add to its assets, and if it fails the liquidators are at no loss. It appears by the affidavit of Mr. Teed, now before me, that upon the hearing of the application for leave to appeal, an objection was raised as to the expense which would be incurred, and in answer to that he then, on behalf of the applicants, offered to give to the liquidators any reasonable indemnity against costs that might be required, but that Mr. Justice *McLeod* stated that he did not think it was a case in which such security should be given; that if the appeal succeeded, the assets of the company would receive the benefit, and if the appeal failed, that they should bear the loss, or to that effect. That, no doubt, is a very good rule, but it cannot be said

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to be of universal application. And this present case seems to me to be one where all objections to granting the leave are met by the offer of indemnity. I myself should have exacted the indemnity as a condition to granting the leave. In *In re Silver Valley Mines* (1), Sir George Jessel discusses at some length the rights of liquidators as to costs of appeals. At page 387 he says: "There is another course which the liquidator sometimes takes. Instead of applying to the Judge he goes to the parties interested and says, 'Will you indemnify me against costs if I appeal?'" Later on he says: "Of course, he still can appeal in perfect safety if he can get the person interested to indemnify him as to the costs."

Entertaining the opinion which I have intimated, it is impossible for me to grant the order asked for. If I were to vary Mr. Justice *McLeod's* order at all, it would be only to add to it a condition requiring the appellants to indemnify the liquidators as I have mentioned. But I could not force on them a change in the order which they did not ask for, and which perhaps they do not want. At most I could give them the option of accepting an order in these terms. But as Mr. Justice *McLeod* has already refused to make an order of that kind, it would be out of place for me to renew the suggestion. I have no alternative except to dismiss this application with costs.

(1) 21 Ch. D. 382.

1906.

March 20.

LOGGIE v. MONTGOMERY.

Easement — Origin in grant — Prescriptive title — Evidence — Referee's deed — Proof of decree.

In 1854, R. B., owner of Lot 8, conveyed the northern part thereof to M., together with the privilege of taking water thereto through a pipe, which M. was empowered to build, from a spring on the southern part of the lot. By mesne assignments M.'s lot, with the water privilege, became vested in J. B. In 1871 he executed to S. for 21 years, with covenant for renewal, a lease of the spring, with a right to lay a pipe therefrom through the southern part of Lot 8 to Lot 9. The ownership of the southern part of Lot 8 was then in H., and in 1905 became vested in the defendant. In 1872 S. built a pipe from the spring across H.'s land to Lot 9, and it has been in uninterrupted use ever since, a period exceeding 20 years. In 1904 Lot 9, with the lease, was assigned to the plaintiffs. The plaintiffs' predecessors in title always rested their right to the easement on the lease and not upon adverse user:—

Held, that a prescriptive title to the easement could not be set up.

A deed of a Referee in Equity, though purporting to have been made under a decree of the Court, is not admissible in evidence without proof of the decree.

Bill for an injunction. The facts fully appear in the judgment of the Court. At the hearing plaintiffs offered in evidence a registered conveyance of land dated May 7, 1892, executed by E. H. McAlpine, Referee in Equity, to Francis E. Winslow. The conveyance purported to be made under a decretal order of the Supreme Court in Equity, made December 12, 1891, in a suit between the Bank of Montreal, plaintiffs, and the New Brunswick Trading Company, Limited, in liquidation, and Caldwell Ashworth, liquidator, defendants. Objection was taken to the admissibility of the deed until proof of the decree under which the deed purported to have been made was given.

Pugsley, A.-G.:—The decree cannot be found. It is submitted that section 201 of chap. 112, C. S. 1903, providing that a registered conveyance by a Referee referring to the decree under which the conveyance is made shall be

evidence that all the proceedings on which such conveyance was founded were rightly had, dispenses with original proof of the decree.

BARKER, J.:—I think the decree must be proved.*

R. R. Ritchie, former Deputy Clerk in Equity, was examined as to minutes kept by him.

To *G. W. Allen*, K.C.:—It was not my practice to draw decrees; the papers were sent to the Clerk, who would draw them.

E. G. Kaye gave evidence that he was solicitor for the defendants in the suit of the Bank of Montreal against the New Brunswick Trading Company, Limited, in liquidation, and Caldwell Ashworth, liquidator, and produced copy of minutes of decree in suit and appointment by Clerk to settle the same.

Allen, K.C., objected to its admissibility on the ground that there is no proof that there was a decree or that minutes were ever settled. The paper was not pressed for the present.

T. C. Allen, K. C., Clerk of the Pleas and Clerk of the Supreme Court in Equity, gave evidence that he had found on file a number of papers in the suit, including bill and interrogatories, and a report by Referee in Equity, E. H. McAlpine, on a reference to him to take accounts. On it was an indorsement dated 12th December, 1891, in the handwriting of and signed by the late W. H. Fry, then official stenographer of the Court, stating that the report was ordered by Mr. Justice *Palmer* to be confirmed and the property mentioned therein to be sold by the Referee; that the motion was made by C. W. Weldon, Q. C., for plaintiffs; E. G. Kaye, for defendants, being present.

* See *Jarvis* v. *Edgett*, 1 All. 66; *Doe dem. Stevens* v. *Robinson*, Chip. MSS. 492; *O'Brien* v. *Cogswell*, 17 Can. S. C. R. 420; *Soules* v. *Donovan*, 14 U. C. C. P. 510; *Hutchinson* v. *Collier*, 27 U. C. C. P. 249.—REP.

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The Court accepted it as a minute of the Judge's decree.

Mr. Allen then gave evidence that copy of the minutes produced by Mr. Kaye is a copy of minutes drafted by him (Allen) from minute endorsed on Referee's report. He also stated that he had made search and could find no decree in the suit; that the decree ordinarily would be sent to plaintiffs' solicitor; that he had no record of drawing up decree or of sending out the same, or that minutes were settled; that it is customary to record the decree in his office upon the minutes being settled, but no record had in this instance been made.

Pugsley, A.-G., offered in evidence draft minutes of decree.

Allen, K.C., objected that there must be proof of decree; that the minutes were settled and a decree made.

Pugsley, A.-G.:—The decree was that made by Mr. Justice *Palmer*. Evidence has been given that the Clerk merely draws up minutes of the decree.

Teed, K.C.:—There must be a decree drawn up by the Clerk before the Referee can act.

BARKER, J.:—I will admit it, subject to objection, as secondary evidence that a decree was made.

Witness, to *Allen*, K.C.:—If minutes were settled and a decree made it would ordinarily be recorded. I would not, however, say that minutes were not settled. The draft may have been lost after the minutes were settled.

To BARKER, J.:—The fact that the fee on the decree was paid would be evidence that decree was completed and taken out.

H. H. McLean, K.C., called.

To *Pugsley*, A.-G.:—I was a member of the firm of Weldon & McLean, the solicitors for the plaintiffs, in the

suit of the Bank of Montreal against the New Brunswick Trading Company, Limited, in liquidation, and Caldwell Ashworth, liquidator. There was a final decree. I do not know where it is.

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The deed was then admitted in evidence.

Argument upon the case was heard October 13, 1905.

W. Pugsley, A.-G., and *L. J. Tweedie*, K. C., for the plaintiffs:—

Under the conveyance from Robert Blake to Marshall, Marshall could take the pipe from the spring to any point north of the highway. The same right passed by the different mesne assignments to John Blake, and empowered him to lease the spring to Stewart with a right to convey the water to the mill property. Immediately after the making of the lease, which was in 1871, Stewart placed the aqueduct in its present position, and it has been in use ever since. In addition to a documentary title the plaintiffs are entitled to the easement by prescription. See *Ring* v. *Pugsley* (1), and c. 156, s. 2, C. S. 1903. The right of the dominant owner to enter the servient tenement, carries with it the right to prevent the servient owner from doing anything which would hinder him from repairing the pipe. If the defendant is permitted to build above the pipe, the right which heretofore we have enjoyed without interference, of taking up and cleaning the pipe, will be greatly obstructed. The case therefore, is one proper for an injunction. In *Goodhart* v. *Hyett* (2), it was held that if the owner of a house has an easement of getting his supply of water through pipes under his neighbor's land, he can restrain the neighbor from building on the land so as to render it impracticable for him to get at the pipes for repairs.

G. W. Allen, K. C., *M. G. Teed*, K. C., and *R. A. Lawlor*, K. C., for the defendant:—

(1) 2 P. & B. 303. (2) 25 Ch. D. 182.

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The easement granted in the deed from Blake to Marshall can only be appurtenant to or connected with that part of Lot 8 lying to the north of the highway conveyed to Marshall. No right could be granted by it to take the water through the defendant's land to the mill property. An easement must inhere in the land and must concern the premises conveyed, or the mode of occupying them, so as to be appurtenant to them. See *Ackroyd* v. *Smith* (1); *Purdom* v. *Robinson* (2). The easement could not be granted for the use of Lot 9. Even if the deed to Marshall did give him a right to take the water anywhere, it would not be a covenant running with the land. As a grant in gross it would be personal to Marshall and not assignable. Blake's lease to Stewart is of no avail to the plaintiffs, for Blake had no title to that part of Lot 8 lying to the south of the highway. It was then in the ownership of Hutchison. Neither he nor any subsequent owner of that part of the lot had any knowledge of the laying of the pipe by Stewart, or was privy to Blake's arrangement with Stewart. No case has been made out for an injunction, even if the easement were established. See *Doherty* v. *Allman* (3); *Clarke* v. *Clark* (4); *Robson* v. *Wittingham* (5). Under s. 33 of c. 112, C. S. 1903, damages will be awarded in lieu of an injunction. See *Kino* v. *Rudkin* (6); *Holland* v. *Worley* (7).

[*Pugsley*, A.-G.:—In a case of continuing actionable nuisance, damages instead of an injunction are rarely given: *Shelfer* v. *City of London Electric Lighting Co.* (8).]

Goodhart v. *Hyett* is quite distinguishable. It was there shewn that there was no way to ascertain where repairs to pipes were needed except by tunnelling under the walls of the building. In the present case the pipe will always be accessible, and the expense of maintaining it or making repairs to it will be in no wise increased. To

(1) 10 C. B. 164.
(2) 30 Can. S. C. R. 64.
(3) 3 App. Cas. 709.
(4) L. R. 1 Ch, 16.
(5) L. R. 1 Ch. 442.
(6) 6 Ch. D. 160.
(7) 26 Ch. D. 578.
(8) [1895] 1 Ch. 287.

establish an easement by user it would have to be shewn that it was uninterrupted, continuous and adverse for twenty years. While Mrs. McKnight was the owner of the servient tenement the time would not run, she being under disability: *Melvin* v. *Whiting* (1). The *Prescription Act*, c. 156, C. S. 1903, does not place the plaintiffs in any better position than they were at common law. See *Palk* v. *Shinver* (2).

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The plaintiffs are a firm carrying on an extensive fish business, at Loggieville, in the Parish of Chatham, and other places in the Province, and elsewhere. In October, 1904, they purchased a steam saw-mill and property, situate at Loggieville; what is known as the Black Brook mill property. It lies on the north side of the highway road, between the road and the river Miramichi, and is a part of Lot No. 9. In April, 1905, the defendant purchased a lot of land on the opposite or southern side of the road, a part of Lot No. 8, which seems to have been granted to one John Blake, though not the person of that name who made the lease out of which this suit arises. Lot No. 8, by the description in the conveyances, contained 200 acres. It is bound on the west by Lot No. 9, and extends from the river southward some distance beyond the highway road. In addition to the mill property, purchased in 1904, the plaintiffs had acquired, before this suit was commenced, the greater part of Lot No. 8 to the south of the road, and a portion of Lot No. 9 on the same side. Among the lots of land included in the southern part of Lot 8 is a lot conveyed to them by one Mary Lantaigne, in August, 1904, which lies to the west of the defendant's lot. With the exception of a dispute as to the division line between these two lots, there is no dispute between the parties as to the title to the lands in reference to which this litigation arises. The dispute arises over the use of a certain spring of water and its diversion through underground pipes from its

(1) 13 Pick. 184. (2) 22 L. J. Q. B. 27.

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source to the plaintiffs' mill, running through the defendant's lot of land, which the plaintiffs claim as secured to them as owners of the mill to be used in its operation. It is alleged in one of the amendments made to the bill that previous to February, 1854, one Robert Blake, who is the father of the present John Blake, was seized in fee and in possession of this Lot No. 8. This fact is not disputed by the defendant. In fact he acquires his title to his own lot through Robert Blake by the following conveyances: Robert Blake to Richard Hutchison, dated March 26, 1867, conveying all of Lot 8; Richard Hutchison to Joseph McKnight, dated October 9, 1873, a part of Lot 8; Joseph McKnight to Alice McKnight, June 4, 1886; and Alice McKnight to the defendant, April 13, 1905. The plaintiffs' title, so far as it is important for the purposes of this case, is as follows: In 1871 the mill property was purchased by Guy, Stewart & Co. from the Honorable Peter Mitchell, and a conveyance dated Nov. 1, 1871, was executed to John Stewart, a member of that firm. On the dissolution of that firm, in 1878, this mill property, together with two lots on the south side of the highway—a part of Lot 9—one of which was purchased in 1873, and the other in 1874, and a third lot on the north side of the road, part of Lot No. 8, purchased by John Stewart from John Blake in 1874, to which I shall refer more particularly further on, were conveyed by John Stewart to Richard George Guy, one of the partners, as a part of his share of the partnership property. That conveyance is dated February 1, 1878. In 1871 Stewart had acquired by lease from John Blake the right to use the water and maintain the pipes as I have already mentioned. That lease is dated December 18, 1871, and it was registered December 19, 1872. By a second conveyance from Stewart to Guy, dated February 1, 1878, this water lease was assigned to Guy. By a conveyance dated December 4, 1885, Guy conveyed the mill and other properties in the first deed from Stewart to Guy to the New Brunswick Trading Company, and by a second deed, dated January 30, 1886, Guy assigned the water lease to the same

company. By virtue of a decree of the Court of Equity made in a foreclosure suit, E. H. McAlpine, as Referee in Equity, sold, and by a conveyance dated May 7, 1892, transferred all these properties, including the water lease, to Francis E. Winslow. On the 21st July, 1896, Winslow conveyed to Vaughan. He conveyed to Bentley on September 14, 1901, and Bentley conveyed to the plaintiffs on October 8, 1904.

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The spring of water in question is a natural spring rising to the surface on the back part of Lot No. 8, at a point within lands now owned by the plaintiffs. So far as one can tell from the evidence, and the plan made by Fish, which is also in evidence, the natural flow of the water from the spring was down the easterly part of the lot until it discharged into the Miramichi river. That, at all events, was its course in 1854, when Robert Blake made his conveyance to Robert Marshall. By that conveyance, which is dated February 3, 1854, Robert Blake conveyed to Robert Marshall all that part of Lot 8 lying north of the highway road, and lying between Lot No. 9 on the west and the rivulet, that is, the water from this spring which I have mentioned, on the east, except the school lot. The Attorney-General, on his examination of Blake, after reading him the description of the lot from this conveyance, asked this question: "Is this correct, that included that part of Lot 8 which was on the north side of the highway, with the exception of the centre of the lot?" The witness answered, "Yes, down to the rivulet." Marshall's conveyance, after giving this rivulet or brook as the eastern boundary of the lot and otherwise describing it, contains the following clause: "Also the right and privilege of carrying and conveying the waters of the said spring in the field on the south side of the said highway from within forty feet of the head of the said spring where it at present rises, through a trench or drain to be cut through the said field to any point that the said Robert Marshall, his heirs or assigns, may think fit, on the north side of the Queen's highway, into the lands above described, and thence into the river by such drain, trench or channel, and

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for that purpose to enter into the said lands on the south side of the said highway (and without doing damage to any growing crop), at all reasonable times, with workmen to make such drain or trench, and to repair, amend or cleanse the same whensoever the said Robert Marshall, his heirs and assigns, shall think necessary; and also to view the state and condition of such drain, trench or channel and the waters flowing through the same; and also, whenever the said Robert Marshall, his heirs or assigns, shall think fit to close up any such drain or trench, he or they shall be at liberty to open another drain or trench through the said field to the north side of the highway and lay down pipes to convey the water of the said spring, or so much thereof as he or they shall think fit, through such pipes of sufficient depth below the surface to be free from injury in ploughing, which drain or trench shall be kept covered, except when it shall be necessary to enter upon and repair the said pipes, which the said Robert Marshall, his heirs or assigns, shall be at liberty at all reasonable times to do without doing any damage to growing crops; and also, when such pipes shall be laid down, the said Robert Marshall, his heirs or assigns, shall be at liberty to place in the said spring, or the stream therefrom, not less than forty feet from the fountain head, a tank reservoir or other vessel for protecting and securing the said stream in entering and flowing thereout into the said pipes, and at all times to enter and repair the same, and to view the state and condition thereof, together with all the rights, members, privileges and advantages to the said piece of land above described belonging." The conveyance also contained the following covenant: "And the said Robert Blake, for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said Robert Marshall, his heirs and assigns, that he, the said Robert Blake, his heirs and assigns, shall at all times hereafter keep the waters of the said spring in the said field south of the front highway free and clear of all incumbrances or obstructions, and shall not suffer or permit the said waters of the said brook flowing from the

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said spring, or the fountain head, to be troubled, polluted, or in any wise injured in passing through any drain or trench that may be made to carry the same to the lands above described, but the said spring and the waters thereof, and the channel for the same to reach the said lands shall be free and clear of all injury, interruption or incumbrance by him, the said Robert Blake, his heirs and assigns, at all times hereafter."

This lot, together with the water privileges appurtenant to it, was conveyed by Marshall to Davidson by deed dated June 27, 1857; by Davidson to Hutchison by deed dated April 29, 1859; and by Hutchison to John Blake by deed dated November 20, 1861. John Blake, by deed dated October 15, 1874, conveyed a part of this lot to John Stewart, who subsequently conveyed to Guy, as I have already stated. The part of the lot conveyed extended from the south-east angle of the school lot, on the north side of the highway, 581 feet easterly along the northern side of the highway; the eastern boundary ran from that point N. 30° E. to the shore of the river. The total distance from the school lot to the rivulet or brook, measured along the northern side of the highway, is 916 feet, so that Blake retained a strip of the Marshall lot, 335 feet wide (speaking generally), extending from the highway to the river, having the rivulet for its eastern boundary, and the eastern line of the lot sold to Stewart for its western boundary. He severed the dominant tenement, for the benefit of which the easement granted by the conveyance from Blake to Marshall was created. This conveyance from John Blake to Stewart contains no reference whatever to this easement, but does convey "all houses and outhouses erected on the lot, also the right of way, all waters, water courses, water privileges and improvements thereunto belonging or in any wise appertaining." It appears from these conveyances that when Stewart purchased the mill property from Mitchell and entered into the lease with John Blake for the use of the water, Blake was the owner of that part of Lot No. 8 lying north of the highway, and entitled, as such, to the benefit of the easement as to the

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spring and the use of the water appurtenant to it, as granted by the conveyance from Robert Blake to Marshall.

The plaintiffs in their original bill, upon which, as verified by one of their number, and the affidavit of one other person, an injunction was granted by Mr. Justice *Landry*, set out at length the lease made by John Blake to Stewart, and it is upon that, and upon that alone, the plaintiffs rested their rights to the use of the water and to its flow through the pipes to their mill. Two amendments have been made to the bill so as to enable the plaintiffs, if they could do so, to sustain their contention on other grounds. It will be convenient to dispose of the first contention before stating the others. The lease is as follows:—

"Memorandum of Agreement, made this 18th day of December, in the year of our Lord one thousand eight hundred and seventy-one, between John Blake, of the Parish of Chatham, in the County of Northumberland, in the Province of New Brunswick, farmer, of the one part, and John Stewart, of the City of St. John, in the said Province, merchant, of the other part: Witnesseth, that the said John Blake, in consideration of the covenants and agreements hereinafter contained on the lessee's part to be done and performed, and also in consideration of the sum of five shillings of lawful money of New Brunswick, to him in hand paid by the said John Stewart at or before the ensealing and delivery of these presents, the receipt and payment whereof is hereby acknowledged, hath demised, leased, let and to farm let, and by these presents doth demise, lease, let and to farm let unto the said John Stewart, his executors, administrators and assigns, all that spring of water situate and being on the lands of the said John Blake, occupied by him in the said parish, on the southerly side of highway, and southerly from the steam mills of him, the said John Stewart, known as the Black Brook Mills; also the right and privilege of entering at all times with his agents, workmen, teams and necessary appliances upon the said lands, and digging thereon and making and maintaining a proper and sufficient reservoir or fountain at or near the said spring, to preserve and hold

the waters of the said spring, or other springs or sources of water adjacent thereto, and also to dig and make all necessary trenches, and to lay, place and maintain an aqueduct or pipes of the size of not less than three inches diameter in the bore to carry and convey the waters from the said spring or reservoir over and through the said lands to the said mills, doing no unnecessary damage to the said lands and property, filling up the said trenches and covering the said aqueduct, and laying and maintaining a branch aqueduct and pipes not less than one inch bore from the said main aqueduct to the south side of the highway, and opposite to the dwelling house of the said John Blake, such branch aqueduct to be secured by a proper cock or faucet, and no water to be allowed to go to waste through the same or more used than required for the domestic purposes of the said John Blake at any time while the said mill is in operation. To have and to hold the said spring and right of water and of directing and conveying the same and other the privileges and premises hereby demised, with all the rights and appurtenances appertaining to the same or necessary for the full enjoyment thereof to him, the said John Stewart, his heirs, executors, administrators and assigns, for and during and until the full end and term of twenty-one years from the day of the date hereof. And the said John Blake, for himself, his heirs and assigns, doth hereby covenant, promise and agree to and with the said John Stewart, his heirs and assigns, that at the expiration of the said term he or his aforesaids shall and will renew the lease of the said premises and privileges for the further term of twenty-one years from the expiration hereof, on the same terms and conditions as are mentioned and contained herein, and with a similar clause for renewal.

In witness whereof," etc.

This instrument is under seal; it was proved by the subscribing witness on December 19, 1871, and registered a year later—December 19, 1872. Section 5 of the bill alleges that "at the time of making this agreement John Blake was in possession of the said lands and premises, but the legal title thereof was in the Honorable Richard Hutchison, of

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Douglastown, who had agreed to sell the said lands and premises to the said John Blake; the said John Blake made contracts regarding the said lands with the assent of the said Richard Hutchison, and the said agreement in the last paragraph of this bill mentioned was made with the knowledge and consent of the said Richard Hutchison." I refer to this particularly to shew that the plaintiffs' case put forward in the bill in its original form was that the lease was made with the knowledge and consent of Hutchison, who was the legal owner of the land, and under circumstances from which an authority to make it would be implied. The evidence entirely failed in shewing either the one or the other. Blake, the only witness examined on the point, could not state that Hutchison ever heard of the lease or the pipes being laid, or knew anything about them. He does state that he negotiated the sale of the McKnight lot, and that Hutchison carried it out by executing a deed of it. There may have been another instance of a similar kind, but these sales were all made long after this lease was made. The McKnight sale is the only one of which we have the particulars, and the deed of that lot is dated October 9, 1873, well on to two years after these pipes were laid down and in use. The only other ground relied on as conferring any authority is that Blake had some agreement with Hutchison to purchase the property, and he was in possession of it because he lived on the property without paying rent. No evidence of any such agreement was produced except a loose statement by Blake, but if such an agreement existed, it would confer no such authority as is claimed. This lease expired in 1892—twelve years before this suit was commenced, and eleven years before the plaintiffs purchased the mill—and it has never been renewed. To whom are the plaintiffs to look for a renewal in accordance with Blake's covenant? Surely not to Hutchison's heirs or assigns on the ground that Blake had authority to bind them. The plaintiffs cannot maintain their bill as it originally stood. On the 6th July, 1905, I made an order allowing the plaintiffs to amend their bill by inserting allegations of the conveyance of the lot north of the road

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by Robert Blake to Marshall and the subsequent conveyances by which John Blake acquired the lot with the easement created and granted in Marshall's conveyance. The second contention made is that the lease made by John Blake to Stewart is binding on the owners of the servient tenement—the defendant among the others—as an exercise by him as owner of the dominant tenement of the right given to lay conduit pipes through the southern part of Lot 8. Immediately after the lease was made Stewart built a reservoir at the spring and laid a wooden pipe from the reservoir in a straight line to his saw-mill, a distance of 1618 feet, about three feet under ground. This pipe line goes diagonally through the defendant's lot and crosses the northern side of the highway some feet westerly of the point at which the division line between Lots 8 and 9 intersects the line of the highway. Another reservoir was built at the mill, which is supplied by a branch pipe which taps the main pipe some 160 feet before it reaches the mill, and is itself about 162 feet long. There is or was originally somewhere about 450 feet of this pipe in Lot No. 9. The reservoir at the mill was used as a protection in case of fire, and the residents of that part of the village took water from it for domestic purposes. The branch was laid to the southern side of the highway, opposite Blake's house, and there was in fact none of the pipe laid in Lot No. 8 north of the road, all of it being in No. 9. It is obvious, from the nature and contents of the lease in question, that it was never intended as an exercise of any right acquired under the sale to Marshall. But assuming that it was so intended, are the plaintiffs in any better condition? I think not. The effect of the lease is to divert the whole spring for all time to Lot No. 9 for the benefit of the mill there, and the easement granted solely for the benefit of the front part of Lot 8 has been transferred so as to enure solely to the benefit of No. 9. As owner of the dominant tenement, he (Blake) might have released the servient tenement of the burden imposed upon it, but he could not, in the exercise of a power to change the method of enjoying the easement, convert it into one for the benefit of another tenement

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altogether. In *Purdom* v. *Robinson* (1), the Chief Justice says: "In *Ackroyd* v. *Smith* (2), which may be considered the leading case on the point, the question was raised distinctly on demurrer whether the defendant could, under a grant of a right of way as incidental to the enjoyment of a particular close, make use of this way for his own purposes irrespective altogether of its use in respect of the dominant tenement to which it was originally made appurtenant. The defendant there claimed as an assignee of the right of way from the original grantee. It was held first that the road was granted only for purposes connected with the occupation of the land conveyed, and therefore could only be used as connected with that land. It was, however, further determined that even if the original grantee did acquire under the grant a more extensive right, a personal right to use the way irrespective of the land granted, that was a mere personal license which could not be granted or assigned over by the original licensee, since there is not known to the law such an interest in land as an easement in gross." See also *Skull* v. *Glenister* (3).

A second amendment was made to the bill by which it is alleged that these pipes were laid down in the year 1872 for the purpose of conducting the water of this spring to the plaintiffs' mill, and from that time until the defendant exposed the pipes in the course of his excavations, a period of over twenty years, the water had uninterruptedly flowed through them to the mill, and that during that period the pipes had been kept and maintained as of right, and the water was used and enjoyed as of right, whereby the plaintiffs, as owners of the mill, had acquired a right for all time to have, use and maintain the said pipes through the defendant's lot of land, and to enter on the same when it is necessary to do so for the purpose of repairing the said pipes.

The evidence, I think, shews that from the time the pipes were laid in the early part of the year 1872

(1) 30 Can. S. C. R. 64, 71. (2) 10 C. B. 164.
(3) 16 C. B. N. S. 81.

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they have been used and maintained for conducting the water of the spring to the mill, and that the water had been, for over twenty years previous to the defendant's purchase of his lot, used without interruption as is alleged. Reference was made to section 2 of the *Prescription Act*, c. 156, C. S. 1903, but as the first seven sections of that Chapter do not come into force until January, 1910, any prescriptive right which the plaintiffs claim must be established, if at all, outside of that Statute. It has, however, been long settled, quite irrespective of the Prescription Acts, that as to easements such as that involved in this case, and which lie in grant, an uninterrupted user for twenty years or more, of itself ripens into an indefeasible title to the easement where the enjoyment has been adverse, unless there is evidence which rebuts the presumption of a grant which arises from such user. In *Angus* v. *Dalton* (1), Lush, J., speaks of the doctrine thus: "But it afterwards came to be settled law that an uninterrupted possession of light, water, or any other easement, for twenty years afforded a ground for presuming a right by grant, covenant, or otherwise, according to the nature of the easement; and if there was nothing to rebut the presumption a jury might, and should be directed to act upon it." In that same case on appeal, *Dalton* v. *Angus* (2), Lord Blackburn describes this doctrine in this way: "That a jury ought to be directed that if they believed that there had been what was equivalent to adverse possession as of right for more than twenty years, they ought to presume that it originated lawfully, that is, in most cases, by a grant." In *Cross* v. *Lewis* (3), Bayley, J., says: "I do not say that twenty years possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right, and ever since the decision of *Darwin* v. *Upton* it has been held that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it." And in *Campbell* v. *Wilson* (4), Lawrence, J., says: "No doubt but that adverse enjoy-

(1) 3 Q. B. D. 85, 90.
(2) 6 App. Cas. 740, 812.
(3) 2 B. & C. 686.
(4) 3 East, 294.

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ment of a right of way for twenty years unexplained is evidence sufficient for the jury to found a presumption that it was a legal enjoyment. But it has been said if the enjoyment were shewn to have originated in mistake, however adverse it may have been, that is against the presumption. For if in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it was exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time." See also *Ring* v *Pugsley* (1).

The present case is not complicated by any question of a lost grant. We have in evidence the title under which the plaintiffs claimed by their bill, and the title under which Stewart originally put down these pipes in 1872, and the title under which he and the subsequent proprietors of the mill property have used and maintained the flow of water through these pipes from the spring to the mill. The lease from Blake is set out at length in the plaintiffs' bill as the origin of their title, and the only title to this easement which they are now seeking to establish as a burden on the defendant's land. It was assigned by Stewart to Guy, and by him and the subsequent owners of the mill property down to the plaintiffs, not as a mere right appurtenant to that property, but as a special right or easement acquired altogether separate and distinct from the property, and by a separate and different title. In point of form it is a lease for twenty-one years with a covenant for renewal. The privilege reserved by Blake to have a branch pipe carried from the main to a point on the southerly side of the road, opposite his house, in order to procure a supply of water for his own domestic purposes, is in the nature of a continuous rent or compensation to him for the rights and privileges granted to Stewart. It seems to me altogether impossible to say that the enjoyment of this right by the plaintiffs, and by Stewart and the others

(1) 2 P. & B. 303.

under whom they claim, is referable to any other origin or any other title or authority than the lease in evidence. That it was made by Blake without either the knowledge or authority of the legal owner of the land sought to be burdened by it, can make no difference to the plaintiffs' position as against the defendant. However faulty Stewart's title as derived from Blake was, it was under that title that he and his successors in title acted and always claimed; and the plaintiffs can not now convert either his or their enjoyment under the lease, of the privileges secured by it, into an adverse possession upon which to found a prescriptive right to the easement, on the ground of a twenty years' uninterrupted enjoyment.

The plaintiffs are seeking to restrain the defendant from erecting a building on land purchased for that purpose in 1904, on the ground that their right to maintain these water pipes through his lot in their present position would be thereby invaded; that their right of access, for the purpose of making repairs, would be seriously interfered with, and the pipes themselves, exposed as they are by reason of the excavations made for a cellar under the building, will be endangered and rendered liable to injury. The plaintiffs' claim is, that the lease from John Blake to Stewart, under which these pipes were laid through what is now the property of the defendant, but which was at that time the property of Richard Hutchison, created an easement subject to which the property now is. John Blake did not at that time own this lot, and in fact he never owned it. Neither was the lease, as I have already pointed out, made either with the knowledge or by the authority of Hutchison, who owned the lot, and through whom the defendant claims title. The plaintiffs lease expired in 1892, and has never been renewed. They could not to-day compel the defendant, who is the assignee of the owner of this lot when the lease was made, nor could Blake have compelled Alice McKnight, who owned it in 1892 when the lease expired, to join in any renewal, for Blake's covenant for a renewal was in no way binding on them. They are not his assignees and do not claim under

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him in any way. How can they now continue this servitude over the defendant's land, when their only title is an expired lease of which they are powerless to obtain a renewal, and when the defendant purchased without any actual notice, and so far as is suggested without any constructive notice of the alleged easement, or the lease under which it is claimed. In my opinion, the plaintiffs have failed in shewing any ground of relief so far as the maintenance of these pipes is concerned. Other important points have been discussed by the defendant's Counsel, such as the right of the owner of land upon which a spring of water, such as the one in question, comes to the surface, to divert it from its natural flow, but I have not thought it necessary to discuss them.

There is another question involved in this suit which arises out of a dispute between the parties as to the division line between the defendant's lot and the plaintiffs' lot lying immediately to the west of it. The starting point of the plaintiffs' lot, as it is described in his deed, is a post standing on the south side of the highway road, on the division line of Lots Nos. 8 and 9; thence running easterly along the south side of the highway 80 feet to a post, etc. There is no dispute as to the division line of Lots 8 and 9, but there is no clear evidence as to where the actual lines of the highway road are. A return from the commissioners of highways of a road laid out by them in 1823, in the Parish of Chatham, and which would include the road through what is known as Loggieville, was put in evidence. It gives the courses and distances of the southern side of the road, which was to be four rods wide extending from that line towards the river. There is no evidence to shew by actual survey where that line now is. The road as it is used and fenced, and as it is indicated by the occupation of owners of land on both sides, is not more than about two rods wide. The plaintiffs claim that the starting point is a post standing on what they say is the true southerly line of the highway as laid out by the commissioners, where it intersects the division between Lots 8 and 9. As that division line runs in a south-easterly direction at this

point, the effect would be to locate the lot some fifteen feet farther east than it would be if the starting point was on the southern side of the highway, as established by user and many years' recognition, as the defendant claims it should be. In sections 30, 31, 32 and 33 of the bill the plaintiffs allege that the erection by the defendant of a building on his lot, as indicated by the excavations of the cellar for it, will, by reason of this alleged encroachment on their lot, be so near the house on their land as to darken the eastern windows and prevent access to it by one of the doors on the eastern side. I do not suppose these allegations were intended to put forward any claim by the plaintiffs to an easement of any kind as to the windows or to the door, but if they were framed with that view, I do not think they can be sustained. The evidence rather shews there was no such door at all, and it is not very clear as to the windows. It does, however, appear that the house was built after Alice McKnight purchased the lot in 1886, so that no such easement can have been acquired. More than that, the house was moved several feet to the east of its original position by Mary Lantaigne after she purchased in 1899. The question is merely one of trespass depending upon the true division line between the two lots, as determined by actual survey, or as established conventionally by the respective owners. For this there is an ample remedy at law, and in such cases this Court does not interfere.

The bill must be dismissed with costs.

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Fraudulent conveyance—Stat. 13 Eliz., c. 5—Consideration.

In 1891, E. S., a farmer, deceased, agreed with two of his sons, in consideration of their remaining on the farm and supporting him and their mother, and paying to their two sisters $1,000 each, that the farm and his personal property should be theirs. The farm consisted of adjoining pieces of land, each worth about $3,200. Subsequently the sons paid about $3,000 in paying off balances of purchase money due on the farm, paid $2,000 to the sisters, and supported the father and mother. On July 19, 1899, the father, in performance of the agreement, conveyed the farm to the sons for an expressed consideration of one dollar. At that time he was not in debt, but he was surety with others for loans amounting to $14,000 to a company, of which he and they were directors, the last loan being for $3,000, and made June 7, 1899. On May 3, 1901, the company went into liquidation, and the amount for which the directors were sureties was paid by them, except E. S. In a suit by them to set aside the conveyance as fraudulent and void under the Stat. 13 Eliz., c. 5:—

Held, that the bill should be dismissed.

Bill to set aside two conveyances executed by Elisha Slipp, deceased, dated July 19, 1899, on the ground of their being void under Stat. 13 Eliz., c. 5, and for administration of his estate. The facts fully appear in the judgment of the Court.

Argument was heard March 24, 1906.

A. B. Connell, K. C., and *J. C. Hartley*, for the plaintiffs and the defendant Dibblee:—

While it is necessary, in order to invalidate a conveyance, under the provisions of Stat. 13 Eliz., c. 5, for the person impeaching it to prove that it was made to the end, purpose and intent to delay, hinder or defraud creditors, *prima facia* evidence is sufficient. The deeds here on their face appear to be voluntary. The consideration is stated in them to be one dollar. They were given immediately after the grantor had contracted a very large liability. The effect of the conveyances was to leave him without any

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means to meet it. It is immaterial that it was a contingent liability that might never ripen. It is plain that the conveyances were made under a very real apprehension that he was in jeopardy. If there was an arrangement concluded in 1891 to convey the farm to the sons, it is strange that it was not carried out until 1899, and within a week after the father had involved himself in this heavy liability. Reference was made to *Thompson* v. *Webster* (1), and *Spirett* v. *Willows* (2).

L. A. Currey, K.C., and *D. McLeod Vince*, for the defendants:—

The conveyances are supported by the agreement made with the sons in 1891 to convey the farm to them, in consideration of their remaining at home, supporting the mother and father, and paying their sisters $2,000. See *In re Johnson*; *Golden* v. *Gillam* (3), and *Harman* v. *Richards* (4). Nor can it be said that the conveyances were made by the grantor with a fraudulent intent. When the guarantees were entered into by him the company was in solvent circumstances. In 1898 it paid a dividend of 4 per cent., and in 1899 a dividend of 5 per cent. See *Gorman* v. *Urquhart* (5); *Smith* v. *Wright* (6); *Atkinson* v. *Bourgeois* (7).

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This suit is brought for the administration of the estate of Elisha Slipp, and the only question involved is as to the validity of two conveyances made by him on the 19th July, 1899—one to his son Isaac Slipp, who is one of the defendants, and the other to his son Frank R. Slipp, who is also one of the defendants. These conveyances were registered on the 26th July, 1899, a week after they were executed, and the expressed consideration in each is one dollar. The two lots of land conveyed adjoin each other, and are of about the same value—each being estimated as

(1) 7 Jur. N. S. 531.
(2) 3 DeG. J. & S. 293.
(3) 20 Ch. D. 389.
(4) 10 Hare, 89.
(5) 2 N. B. Eq. 42.
(6) 2 N. B. Eq. 528.
(7) 1 N. B. Eq. 641.

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worth about $3,200. The lot conveyed to Isaac Slipp, the elder of the two brothers, is the homestead lot, upon which Elisha Slipp, the father, continued to reside until his death; the other lot was purchased in 1894 for $3,000 from one Kearney, and conveyed to Elisha Slipp. Elisha Slipp died intestate on the 11th April, 1900, leaving him surviving a widow, three sons—George, the eldest, Isaac and Frank, and two daughters, Sarah and Lillian, both of whom were then unmarried. George died on the 18th May, 1900, about a month after his father, leaving a wife and children. Letters of administration of the estate of Elisha Slipp were granted to the defendant Dibblee on January 3, 1903. There is little or no dispute as to the facts. With one or two exceptions the plaintiffs' allegations are admitted, and the defendants' evidence is uncontradicted except so far as surrounding circumstances may suggest inferences at variance with it. It seems that in 1893 the plaintiffs, with Elisha Slipp and others, were incorporated under the *Joint Stock Companies' Act* by the name of "The Maritime Pure Food Company, Limited," for the purpose of carrying on the business of canning and preserving meats, fruits and vegetables. They commenced business at Woodstock in April, 1897, and continued it until May 3, 1901, when the company became insolvent and its property was all sold at sheriff's sale. From the organization of the company up to the time of Elisha Slipp's death the plaintiffs, with Slipp and one James Good, and Lee Raymond, were the directors of the company. In May, 1898, the company borrowed from L. P. Fisher $5,000, for which the company gave its note, and the directors gave their note as a collateral security. In March, 1899, the company required more money, and the directors negotiated a loan of $6,000 with the Peoples' Bank of Halifax, as a security for which the directors gave their written guarantee, dated March 10, 1899. In the following June the company required further advances, and the directors applied to the same bank for a further loan of $3,000, which the bank advanced on the directors becoming personally responsible for it as before, which they did by a written guarantee dated June 7, 1899.

So that at the time Elisha Slipp made the conveyances in question, in July, 1899, he was liable as a guarantor with his six co-directors for these three sums, amounting in all to $14,000. The plaintiffs were compelled to pay and did pay all of this sum and interest, except about $400 paid by Good as a compromise of his share, and some $1,923 paid by Raymond as a settlement of his, both having become insolvent. There is no dispute as to the liability of Elisha Slipp's estate for his contributory share of the amount paid by the plaintiffs under their guarantee.

The evidence shews that Elisha Slipp was a farmer living on his farm at Jacksonville, and that at the time he made the conveyances in question he was not indebted outside of his liability as a surety for this company for this $14,000, except for a small balance of the purchase money of the Kearney farm, bought in 1894. It does, however, appear that the property conveyed to the two sons was substantially all the property which he then owned. The plaintiffs contended that in that state of facts, it must be assumed as a matter of law that the conveyances were made with the intention of defeating, delaying and hindering creditors, and that they were therefore fraudulent and void as against creditors under the Statute 13 Eliz., c. 5. What the circumstances were which led this company to expend its capital, and this $14,000 in addition, in the short period of four years, and then find itself insolvent, and its property under seizure, I do not know, for the evidence does not disclose them. There is, however, one circumstance which has a direct bearing on this case. The directors declared and paid a dividend of 4 per cent. in 1898, and another of 5 per cent. in 1899, so that unless the plaintiffs and their co-directors were actually paying dividends without the profits to warrant it, of which there is no evidence, and which I can not assume to be the fact, Slipp may very well have regarded his contingent liability for this $14,000 as one which the company itself could easily take care of, and which therefore was of no importance as to any disposal of his property he might make by way of a family arrangement. The real consideration for the conveyances,

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and the circumstances which led to their being made, date back, if the defendants' account is true, to a period long anterior to the formation of this food company, and when no objection to their being made is even suggested.

Isaac Slipp is 43 years of age, and Frank, his brother, is 36, so that when these conveyances were made in 1899, they were 36 and 27 years old respectively. In 1885, Elisha Slipp bought what was spoken of as the Cowperthwaite farm, for $4,000, which was conveyed to his son George, and in order to assist Isaac at the same time, and make them even, George was to give, and in fact did give his note to Isaac for $2,000, with interest, which note George afterwards paid in full. In 1891, he had from this note and accumulations of interest and in other ways, what was equivalent to about $3,000, and as he was about being married he intended leaving home and buying a farm for himself elsewhere. His father wished him to remain at home, and said if Frank and he would "stay on the place" and pay the girls $1,000 each, they could have the farm and all the personal property equally between them. They were also to work the farm together and take care of their father and mother. This arrangement was then agreed upon, Isaac was married and has remained on the place, working it ever since. Frank remained there until he was married in November, 1896, and moved to the Kearney farm. A short time before this the father one evening told the two sons that he was going to tell them how to divide the personal property and the real estate, and said he was willing to give them deeds at any time. About that time—that is, when Frank married in 1896 and went to live on the Kearney farm—the personal property was divided and a division line between the two lots was agreed upon, which gave a piece of the homestead farm to Frank so as to equalize the values. Frank has lived there ever since, and Mrs. Slipp, the mother, and the unmarried sister are living with Isaac. When the conveyances were made in 1899, the lands were described in them according to the division made in 1896, which I have just mentioned. The evidence shews that the $3,000 which Isaac had, together with the

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surplus earnings of himself and his brother Frank, were all utilized in paying for the Kearney farm and the balance due on the Cowperthwaite farm, and that a note of theirs for $500, to which their father was a party, is still unpaid. When the conveyances were made, notes were also given to the daughters. As Sarah was the oldest, she was to get $1,400, the extra $400 being by way of interest from the time the original arrangement was made. Isaac gave her his note for $1,200 with interest, and Frank gave her his note for $200 and a note to Lillian for $1,000, on which he paid her $400 when she married. Besides this they have always paid the daughters the interest as it became due, and Frank has contributed about $40 a year toward his mother's support. The figures given shew that the amount paid by the two defendants, Isaac and Frank, since 1891, when the arrangement was made, by Isaac's money then in hand and money earned by him and Frank since that time for the purchase of the Kearney farm, the balance due on the Cowperthwaite farm and the $400 paid Lillian, together with the outstanding notes for which they are liable, and which amount to $2,500, represent more than the assessed value of the farms. Of course the father's labor has contributed in some respect to the amount, but it is mainly due to the industry and thrift of the sons. The Kearney property was, of course, not included in the arrangement of 1891, as it was not owned by Slipp at that time. Isaac Slipp, in his evidence, explains that purchase as follows. He says: "In 1894 we bought the adjoining farm that Frank lives on now. A man offered it for sale and Frank and I decided to buy it and divide it and make a home for each of us. We gave $3,000 for it. We agreed to buy it, Frank and I and father. Frank and I were most interested. We were going halves, and Mr. Kearney asked me, before he got the deed, would I have a deed given, and father said, 'Have a deed given to me, and this homestead is worth more than your half, and when you buy it we will have it written out.' As to paying for it, he says, "they used all the money they had on hand at that time

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Brother George owed me $1,400, and we made $500 to clear off the place. We paid the $500 down and gave two joint notes, one for $500, 15 months after date, and one for $2,000, payable 27 months after date,—joint notes." The $1,400 from George went on account, and the $2,000 note was finally paid off in March, 1898. It seems clear that this purchase was made long before this food company commenced business, and it was fully paid for in 1898, before the loan had been made with Mr. Fisher. It is also clear to my mind that the property was bought for a home for Frank, and that it was with that object that all parties contributed towards its payment. This in a general way is the defendants' account of this transaction. It was sworn to by all of them—the two brothers, the mother, and the two sisters, all of whom were present when the original arrangement was made in 1891, as well as the time the conveyances were given in 1899. In addition to this the widow of George Slipp proved the giving of the note for $2,000 to Isaac and its payment. It is true that these witnesses were all interested. It is, however, due to them to say that I have rarely seen witnesses whose appearance and demeanour under examination furnished stronger evidence of their credit and reliability. And unless I am prepared to entirely disregard their evidence I can not see how the plaintiffs can succeed. This I certainly am not prepared to do. There does not seem to me anything unusual about the arrangement said to have been made by these parties. The father had already made provision for his eldest son, and what is more natural than that he should try to prevail upon his second son to remain at home, and as an inducement to do so, that he should promise him and his brother as he is said to have done. The conveyances are, I think, in no sense voluntary, nor were they made with any such fraudulent intent as that alleged in the bill, but they were made in execution of a *bona fide* arrangement between the parties, made at a time when no one pretended to say there was anything to cast suspicion on it or to prevent it in any way.

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In *Pott* v. *Todhunter* (1), the Vice-Chancellor says: "If my view of the facts of this case be correct, it does not reveal a transaction not founded on valuable consideration. The mere circumstance that the deed does not represent it otherwise than as a voluntary transaction is nothing. A deed, apparently voluntary, may be supported by collateral evidence shewing a contract for value. It is needless, therefore, to resort to other possible views of the case, one, namely that this legacy was given to a lady for her separate use, and another that this was such a family settlement as, consistently with the principles of this Court, could not be disturbed." In *Bayspoole* v. *Collins* (2), it appeared that the real consideration for a post-nuptial settlement was an advance of £150, though no mention of it was made in the instrument which on its face was a voluntary settlement. It was, however, held that evidence of the real consideration might be given, and on that being shewn the settlement was held good and the bill was dismissed with costs. In *Gale* v. *Williamson* (3), it appeared that a father had assigned his dwelling house and all his personal estate to his son "in consideration of natural love and affection." It was held that the real consideration for the assignment was the giving of a bond by the son to the father for the maintenance of his father's wife and children, and that on that being shewn, the assignment was *bona fide*, and not void against creditors under 13 Eliz., c. 5. Rolfe, B., says: "It is a mistake to suppose that the Statute makes void, as against creditors, all voluntary deeds. The Courts, in construing the Statute, have held it to include deeds made without consideration, as being *prima facie* fraudulent, because necessarily tending to delay creditors. But the question in each case is, whether the deed is fraudulent or not; and to rebut the presumption of fraud, the party is surely at liberty to give in evidence all the circumstances of the transaction; not to contradict the consideration stated in the deed, but to take it

(1) 2 Coll. 76. (2) L. R. 6 Ch. 228.
(3) 8 M. & W. 404.

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out of the operation of the Statute." In addition to what I have already said, the evidence shews that the defendants knew nothing whatever about the guarantee to the bank until after their father's death. They did know of the Fisher loan, but understood the directors held security on the company's plant against loss by reason of the collateral note which they had given.

The bill, so far as it relates to the two conveyances, will be dismissed with costs, and there will be the usual reference as to the general administration of the estate.

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May 8, 15.

Bill of Sale—Staying sale—Payment into Court—Amount.

In a suit by the mortgagor to set aside a bill of sale, an interim injunction order to restrain a sale by the mortgagee was granted upon condition of the mortgagor paying into Court the amount due the mortgagee.

The bill of sale was collateral security for promissory notes, some of which had been indorsed over for value:—

Held, that the amount to be paid into Court should not be reduced by the amount of such notes.

Motion to continue an injunction order granted by Mr. Justice *Barker*, April 10th, 1906.

The plaintiffs, Peter Petropolous and Andrew Petropolous, carry on business in co-partnership as shoe shiners and cigar dealers at 25 King street, in the city of St. John. They held a lease of the premises at a rental of $510 for one year from May 1st, 1905, which they were able to secure by the defendant, Frank E. Williams, guaranteeing the payment of the rent. In or about the month of August, 1905, the defendants placed an automatic electric piano on the plaintiffs' premises and put it in use. It is set in motion by the insertion of a coin in a slot. After it had been on the premises a few weeks it was offered to the plaintiff, Peter Petropolous, for sale to him. He agreed to buy it provided the defendant Williams could secure a renewal of the lease for a further term of four or five years. Williams saw the lessors, and they agreed to grant a new lease for four years at $540 a year and payment by the lessee of the water rates, $10, on condition that Williams should continue to be responsible for the rent or should take the lease to himself. On being advised by the lessors that, in event of the plaintiffs making default in paying the rent, he would have no remedy by distress, Williams took the lease out in his own name. The

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plaintiff, Peter Petropolous, thereupon agreed to buy the piano for $750, $100 to be paid down and the balance to be paid in monthly payments of $50 each. Subsequently, on his representing that he was unable to make the cash payment, it was agreed that an amount then earned by the piano, $19.20, should be credited on account of the purchase price, and the balance secured by twelve notes for $60.90 each, payable one, two, three, four, five, six, seven, eight, nine, ten, eleven and twelve months respectively after date. An agreement at the same time was executed, drawn up in the words and figures following:—

ST. JOHN, Sept. 7, 1905.

To F. E. Williams Company, Limited.

Please deliver to me one Automatic Electric Piano (manufactured by the Automatic Musical Co., Binghampton, N. Y.), for which I agree to pay seven hundred and fifty (750) dollars, to be paid as follows: $19.20 cash on receipt of instrument, and the balance by notes for $60.90 each, payable respectively one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve months after date.

I agree not to countermand this order, a copy of which I hereby acknowledge to have received, and I agree that it is not to be binding on you until ratified by you. Said instrument shall remain your property absolutely until said purchase price and all notes given therefor are fully paid. In default of payment of said purchase price or any note given therefor, you are hereby authorized to retake possession of said instrument, for your own use and benefit, without process of law and without previous demand. It is agreed that on default being made by me in respect to payment of said purchase price or any part thereof as aforesaid, or in the event of your retaking possession of said instrument, my liability to make said payment and upon said notes shall not be affected or cease until I shall have paid to you a sum equal to $20 per month as rental for the whole number of months said instrument shall have been in my possession, and also the expense of retaking possession of said instrument, and in repairing damages thereto. The use and possession of said instrument is at my risk. It is agreed that said instrument shall not be removed from my present premises, No. 25 King

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Street, in the City of St. John, without your consent in writing. It is agreed that no money shall be paid agents except on your written order, and that the whole agreement between us is contained herein, and may not be varied or added to by agent. The said F. E. Williams Company, Limited, guarantee said instrument to be free from imperfection in material or workmanship, and agree to make good any such defect if it appears within one year from receipt of instrument, provided such defective parts are delivered freight paid at St. John, N. B. This guarantee does not cover repairs required through accident, misuse, neglect or ordinary wear or tear, and does not cover electric motors.

(Sgd.) PETER PETROPOLOUS.
(Sgd.) F. E. WILLIAMS CO., LTD.
per F. E. Williams.

I, , landlord of the premises occupied by the above mentioned , hereby agree with the said F. E. Williams Company, Limited, not to seize, distrain, or levy upon said instrument for rent or debt due or to become due in respect of said premises while said instrument is the property of said F. E. Williams Company, Limited.

The plaintiffs alleged that they asked the defendant Williams a number of times for their lease, but were put off from time to time by him, and that finally in January last he declined to give it unless they would reduce their indebtedness to the defendants and give a bill of sale to secure the balance. The plaintiffs at that time, in addition to being indebted to the defendants for the price of the piano, owed them nearly $400 for cigars and tobaccos. The plaintiffs thereupon paid the defendants $100, $60.90 of which was applied in retiring one of the piano notes, and the balance in reduction of the current account. The plaintiffs also executed a bill of sale in favor of the defendants upon their stock-in-trade and fixtures to secure the balance of their indebtedness, including the amount owing on the piano, and a note was also given for $363.55 to cover the balance of the current account. The defendant Williams then executed a lease of the premises to the

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plaintiffs for a term of three years and eleven months at the rental and subject to the conditions contained in the lease to himself. After the purchase of the piano the plaintiffs complained that it was not working well. The defendants had it examined and found that the keys had swelled owing to fog. The defendants substituted another piano for it, and in time this was also found not to work well, and the plaintiffs alleged they made numerous complaints of it. The defendants offered to send it to the manufacturers to be cleaned and repaired without expense to the plaintiffs, but this offer was declined. The plaintiffs alleged that the piano was worthless and that they had no faith in it, and that it was not as warranted. They further alleged that the defendant Williams obtained the lease of the premises occupied by the plaintiffs at a rental of $510; that when he obtained it he was acting in a fiduciary capacity and undertook to procure it in the name of the plaintiffs, but contrary to good faith and in fraud of the plaintiffs, he procured a lease in his own name and forced the plaintiffs to pay a higher rent than that reserved in the original lease, and that he inserted terms and conditions in his lease to the plaintiffs of an onerous and vexatious character. It was shown on the hearing of the motion that the rent reserved and the terms in both leases were the same. The plaintiffs paid the note given for the current account, but declined to pay the notes given for the piano. The affidavit of the defendant Williams set out that he had always been ready and willing to perform and fulfil the terms of the warranty with the piano, and he alleged and claimed that there had been no breach of it; that he believed that if there was any trouble with the piano it could easily be rectified; he alleged and charged that the plaintiffs had misused the piano, and that if repairs were required to it they were due to misuse or neglect by the plaintiffs or to ordinary wear and tear within the exceptions in the warranty. By their bill, upon which the interim injunction was granted, the plaintiffs prayed that the defendants might be restrained from seizing or taking possession of the goods and chattels

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conveyed by the bill of sale; that the bill of sale might be set aside; that the contract for the sale of the piano might be cancelled; that the defendants might be directed to repay to the plaintiffs $60.90, an amount paid on account of the piano, and to deliver up to the plaintiffs the notes given for the piano; and that the defendant Williams might be directed to execute a lease to the plaintiffs upon the same terms as those in the lease to him. It appeared that five of the notes given for the piano had been discounted by the defendants with the Bank of Nova Scotia prior to the service of the injunction order.

Argument was heard April 24, 1906.

W. H. Trueman, for the defendants:—

The injunction should be dissolved for misrepresentation. The bill charges that the defendant Williams forced the plaintiffs to pay a higher rent than that reserved under the original lease, and inserted terms and conditions in the lease to them of a more onerous and vexatious character than those in said lease. The rent payable under the lease from Williams is that which he has to pay, and the leases are in every other respect identical. The lease from Williams is for one month less than the term to him, but it was necessary to retain in him a reversionary interest or his position as landlord with right of distress would have been lost. Both leases should have been set out in the bill to shew in what respect the terms were more onerous in one than in the other: *Harbottle* v. *Pooley* (1). Before a party makes an application for an injunction he should make the strictest investigation into the accuracy of the circumstances upon which he relies: *Vandergucht* v. *DeBlacquiere* (2); *Clifton* v. *Robinson* (3). The misrepresentation is material, for a part of the relief asked is the execution of a new lease. A motion to discharge an *ex parte* injunction on the ground of its having been obtained by misrepresentation is proper, though the

(1) 20 L. T. 436. (2) 2 Jur. 738.
(3) 16 Beav. 355.

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injunction is about to expire: *Wimbledon Local Board* v. *Croyden* (1). The bill also suppresses the circumstance that the original lease was obtained by Williams becoming surety for the rent. The case is not one for injunction, nor for the jurisdiction of this Court. The warranty in the hire and sale agreement is to make good any defect in material or workmanship in the instrument. The bill does not allege a refusal by defendants to implement this warranty. On our part it is set up that we offered to ship the piano to the manufacturers for overhauling and repair, without expense to the plaintiffs, and that the offer was refused. Even if the action was at common law for breach of warranty it must fail. If there has been a breach of warranty it only gives rise to an action for damages. The plaintiffs would not be entitled to return the piano where there is no condition authorizing its return. See *Street* v. *Blay* (2); *Dawson* v. *Collis* (3); *Gompertz* v. *Denton* (4). Since the piano cannot be returned and sale agreement rescinded, there cannot be a total failure of consideration for the bill of sale. As the bill of sale cannot be vacated, and the utmost relief plaintiff can obtain is damages for breach of warranty, it is plain that an injunction should not be granted. For mere breach of warranty there is no remedy in equity: 30 Amer. & Eng. Ency. 190. In *North* v. *Great Northern Railway Co.* (5), it was held that where specific things necessary for conducting a business are in the possession of a person who claims a lien upon them and threatens an immediate sale, the Court of Equity has jurisdiction to interfere by injunction and prevent irreparable injury to the debtor, by giving him an opportunity of redeeming. Here redemption is not sought, but the suit is merely to determine whether there has been a breach of warranty. If it is argued that the bill of sale was obtained by a refusal to give a lease, and that this was duress, the short answer is that there was consideration for the bill of sale apart from the lease.

(1) 32 Ch. D. 421.
(2) 2 B. & Ad. 456.
(3) 10 C. B. 523.
(4) 1 C. & M. 207.
(5) 2 Giff. 69.

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W. W. Allen, K. C., for the plaintiffs:—

The plaintiffs are entitled to rescind the agreement and to return the piano. In addition to the warranty given on the sale there is an implied warranty that the instrument would be reasonably fit for the purpose for which it was sold: *Randall* v. *Newson* (1). Such implied warranty is not excluded by the express warranty: *Bigge* v. *Parkinson* (2). Failure to comply with such implied warranty entitles the vendee to return the article. Ordinarily our remedy would be at common law; but we are obliged to come into equity in order to have the bill of sale set aside. The bill of sale was obtained by coercion. The plaintiffs were entitled to the lease without condition, and there is therefore no consideration for the bill of sale.

1906. May 8. BARKER, J.:—

I thought at the argument, and I still think, that the defendants on their shewing of the facts of this case, might well abandon the bill of sale which they obtained from the plaintiffs, and which is the immediate cause of this bill being filed. The plaintiffs have paid their account in full, except the notes given for the piano, and for these the defendants have their security upon which the piano was sold. So that without the mortgage the defendants would be in precisely the same position as when they delivered the piano. And they themselves say that they did not want the mortgage or ask for it. The defendants, however, have shewn no intention of waiving any rights under their mortgage, and so I must deal with the matter as best I can.

I shall continue the injunction, but to that order I must attach a condition, and that is that the plaintiffs, on or before the 15th inst., pay into Court to the credit of this cause the sum of $670.80. On that payment being made the injunction will be continued; if not it will be dissolved.

(1) 2 Q. B. D. 102. (2) 7 H. & N. 955.

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See *Hill* v. *Kirkwood* (1); *Hickson* v. *Darlow* (2); *MacLeod* v. *Jones* (3).

Reserve question of costs.

On May 15th, motion was made by the plaintiffs on summons to reduce the amount ordered by the learned Judge to be paid into the Court from $670.80 to $365.40, and to enlarge the time to July 17th.

W. W. Allen, K. C., in support of the application:—

The defendants having discounted five of the notes given for the piano with the Bank of Nova Scotia, their total claim against the plaintiff is $365.40. The bank has already recovered judgment against us on one of the notes. The security only attaches for the notes that the defendants have retained. It is discretionary with the Court to enlarge the time.

W. H. Trueman, contra:—

The plaintiffs could not redeem the bill of sale except upon paying the full amount of the indebtedness secured by it. The bank could return the notes held by it and assign to us its judgment, or we could assign the bill of sale to it together with the remainder of the notes. If such were done there could be no question that the full amount would have to be paid. If the defendants were seeking to sell under the power of sale in the instrument, they could only do so to the amount of the notes held by them. If they held all the notes and the judgment obtained by the bank, there would be no doubt of their right to sell for the satisfaction of the whole sum. There would only be an equity to restrain the defendants from selling for such an amount if some of the notes were in the ownership of another party. In *Bramwell* v. *Eglinton* (4), it was held that the taking of a bill of exchange as collateral security does not suspend the grantee's remedy under a bill of sale, and that he might lawfully take posses-

(1) 28 W. R. 358; 42 L. T. 105.
(2) 23 Ch. D. 690.
(3) 24 Ch. D. 289.
(4) 33 L. J. Q. B. 130.

sion under it, though the bill of exchange has been indorsed over for value. See also *Hepburn* v. *Park* (1); *Hyman* v. *Cuthbertson* (2); *Cochrane* v. *Boucher* (3). The time for paying money into Court has been fixed here at one week in accordance with the English practice, and it is submitted should not be enlarged.

BARKER, J.:—As I do not think the defendants will be prejudiced and the matter is one for my discretion, I will enlarge the time for payment into Court to June 11th, but I will not reduce the amount. If the amount is not then paid into Court the injunction will be dissolved. In the meantime the undertaking as to damages and that the goods covered by the chattel mortgage will not be removed from the plaintiffs' premises, will be continued. Reserve question of costs.

(1) 6 O. R. 472 (2) 10 O. R. 443. (3) 3 O. R. 462.

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May 22.

FAIRWEATHER v. ROBERTSON.

Costs—Appeal to Judicial Committee of the Privy Council—Order of King in Council—Construction.

In a suit against L. and R. the bill was dismissed by this Court with costs. An appeal to the Supreme Court was allowed with costs. On appeal by R. to the Judicial Committee of the Privy Council it was ordered that the decree of the Supreme Court should be discharged as against the appellant with costs, and that the decree of this Court should be restored :—

Held, that costs under the original decree should be taxed to L.

Motion on summons for directions to the Clerk to tax the costs of the defendant George E. Lloyd. The facts fully appear in the judgment of the Court.

Argument was heard May 15, 1906.

M. G. Teed, K. C., in support of the application :—

The order of the King in Council restores the decree of this Court, which gave costs to both defendants. If restored at all, it must be with full effect. See *Vaughan* v. *Halliday* (1). On principle Lloyd should have his costs, as they were incurred before Robertson was made a party.

G. W. Allen, K. C., *contra* :—

The order discharges the decree of the Supreme Court reversing the decree of this Court, as against the appellant Robertson, with costs. He alone is entitled to costs. So far as Lloyd is concerned the decree of the Supreme Court is unreversed. The order only restores the decree of this Court with respect to Robertson.

1906. May 22. BARKER, J. :—

Application has been made to me for instructions to the Clerk as to the taxation of the costs of the defendant

(1) L. R. 9 Ch. 561.

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Lloyd. The suit involved the claim of the plaintiff to a right to use a highway in common with the defendant Lloyd, who, when the suit was commenced, owned the property to which this highway was appurtenant, and for the exclusive benefit of which it was, according to Lloyd's contention, originally made and laid out. After the suit had proceeded, but before the hearing, the defendant Robertson purchased the property from Lloyd and took a conveyance of it, and he was then added as a defendant to the suit. Lloyd's name was not removed from the record as a defendant, though he ceased to have any interest in the subject-matter of the litigation. At the hearing this Court dismissed the bill with costs. From this judgment the plaintiff appealed to this Court in term. His appeal was allowed with costs against the defendants; a declaration of the plaintiff's right to use the highway was made, and the defendants were perpetually restrained from obstructing the plaintiff in the use of his right of way. From this decision the defendant Robertson appealed to His Majesty in Council, and on the report of the Judicial Committee it was ordered "that this appeal be and the same is hereby allowed; that the said decree of the Supreme Court of New Brunswick in Equity (on appeal), dated the 3rd day of August, 1904, be and the same is hereby discharged as against the appellant with costs, and that the said decree of the said Supreme Court in Equity, dated the 21st day of October, 1902, be and the same is hereby restored." The defendant now seeks to have his costs of suit taxed against the plaintiff under the original decree by which the bill was dismissed with costs, and which by the direction of the order in Council has been restored. The plaintiff's contention is that, by a proper reading of that order, the original decree is only restored so far as the appellant Robertson is concerned, and that the decree of the Supreme Court having reversed the original decree, and Lloyd not having appealed against it, as against him it stands. I am myself unable so to read the order; neither do I think any such order was intended. The words are express—"that the said decree of the said Su-

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preme Court in Equity, dated the 21st day of October, 1902, be and the same is hereby restored." What that order was appears in the previous part of the order in Council, and I am unable to conclude that when the Judicial Committee recommended that the original decree be restored that they intended to vary it, leaving it operative in favor of Robertson and against Lloyd, both representing precisely the same right. The Judicial Committee simply restored the original decree; they did not vary it; and in my opinion the defendant Lloyd is in precisely the same position as to his costs of suit as if there had never been any appeal from the original decree. It is the practice of the Judicial Committee in disposing of appeals, to make the order which they think the Court appealed from should have made—that is, in this case, that the original appeal should have been dismissed, which would have left the original decree as it was made; or as it now is by the order in Council, restored.

I think the Clerk should tax to Lloyd's solicitor such costs as he is entitled to under the original decree by which the plaintiff's bill was dismissed with costs, and as if that decree had never been appealed against.

In re LAWTON INFANTS.

1906.
July 13.

Infant—Guardian—Removal.

It is a ground for the removal of the guardian of the persons of infant children that he has removed out of the jurisdiction of the Court.

Application for removal of James Clark Lawton, as guardian of the persons of his infant children, and for the appointment of their mother and J. Fraser Gregory in his place. The facts sufficiently appear in the judgment of the Court.

1906. July 10. *J. Roy Campbell*, in support of the application.

July 13. BARKER, J.:—

The late Charles Lawton devised all his property to his executors upon trust to pay from time to time so much of the income of his estate as they in their discretion should see fit toward the support, maintenance and education of the children of his nephews, James Clark Lawton and Charles Abbott Lawton, until they should respectively arrive at the age of twenty-one years. This application is made on behalf of the infant children of James Clark Lawton. On the 14th April, 1899, this Court made an order appointing the said James Clark Lawton guardian of the persons of his infant children, to whom should be paid by the executors of Charles Lawton the six hundred dollars a year which they at that time fixed as an appropriate amount to be annually paid for the support and maintenance and education of the infants. James Clark Lawton, and the infant children (of whom there are now four, one having been born since the previous application), by their mother acting as their next friend, now ask that James Clark Lawton be removed from the position of

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guardian, and that his wife, Elizabeth Alice Lawton, and J. Fraser Gregory be appointed guardians in his place. The ground upon which the removal is asked is that Lawton has removed from the city of St. John and become a resident of the United States, without the jurisdiction of this Court. The children are now living with their mother in St. John, and are under her care. Under these circumstances I think the order asked for should be made. See *In re Kaye* (1); *In re Loftus House* (2). The infants' mother and Mr. Gregory will therefore be appointed guardians of the infants' persons. James Clark Lawton will be removed, and in future the $600 a year, or such other sum as the trustees may in their discretion fix, shall be paid by them to Mrs. Lawton and Mr. Gregory for the support, maintenance and education of the infants. The costs will be paid by the trustees and charged to the distributive share of the infants in Charles Lawton's estate.

(1) L. R. 1 Ch. 387. (2) 29 Ch. D. 921.

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August 24.

Agreement—Family arrangement—Consideration.

J. H. died intestate possessed of property worth about $40,000, and survived by his widow, two sons and three daughters. Part of his property consisted of lumber lands worth $21,000, which it had been his intention, known to all the members of the family, to give to the sons, who were associated with him in his business as a lumberman. A few days before his death, in discussing with his solicitor the terms of a will he intended to make, he stated he wanted his lumber lands and mill property to go to the sons, who should continue his business and pay his debts, and that he did not intend making any provision for the daughters. At a meeting of the family held after his death, they were informed of these wishes: that performance of an outstanding contract by the deceased for the delivery of a quantity of lumber was being pressed, and that his liabilities were $15,000 or $20,000, though in fact they were $22,000. It was agreed for the purpose of giving effect to the deceased's intentions that the sons should assume the debts; that the daughters should convey all their interest in the estate to the sons; that the sons should pay to the plaintiff $500, to another daughter $600, and should join in a conveyance to the third of land given to her by her father, but unconveyed by him. At the time the exact condition of the estate was unknown. Before the deed to the sons was executed, the solicitor of the deceased present at the meeting explained to the daughters their legal rights and the effect of the deed. On the true condition of the estate being subsequently ascertained, the plaintiff sought to have the conveyance set aside:—

Held, that the agreement as a family arrangement, entered into for the purpose of giving effect to the intentions of the deceased, without fraud or misrepresentation, should be upheld.

Bill to set aside a conveyance. The facts fully appear in the judgment of the Court.

Argument was heard May 30, 1906.

A. S. White, K.C., and *James Friel*, for the plaintiffs:—

The conveyance was obtained by misrepresentation and suppression of the real condition of the deceased's business. The plaintiff was given to understand that unless the business and property were vested in the sons to enable

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them to complete the contract with McKean, the estate would be involved in litigation. The impression was created upon her mind that the liabilities were so large that if the estate was taken into the Probate Court a great sacrifice in its value would result, and the affairs of the estate would be thrown into inextricable confusion. It was even intimated that her own property would be lost if the sons were not put in possession of the estate. It is quite apparent that Wood wanted the business kept as a going concern in the sons' hands, and that in his partizanship he did not place the rights of the plaintiff and the other daughters fairly before them. The plaintiff was overborne by his views, and her mind was not free to reach an independent judgment. If there was no misrepresentation, then it can be said that the plaintiff compromised her rights in ignorance of the true state of affairs, and that the mistake was one shared in by all. This will be sufficient ground for setting the conveyance aside. The transaction cannot be disguised as a family arrangement to give effect to the intentions of the intestate. That consideration is not shewn to have weighed with any of the parties, or to have been pressed upon them.

H. A. Powell, K. C., and *A. W. Bennett*, for the defendants:—

The plaintiff entered into the agreement in order that the wishes of her father respecting the disposition of his property might be carried out. The only fraud, misrepresentation or concealment that could affect the validity of the agreement would be fraud, misrepresentation or concealment as to his intentions, and there is no pretence of that. As a family arrangement to give effect to the deceased's wishes it will be upheld. No fraud or misrepresentation taints it. It is idle for the plaintiff to say that she was misled as to the value of the estate. That was a matter that was not discussed. Nor did it interest her. Aware that she was not to expect anything from her father, she raised no question as to her rights. She was

only concerned in securing the safety of the property he had given her, and in having her mind made easy in that respect. The $500 was a gratuity, and was not part of the consideration for signing the deed. The case set up by the bill was one of fraud; that fraudulent misrepresentations were made by the defendants and those in concert with them as to the financial condition of the estate. That position has absolutely failed. No representations were made, nor was any inquiry made by the plaintiff, as to the value of the estate. The only question asked was that by herself, as to whether there was enough property to pay the debts of the deceased without resorting to the property given to her, and she was assured there was. She had as much knowledge at the time as any of the defendants of the value of the estate and the extent of the liabilities.

White, K. C., in reply.

1906. August 24. BARKER, J.:—

This bill was filed by Celia Sears and Warren Sears, her husband, against Arthur A. Hicks, John L. Hicks, and Docia Fillimore and Jane Hicks, and John and Arthur Hicks, as administrators of the estate of John Manning Hicks, for the purpose of setting aside a certain conveyance made to the defendants, Arthur and John, by the plaintiff, Celia Sears, and her sisters, bearing date the 6th June, 1905. The circumstances which led up to the execution of this conveyance are somewhat peculiar. John Manning Hicks, for many years previous to his death, which took place on the 3rd day of June, 1905, had been engaged in farming and lumbering in the Counties of Albert and Westmorland, and in connection with his business he had acquired marsh and lumber lands of considerable value. He died intestate, leaving him surviving his widow, the defendant Jane, his two sons, the defendants Arthur and John Hicks, and four daughters, the plaintiff Celia Sears, and the defendants Docia Fillimore, Etta Hicks and Lucinda Hicks. The conveyance in question was executed by Celia Sears and her husband, Etta Hicks and

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her husband, Docia Fillimore and her husband, and Lucinda Hicks, who is unmarried. John Manning Hicks met with an accident in his mill on the 31st May, which resulted in his death four days later, and during this intervening period he seems to have been in an unconscious state and unable to attend to business matters. On the 6th May, 1905, he made a contract with McKean, of St. John, for the sale of between 400 and 500 M. superficial feet of spruce deals and battens, which he was to manufacture at his mill during the season of 1905, ready for shipment not later than May, June, July and August, and which he was to deliver on the cars at Midjic station. The price to be paid was $11.50 per M. for the deals and $9 per M. for the scantling. At the date of Hicks' death he had not commenced sawing these deals, and therefore he was unable to fulfil his contract so far as the May deliveries were concerned. At the very time the accident occurred Read, McKean's agent, through whom the contract was negotiated, was telephoning to Mr. Hicks complaining of the delay, and saying that he had a vessel then waiting ready to load. Within a few years of his death (the precise dates are immaterial) Hicks had given certain properties to his children. He conveyed to the plaintiffs, as tenants in common, the property in Albert upon which they now live. The consideration for this was in part the discharge of a certain indebtedness of some $700 due by Hicks to Warren Sears for wages, and in part a gift to Celia Sears. Another property had been conveyed to Etta Hicks, and she and her husband Mansfield Hicks occupy that as a home. Another property he had purchased for his daughter Docia Fillimore, but she had received no conveyance of it, though she had been living on it for some time. The father's intention to give her this property seems to have been known and recognized by all the family, and the conveyance of it by the sons Arthur and John, after the deed now in question had been made to them, is concurred in by all the family as merely carrying into effect what they all knew was their father's intention in reference to it. No provision had been made for Lucinda. She seems to be not

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very strong mentally, and it appears to have been recognized by the family that some special provision must be made for her case. The position of the two sons, Arthur and John, is somewhat peculiar. Arthur is 33 years of age, and he with his family occupy a property purchased for him by his father some six or seven years ago for $5,100, the conveyance of which, though executed at the time of the purchase, was not delivered until some three years later. John, the other son, is 30 years of age, and he with his family occupy a property purchased by his father and conveyed to him. This property is a farm, including some marsh land, and it has a new house upon it, built after the purchase, at a cost of $900, exclusive of the lumber and some of the hardware used in its construction. The uncontradicted evidence of these two young men is that their father always intended to give them the lumber lands. Arthur Hicks' evidence on this point is as follows:

"Q. Was there any understanding with your father as respects what he was going to do ultimately with his wood lands? A. Yes, sir.

"Q. What was it? A. Well, he told me about the time he went over to Albert. He asked me if I would go over there with him, and I told him I would, and I believe it was about that time he told me he would give me a deed of my place, and if I would go help him work along the same as I had that he would—well, some future time he intended giving my brother and me the lumber land and mill. We had two mills at that time, and he said he intended to give each of us a mill. He didn't say what part of the land he would give me, or anything like that. He told me he would give me part of the lumber land.

"Q. You and John were to get the lumber lands? A. Yes, sir; we were to get the lumber land between us; that is what he told me."

The evidence shews that the sons had always worked for their father in the business—sometimes in one capacity and sometimes in another; they were not partners, neither were they under wages. What they received for their sup-

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port, outside of the product of their own farms, seems to have come from a common fund, of which the father had the control. The business was managed altogether by the father, and the sons had but a very general knowledge of its details.

This suit was commenced on December 26th, 1905, and the principal grounds upon which the validity of the conveyance is attacked are set out in section 5 of the bill, which is as follows: "That immediately after his (that is, John Manning Hicks) death, the defendants, Arthur A. Hicks and John L. Hicks, set about obtaining a conveyance and transfer to themselves of the share and interest of the plaintiff, Celia Sears, and the shares of the other heirs above mentioned, in the said estate, and they, the said defendants, together with their mother, the said Jane Hicks, knowingly, falsely, and fraudulently represented to the said Celia Sears that the personal property and real estate of the said John Manning Hicks was left in such a condition, and that there were such large debts against the same, that it was of relatively small value; and further, that the said John Manning Hicks, deceased, had left certain contracts to be carried out, and unless the said contracts were carried out the said estate would be involved in litigation and costs and there would be nothing left for the heirs, and that if the other heirs sold and transferred their respective shares to the said defendants they, the said defendants, might be able to protect the said estate; that the said defendants, Arthur A. Hicks and John L. Hicks, offered to the said Celia Sears the sum of $500 for her share in the said real estate and personal property of the said John Manning Hicks, deceased, and for the purpose of inducing her to accept the same, knowingly, falsely and fraudulently represented to her that that amount was a fair value for her said share and interest in said estate, and falsely, knowingly and fraudulently misrepresented to her that if she did not sign and convey her said share and interest in the said estate to them that she might get nothing whatever." Section 6 of the bill alleges that the plaintiff, Celia Sears, was at the time worried in mind over

her father's death, and not in a proper mental condition to do business, and that she and her husband were both ignorant of the true value and condition of her father's estate, and without independent advice or opportunity of getting the same, and under these circumstances they executed the conveyance in question, relying upon the representations made by her brothers and mother, falsely and fraudulently, as she alleges. At the hearing the bill was amended by adding an allegation that the defendants, Arthur and John Hicks, wilfully suppressed facts within their knowledge material to be communicated to the plaintiffs. Besides denying the fraud with which they are charged, the defendants set up by way of defence that the arrangement in question was honestly made as a family arrangement in order to carry out their father's intention as to the disposal of his property, and which he was himself prevented from carrying out by will in consequence of his sudden death.

The facts, so far as I have stated them, are not contradicted, but the witnesses differ in their account as to what took place at the time the arrangement was made. The exact condition of the estate was of course not then known by any one. Senator Wood was perhaps in a better position than any of the others to form an estimate of it. He says that he had no doubt whatever of the solvency of the estate, and that the assets were considerably in excess of the liabilities. He estimated the debts at about $20,000, and so stated to the parties before the deed was executed. Mr. Bennett estimated them at $15,000, and so stated to Mansfield Hicks when he executed the conveyance. The debts, in fact, amounted to over $22,000, of which about $12,000 were owing to Wood himself. No special inquiry seems to have been made as to the assets, and the witnesses differ somewhat as to the value of the lumber lands. I accept Mr. Black's evidence on this point. He was one of the estate appraisers appointed by the Probate Court; he is practically acquainted with such property; he cruised the land in order to ascertain the nature and quantity of lumber on it, and he valued it at $21,000. The value put

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upon the remaining land by Mr. Wheaton, the other appraiser, was $4,570 for the marsh, $4,000 for the homestead, and $2,000 for the land which was conveyed to Mrs. Fillimore, as I have already stated. This would make the total value of the estate to be in round numbers $40,000, subject to the widow's right of dower. It appears that Wood had had business dealings with Hicks for some thirty years. Hicks consulted him in reference to his business matters, and on several occasions spoke to him of his intentions as to his disposal of his property among his family. Wood knew of the McKean contract, and generally of Hicks' property and business. Hicks' sudden death threw upon his widow and the two sons a business responsibility to which they were altogether unaccustomed. McKean's agent was pressing for the lumber deliverable under the contract, and it seems to have been a natural thing that they should, under the circumstances, go to Wood and get the benefit of his advice. Accordingly, at the mother's suggestion, the two sons did go to Wood, and they, with Wood and Mr. Bennett, who had been Hicks' solicitor, and attended at Wood's suggestion, had a long consultation over the estate affairs. It is put forward that this consultation was the initial fraud in this transaction—that it was had with a view to bringing about a division of the estate in the brothers' interest. The evidence entirely disproves this. Its object was simply to find out what, under the circumstances, was the wisest course to adopt to wind up the estate to advantage and without loss or unnecessary expense. The result of this conference was that Mr. Wood and Mr. Bennett met Mrs. Hicks, the sons and the daughters, with their husbands, on the 6th June, at the Hicks homestead. Wood and Mrs. Hicks had separate interviews with the three daughters; afterwards a general conference, when all were present, and the result was that the conveyance in question was then and there prepared by Bennett and executed by all the parties. The conveyance of the piece of land which was to go to Mrs. Fillimore was at the same time prepared and executed and delivered to her by the two sons; a note for $500, payable in six months

was also given by the sons to the plaintiff Celia; a similar note of $600 was given to Etta Hicks, and the whole matter was settled up then and there. The note for $600 to Etta was paid at maturity, shortly before this suit was commenced, but not until after it had been threatened.

That an agreement such as that which is alleged to have been made by these parties is to be regarded as a so-called "family arrangement," and dealt with on the principle applicable to that class of contracts, is settled by *Williams* v. *Williams* (1). That case involved a contract between two brothers in reference to certain properties which it was alleged they had agreed to hold in equal shares as tenants in common. The father died in November, 1831, and among his papers was found a testamentary document signed by him and dated in January, 1824, but as it had no witnesses it could not be admitted to probate. By that document he gave all his property to the two sons equally. There being an intestacy, his real estate, by reason of its being held by different tenures, did not descend to the sons in equal shares, and the contention was that they had agreed to carry out what seemed to have been their father's intention as expressed in the document in question. The agreement was proved mainly by the way in which both parties had dealt with the properties for a long period of years. It was upheld, although the paper indicating the father's intention was signed by him nearly eight years before his death, and although the agreement was not in writing and its existence proved, as I have just mentioned. In that case Turner, L. J., says: "The Vice Chancellor has, and I think correctly, rested this part of the case upon the footing of the cases as to family arrangements. It was strongly argued for the appellant that this case does not fall within the range of those authorities; that those cases extend no further than to arrangements for the settlement of doubtful or disputed

(1) L. R. 2 Ch. 294. (See *In re Roberts* [1905] 1 Ch. 704; *Baldwin* v. *Kingstone*, 18 A. R. 63, 82, 97.—REP.)

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rights and that in this case there was not, and could not be, any doubtful or disputed right; but this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much further than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property." The parties to this arrangement stood in no fiduciary relation to one another, which would shift the onus of proving its *bona fides* upon the grantees. The transaction must, of course, be free from fraud or misrepresentation or bad faith or suppression of material facts. As James, L. J., says in *Moxon* v. *Payne* (1), "the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection." The onus of proof is, however, upon the plaintiffs. That there was a well-settled intention on Hicks' part to dispose of his property substantially as has been done by this conveyance is proved not only by his repeated declarations to that effect to Wood, but by his more specific declarations to his own solicitor made only a week before his death. Mr. Bennett's evidence on this point is as follows: After stating that Hicks came to his office on the 26th May, 1905, for the purpose of discussing with him the terms of his will which he wished to make, Mr. Bennett proceeds: "He told me he came in for this purpose. He began first—the first matter was the question of his lumber lands. He told me that he had become somewhat exhausted over the management of his lumber business. His health was—it was telling on him, and that he thought of disposing of his lumber lands and paying his debts as one idea. The other was leaving the lumber lands to the boys and charging them with the payment of his debts on the lumber lands. He asked me what I thought about it in that respect. Then in the discussion he said that he was very loath to part

(1) L. R. 8 Ch. 881.

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with his other lands, that his boys had been brought up to lumbering—it was what they knew about, they didn't care to farm, and that he was very anxious to have the lumber lands reserved for the boys, but he said: 'If I live and I suppose I will, I know that if I retain them during the time I do live, I will be still actively engaged in the lumber operation myself, and I can't be relieved from this worry and hard work that I wish to be relieved from.' I said ultimately: 'Mr. Hicks, how would it do; you seem inclined to have the lumber lands reserved for the boys—how would it do if you were to make a will leaving the lumber lands to your boys and charging them with the payment of your debts? That will enable you to make your will now and settle it; that can't prevent you from afterwards, if you wish to change your mind at any time, to change your mind, because a will is not of a nature that prevents you from altering any time you like.' That was a phase of it I believe he had not worked out, and that was settled upon as one of the provisions of the will. The next feature we discussed was his wife, and he said he intended leaving the home place for his wife for life, and the mention of that apparently suggested the daughter at home. At any rate, he next said: 'I have a daughter at home, an unmarried daughter, and I want—I have to make provision for her;' and he says: 'She is not very bright.' That is the first time I knew he had a daughter who wasn't very bright, and he said: 'I have got to make some provision for her.' We discussed then the nature of what we thought between us was the best provision, a good provision to make in such a case. It came as a surprise to me, and after discussing it for some little time, we could work it out all right while Mrs. Hicks was living, but the providing beyond in case of her death, what was to become of his daughter, was perplexing, and Mr. Hicks, when confronted with that, felt that he hadn't the thing worked out as well as he would like. I said: 'Well now, for the time being, let us pass along and get your other provisions and then we will have only this one to meet later on.' So I knew the other mem-

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bers of the family and said: 'What about Mrs. Sears?' He said: 'I don't intend leaving Mrs. Sears anything. I have done a good deal for her, and I made some provision for her in the property in Albert County.' The next was Mrs. Mansfield Hicks. I asked him about her and he said: 'I haven't intended to leave her anything; I have never been intending to leave her anything.' While I knew Mrs. Hicks, I didn't know Mrs. Sears—never met or had seen her that I know of—I knew Mrs. Hicks and knew the family and I said: 'Don't you think you better leave her something? I think I would if I were you?' 'Well,' he said, 'what was the use, she would only spend it and only waste it, she and her husband.' 'Well,' I said, 'we can fix that about it; I can fix that so she can't have the opportunity of wasting and spending it.' 'Well,' he said, 'I will make some—I will leave a small amount for her, or make some small provision for her.' Then Mrs. Fillimore was spoken of. He said that he intended leaving her the Silas Estabrooks Farm. He bought that farm through me, and I knew at the time he really intended that for her, in a way. Well, he didn't take the deed in her name, although I hesitated a few years before I wrote the deed. I held the deed a number of years after he bought it—the title of it. He said he intended to leave her the Silas Estabrooks farm and a piece of marsh land, and he intended doing something more than that. We again came back to Lucinda Hicks, at home, and we tried to settle definitely on the provisions for her. We decided, so far, the charge was to be on the marsh lands, a life provision, providing for her maintenance and care, and afterwards at her death, the marsh lands, and after Mrs. Hicks' death, the marsh lands would go to the boys. Mr. Hicks desired to consult his wife further about that, about Lucinda, and in view of that I didn't learn definitely the particular marsh or particular amount that was going to Mrs. Hicks or to Mrs. Fillimore. He told me at the end of the interview, he said: 'Now I have been intending to make my will, talking of making my will for some time past. I mean to have it done this time. I don't intend putting it off. I will be

down and complete this in a week or ten days,' and he left my office. Within that time he was killed." Mr. Bennett afterwards corrected his statement and said that Hicks only spoke of selling the "big lot" of wilderness land, which contained 5,000 acres according to Hicks. That would leave 1,000 acres for the boys. Mr. Bennett told this conversation to Mr. Wood and John and Arthur Hicks at the interview they had together, and it seems clear from this evidence that Hicks had fully made up his mind to execute a will during the following week which would not have benefitted these plaintiffs in any way. Mr. Bennett further says: That after Mr. Wood and Mrs. Hicks had been talking with the plaintiff and her sisters when they were all at the Hicks home on the 6th of June, he was asked to go into the room where they all were. Mrs. Mansfield Hicks, Mrs. Sears, Mrs. Fillimore, Mrs. Hicks, the mother, Arthur, John, Senator Wood and himself were all present. Mr. Bennett says: "Senator Wood said that they had been discussing Mr. Hicks' affairs and the family were disposed to carry out Mr. Hicks' wishes respecting his property. 'And the boys are to give Mrs. Hicks $500, Mrs. Sears $500, and Mrs. Fillimore is to receive the place she is living on, the Silas Estabrooks place and a piece of marsh land; I suppose it will be necessary to have some writing done embodying this agreement;' I said 'Yes,' and they asked me to prepare the document." When Mr. Wood in this way in the presence of all the parties, and after the interviews and discussions with them had taken place, stated as the result that the family were disposed to carry out Mr. Hicks' wishes as to his property, there was no dissenting voice—on the contrary Mr. Bennett was there and then authorized to reduce that agreement into writing. In accordance with the instructions Bennett actually commenced drawing an agreement to be signed by the parties there with a view to having the conveyance prepared and executed later on. But it having occurred to him that the conveyance could as well be executed at the time, the agreement was unnecessary. It was therefore prepared and executed. Mr. Bennett says that after that and while he was

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writing the deed Arthur Hicks came into the room and told him that Mrs. Mansfield Hicks was to have $600 instead of $500. When the deed was ready for signature all the parties who actually signed it except Mansfield Hicks were present together. Mr. Wood, Mrs. Hicks, the widow, and Mr. Bennett were also present. Mr. Bennett was asked to tell what took place while they were all there together. He said: "After they had seated themselves all in the parlor I took the document up and read it very slowly and carefully. When I finished it I said: 'This document simply means this—Mr. Hicks died without making a will; his children would inherit his property in equal shares. This paper that I have read over conveys from the daughters to Arthur Hicks and John L. Hicks, all the interest that they inherit from their father.' I added then, 'if you wish it, you are entitled to have this estate administered in the Probate Court, and any surplus after the debts are paid you all are entitled to share in in equal shares.' Then I said: 'In the deed, the consideration is stated to be one dollar.' I said, 'that doesn't mean that the girls are not to receive the provision that is to be made for them, that it was arranged should be made.' I said: 'Mrs. Fillmore will receive the Silas Estabrooks property and a piece of marsh land. I will stay here and draw the deed of it to-day; Mrs Sears will receive her $500 and Mrs. Hicks will receive $600.' I said: 'Satisfactory arrangements will be made to pay or secure to Mrs. Hicks that money; that will be done to-day on the spot.' Mansfield Hicks executed the deed later in the day." Mr. Bennett says that he read it to him, and when he signed it he said: 'The boys are getting a valuable property,' and I said: 'Yes, they are, they are getting a valuable property.' He said: 'Do you know what the debts are?' I said: 'I believe the debts all amount to $15,000. I don't know; I think they will probably amount to $15,000,' and he said: 'Well, I suppose the boys are the most entitled to it.' He then signed the deed." It is clear from this evidence that the plaintiffs and those who acted in the same interest with the fullest knowledge of what their legal rights actu-

ally were, voluntarily executed the conveyance, made as was stated at the time without either objection or dissent, with a view of carrying out the intentions of their father as to his property.

Before going into a consideration of the evidence in reference to the fraudulent misrepresentations relied upon by the plaintiffs as a ground for the relief prayed for, there are two minor points which may be disposed of. There is no evidence whatever to sustain the allegation that Mrs. Sears was so worried by her father's sudden death that she was incapacitated from transacting business. Mrs. Sears herself did not venture to go that distance, and the other evidence entirely disproves it. Neither is there anything in the point as to want of independent advice. Their legal position was told them clearly and accurately by Mr. Bennett, and, as to other matters, these parties who had all a common interest were competent enough to manage their affairs. The evidence shews that Mr. Wood went to the Hicks house on the 6th June, having in his mind the desirability of some arrangement being made by the members of the family which might obviate a formal administration of the estate in the Probate Court, save expense, and simplify the management of the business so as to enable it to be carried on by the sons without delay. It is clear that he had in his mind that if the daughters were willing to give effect to what, from his personal knowledge and what Mr. Bennett had told him, he knew to have been the intention of Hicks as to the final disposal of his property, the sons would be in a position to continue the business practically without interruption, and further delay in fulfilling the McKean contract would be avoided. Mrs. Sears' account of the interview between herself and Mr. Wood and her mother, so far as it refers to the alleged misrepresentation, is as follows: After relating a part of the conversation referring to her home property in Albert, her direct examination proceeds: "And then he (Wood) pointed out this paper (*i. e.*, the McKean contract) on the table, and stated that unless that contract was carried out there would be nothing left, and if it went through law it would take all

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there was, and would swing our Albert County property in with it, and just then somebody came and called him and he went out of the room to the telephone, and my brother John came into the room and he walked around to the table and was looking at the agreement, and my mother says: 'Johnnie, you could no more start that mill without Mr. Read's permission,' and she made reference to an old fellow up there, 'than old John S. Estabrooks could'; and I got up from my chair, starting to go to the table to look at the paper, and she stepped in ahead of me and lifted the paper up so I could not see what was on the paper, and I went back to my chair and sat down, and Mr. Wood came back in the room and my brother went out and he repeated the words, 'unless the contract was carried out there would be nothing left, and if it went through law our Albert County property would be swung in with it'; and I got off my chair and said I felt very sorry to think father had died and left things the way he had, and I did not come home expecting anything like this to happen to-day, and if we could be left alone in Albert County I would go home and be satisfied under the circumstances, if what he told, under the stories he told, I would go home to Albert County and say no more. I would be satisfied with that, and I left the room and went out of the room and walked through the front hall to the front door and opened the door and went out doors with the intention—and I told mother then I guessed I would go home, when I left the room and went out through the hall with the intention of seeing if I would have time for taking the train from Midjic for Sackville in time; that was my intention when I went out." It will be noticed that, according to this account, Mr. Wood said nothing in reference to Hicks' intentions as to his property, and he did say, not only once but twice, that unless the McKean contract was carried out there would be nothing left, and if it went through law Mrs. Sears' Albert County property would be swung in with it, by which I understand the witness to mean that it would be lost in common with the estate of her father. That a man of Senator Wood's intelligence and business

capacity and experience should, under the circumstances, have omitted the one statement or made the other, appears to me altogether improbable. On her cross-examination she swore positively that the whole conversation with Mr. Wood had reference to this McKean contract; that he said nothing as to the amount of the debts or the value of the assets of the estate; neither did he say anything as to Hicks' intentions in reference to his property. This whole contract with McKean only involved some $5,000; the lumber was all in the stream to be manufactured, and though delay might have caused a liability for damages, it could not well prove a very serious loss. Besides this, how was Mrs. Sears' property to be injured by it? She had received a conveyance of it from her father three years before; she was in possession of it and had been for that period; and if her account is correct, her husband has paid her father its full value in cash and labor. Wood must have known that Mrs. Sears' property could not be in any way involved in any loss arising out of the McKean contract or jeopardised by it in any way. Mr. Wood's account is as follows: "I asked her about her property in Albert County, if her father had given her a deed of it, I think. I am not sure if the deed was mentioned, but I asked her. I do not know that I can remember all that was said about what it was, and so on, and I said that was the property her father intended to be a home for her, as I had understood from him, and then I explained to her that my object in coming up there was to see what had been done, and decide what was to be done in reference to the future business of the estate; that we had either to administer or make an arrangement with the family, and I asked her if she was satisfied to carry out the intentions of her father; no will had been made, and she said—I can't give the language—but she expressed herself satisfied. I think the words she used in her own evidence were probably the words she used—that if she could have her home in Albert County, or was left alone in Albert County, or some such words as that, she was satisfied. Then she asked me after that what guarantee she would have from the boys that

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her lands would not be made liable in any way for estate debts—that she had these clear of any liability of the estate, and I said there would be no difficulty about that; there would be plenty of property to pay the debts, and if she was any way alarmed about that, that we would give her any guarantee she wanted that she would not be disturbed for any debts of the estate. I think that is the substance of the conversation." Mr. Wood then told of his interview with Etta Hicks and Mrs. Fillimore. After he had finished these three separate conversations he asked the two boys, John and Arthur, into the room, where their mother also was. He proceeds: "I said to them that I thought the prospects of making a family settlement were very good; the girls all seemed willing to carry out what they thought was their father's intentions, and I spoke particularly of Mrs. Sears. I said that Mrs. Sears, there would be no trouble settling with her, but said the only one that made any objection was Mrs. Mansfield Hicks; at least I did not say she made any objection, but the only one that hesitated was Mrs. Mansfield Hicks, and then I went on to say to the boys that I thought Mrs. Mansfield Hicks' case a little different from what I expected. I said I thought her father, although I knew his intentions were not to give her more, the way he had spoken to me, yet I said I thought it was pretty hard to leave her with the mortgage against her place; that I did not think, from what I knew of her husband, that they would ever pay it, and the result would probably be they would sometime be without a home. I said if this arrangement was made—if the girls carried out the spirit which they had manifested to settle the business according to their father's intentions, that I thought they could afford and I thought they ought to deal generously with them, and I suggested that they should give Mrs. Mansfield Hicks $500; and that if they gave her $500, they should also give Mrs. Sears $500; and we spoke of Mrs. Fillimore, but it appears that she was to get a piece of marsh, which I didn't know before, and which had not been spoken of between us; so she was left out. Well, Arthur objected; thought that if they had

what their father intended for them it was all they ought to claim, and we discussed that for quite a little. Finally John spoke up and said he thought perhaps they had better do what I advised, and later on Arthur agreed to it. Then the boys went out, and I suggested to Mrs. Hicks that we had better now put the matter to a final test and better bring the girls in and see whether they would accept. I said, 'Now we have a definite proposition to make them.' The three girls were asked to come in together, and I told them all together what I had said to the boys and what the boys had consented to do; they had consented to give Mrs. Mansfield Hicks and Mrs. Sears $500 each, and that Mrs. Fillimore would have her deed of the place she lived on and the marsh, and then I remember distinctly of asking each of them separately if they were satisfied. I said to Mrs. Hicks, 'Now are you satisfied with that arrangement?' She said she was. I asked Mrs. Sears, and she said she was. I asked Mrs. Fillimore, and she said the same." Mr. Wood then tells of the preparations and directions for drawing the conveyance. Later on he gave the following testimony:

"Q. At that time was anything said, when you had them individually alone in with you, was anything said about possible trouble or lawsuits or litigation using up the estate, and it would be better for them to take the $500. A. No, nothing. Well I think I said this, that if the estate was administered in the regular way that it would involve some delay, a little delay and some considerable expense; no amount mentioned.

"Q. Was there any idea given out by yourself or Mrs. Hicks in your presence, to them that the estate would be used up if this was not done? A. Oh, I couldn't say that, because I knew better.

"Q. There would be too much then to be used up. A. I knew there was plenty of estate to pay John Manning Hicks' debts, and more too.

"Q. When they were all together was anything said by yourself or Mr. Hicks on these lines? A. Well, I was

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asked at some time, either when the three girls were in together or later, I think it was when Mr. Bennett was writing. I think they were mostly all there—they were in and out—I was asked by one of them if I knew about what Mr. Hicks' liabilities were, or how much he owed, and I said I couldn't say exactly, but I thought about $20,000.

"Q. Another thing; Mrs. Sears says that when she was alone in there with you and Mrs. Hicks this McKean or Read contract was there. Did you have the contract there? A. Well, I hadn't; no.

"Q. Have you any recollection of it being there? A. I don't think it could be there. There was no one but Mrs. Hicks, and I went in there alone. I hadn't the contract. I went there very soon after I got there.

"Q. She says that you, pointing to the contract, made some remark about the difficulty that would arise if no arrangement was made over this contract, and the estate be put in litigation or something to that effect. A. Oh, no. The only thing I did say was that this contract would have to be carried out; the estate was liable to carry out that contract.

"Q. The contract was not before you when you made that statement? A. Oh, no, the contract couldn't be there.

"Q. I think she said you were out at the particular time. Did you see Mrs. Hicks, the widow, attempt to prevent Mrs. Sears from seeing any document that was on the table? A. No, I did'nt."

Mrs. Hicks' memory as to the sequence of events is perhaps not quite so clear as that of Mr. Wood, but her testimony entirely corroborates his. She says:

"Q. Take Mrs. Sears, when Mrs. Sears came in, can you remember what Senator Wood said to her? A. Well, I don't know as I know just what he said to her, but he told her; he said that we thought we would try to get a settlement fixed so that it could be agreeable so that the boys could go on with the work. I don't know as I can just tell word for word.

"Q. Did he inform her as to Mr. Hicks' intentions as to her? A. Well, he did.

"Q. What did he tell her? A. I think Mrs. Sears told Mr. Wood first that she had the Albert County property; said her father gave her that, and if they would let her alone she would take it and go home contented; or something to that.

"Q. Whether she said that first or at a later stage, she said it? A. She said it. I don't know that she said it right at that time.

"Q. Is your recollection clear as to what was said first and last, as to the order in which things were said? A. Well, I don't know that I am.

"Q. Did Mr. Wood, on that occasion, say that the estate was heavily in debt or intimate it was heavily in debt and there would be very little for the heirs? A. No, sir.

"Q. On that occasion do you recollect that was not said? A. No, sir, he never.

"Q. Was anything said about the value of the estate? A. No, sir, nothing.

"Q. Nor there being a small amount for the heirs? A. No, sir, none.

"Q. On that occasion was reference made to this contract with Read? A. Well, he said that the contract—he spoke about the contract. I think that the boys had to sell the lumber as Read was wanting it and very anxious for it, and it had to be carried out; but he didn't say that it was going to.

"Q. Did he say it was going to involve the estate in costs or anything like that? A. I know Mr. Wood said no such a thing as that.

"Q. Was the contract there before you at any time? A. That day? Well, I never saw it. I never saw the contract that day.

"Q. Well, Mrs. Sears says that when you and Senator Wood and she were in the room alone that the contract was on the table, and she went to look at it and you prevented her; is that correct? A. I never saw the contract. I never stopped Mrs. Sears from seeing any contract.

"Q. You didn't see the contract yourself? A. No, I don't mind seeing it that day at all; but I did hear, I think

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it was John, inquiring for the contract; asked for it, or something to that effect. I think he said Mr. Bennett wanted it, or something like that. I think I heard him say that.

"Q. You have no recollection of it? A. Something, but I never seen the contract, I know, that day.

"Q. After you talked the matter over, apart from each other, they all came in, did they? A. Yes.

"Q. And when they all came together what arrangement was arrived at, do you remember? What did they do? Approve of the arrangement arrived at? A. Well, after they agreed to—after Mr. Wood talked to the girls separate they agreed to take the—He proposed if the boys would, he thought if they could get it settled up, the matter, that the boys had agreed to give them $500 a piece.

"Q. Before they came in did Mr. Wood go and see the boys? A. I think before the girls came in together, the three of them, that Mr. Wood went and seen the boys.

"Q. And after he saw the boys he then went in and had all the girls come in together? A. Yes, sir.

"Q. Do you recollect what took place when they were all in there together? A. Well, the girls agreed to take the $500 a piece, and Mrs. Fillimore had the farm and bit of marsh, and I think Mansfield's wife hesitated a bit; she grumbled some. I think she wanted the $600.

"Q. Finally they called in Mr. Bennett, I suppose? Can you recollect distinctly whether it was on that occasion she wanted the $600 or at a later time that she wanted the $600? A. Well, I don't remember just when it was she wanted it, but I remember of her wanting $600.

"Q. And it was agreed to pay her that by the boys? A. Well, they did at last agree to pay her.

"Q. Mr. Bennett was sent for to put the agreement in writing? A. Mr. Bennett was called in.

"Q. Did he do anything after he was called in or anything before he wrote? A. Well, I don't remember.

"Q. He wrote the document, anyway? A. Yes.

"Q. Did he read it over? A. Yes, he read it over to them.

"Q. Do you remember him making any statement with respect to the document? Did he explain it? A. He did explain it to them.

"Q. Do you remember what he said about it? A. Well, I don't know as I can remember, but it was that after they had agreed to take the $500 a piece, the amount, whatever it was, he told them, and had signed it, that they were signing—well, so that they had no more claim in the estate; but I can't put it just.

"Q. Do you recollect him saying anything about Mr. Hicks not having made a will, what the effect was? A. Well, yes, I do. That his dropping off without a will, that each one would have their equal share, I think—something.

"Q. He said that Mr. Hicks, having dropped off without a will, they each would have an equal share? A. Yes, I think.

"Q. And that in signing this they each signed away that share? A. Well, yes, he did.

"Q. Mrs. Sears has said that you told her if she didn't sign this or agree to take the $500 and sign a release of her interest in the estate that her own property would be dragged in, or something to that effect, to the estate. Did you make any representations to any of your daughters then of what the effect would be on the estate if they did not sign the release? A. No, sir, I didn't.

"Q. Who did the talking? A. Well, Mr. Wood talked to them, and they seemed to be willing and appeared to want to do what was their father's wish.

"Q. They appeared to want to do as near their father's wish as possible; that seemed the disposition at the time? A. That seemed to be their—they was noways loath to do it."

This is substantially all the evidence which has any bearing upon the principal ground upon which the plaintiffs' case rests—that is, wilful misrepresentation. I pointed out how improbable to me seemed Mrs. Sears' account of what took place between herself on the one side and her

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mother and Senator Wood on the other. Their evidence contradicts hers in all its important points; she is interested and they are not; for so far as there is any evidence, neither Mr. Wood's position as a creditor nor Mrs. Hicks' position as dowress is affected by the arrangement. Under these circumstances I think I ought not to interfere with the conveyance or the arrangement which these parties made. It is concurred in by Mrs. Mansfield Hicks and her sister Mrs. Fillimore, and the plaintiff herself concurs in it so far as it relates to the land conveyed to Mrs. Fillimore. Before leaving this branch of the case there are, however, some other contradictions to which I shall refer. It was put forward as a strong evidence of an intention on the part of Mrs. Hicks to withhold some valuable information or to commit some fraud in some way, that she prevented Mrs. Sears from inspecting the McKean contract, and she swears positively as to the paper being on the table when the three were conferring together. In addition to the contradiction of Mr. Wood and Mrs. Hicks, Mr. Bennett says that the contract was handed to him before these parties went into the room at all by one of the sons, and that it was not out of his possession until after the conveyance had been executed. More than that, when a search was being made for it, when Mr. Bennett asked for it, Mrs. Sears herself assisted her brothers in searching among the papers for it. There was nothing about it to conceal; it is nothing but an ordinary printed contract for the manufacture and delivery of 400 or 500 M. feet of lumber. Mrs. Sears states that after she came out of the room, when Mr. Wood and she had the first conversation, she met her brother Arthur in the kitchen, and he came and called her by name, "Celia, what is going on here this morning?" and she said, "Why, Arthur, don't you know that Senator Wood and a lawyer is here doing up the business?" He said: "My God! as quick as this; what can the matter be?" Arthur Hicks denies this.

It is said, however, that the conveyance cannot be supported because there was a suppression of fact as to the amount of the debts and value of the assets—matters

which were material to be communicated to the plaintiffs that they might know what they were really being asked to convey. If the conveyance was really made by the plaintiffs, as the defendants contend that it was, solely for the purpose of carrying into effect Mr. Hicks' intention as to the final disposal of his property, it is an altogether immaterial inquiry as to the value of the surplus of the estate or whether there would be a surplus or not, because in any case the plaintiffs are by the arrangement getting all that their father intended them to have. We have Mrs. Sears' own admission that before leaving the room after the first interview she did consent to give up to her brothers all her interest in her father's estate provided she should not be disturbed in her occupation of the Albert property. But she says she did so altogether on the strength of Mr. Wood's assurance that her father's estate was insolvent and that her own property was in danger of in some way being involved with it. Accepting Mr. Wood's version of what took place at that interview it is clear that Mrs. Sears' consent to part with her interest was attributable solely to the only reason given for suggesting any such arrangement, because at that time there had been nothing proposed as to the $500. Mrs. Mansfield Hicks does not seem to have assented at first, but Mrs. Sears, according to her own admission as well as the testimony of Mrs. Wood and Mrs. Hicks, did. Any other view seems to be altogether inconsistent with the fact that according to the plaintiffs' evidence, at all events, neither they nor any one else made any inquiry as to the position of the estate or suggested any delay with a view to ascertaining it. Mr. Wood states that at the meeting, when Mr. Bennett was directed to draw up the papers, some one of the daughters inquired as to the amount of the debts, but that was after the matter had been agreed to. Mr. Wood's estimate of the amount of the liabilities certainly did not induce anyone to decide upon the arrangement, and it was considerably under the actual amount. Assuming, however, that I am wrong in treating this case as simply a case of a family arrangement, and that it is to be regarded as one between

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vendor and vendee, where is the evidence of any suppression of material facts? If without the intervention of Mr. Wood or anyone else, John and Arthur Hicks had gone to their sister, Mrs. Sears, and said to her: "It is clear that our father intended that we should get these lands and pay the debts, and that you were not to get anything more than you already have; we will give you $500 for your interest in the estate," and without inquiry by her and without any representations from them except as to their father's intentions, of which there seems no question, she accepts the offer, takes the $500 and executes the transfer, could she afterwards turn around and have the conveyance set aside because she did not know what the debts amounted to, or what the assets were worth and was therefore not in a position to tell the precise value of her sixth interest? I think the Court would not and ought not to entertain such a claim. Were the brothers in such case bound to give their estimate of the value of the assets —their estimate of the amount of the liabilities—their estimate of the cost of administration and their estimate of the value of the widow's dower, without any request from her? In my opinion they were not. If she chose to act upon her own judgment or chose to waive all inquiry as to facts upon which she was without information she would, in my opinion, be bound, and for obvious reasons she should be.

Assuming that this case, instead of belonging to either of the above classes, is really a combination of both and it should, therefore, be dealt with as if the consideration for the conveyance were compounded partly of value and partly love and affection, as was the case in *Persse* v. *Persse* (1), I cannot agree that in such a case there has been any suppression of material facts. Mr. Wood says that he stated his view as to the probable amount of the debts and it turns out that his estimate was under the actual figures. In fact, neither of the brothers nor Mrs. Hicks knew what the debts amounted to—they themselves went to Wood for

(1) 7 Cl. & F. 279.

information on that subject. As to the assets I should think for all practical purposes Mrs. Sears knew as much about them as her brothers. She seemed to be an active, intelligent, self-possessed and independent woman. She knew all about her own property, and had positive opinions as to its value. She knew all about Mrs. Mansfield Hicks' property and its cost. She knew all about the properties conveyed to her two brothers, what they cost, what money had been expended on them since their purchase, and had positive opinions as their present value. She knew all about the property which was conveyed to Mrs. Fillimore and her father's intention in buying it. Besides this, she knew about her father's lumber lands; she had herself cooked for the men when lumbering on the Albert property. She knew its acreage, and seemed to have about as intimate a knowledge as any of the others as to what property there was. And she knew there would be a surplus, for she was getting $500 and Mrs. Mansfield Hicks was getting $600 for their interest in it. I am unable to see that in this case, any more than the other, there was any suppression of facts, still less any suppression of facts material to be communicated. See *Bainbridge* v. *Moss* (1); *Attwood* v. *Small* (2). In the case of *Persse* v. *Persse*, just cited, the Lord Chancellor, in speaking of arrangements of this description, says: "By what scale of money consideration are these objects to be estimated? The impossibility of estimating them has led to the exemption of family arrangements from the rules which affect others. The consideration in this and in other such cases is compounded partly of value and partly of love and affection." See *Hoghton* v. *Hoghton* (3).

The only other point was that the consideration was inadequate, but there is nothing in that. It is said that in cases like this "modern equity will not weigh consideration in golden scales." And Lord Eldon, in *Coles* v. *Trecothick* (4), says that specific performance will not be refused on

(1) 3 Jur. N. S. 58.
(2) 6 Cl. & F. 232.
(3) 15 Beav. 278.
(4) 9 Ves. 246.

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the ground of inadequacy of price unless the inadequacy amounts in itself to conclusive and decisive evidence of fraud. The $500 was ample consideration, and without that at all the conveyance by the brothers of their interest in the Estabrooks farm and marsh to Mrs. Fillimore in performance of the agreement was an ample consideration to support an arrangement such as this. See *Williams* v. *Williams*, already cited.

The bill must be dismissed with costs.

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Mortgage—Absolute conveyance—Mortgage or purchase.

Land of the plaintiff worth $1,500, subject to a mortgage for $900, and other charges for $300, was conveyed to the defendant in consideration of his paying $140 due for instalments under the mortgage, for the recovery of which an action had been brought. The costs of the action were paid by the plaintiff. The Court, finding under the evidence that the deed, though absolute in form, was intended as a mortgage, allowed the plaintiff to redeem.

Redemption bill. The facts fully appear in the judgment of the Court.

Argument was heard May 30, 1906.

M. G. Teed, K. C., and *R. W. Hewson*, for the plaintiff.

W. B. Chandler, K. C., for the defendant.

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The question involved in this suit is solely one of fact, and that is whether a certain conveyance, dated February 5th, 1897, and made by the plaintiff to the defendant and one J. Temple Forbes, of a lot of land in the Town of Moncton, and which is on its face an absolute conveyance, was really intended to be absolute, or whether the transaction was in fact not a mortgage transaction. The plaintiff alleges that the conveyance was made and intended as a security for a loan, and he has filed this bill with a view of redeeming the premises. The plaintiff acquired the land in question about 1892 from one Edward Robertson, and paid for it between $1,200 and $1,300. At that time it had but one building on it, but he afterwards placed upon it three or four more, which increased its value, according to the plaintiff's estimate, to $2,000. In the year 1892 the plaintiff mortgaged the land to the trustees of the Nova Scotia Permanent Benefit Building Society and Savings

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Fund to secure the sum of $1,260, with interest, payable in monthly instalments of $12.60. In 1897 the plaintiff was somewhat embarrassed in his business matters. He was in arrears in his monthly payments to the amount of about $140, besides being in debt to some others with whom he was dealing in a business way. An action had been brought against him by the Building Society on his bond for the recovery of the $140 overdue for the monthly payments, and in this action final judgment was about being signed when the negotiations were commenced out of which the present litigation arises. The plaintiff's version of the transaction is this. He says that the defendant and Forbes, who were also residents of Moncton, were in the habit of coming into his place of business, and on this particular occasion the defendant noticing that he was apparently in trouble of some kind, asked him the cause of it. He then told him and Forbes that he had been sued by the Building Society for arrears, and was about losing the property after paying on it for four or five years. He said he felt badly about it. The defendant, he says, turned around to Forbes and said: "Temple, let's help him." When he got through with the business in his shop he was then busy about, he said: "Gentlemen, if you propose to help me I will give you a deed as security," and he told them the amount he was behind. His examination proceeds:

"Q. Give them the deed of what? A. A deed of the property in question.

"Q. Was it mentioned then or did they know what property it was? A. They knew; I told them.

"Q. What did they say to that suggestion of yours? A. They agreed to it.

"Q. Do you remember the words they said? If you can remember give what they said? A. They said they would help me, and I said if they would I would give them a deed of the property until they got their money.

"Q. What next took place? A. I told them I would pay all the costs of the case. All they had to pay was the arrears of subscription to the society.

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"Q. Did you state what that was? A. I told them about—somewhere about $140.

"Q. And you told them if they would, you would give them a deed of the property as security? Was anything further stated as to how long it would or might have to stand? A. After they agreed to do that I said: 'You better go right up and see Mr. Hewson in reference to costs' (Mr. Hewson was the Building Society's attorney, who had brought the action). They said they would.

"Q. Do you remember anything else taking place at that time? Was anything said, and if so what, as to who would attend to collecting the rents of the property? A. I was to collect the rents and remit the monthly payments. I said I would pay the costs and collect the rents in the case, and I would remit the $12.60 every month out of the rent."

The plaintiff says that the defendant then went out to see Mr. Hewson as to the costs—that he came back, he thinks, on the same day and told him that he had pleaded his case so hard that Mr. Hewson had "cut the costs about in two;" reduced the amount from about $70 to $40. He then gave the defendant the $40 and told him that he had better go right up and pay the costs and bring back a receipt; and he did so. Some four days after, he says the defendant with Mr. Bray, his solicitor, who prepared the conveyance for him, came to his shop with the deed to be executed. He sent for his wife at their apartments over the shop, to come down, and what took place when the conveyance was executed in the presence of himself, his wife, the defendant, and Bray, he describes as follows: "I said to Mr. Bray, 'I suppose you know this is a trust deed.' Before he had time to reply Mr. Wilbur said: 'There is no trust in it, you have got to trust me.' He repeated that. I said: 'All right, Mr. Wilbur, that is what I agreed to give you and Mr. Forbes—a deed till you get your money.' I took the deed in my hand and looked over the description and what it was agreed, and says to Mr. Bray: 'I suppose this is written like an ordinary

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deed.' He says, 'yes,' and I looked at the description and I signed it." The plaintiff's wife corroborates his statement of what took place at the time the deed was executed. Bray's evidence on this point is as follows. He says: "I went in with Mr. Wilbur for Mr. Beaton to acknowledge the deed, and he asked me was it a trust deed. I told him it was an ordinary deed. Mr. Beaton asked me—and shewed him the description to see if it was correct, and he said the deed was all right, the description was all right, and I asked him to sign it, and asked him to send for his wife, and she came down and signed it. I can't say for certain I asked him to send for his wife before reading the description or after." * * * Mr. Wilbur repeated several times that he wished to help Mr. Beaton out, that he was in trouble and a pretty decent fellow, and he would like to help him, but further than that as to any discussion, just what was said I can't give it. * * Bray says they (by which I presume he means the plaintiff, defendant, and himself, for Mrs. Beaton does not seem to have remained longer than was necessary to execute the deed) were there probably an hour and a half talking the whole matter over, and while he was unable to give the conversation at length he summed it up thus: "My recollection of the conversation that took place from the time we went in, the points that I recollect, we discussed the difficulties of Mr. Beaton, and not only the difficulties with the Building and Loan Society, but difficulties, his general financial position right through; and it was discussed whether the fact that Mr. Beaton would lose his property, unless he either did something with it, if it remained in his hands, and that a change had to be made and he required some money down to handle the loans that I understood were then due to the Nova Scotia Building and Loan Society, and the amounts of the Building and Loan Society were all talked over. I don't recollect the amounts; but those were talked over, and his other indebtedness was talked over, to other people. I don't recollect the amounts, and Mr. Wilbur was going to advance this money.

"Q. And take this deed? A. And take this deed.

"Q. For the Building and Loan Society? A. For the Building and Loan Society. Mr. Wilbur wasn't to advance money to anything else but the Building and Loan Society. He was to advance to the Building and Loan Society for the purpose of saving himself the getting an execution under a judgment; advance to Mr. Beaton, and sacrifice his money." (This last clause is not very clear, but I copy from the official report).

Mr. Bray was asked if he and Wilbur had any discussion over the matter before they went to the plaintiff's shop, and in reply he said: "The only discussion I had with Mr. Wilbur he told me to write the deed and he would call for me to go down to Mr. Beaton. He told me Mr. Beaton was in trouble and he was helping him."

It seems to be admitted that there was about $900 unpaid on the mortgage at the time, including the $140 overdue for monthly instalments. In addition to this there were city taxes and other municipal charges against the property, amounting in all to about $300 more, making the total incumbrance to be about $1,200. The evidence, I think, shews that these figures were in the minds of all parties when these negotiations were in progress. The defendant and Forbes were going into the matter on equal shares and with the same security and on the same terms. They paid the amount due the Building Society—for which the action was brought—$138.77, each paying one-half. Forbes sold out his interest to Robertson, from whom the plaintiff had purchased in 1892, for the sum of $70, though the consideration mentioned in the conveyance, which is dated April 19, 1897, is $600.

The case set up by the defendant is that the transaction in question was not only in form but in fact an actual purchase by him and Forbes of the plaintiff's equity of redemption in these mortgaged premises, which they bought subject to the mortgage and other charges. He does admit that at or about the time the conveyance was made, the plaintiff stated that he thought he should be able to sell the property in a short time to one Watters for some $1,500 or $1,600, and he says that he and Forbes did con-

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sent to re-convey the property in case he succeeded in selling to Watters, on repayment of their money. He, however, says that Watters soon bought elsewhere, and his negotiations with the plaintiff, such as they were, fell through. The defendant's history of the transaction is as follows. He says, as a result of a conversation with Forbes, he went with Forbes to see the plaintiff at his store in Moncton. He was asked to tell what took place, and he answered: "Beaton told me that he was sued, and that he wanted me to let him have some money and take security, and I asked him what security, and he began to tell me about this security, and I said: 'How much is against it?' And they figured up how much against it, about $1,200, and I said there was no security in that, taxes and frontage and all. That is what had to be paid then. I said that was no security, and I couldn't look at it, and he asked me what I would do and I said that I would buy the property right out, and if Mr. Forbes would buy half I would buy half, and we would pay what was against it; that is, the $1,200."

"Q. What did you understand was against it at the time? A. I understood the Building Society had a mortgage against it.

"Q. Just what they told you? A. That is what they told me right there, that the Building Society had a mortgage on it, and that Mr. Hewson had sued for a year's back dues, and it was about $900, the mortgage, and the arrears and the taxes, and the frontage and rates; what the city had against it was $300, and I agreed to take it on that, buy it on that and pay for it." * * *

"Q. When you said you were willing to buy the property in this way what did Mr. Beaton say to it? A. He said he would rather we take security, but if we wouldn't take security he would sell it.

"Q. Do you remember what they said the arrears were that Mr. Hewson was collecting? A. The judgment, I understood, was about $140 or $150—about that."

The defendant then says that he, at the plaintiff's request, employed Bray to prepare the conveyance, giving

him a description of the land which he had received from the plaintiff. He says the next thing was that Bray brought him the deed executed by the plaintiff and his wife, but that he was not present when it was executed. His examination then proceeds:

"Q. What took place in connection with the costs of the proceedings? A. Mr. Beaton agreed to pay the costs on it himself—Mr. Hewson's costs. We wouldn't take it without he would."

He says that he went to Mr. Hewson, at plaintiff's request, and got a reduction in the amount of the costs in his interest —that Beaton himself not only provided the money to pay them, but that he himself handed the money to Mr. Hewson, and that Hewson there and then gave him a receipt for the $40 paid. He further states that he and Forbes did afterwards agree to give plaintiff a chance to sell to Watters, but that Watters refused. He also states that he consented that while these negotiations were going on with Watters, the plaintiff should collect the rents and appropriate them in paying the monthly dues on the mortgage.

Mr. Forbes, the only other person who had any personal knowledge of the original arrangement, says that the plaintiff first applied to him for assistance, and after some conversation he went to see the defendant, and told him that the plaintiff wanted help and offered this property in security. He says, "he (the defendant) looked at me and said: 'I wouldn't go into that, not for any consideration at all. I just got through another case. I wouldn't do it for my father—the only way I would take hold of that thing would be an absolute deed. I think these are the words he used out and out." They then went to see the plaintiff, when the same conversation was repeated, and he says that the defendant then told the plaintiff there and then that he wouldn't go into it unless he had an absolute deed out and out of the property. He also says that the plaintiff wanted the defendant to take security on the property, but he hooted at the idea and said he wouldn't do it. Mr. Forbes further says, that after the plaintiff had

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consented to give an absolute deed, that he made inquiries in order to ascertain the amount of charges against the property, and he says: "When I found it was $1,200 I told him it was more than the property was worth. I wouldn't give it and I wouldn't go into it. I found it was costing—I said, 'to shew you (*i. e.*, Beaton) can sell this property, you pay the costs.' I just tapped on the counter and said: 'You pay the costs.'"

The rule of law by which cases of this kind are governed is, that *prima facie* an absolute conveyance containing nothing to shew the relation of debtor and creditor does not cease to be an absolute conveyance and become a mortgage, merely because the vendor stipulates that he shall have a right to re-purchase. In every case the question is, what upon a fair construction is the meaning of the instrument, and the absolute conveyance will be turned into a mortgage if the real intention was that the estate should be held as a security for the money. See *Coote* on Mortgages (4th ed.), p. 22.*

If this case rested solely on the evidence of Mr. Forbes I should be prepared to hold that the transaction was a mortgage one as the plaintiff contends, for Mr. Forbes shewed every disposition to assist the plaintiff from motives of kindness or friendship and was willing to make the advance required, although he thought the security weak. He did not stipulate for an absolute conveyance, and never put forward any suggestion that he and the defendant were buying the property. He was asked for a loan on a certain security—it was the defendant, not Forbes, who insisted on the conveyance being in its present form. But for that, so far as Forbes is concerned, I have no doubt the security would have been by a mortgage in the ordinary way. In fact, in all the conversations—both those between Forbes and the defendant alone, and those between them and the plaintiff as detailed by Mr. Forbes, there is not a

* See *Gordon* v. *Selby*, 11 Bligh (N. S.) 351; *Fee* v. *Cobine*, 11 Ir. Eq. R. 406; *Perry* v. *Meddowcroft*, 4 Beav. 197; *Douglas* v. *Culverwell*, 3 Giff. 251; *England* v. *Codrington*, 1 Eden, 169; *Fallon* v. *Keenan*, 12 Gr. 388.—REP.

word about buying the property—the defendant's stipulation was that he must have an absolute deed. It was the form of the security he was anxious about—not the nature of the transaction itself. There never was at any time a proposal by the plaintiff to sell his property—he was trying to avoid that—his application was for a loan of money on security by way of mortgage. The loan was never refused; the security by way of an ordinary mortgage was, and a deed absolute on its face stipulated for. This would not, however, alter the real nature of the transaction.

It is put forward in the bill that the defendant and Forbes were both personal friends of the plaintiff. This was probably done by way of suggesting a reason why these parties should have gone into a transaction which, upon business grounds alone, they might not have done. So far as Forbes is concerned it seems to be true that he was disposed to assist the plaintiff from motives of friendship and kindness. The defendant, however, entirely repudiates any such idea on his part. He says he was not friendly with the plaintiff and never had been—that he went into this transaction, to quote from his evidence, "as a straight actual purchase in the ordinary way of business—that he had no intention of helping the plaintiff at all, and that the transaction was an ordinary purchase." In view of all the circumstances is this probable? He says that the value of the property at the time was not over $1,200—the amount of the mortgage and other charges. He added: "There has never been a day since I bought it but I would have taken less." At that time he knew there was $1,200 against the property which he would be compelled to pay, and yet, according to him, he was quite willing and ready to take it over with a probability of loss, and this as an ordinary matter of business. Mr. Hewson, who had been for many years before this, the solicitor of the Building Society, and in that way acquired a fairly accurate knowledge of the value of real estate in Moncton, places the value of the land at $1,500 in 1897. This estimate is sustained by the evidence of the plaintiff—also by the value placed on it by the assessors and by the monthly

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rental. What had the plaintiff to gain by making a gift of his interest in the property to the defendant and Forbes, for, according to the defendant's account of the transaction, that was the effect of the arrangement. It is true they paid the $140, and he paid the $40 costs and thus settled the suit. But the $140 did not go to the plaintiff; it went in reduction of the mortgage on the property, and enured solely to the benefit of the defendant and Forbes as owners of the equity of redemption. Then as to the costs. I can understand Forbes' attitude in reference to them, because, if the plaintiff paid them, as he in fact did, it was a guarantee of his honest expectation that the property would redeem itself and that he would find a purchaser to take his place. From the defendant's standpoint it is difficult to see why he should have taken any trouble about the costs; he was not liable for them. If, in fact, the defendant was making a loan on security as the plaintiff says, it was a most natural thing for him and Forbes to say to the plaintiff: "We will advance the $140; that will go in reduction of the mortgage, and our security will remain as it is, but you must help by paying the costs, for if we have to advance that amount also it will simply add so much to the charges on the property." The defendant's assistance in getting a reduction in the amount of the costs would then naturally follow; and the receipt given by Mr. Hewson for the amount shews on its face that the reduction was made in view of the prompt payment of the $140. The defendant says that he was not assisting the plaintiff, and that what he did was not done with the intention of assisting him in any way. That is in direct conflict with his declarations as proved by Mr. Bray, his own solicitor, when he gave him his instructions to prepare the deed, and to his declarations as proved by Mr. Hewson when he was asking for a reduction of the costs. Mr. Hewson's evidence on this point is as follows. He says that the defendant said Mr. Beaton was in trouble and he was helping him, and "he wanted to know what I would take, what I would reduce my costs to. I had shewed him the amount of the claim, about $75, I

think, and he was anxious I should reduce that, said he was helping him out. He joked something about the lawyers making money, and this poor fellow was in trouble and he was helping him out, and he wanted to know if I wouldn't lessen the costs, considering the situation; that he was poor and they were doing this for nothing, if I wouldn't do something to lessen the costs, and I did cut it down." Besides this we have the positive testimony of the plaintiff, his wife, and Mr. Bray as to what took place when the deed was executed, which, if true, proves clearly that the transaction was intended to be simply one of mortgage. It is true that the defendant swears he was not present on that occasion and that no such conversation ever took place, but there is the testimony of these witnesses against him on that point. The defendant's recollection as to the payment of the costs seems in conflict with that of the plaintiff and Mr. Hewson; Hewson's entries in his books made in the ordinary course of business at the time, and the receipt given when the money was paid. On the other hand it was consistent with the plaintiff's position that he should have kept the account which he did, and that for a period of eleven months, and until he was about moving away from Moncton, he should have continued to manage the property, collect the rents and utilized them in payment of the monthly sums accruing due on the mortgage.

There is one other circumstance which seems to have a somewhat important bearing on the case. Forbes conveyed his interest to Robertson on April 16, 1897, for the $70 which he had advanced, and Robertson sold and conveyed to the defendant on the 16th September, 1898, for the sum of $308. It seems that about the time Robertson purchased, the plaintiff owed a man by the name of Strand $145, and that the claim had been placed in the hands of an attorney for collection. In April, 1897, shortly after the transfer from Forbes to Robertson had been made, the plaintiff applied to Robertson for assistance in paying this Strand account. He says he asked Robertson if he and the defendant would advance the money, as they had his property in their hands and they could take the property

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as their security. He says they did advance it on these terms, that they were to get 7 per cent. for their money, and that he gave his notes to them for the amount. This took place on April 20, 1897. One note was for $40, payable in four months, the other two were for $56.66 each, one at eight months and one at twelve, all of them payable to Robertson and the defendant Wilbur. One-half the amount was advanced by Robertson and the other by the defendant. Nothing has ever been paid by the plaintiff on the notes. Robertson agrees with the plaintiff that he was to hold this property as a security for his half of the Strand advance as well as for the amount paid Forbes. The defendant, however, disclaims any such arrangement so far as he is concerned, and for a second time seems to be at variance with his co-owner, as to the terms upon which they acquired this property. It is obvious that if the defendant was to claim the Strand advance as a charge on this land, he must admit that in April, 1897, when the advance was made, the plaintiff had an interest in the property which he could charge and give as a security for the advance, a position altogether inconsistent with his present contention. When the defendant arranged in September, 1898, to buy Robertson's interest, the amount agreed upon and paid was $308. That sum was not made up in any way as the saleable value of Robertson's interest—it was made up admittedly of the sums for which Robertson held the property as a security. It included the $74 paid Forbes—the amounts paid on account of the property by Robertson while he held his interest and this $76.66, his half of the Strand advance. There can be no doubt that the defendant knew this; he does not pretend that he did not, and yet he swears that this Strand advance was also a pure business transaction, made without any reference to the property in any way, and with a man for whom he entertained no feeling of friendship to supply a motive for aiding him in a difficulty, and a man whom to use his own language "he did not consider worth a cent," and whose business affairs were going behindhand.

This Court always regards the substance of a transac-

tion, and though in form it is a sale, if in fact and reality it is a mortgage, it will be so treated. In my opinion it was the intention of the parties that the property should be held as security for the advance, in which case the plaintiff has a right to redeem. There will be a declaration to that effect, and a reference as to the amount due.

Reserve question of costs and further consideration until after the report.

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August 28.

PARTINGTON v. CUSHING.

Practice—Dismissal of bill—Want of prosecution—Form of motion.

An objection on a motion to dismiss for want of prosecution a bill by a shareholder and the company, which subsequently to the commencement of the suit went into liquidation, that the motion should have been for an order that, unless the plaintiff obtained leave to proceed within a limited time, the bill should stand dismissed, overruled.

Motion to dismiss bill for want of prosecution. The facts and grounds of motion sufficiently appear in the judgment of the Court.

Argument was heard August 21, 1906.

A. P. Barnhill, K.C., in support of the application.

M. G. Teed, K.C., for the plaintiff Partington:—

The proceedings in the suit were carried on in due course up to shortly after the commencement of the winding-up proceedings. Pending the disposal in a final way of the questions that arose in those proceedings, it seemed inadvisable to press the suit. Nor should we at the present stage be compelled to proceed with it. The form of the motion has been misconceived. The winding-up proceedings having arisen after the commencement of the suit, it is necessary that the liquidators or the plaintiff obtain leave to proceed with it. The motion should therefore be for an order that unless the plaintiff proceeds with the suit within a limited time after leave for the purpose obtained, the bill be dismissed. See *Robinson* v. *Norton* (1), where it was held that a motion to dismiss for want of prosecution made after the bankruptcy of the plaintiff, should be refused, the proper form of motion being that the assignee do file a supplemental bill within a given time. See also

(1) 10 Beav. 484.

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Kennedy v. *Edwards* (1). The defendant is not in a position to complain of the delay. The proceedings were stayed by the winding-up order, which was obtained at his instance. See *Futvoye* v. *Kennard* (2).

J. D. Hazen, K. C., for the liquidators, took no part.

1906. August 28. BARKER, J.:—

This is an action brought in the name of Edward Partington on behalf of himself and all other shareholders of The Cushing Sulphite Fibre Company (other than the defendant), and The Cushing Sulphite Fibre Company, against George S. Cushing for the purpose of obtaining a declaration of certain rights which the company claims to the use of a shore lot of land near the pulp mill, the legal title to which is in the defendant. The suit was commenced on the 14th October, 1904, and it seems to have been at issue on the 24th February, 1905, when the replication was served. This is an application to dismiss the suit for want of prosecution. It appears that with the exception of taking out a commission for the examination of witnesses in England, which has not been executed, no proceeding has been taken in the suit since February, 1905. The order for commission was made on the 5th May, 1905, and the commission seems to have been forwarded to England soon afterwards. The delay is accounted for by the fact that in April, 1905, the defendant, as a creditor of the company, presented a petition for a winding-up order against the company, and that on that petition a winding-up order was actually made on the 15th September, 1905. Liquidators have been appointed, and the company's business is in course of being wound up. Up to the time the defendant's petition was presented there does not seem to have been any unnecessary delay, and the delay since that time, the plaintiff Partington claims, has been caused or at all events justified by complications resulting from the

(1) 11 Jur. N. S. 153. (2) 2 Giff. 533.

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winding-up proceedings. Apart from this, Mr. Teed, who appeared as counsel for Partington, took the objection that this motion was irregular in point of form—that the application should not have been for an order dismissing the suit for want of prosecution, but for an order that unless the plaintiff got leave to proceed within a specified time the bill should stand dismissed, by analogy to a similar application in the case of a bankruptcy. *Robinson* v. *Norton* (1), was cited in support of this view, in which it was held that under similar circumstances in the case of a bankruptcy the proper motion was for an order that the bill should be dismissed, unless the assignee in bankruptcy, within a limited time, filed a supplemental bill. *Sharp* v. *Hullett* (2), and other cases are authorities for the same practice. The reason upon which the rule rests is that the suit must be set right; that is to say, as there has been a bankruptcy and a consequent devolution of interest by operation of law, the form of the suit must be recast by the assignee filing a supplemental bill. This rule seems more technical than substantial and strong reasons may be given why, even in cases of bankruptcy, it should not apply to a procedure which, like ours, requires no supplemental bill to be filed. Indeed the Master of the Rolls seems to have disregarded it in *Ward* v. *Ward* (3), and made the order which he thought just. These cases can, however, have no bearing upon the present case. There is in reality but little analogy between a winding-up of a company and a bankruptcy. The property of a bankrupt vests by operation of law in his assignee; the title as well as the control is completely divested from the one and vested in the other. Nothing of the kind takes place in the case of a winding-up. The title to the company's property remains in the company; the control and management and disposal of it is taken from the directors and placed in the liquidators, who simply are officers of the Court—receivers and managers acting under the direction of the Court for the purpose of closing up the company's business, realizing its assets and making

(1) 10 Beav. 484. (2) 2 Sim. & St. 496. (3) 8 Beav. 397.

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a legal distribution of them among the creditors and shareholders. See *Gooch's Case* (1); *In re Anglo-Moravian Railway Company* (2). Every statutory power conferred upon the liquidators is given with a view to the speedy, inexpensive and effectual accomplishment of this object. The fraudulent preference clauses present practically the only analogy between the two cases. There is nothing in the form of this suit to be rectified. The liquidation has not interfered with that in any way. The suit can be proceeded with just as it is. Another point made was, that as the winding-up order was made on the application of the defendant, and it stayed the proceedings, it must be taken as his own act, in which case this motion must fail. *Futvoye* v. *Kennard* (3) was cited in support of this argument. That was an altogether different case. There the proceedings in the suit itself had been stayed on the defendant's own application, and it would have been manifestly inequitable to dismiss a bill at the instance of a defendant for not proceeding in a suit when that same defendant, for his own purposes, had obtained an order preventing him from proceeding. It would have been no authority for refusing this order even if the effect of the winding-up order was to stay this suit, but in my opinion that was not the result of it. Sections 13 and 16 of *The Winding-up Act* (R. S. C., c. 129) are the only two sections referring to stay of proceedings, and they both refer to actions against the company; not actions like the present brought by the company, and presumably for the company's benefit. Of course the control of the suit, so far as the company is concerned, like the control of any other of its assets, passes from the company to the liquidators, and they are the persons who, under the Court's direction, are to determine whether the suit shall go on or not. Should they determine not to carry it on, it is quite open to the plaintiff Partington, who is a creditor, and, I believe, a contributory as well, to apply to the Judge who has charge of the winding-up proceedings for leave to continue the suit in the name of the company. Such applications are by no means

(1) L. R. 7 Ch. 207. (2) 1 Ch. D. 130. (3) 2 Giff. 533.

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unusual in winding-up cases, and, unless the circumstances are exceptional, they are, I believe, generally acceded to on the applicant furnishing the company a sufficient indemnity against loss.

The liquidators were served with a notice of this motion, and at the hearing I asked Mr. Hazen, who appeared for them, whether the liquidators wished to go on with the suit, but he was unable to inform me, and he neither assented to the motion nor opposed it. Since then I have communicated with Mr. Justice *McLeod* on the subject, and he authorizes me to state, that after considering the matter he will not sanction the continuance of the suit by the liquidators. This being so, it remains for the plaintiff Partington, if he wishes the suit to go on, to apply for leave to use the company's name for that purpose, because it is I think the right of the defendant either to have the suit proceeded with or dismissed. I shall therefore hold this application until Tuesday, the 18th September next, when the Court will be sitting at St. John, in order that the plaintiff Partington may make the necessary application for leave to use the company's name if he desires to do so. When I am informed of the result I shall be in a position to make an order disposing of the motion.

September 21.

The plaintiff subsequently having made an application to Mr. Justice *McLeod* for leave to continue the suit in the name of the company, which was refused, Mr. Justice *Barker* made an order dismissing the bill for want of prosecution. Respecting the costs he observed that he could not make the plaintiff pay them because he was a proper party to the suit originally, and the present position of the proceedings was not due to his default. The company were differently situated. They could proceed, but the learned Judge would not allow them to do so. He thought the order should be that the bill should be dismissed with costs as against the company, to be recovered in the winding-up by proving against the company. He referred to *Caldwell* v. *Ernest* (1).

(1) 5 Jur. N. S. 667.

In re McGIVERY, A LUNATIC. 1906.

June 25.

Lunatic—Repairs to estate—Collection of rents—Agent.

Committee of the estate of a lunatic empowered to make needed repairs to the estate and to employ an agent at a fixed salary to collect rents.

Petition by the committee of the person and estate of James McGivery, a lunatic so found, for leave to make repairs and improvements to the estate of the lunatic; to mortgage the estate for payment of debts due by the estate and cost of proposed repairs, and for the appointment of an agent to collect rents and manage the properties of the estate. The estate consists in part of a large number of leasehold and freehold properties in the city of Saint John, yielding a yearly rental of about $2,200, and subject to ground rents of $338.25. The rents of the estate are almost all at small sums payable monthly, and there are about forty tenants on the rent roll. It was shewn that the proper management of the estate required a degree of personal attention the committee were unable to bestow, and that in the interests of the estate the collection of the rents and supervision and letting of the tenements should be confided to an agent. Repairs to buildings, estimated to cost $300, were urgently required. To defray the cost of repairs and to pay off an indebtedness of the estate, leave to mortgage the estate for $1,500 was sought.

The application was heard June 8, 1906.

D. Mullin, K. C., for the petition:—

It is necessary that the permission of the Court be obtained by the committee before undertaking alterations or improvements to the lunatic's estate: *Re Buckle* (1); *Ex parte Marton* (2). As an aid in the management of

(1) 8 L. J. Ch. 264. (2) 11 Ves. 397.

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the estate the committee propose that an agent be appointed at a yearly salary of $100. This amount will not exceed five per cent. on his receipts. An agent for the purpose sought here was appointed in *Re Westbrooke* (1), and a similar course was adopted in *In re Errington* (2). In the last named case it appears that the allowance to the agent was in addition to the commission to the committee. See also *Re Walker* (3).

1906. June 25 BARKER, J.:—

The application is allowed.

(1) 2 Ph. 631. (2) 2 Russ. 567. (3) 2 Ph. 630.

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September 21.

Agent—Failure to account—Interest—Costs of preparing receipt-inventory of estate—Costs of suit.

An agent refusing to give an account and pay over balance is chargeable with interest.

Costs disallowed to an estate agent of preparing a receipt containing a schedule of leases and securities delivered up to the principal.

Costs of suit against an agent for an account ordered to be paid by him where he had disregarded requests for an account, and had filed an improper account in the suit.

Exceptions to report of Referee. The facts fully appear in the judgment of the Court.

Argument was heard August 28, 1906.

D. Mullin, K.C., for the plaintiff:—

Were it true that the defendant had paid off the Campbell mortgage he could not charge the payment to the plaintiff. It is plain that no payment was made before December 30. A payment made after that date, when his power of attorney was revoked, would be voluntary. It is, however, but a pretence to set up that the mortgage has been paid. The exception with respect to the charge for interest should not be allowed. It is the duty of an agent to have his account in readiness and to pay over on demand any balance on hand. By letter of January 27th he was notified that interest would be charged from February 3rd. In *Harsant* v. *Blaine* (1), Lord Esher, M. R., after pointing out that while at common law interest could not be claimed in an action by a principal against his agent for money had and received, in equity interest would be recoverable where the agent refused to pay or give an account of

(1) 56 L. J. Q. B. 511.

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money belonging to the principal, says that it is the duty of an accounting party to be constantly ready with his accounts, and that if the accounts shew that he has money which he ought to pay over, he ought also to be constantly ready to pay. Then, after referring to *Pearse* v. *Green* (1), where the Master of the Rolls said that "the circumstance of one person having money in his hands belonging to another, if the debt does not in its nature carry interest, will not make him liable; but with agents or trustees, if they neglect to account properly, if they violate their duty, the Court, for the sake of compelling them to perform it, says they ought to be charged with interest on what they have retained," he proceeds: "The duty laid down in this second phrase is the duty to account properly. That is a clear statement of what the doctrine is, and it seems to me that where an agent who is bound to account refuses to pay over money belonging to another, that is a reason why a Court of Equity gives interest against him." Lindley and Lopes, L. JJ., in their judgments in the case, affirm the same principle. The present defendant was requested not once but several times to hand in his account and to pay over any balance belonging to the plaintiff. It would, as Lindley, L. J., says in the above case, be strange if, when sued, he could not be compelled to pay interest. The defendant should also pay costs. See *Collyer* v. *Dudley* (2). The charge of $100 by the defendant for preparing list of leases cannot be upheld. The defendant prepared it for his own benefit as a receipt. It was no part of his duty or work as agent to prepare it so as to entitle him to charge the plaintiff for it.

A. O. Earle, K. C., for the defendant:—

It is conceded in point of law that the charge for payment of the mortgage cannot be maintained. The good faith, however, of the defendant in making the deduction cannot be impugned. The mortgage had been procured for the plaintiff from a client of the defendant, and, as the

(1) 1 Jac. & W. 135. (2) T. & R. 421.

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estate was passing out of his management, he desired that the transaction should be brought to an end. The plaintiff had instructed the defendant from the time the mortgage was given, to pay it off whenever possible, and was constantly lamenting that there were no funds available for the purpose. Why the plaintiff should not have taken a discharge of the mortgage when the accounts were before the Referee is not apparent. The defendant *bona fide* believed that he was entitled to charge payment of the mortgage where he was able to give the plaintiff a discharge of it. In treating it as an actual payment he was in error. But his good faith and previous upright conduct should protect him from costs. The defendant should be allowed for the inventory of leases. Its utility in the management of the estate is undeniable. It is not merely a receipt. If the defendant had not prepared it the present agent of the estate undoubtedly would have had to. The referee had no authority to charge the defendant with interest. The matter of interest was not dealt with at the hearing. The decree was silent as to it, and it was not included in the reference. The case is not one for interest. The defendant managed the plaintiff's estate with the utmost care. The accounts were kept with scrupulous accuracy, and each quarter all balances on hand were promptly remitted. The change in the management of the estate was not owing to dissatisfaction, but to other causes. The defendant was naturally irritated by the change, and his dilatoriness may be ascribed to it. To ask for interest after so many years of faithful service by the defendant savors of oppression and certainly of want of gratitude. The defendant is entitled to costs. The action was wholly unnecessary. There was no substantial question in dispute, and nothing that could not have been settled out of Court had the defendant been dealt with in a professional spirit.

Mullin, K. C., in reply.

1906. September 21. BARKER, J.:—

For some years previous to 1906 the defendant acted as the plaintiff's agent in the management of her property

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at St. John. His power of attorney was revoked and Mr. Mullin appointed in his place in December last. Notice of the cancellation was given to Mr. Coster by Mr. Mullin on the 30th December last, and on the same day he received the following letter from the plaintiff, Miss Simonds, and her mother, who had also been interested in the property:

VIA S. GERVAIS 67, FLORENCE,
Dec. 11th, 1905.

DEAR MR. COSTER:—

We beg to inform you that after mature consideration, we have decided to make a change in the agency for the property owned by me, Irene M. Simonds, but in which my mother, who joins me in this letter, hitherto has had an interest, which, however, she has released to me, as well also as her share or interest in the moneys now in your hands, being balance of account current. We have had it in our mind for some time to give the management of our affairs and business to Mr. Daniel Mullin, husband of our dear grand-child and niece, Constance. Accordingly a power of attorney has been executed to him, and the one heretofore held by you has been revoked. Kindly deliver to Mr. Mullin all leases, documents, deeds, plans, books, accounts, records, rent rolls and papers relating to the property, as well as any balance in your hands payable to us, but to which I, Irene M. Simonds, am exclusively entitled under the release executed to me by my mother. Thanking you, dear Mr. Coster, for the valuable services you have rendered to us,

I remain, yours sincerely,

(Sgd) IRENE M. SIMONDS.
GERTRUDE A. SIMONDS.

Application was made to Mr. Coster by Mr. Mullin for his account for the year 1905—the only year about which any question arises—and for the leases and other securities in his hands, but as no attention was paid to the demand, Mr. Mullin on the 9th March commenced this suit. No appearance was entered, and on the 17th April the bill was taken *pro confesso*, and the matter was sent to a Referee in the usual way to take the account for the year 1905 and

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report the balance due. On the 19th of May the defendant filed an account with the Referee, and on the 28th of that month Mr. Mullin acting for the plaintiff filed an affidavit objecting to three items on the credit side of the account. The Referee then issued a warrant for the parties to proceed, but as the defendant did not attend at the return, the Referee disallowed these three items and reported a balance of $2,439.75 due the plaintiff, including the sum of $43.65 for interest on the balance in the defendant's hands from February 3rd, 1906, at which time he was formally notified that interest on the balance would be claimed. Exceptions to the report were filed, and on the matter coming before me, on a motion to confirm the report, I consented with the concurrence of Counsel for both parties, to hear the matter myself rather than incur the expense of sending it back to the Referee.

The plaintiff's account as filed with the Referee shews a balance of $1,535.92 on hand at the beginning of the year, and at the end of it a balance on hand of $113.60. The account is stated thus:

Total receipts for the year, ...	$5,258.40	
Cash on hand January 1, 1905,..	1,535.92	
		$6,794.32
Total disbursements for the year, ...		6,680.72
Balance, ...		$113.60

The three items objected to and disallowed are, (1) a charge of $2,000 paid in discharge of a mortgage to Major Campbell; (2) a charge of $100 for making a schedule of the leases and securities on their being handed over; and (3) a charge of $182.50 paid to Madame deBury. It is unnecessary to discuss the first and third of these items, because Mr. Coster's Counsel now admits that the charge of $2,000 cannot be sustained, and on Mr. Coster's explanation of the payment to Madame deBury, Mr. Mullin, very properly as I think, withdrew all objection to it. That leaves the charge of $100, the claim for interest and the question of costs to be disposed of.

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As to the $100 charged for making a schedule of the leases, I was at first disposed to think that the item might possibly be sustained on the ground that the service was to some extent for the benefit of the trust estate; but on further consideration I think that the charge must be disallowed. I am not speaking as to the amount of the sum charged, but as to the charge itself. Mr. Coster was of course not acting gratuitously—he received the usual commission of 5 per cent. on collections, and also ordinary solicitor's fees, as I judge from their being charged in the account without objection. The sum of $327.51 is allowed in the year's account under these two heads; and I am not sure that I should be going too far if I were to hold that a service like this is but a part of the consideration for which the commissions are paid. Apart, however, from that, I think the charge cannot be sustained. How is the plaintiff's estate benefitted by this outlay? It was, no doubt, a prudent and businesslike course to adopt to prepare this list as a receipt from the principal to her agent for the property handed over, but it is solely for the protection of the agent who is handing it over. It is nothing more than a receipt, a long one and one which required some time for its preparation, but a mere receipt nevertheless. If a decree had been made by this Court directing the defendant to hand over these securities and leases, which admittedly were the plaintiff's property, it would not have been made a condition that a charge like this should be paid. The expenditure only became necessary when the plaintiff demanded and was entitled to receive her securities from her agent. I cannot think so clear and unmistakeable a right is to be clogged by a payment to the agent for making a list of the securities—something not asked for or required by the principal, and in no way necessary to the defendant for the discharge of his duty to deliver the property. To state a case by way of illustration, we will suppose A is possessed of $100,000 of municipal debentures—say 200 of $500 each. He wishes to leave St. John and travel abroad for two or three years, and he places these securities in the hands of an agent with

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instructions to collect the coupons and remit him the moneys, retaining a commission of 5 per cent. In three years A returns and resumes the management of his own affairs. He asks his agent to hand him over his 200 debentures. The agent says yes, but I made a schedule of these, shewing their dates and numbers; it took my clerks a week to do it, and I have charged $100 for the work, and before you can get your property you must pay this amount. Could such a claim be sustained? I think not.

The next question is as to the interest. The Referee has allowed it at five per cent. from the 3rd February, when the defendant was notified that it would be claimed. Apart from any question of notice, I think this is a case where the defendant must be charged with interest. In *Pearse* v. *Green* (1), the Master of the Rolls says: "It is the first duty of an accounting party, whether an agent, a trustee, a receiver or an executor, for in this respect, as was remarked by the Lord Chancellor in *Lord Hardwicke* v. *Vernon*, they all stand in the same situation—to be constantly ready with his accounts. Was that the case with these persons? Now it is admitted that, though called upon, they rendered no account. It cannot then be said that in their characters of agents and managers they performed their duty." The Master of the Rolls goes on to say that this refusal to account is a clear ground for charging the agent with interest and with costs. That of itself is sufficient where there is no charge of fraud: *Turner* v. *Burkinshaw* (2). See also *Harsant* v. *Blaine* (3). I think the amount for which the defendant is liable is the $113.60 admitted to be on hand, and the $2,100—in all $2,213.60, and interest on that sum from February 3, 1906, until paid, at the rate of five per cent.

I come now to the question of costs—perhaps the most important question involved in the case. In order to determine this it is necessary to look somewhat closely into the conduct of the parties. It was more than hinted on the argument before me on this point that the litigation

(1) 1 Jac. & W. 135, 140. (2) L. R. 2 Ch. 488.
(3) 56 L. J. Q. B. 511.

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was promoted from motives of personal animosity—that it was altogether unnecessary, and that it might easily have been avoided; and it was contended on that account that the defendant should not be made pay costs, or, at all events, but a small proportion of them. If the evidence convinced me that this suggestion was well founded, I certainly should not encourage such a course by making it beneficial to the plaintiff at the defendant's expense if I could see my way to avoid it. But is this charge sustained by what took place? What are the facts? On the 30th December last—the day on which the plaintiff's letter of December 11th was received—Mr. Mullin wrote the defendant a letter in which he notified him of his appointment as the plaintiff's agent in the defendant's place, the revocation of the defendant's power of attorney, and that he (Mullin) was the only person authorized to collect the rents, and he adds: "I have therefore to request, first, that you will without delay furnish me, on behalf of Miss Simonds, with a full statement shewing balance due on account current to date; secondly, that you will deliver to me the rent rolls, leases, deeds, documents, books, papers, plans, etc., relating to Miss Simonds' property, and to which she is entitled; and, thirdly, you will pay over to me, as her attorney, the balance due from you on account current. I trust that you will be good enough to give this matter your prompt attention. Please let me have an early reply stating when you will be prepared to comply with the above specified requests." Nothing having been done, Mr. Mullin on the 27th January, nearly a month later, wrote a second letter to the defendant in which he refers to his previous letter of December 30, and reminds him that he had not complied with the request made in it, and he adds: "Up to the present time you have not complied with that request. In fact, in an interview which I had with you on the 22nd inst, you declined even to say when you would either furnish the account, pay over the balance, or deliver up the documents, alleging that you had written to Miss Simonds, and until you had her reply you could not give me the information which I required." He then gave him

notice that interest would be claimed on the balance, and that proceedings would be commenced unless the account was furnished and the leases handed over by the 3rd of February. He adds: "I trust that you will be good enough to hand over the account, papers, balance, etc., without further delay, and spare me from the performance of an unpleasant duty." Nothing having been done in reply to this letter, Mr. Mullin on the 2nd March, sent the defendant a third letter, which is as follows:

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March 2, 1906.

C. J. COSTER, ESQ., K. C.

Dear Sir,—Referring to my letter to you of the 27th January last, in which I stated that unless you handed me Miss Simonds' account, with all leases, plans, etc., together with balance, by the 3rd of February, I should be obliged to take proceedings against you, I may say that I decided to defer taking any steps until I heard from Miss Simonds. I wrote Miss Simonds the day after my interview with you informing her that you said you had written to her, and that until you had her reply you were not prepared to furnish the account nor hand over the papers and balance, nor even to say when you would be in a position to do so. I received a letter from Miss Simonds the other day stating that she had heard from you the day after she received my letter of the 23rd of January last, and that she was replying at once instructing you to give up everything to me. I presume you have her letter by this time, as I received mine (which was dated February 9th) last Monday, the 26th inst. I beg, therefore, to apply to you again for the account and balance, also for all papers, etc., belonging to Miss Simonds in your possession, and to say that unless same are delivered to me on or before the 8th inst., I shall be obliged to commence a suit against you. I regret that my duty to my principal will impel me to take the course suggested, but in view of her instructions to me as to the disposal of the funds, which she has informed me she has directed you to place in my hands, I shall have no alternative if you do not accede to the terms of this letter. I trust, therefore, you will comply with this final demand for an account, as well as the payment over to me of the balance in your hands and the delivery to me of the leases, etc., within the time stipulated.

I am yours truly,

(Sgd.) DANIEL MULLIN,
Attorney and Agent for Miss Irene M. Simonds.

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The defendant's letter to the plaintiff of 25th January, referred to by Mr. Mullin in his last letter, is not in evidence, but the plaintiff's letter in reply is as follows:

February 10, 1906.

DEAR MR. COSTER:—

I have just received yours of January 25th. I am indeed sorry you should think that anyone has misrepresented you to me, for such is not the case. I can only confirm the contents of my previous letter to you, and beg you to be so kind as to hand over all moneys, balance, plans, etc., to Mr. Mullin without further delay. My poor sister's is indeed a sad case, and I am grateful to you for the assistance you gave her and for your past valuable services to our estate.

Yours truly,

(Sgd.) IRENE M. SIMONDS.

Mr. Coster paid no attention to this letter, and Mr. Mullin commenced this suit on the 9th March, after a lapse of over two months from the cancellation of the power of attorney and the first application for the account. On the 13th March the defendant wrote the plaintiff another letter, which is as follows:

March 13, 1906.

DEAR MISS SIMONDS:—

Mr. Mullin has commenced a suit in the Court of Chancery against me. I cannot believe that this is done at your instance or with your authority. The tenants have all been notified to pay their rents to him, a list of all arrears has been given to him, and there are no further rents due until the first of May. Therefore I should think that there was no necessity of putting me to this trouble and expense. I can easily have everything transferred to Mr. Mullin in plenty of time for him to collect the May rents.

Yours faithfully,

(Sgd.) C. J. COSTER.

To this letter the plaintiff made no reply to Mr. Coster, but she sent it out to Mr. Mullin with a memo. on it directing him to proceed with the suit. I am unable to see in this correspondence any indication on Mr. Mullin's

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part of a desire to institute proceedings unnecessarily. His language does not seem to me different from what any professional man might with propriety use to another under the same circumstances. The plaintiff was entitled to the account and to her money and her securities. The account is neither long nor complicated. Any clerk could have made it up and copied it in an hour. The balance of $113.60 the defendant could of course have paid at any time. No excuse is offered or suggested for his refusal to do what, as a professional man, he must have known the plaintiff had an undoubted right to have done. It seems to me the suit followed as the natural result of a disregard of what appears to me to have been a plain duty. Now what took place afterwards? The account was never furnished until it was filed with the Referee on the 19th May, and only then after two or three adjournments for the purpose had been made by the Referee on the defendant's application. I should not think it necessary to make any further reference to the charge of $2,000, now that the defendant's liability to pay it over is admitted, were it not that it has an important bearing on this question of costs. The liability was in fact not admitted until the last moment, and when all the costs had been incurred, notwithstanding the facts were all known to the defendant from the beginning. In the account filed the defendant, under date December 30, 1905, charges the plaintiff as follows: "To paid George C. Coster principal, mortgage to Major Campbell, and six months' interest to date, $2,050." The precise time when this entry was made in the defendant's books does not appear. It probably from the evidence was not made until May; it certainly was not made until long after the power of attorney had been cancelled. In fact the $2,000, principal of this mortgage, was never paid to Mr. George Coster or any one else, and never has been paid, but the defendant explains the charge and the form of the entry by the following facts. Some years ago, and some time after the defendant had taken over the management of this property, it became necessary, in order to meet

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some liabilities which were then pressing, to borrow $2,000. The money was obtained from Major Campbell on mortgage through Mr. Coster, whose firm acted also for him. There is nothing to suggest that Major Campbell wants his money or that his security is at all doubtful. The defendant having had to do with this loan seems to have been anxious that if he were to be deprived of the agency the mortgage should be paid off, and, in lieu of actual payment, he offered to procure and deliver to Mr. Mullin, as the plaintiff's agent, a discharge of the mortgage and treat that as a payment. He produced a letter from the plaintiff, dated August 8, 1902, in which she alludes to the mortgage, and says she begins to despair of ever getting it paid off. And she says that she would like the defendant to put aside from the balance all that is possible for the mortgage and to give her an idea as to when she could pay it off. By the balance I understand her to mean the surplus of her income after deducting her quarterly payments and certain allowances to members of her family which she mentions. At all events, nothing ever was put aside for the purpose. The defendant, in his evidence, says that he told his bookkeeper in the office to charge up the principal sum in the books in the event of the agency being taken away from him. It is obvious that the charge could not be sustained, and it is equally obvious that there was no other course open to the plaintiff than to object to the item with a view of its being disallowed. It is of course immaterial to the defendant whether he pays this $2,000 to the plaintiff as he in the ordinary course would have done had he continued to be manager of the property, or to Major Campbell in discharge of the mortgage, but the form of the entry, in view of the facts, necessarily called for investigation, and necessarily increased the costs of the reference. I can see no reason why the plaintiff should not have her costs of the suit—there was nothing really in dispute about the accounts except the $100 item, and that should have been determined amicably, and in any event could have been determined at comparatively little expense.

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October 12.

Re WOODFORD CLAIM.

Gift—Promissory note—Promise to maker by payee to pay—Want of consideration—Involuntary payment by payee—Action against maker.

Semble, that where the payee (deceased) on endorsing a promissory note for the accommodation of the maker promises without consideration to pay it, and the holder compels payment by the payee's estate, an action for the recovery of the amount lies by the estate against the maker.

Question in an administration suit as to the liability of Margaret Woodford, one of the next of kin of the intestate, Margaret A. Hazen, upon two promissory notes made by her in favor of the deceased. The facts sufficiently appear in the judgment of the Court.

Argument was heard October 5, 1906.

A. O. Earle, K. C., and *J. R. Armstrong*, K. C., for the plaintiffs and certain other next of kin of Margaret A. Hazen:—

Accepting defendant's version of the transaction, it cannot be put higher than a gratuitous intention or promise on the part of the intestate to pay the notes. As a promise without consideration it could not have been enforced in the lifetime of the deceased. The transaction does not lose its voluntary nature by reason of the notes being discounted. Had the defendant paid them she could not have sued the deceased or her estate. The matter is not altered by the payment made by the administrator.

[Barker, J.:—Is his payment not the same as payment by the deceased, and therefore a completion of the gift which has become irrevocable?]

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It is submitted that the essential nature of the transaction—a mere promise to pay—has not been altered, unless it could be shewn that the notes were retired in performance of the promise. The payment is nothing more than payment of money for the defendant's use which she must make good to the administrator. The evidence fails to shew that the notes were part of the house transaction. They were not given as the defendant claims, on account of repairs, for repairs had been made a year before the notes were given.

L. A. Currey, K. C., for the defendant:—

The evidence is conclusive that a gift was intended, and that an actual gift took place. The matter proceeded beyond the stage of intention when the house was bought. The notes were just as much an advance on the house account as the cash payment of $600, and the subsequent payment of $100. The purchase of the house in reliance upon the deceased's promise would be consideration for the notes. The notes having been paid by the estate the gift has been completed.

1906. October 12. BARKER, J.:—

In a suit brought for the administration of the estate of Margaret Hazen, a question arose as to the liability of the defendant Margaret Woodford on two promissory notes made by her in favor of Mrs. Hazen—one for $165, dated November 21, 1902, at three months, payable at the Bank of Nova Scotia, and the other also at three months, dated October 31, 1902, for $95, payable at the same bank. These notes were discounted by the defendant at the Bank of Nova Scotia, and had not matured at the time of Mrs. Hazen's death, which took place on December 8, 1902. Both notes were dishonored, and Mr. Hazen as administrator of the estate was compelled to pay them to the bank, and did pay them on the 5th August, 1902—the amount with interest being $266. As this was the only unsettled matter connected with the estate, it was sub-

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mitted to me for determination without pleadings by consent of all parties to the administration suit.

The defence set up is this. The defendant, who is a niece of Mrs. Hazen, says that in May, 1900, at the instance, or at all events on the suggestion of her aunt, she purchased a house on Peters street, for which her aunt said she would pay. She says that Mrs. Hazen did give her $600 in cash at the time, and later on she gave her $100 on the same account. The purchase money was $1,100; of that amount the defendant seems to have paid $300 out of the money her aunt gave her, and the remaining $800 of the purchase money she secured on the premises by a mortgage to Miss Smith. The remaining $300 the defendant says she used in making repairs or alterations to the house. The evidence as to the transaction is not very clear, and for the sake of accuracy I will quote the defendant's own version of it. After stating that her aunt inspected the house before the purchase was made, and that her aunt said she would pay for it, she gives the following account of this note transaction.

"Q. Look at these notes. Did you get these from her? A. I did.

"Q. For what purpose? Tell the facts. A. It was for building an ell on the house.

"Q. (The Court) What are the notes? Are they hers? A. Yes, they are her notes.

"Q. What did you do with them when you got the notes? A. I took them down to the bank and got the money.

"Q. What did you use the money for? A. For the house.

"Q. Is that the object for which they were given? A. Yes."

The defendant says her aunt wanted to build the ell, and did not have the money, so she gave the notes. She also says that she cannot tell what the improvements (which included the ell) cost, but that Crawford and another man built it, and the work was done in 1900—the

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year she bought. On her cross-examination she was asked as follows:

"Q. Were there any repairs made in 1900 to speak of? A. Well, every year there were some.

"Q. Anything Mrs. Hazen had to do with? A. No, I think not.

"Q. Do you say the proceeds of these notes went to pay for the repairs, these two notes? A. Yes."

Later on she was asked if her arrangement was that Mrs. Hazen was to repair the house as well as buy it. The answer was: "She looked at it and we knew we couldn't live in it without having it repaired."

The notes in question are renewals of notes originally given, as the bank books shew, not in 1900 as the defendant says, but in 1901. The $165 note was originally for $195, and dated August 5, 1901. The $95 note was originally for $125, and dated July 23, 1901. They had been renewed five times, and during that period $30 had been paid on each. So it is clear that this transaction had its origin a year after this ell was built and these repairs were made, and cannot have been given for any such purpose, or for any purpose, as it appears to me, connected with the purchase of the house. Mrs. Hazen was no doubt a very generous woman to her relatives—there is abundant evidence of that, by her donations made at various times. She was constantly assisting them as well as others by endorsing their notes for their accommodation. There is abundant evidence of this. But I can scarcely think that if she had pledged her word absolutely to pay for this house she would not have done so, especially if she had endorsed notes so that the money could be raised for her convenience. She had a large estate and ample means for the purpose. Mrs. Hazen no doubt intended to assist and did assist the defendant in procuring a house for herself. She certainly paid $700 out of the $1,100 purchase money, and for ought that I know, she might had she lived given further assistance, but that she has created any liability to do so, either legal or equitable, I can not agree. Mr. Currey says an intention

to make a gift creates no liability. I agree in that. But, he says, when that intention has been carried out and the gift made, it is irrevocable. Admitting that proposition also, how does it apply to this case? The $700 was a gift and must remain so. But where is there any further gift? Mrs. Hazen gave the defendant nothing but her endorsement. How did that create a liability to her? It is true that it placed the defendant in a position where she could borrow money from the Bank of Nova Scotia, as she did, but that was not Mrs. Hazen's money. It was the bank's money lent to the defendant, and which Mrs. Hazen's estate had to pay by virture of her endorsement on a dishonored note of the defendant. I quite agree with Mr. Earle, that as there was no consideration for any promise as relied on by the defendant, that the making of this note is altogether immaterial. The bank might have made the defendant pay the note. She could not in that case have brought any action against Mrs. Hazen, and I think the mere fact that the bank made the estate pay cannot alter the rights of these parties *inter se*.

The effect of this defence if it succeeded, would be to compel the estate of Mrs. Hazen to pay the defendant $266 instead of her paying that amount to the estate as she promised to do. If it were a case of a contract which could be made the ground of an action, I should think the evidence altogether too loose and uncertain to warrant this Court in sustaining the claim, under the rule by which Courts are governed in cases of claims against the estates of deceased persons.

The claim against the defendant must I think be paid.

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September 21.

PETROPOLOUS v. F. E. WILLIAMS COMPANY, LIMITED.

(No. 2. *Ante*, p. 267)

Chattel mortgage — Coercion — Sale of chattel — Warranty — Breach — Executory contract — Return of chattel.

A lease of store premises was obtained by plaintiffs through a guarantee of payment of the rent by defendant. Subsequently at plaintiffs' request defendant took out in his own name a lease of the premises for a further term of four years upon an agreement to assign it to them in consideration of their purchase from him of an automatic electric piano. The purchase price was $750, upon which a payment of $100 was to be made. The cash payment subsequently was waived and notes for the full amount of the purchase money given. After the purchase, plaintiffs incurred an additional indebtedness to defendant of about $400. This amount, together with the notes, some of which were overdue, was outstanding when the plaintiffs asked for an assignment of the lease. This the defendant demurred to giving, desiring to retain the lease as security. The plaintiffs then, but against the defendant's advice, executed a chattel mortgage of their stock-in-trade to him, whereupon he made over the lease to them:—

Held, that the chattel mortgage should not be set aside on the ground of having been obtained by coercion.

While the rule, that in absence of agreement the purchaser of a specific chattel cannot return it on breach of warranty, may not apply to a sale providing that the property shall not pass until payment of the purchase price, it will apply in such case where the vendee in addition to keeping the chattel a longer time than reasonable or necessary for trial, has exercised the dominion of an owner over it, as by giving a chattel mortgage of it to the vendor.

The facts sufficiently appear in the report of the proceedings on the motion to continue the injunction order granted in the suit, *ante*, 267, and in the present judgment.

Argument was heard August 17, 1906.

W. W. Allen, K. C., for the plaintiffs:—

We are entitled to have the piano sale set aside; to an absolute assignment of the lease, and to have the chattel mortgage cancelled. The piano has been shewn to be

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worthless. The contract on the sale of the piano was subject to an implied condition that the piano should be reasonably fit as a piano and for the purpose for which it was bought. This condition is not excluded by the express warranty. See *Randall* v. *Newson* (1). The chattel mortgage was obtained by coercion and without consideration. The defendant Williams held the lease of plaintiffs' premises as a trustee for them, and could not stipulate for a benefit to himself as a condition of assigning it. The indebtedness to secure which the chattel mortgage was given, being to the defendant company, the defendant Williams could not take it to himself. His affidavit with the chattel mortgage that the indebtedness secured by it was due to himself was untrue. The chattel mortgage can be set aside even if the sale agreement is not.

W. H. Trueman, for the defendants:—

A chattel mortgage may be taken in the name of an agent. See *Light* v. *Hawley* (2); *Brodie* v. *Ruttan* (3). The only real question raised by the bill is the allegation that in taking the lease in his own name the defendant Williams did so in fraud of the plaintiffs. It has been made clear that the original lease to the plaintiffs was obtained on the strength of the defendant's guarantee, and that a renewal could not have been obtained without it. The defendant took the subsequent lease in his own name after he had informed the plaintiffs of his intention to do so, and they had expressed their approval. He did so in order that he might have the means of enforcing payment of the rent, and this was his reason for retaining a reversionary interest in the lease when sub-letting to the plaintiffs. The delay in granting the sub-lease was due to the failure of the plaintiffs to pay $100 down on account of the purchase price of the piano, called for under the sale agreement, and the large outstanding indebtedness on merchandise account that had been created. Before the plaintiffs could fairly

(1) 2 Q. B. D. 102, 107.
(2) 29 O. R. 24.
(3) 16 U. C. Q. B. 207.

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demand the sub-lease they were bound to perform their part of the piano agreement. There was no duress in obtaining the bill of sale. It was in fact proposed by the plaintiffs, and given in opposition to the advice of the defendant. The plaintiffs were suffering no detriment by the lease remaining in the defendant's possession. Their anxiety to obtain it was plainly due to the idea that the defendant might assign it to somebody else in event of a repudiation by them of the piano sale. No warranty as to the piano can be set up other than that contained in the agreement. No evidence has been given that the piano is not in accordance with it, or in what particular it is defective. If there is any trouble the cause of it should be shewn. The trouble, if any, may be within the exceptions in the agreement. Even if breach of warranty, there is no jurisdiction in this Court to grant relief, the plaintiffs' remedy being at common law.

1906. September 21. BARKER, J.:—

The principal facts of this case are set out in the report of the motion to continue the injunction, *ante*, 267. The bill alleges that when the first note fell due, which would be on the 10th October, 1905, the plaintiff, Peter Petropolous, did not pay it because the piano became out of order in about twenty days after the note was given, and was not doing its work. This was shortly before the second piano was furnished. The bill also alleges that the second piano soon got out of order; that it would not work, and that it was not such a piano as it was represented and warranted to be. The bill further alleges that one of the objections the plaintiffs had to buying the piano was that they had a short lease of the premises, and that it was a part of the arrangement for the purchase that the defendant should procure a renewal of the lease for a longer period on substantially the same terms—that he did procure a renewal but took it in his own name, and then refused to give the plaintiffs a lease until they executed the mortgage in question.

It further alleges that the mortgage was given under this pressure—that the plaintiffs were ignorant of the nature and effect of its provisions, having an imperfect knowledge of the English language, and being without legal advice. The bill also charges that not only did the defendant take advantage of the plaintiffs' ignorance of English, and the fact of his having the lease in his own name, to force them to give the mortgage and pay the first note, but that as to the plaintiffs he stood in a fiduciary position in reference to the renewal lease which entitled the plaintiffs to have it transferred to them. The prayer of the bill is, (1) for an injunction restraining the defendant F. E. Williams from taking possession and proceeding under the mortgage; (2) that the mortgage be set aside and its cancellation on the records ordered; (3) that it be declared that the contract for the sale of the piano be cancelled, and that the defendants be ordered to repay to the plaintiffs the sum of $60.90, the amount of the note paid by the plaintiffs, and to deliver the other eleven notes back to the plaintiffs, and be restrained from bringing any action on them, and (4) that the defendant F. E. Williams be ordered to execute a lease to the plaintiffs upon the same terms that are contained in the lease to him.

It is important to bear in mind the following dates. The first lease is dated March 4, 1905, and expired May 1, 1906. The piano contract and notes are dated September 7, 1905; the chattel mortgage February 14, 1906; the notice of repudiation was given April 3, 1906; and this suit was commenced April 10, 1906, when I granted an *interim* injunction restraining proceedings under the mortgage. Later on this injunction was continued on condition of the money secured by it being paid into Court. It will also perhaps prevent confusion if I point out that although the purchase of the piano was made in the name of the plaintiff, Peter Petropolous, and the notes were given by him, and the lease was to him alone, both the plaintiffs, who are brothers and in partnership, joined in the mortgage, and they were both interested in the whole transaction. In the same way, though the plaintiffs' indebtedness was all

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to the defendant, the F. E. Williams Company, Limited, and the lease was taken in the name of the defendant F. E. Williams, and the mortgage was to him, they represent the same interest, Williams being the president and manager of the company, and I presume its principal shareholder.

The specific relief prayed for is claimed on three grounds:

(1) That the mortgage was given under coercion and procured as the result of the plaintiff's' ignorance of its nature and contents, and in the absence of competent or legal advice.

(2) That the defendant Williams holds the renewal lease as trustee for the plaintiffs.

(3) That the plaintiffs, by reason of a breach of warranty by the defendants, were entitled to return the piano and repudiate the contract, which they did do by their notice of April 3, and that as a legal result the notes could not be recovered, and the mortgage could not be enforced, the note for the cigars, mentioned in the mortgage, having been paid before the suit was commenced.

The greater part of the evidence as well as of the argument was directed to the third ground, but, as the first two points only involve a part of the relief asked for, I shall dispose of them first. There is no doubt I think that the plaintiffs are entitled to the full benefit of the renewal lease. As to the mortgage, however, I think the evidence fails in shewing anything like duress or an improper advantage taken of the plaintiffs by reason of their ignorance of English or their ignorance of the nature of the transaction. So far from this being the case, special care seems to have been taken to make them understand all about it. The plaintiffs both gave their evidence in English, and though they may not be, and probably are not, sufficiently well acquainted with the language to understand or read a document such as this mortgage without explanation or assistance, they obviated all difficulty, because they took the precaution of

having the witness Sperdakes—a friend and fellow-countryman of theirs, who seems to understand English very well—with them, and he explained, at all events to the plaintiff Peter, who was the acting man in the business, not only before the mortgage was prepared, the general nature of such a security, but at the time of its execution, the nature and contents of this particular instrument. It is true that the plaintiff Andrew was not present when the mortgage was read over in Mr. Trueman's office and Peter executed it, but he says that Peter told him about it and he knew that it was a security to Williams for his money. Sperdakes says that Peter was very anxious to get his lease, that he came to him and told him the defendants wanted a bill of sale—that he explained to him what a bill of sale was, and Peter said he would give all the stuff he had in the store, he wanted his lease. He also says that the defendant advised Peter not to give the bill of sale, but that the plaintiffs wanted to do so and said they would give anything to get the lease. The defendant says that he did not want a bill of sale—that he advised the plaintiffs not to give it as it would interfere with their credit. He does, however, admit that as the indebtedness of the plaintiffs to him was then nearly $1,200, he was desirous of having some security, and proposed that he should hold the lease in his own name for that purpose. The plaintiffs, however, refused this, and the mortgage seems to have been the result. While the defendant may not have absolutely refused to give the plaintiffs the lease, he did delay doing so, and I think with a view of getting security. The plaintiffs were, however, in no way bound to give the security. They had the same means of enforcing their right to the lease that they have now. The existing lease did not expire for nearly three months after the security was actually given, and the plaintiffs were under no pressure arising out of the want of the renewal which rendered it necessary for them to give the security. There is a distinction between an agreement to pay money to be released from a wrongful arrest, and an agreement to pay money for the release of goods unlawfully detained.

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In *Skeate* v. *Beale* (1), Lord Denman says that "it is of great importance that parties should be holden to those remedies for injuries which the law prescribes, rather than allowed to enter into agreements with a view to prevent them, intending at the time not to keep their contracts." Of course money paid in order to obtain possession of goods improperly detained may be recovered back, but the distinction seems to be that, although the mere duress of goods will not avoid a contract, a payment of money in order to obtain them is not a voluntary payment: Per Parke, B., in *Parker* v. *Bristol & Exeter Railway Co.* (2). This case is not a case of duress of goods. The defendant had no goods belonging to the plaintiffs, but he was under an equitable obligation enforceable by this Court to execute and deliver to the plaintiffs a sub-lease of their premises. It seems to me a very unreasonable thing to suppose that the plaintiffs, who were willing to give their stock as a security for the defendants' claim in order to get their lease, and actually, according to their version of the transaction, did so, could turn around and set aside the transaction afterwards on the ground of coercion. The only reason pressing upon the plaintiffs was the fear that the defendant might die without executing the lease, or something of that kind. The plaintiffs are I think entitled to the renewal lease, though they do not seem to have objected to the one that was actually delivered to them until this suit was commenced. In fact, the only difference between the two is that one expires a month earlier than the other.

I do not think the plaintiffs can maintain the third ground—conceding that the plaintiffs were entitled to retain and use the piano for such a time as might be reasonably necessary in order to determine whether or not it was up to the requirements of the contract and warranty, and their right, if it were not so, to return it and repudiate the contract, except as to their remedy on it for damages. What is their position as shewn by the evidence? Whether there was in fact a breach of warranty or not, or whether

(1) 11 A. & E. 983. (2) 6 Ex. 705.

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the piano fulfilled all the requirements of the contract or not, is a question of fact upon which I have heard a large amount of evidence, but upon which I do not express any opinion, as it is not in my view necessary for the determination of this case, and I do not wish to embarrass the parties by my view on this point should it arise in any future litigation. I think the plaintiffs have forfeited their right to return the piano, even if that right once existed. On the 3rd of April, 1906, when this notice was given, nearly seven months had elapsed from the time the second piano was delivered, and both pianos had been in the plaintiffs' shop for two weeks previous to their purchase. That in my opinion was a much longer time than was either reasonable or necessary for the purpose of ascertaining whether the instrument was up to the warranty and what they contracted for. If the plaintiffs' account is not altogether exaggerated, all the time that it was in use—certainly four months—it was constantly getting out of order and was not working except at uncertain intervals. Yet they kept it, used it and received $38 from its earnings. Andrew Petropolous, one of the plaintiffs, said in his evidence that it had not been working at all since November or December. Complaints were made, it is true, but no formal notice was given until April. That is, in my opinion, a much longer time than was necessary or reasonable for the purpose of trial. It was contended before me, that the notice was useless for any purpose because the piano was sold with an express warranty, and in that case the purchaser having received it could not afterwards return it as there was no provision in the contract to that effect. *Hinchcliffe* v. *Barwick* (1), and other cases, may be cited for that position. On examining these cases I think it will be found that they only apply where the sale has been an absolute one, and where the property in the chattel has passed to the vendee. In *Street* v. *Blay* (2), Lord Tenterden speaks of it as a well-known doctrine, that when the property in the specific chattel has passed to the vendee

(1) 5 Ex. D. 177. (2) 2 B. & Ad. 456

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and the price has been paid, he has no right to return the article and revest the property in the vendor, but he must sue on the warranty. He says, however, that as to executory contracts, the purchaser may return the chattel as soon as he discovers the defect in it, provided he has done nothing more in the mean time than was necessary to give it a fair trial. He adds: "The observations above stated are intended to apply to the purchase of a certain specific chattel, accepted and received by the vendee, and the property in which is completely and entirely vested in him." In the present case, by the terms of the original purchase the property in the piano was not to pass until the notes had been paid in full. It therefore required no act of the plaintiffs to revest the property in the defendants, because they had never parted with it, unless the position was changed by what took place subsequently.

There is another feature of this case which seems to me of importance, but which was not referred to at the hearing. By the mortgage of the 14th February, 1906, which the defendants are seeking to enforce, the plaintiffs, in order to secure the payment of the remaining eleven notes for $60.90 each, and also a note for $363.55 given in settlement of the defendants' account for cigars, conveyed to the defendant by way of mortgage, among other chattels, this same piano, described as "one Electric Automatic Piano, numbered 9848." The mortgage also contains a covenant by the plaintiffs for the payment of all the notes and a proviso by which on the happening of any of a very long list of events in addition to default in payment, and with which the non-payment has nothing to do, the defendants were authorized to take possession of this piano and other chattels, sell them privately or at auction, and out of the proceeds to repay themselves the amount due on the notes with expenses, and to pay the surplus to the plaintiffs. Such a dealing with the property, especially after five months had elapsed after its purchase, seems to me conclusive evidence of the plaintiffs' option to retain it. They conveyed the property as their own to their vendor to secure payment of the purchase money, and by their covenant under seal

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they bound themselves to pay it. I am unable to see how these parties—the one as against the other—could, in the face of this mortgage, be heard to say that the relation between them was other than that of mortgagor and mortgagee, although by the terms of the original purchase the property was not to pass until payment of the notes. As against the mortgagee the mortgagor is estopped from denying title: *Doe d. Stewart* v. *McDonald* (1). In the case already referred to *(Street* v. *Blay)*, Lord Tenterden says: "But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to shew that he may return it when the purchaser has done more than was consistent with the purpose of trial; when he has exercised the dominion of an owner over it, by selling and parting with the property to another, and where he has derived a pecuniary benefit from it. * * * These are acts of ownership wholly inconsistent with the purpose of trial, and which are conclusive against the defendant that the particular chattel was his own." It was under this mortgage the defendants were about to proceed when they were restrained by the injunction, but had they gone on and sold this piano, the purchaser would have got an absolute title to it as against both plaintiffs and defendants—the same title which the plaintiffs conveyed to the defendants by way of mortgage: *Chapman* v. *Morton* (2).

I am therefore of opinion that the plaintiffs had lost their right to return the piano if it ever existed, and that this case must be dealt with as if the plaintiffs had elected to keep it; not necessarily as a piano up to the warranty, but for which they would at least be liable to pay the defendants the contract price, less the difference between its actual value and its value if up to the warranty. If the piano were in fact up to the warranty—a question upon which I make no finding—then this bill must be dismissed, because the plaintiffs would be liable for the whole con-

(1) 1 All. 673. (2) 11 M. & W. 534.

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tract price. If it has been accepted, *quantum valebat*, what are the rights and remedies of the parties? The difference between the actual value of the piano and its value if up to the warranty is recoverable either in an action by the plaintiffs, together with any special damage they may have sustained by reason of a breach of the warranty, or it may, in the case of an action on the notes being brought by the defendants, possibly be set off as provided by sect. 117, ch. 111, C. S. 1903. No such case as that is, however, set up by this bill; and if this Court could entertain any such cross-claim, I have no evidence whatever before me to enable me to ascertain the damages. The bill would in that case be merely a redemption bill filed in order to ascertain the amount due with a view to its payment in order to redeem the property. A bill to set aside a mortgage for fraud cannot very well be turned into a bill to redeem the mortgage. But if it could be, it is not the usual practice of this Court to entertain a suit involving such an accounting where damages are to be set off against a debt. See *Glennie* v. *Imri* (1). The plaintiffs' remedy on this contract, or for breach of warranty, is not prejudiced by payment of the purchase money. See *Mondel* v. *Steel* (2).

There will be a decree that the defendant Williams give a new lease, and the defendants must have the option of taking the money in Court on delivering up the notes and discharging the mortgage. If they do not so elect, the money will go back to the plaintiffs, and the injunction will be dissolved.

As to the costs, I think the defendants must have their costs, except those of such part of their answer as relate to the renewal lease. I do not think that under the circumstances the plaintiffs are entitled to any costs. They have failed in the principal object of their suit, and the defendant company would not have been a necessary party to the bill if it had been filed simply to enforce the execution of a new lease. The defendant Williams was not asked for a

(1) 3 Jur. 432. (2) 8 M. & W. 88.

different lease—in fact, the plaintiffs accepted the one they got without objection, and executed a counterpart of it, and if the lease had been the only matter in dispute, it is not likely that this suit would have ever been commenced. See *Vernon* v. *Oliver* (1).

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(1) 11 Can. S. C. R. 156, 165.

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October 12.

THE CITY OF ST. JOHN v. BARKER.

Riparian owners—Water rights—Pollution of water—Proof of damage—Act of Legislature.

The pollution of a river by a riparian owner will be enjoined at the instance of a riparian owner lower down without proof of actual damage.

Generally speaking, one not a riparian owner is not entitled to complain of the pollution of the river, and a grant or license from a riparian owner to use the water does not entitle the grantee or licensee to complain of its pollution by another riparian owner.

Where plaintiff was authorized by Act to take a specified quantity of water per day from a lake for, among other purposes, the domestic use of its citizens, it was held that it was entitled to enjoin the pollution of the lake by a riparian owner.

Motion for an interim injunction. The facts fully appear in the judgment of the Court.

Argument was heard October 4, 1906.

C. N. Skinner, K. C., for the plaintiffs:—

It is our right as a riparian owner to have the water come to us in its natural state and unpolluted by the excrement discharged into it from the defendant's hotel. Under Act 5 Edw. VII., chap. 59, the plaintiffs are empowered to erect a dam across the river at the southern end of Robertson's Lake, and to create there a reservoir for the supply of water to the inhabitants of the city, for domestic consumption, among other purposes. The Act would be thwarted if the defendant were permitted to foul the water. Rule 18 of the bye-laws of the Provincial Board of Health prohibits the fouling or contamination of or emptying of a sewer into water that is the source of supply to the inhabitants of any place.

H. A. McKeown, K. C., for the defendant:—

The Act 5 Edw. VII., chap. 59, empowers the city to appropriate a certain quantity of water per day from Lake

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Lomond for the use of the city. There is in this grant no bestowal of the rights incidental to riparian ownership. As a riparian owner the plaintiffs have no rights beyond the limits of their own property. They cannot complain of the condition of the water after it has passed it. Were the water conveyed to the city by a pipe leading from the river where it flows by plaintiffs' land, their right to redress would have to be found outside of any rights they possess as a riparian owner. In *Stockport Waterworks Co.* v. *Potter* (1), the plaintiffs having by grant a right to take water from the Mersey for supplying the inhabitants of Stockport, brought an action against defendants for polluting the water. It was held by Pollock, C. B., and Channel, B., Bramwell, B., *diss.*, that the rights which a riparian owner has with respect to the water are entirely derived from his possession of land abutting on the stream, and that if by a deed which conveys only land not abutting on the stream he affects to grant water rights, the grantee cannot sue a third party on their interruption. See also *Whaley* v. *Lang* (2), where it was held that the mere possession or taking of water by a person not a riparian owner is not sufficient to enable him to maintain an action for polluting it.

Skinner, K. C., in reply.

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The object of this suit is to restrain the defendant from permitting the water of Lake Lomond to be polluted by the drainage from water closets in a building kept by her as an hotel at that place. There is no dispute as to the facts. Lake Lomond is a non-tidal body of water about three and a half miles long by one mile broad, about nine or ten miles from the city of St. John. The Mispec River issues from the foot of the lake for a short distance, and then spreads out into what is known as Robertson's Lake, a body of water covering an area of about ninety acres.

(1) 3 H. & C. 300. (2) 3 H. & N. 476.

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The river flows from the foot of this lake in its natural course to its outlet on the Bay of Fundy. The plaintiffs, in the exercise of powers conferred upon them by the Legislature, the sufficiency of which is not questioned, have for the purpose of utilizing the water of Lake Lomond as part of their system of water supply, constructed a dam at the foot of Robertson's Lake so as to make a reservoir there, and they have also connected the water of Robertson's Lake with that of Lake Latimer by a conduit, and from there the water is conveyed into the city. The defendant's hotel was opened for business by her husband in 1904. It was built on land owned by him fronting on the lake at the lower part, and quite near the head of the Mispec River. It is used principally by guests in the summer season, though it is open for business all the year. It contains a bath-room and two water-closets for the use of guests, and the deposits from these are discharged directly into the lake, quite near the head of the river.

The right to the injunction is based on two grounds, (1) that the plaintiffs are riparian owners of property on the Mispec River, and as such are entitled to have the water flow in an unpolluted condition along their land; and (2) that they are entitled under certain Acts of the Legislature to the use of the water of the lake free from pollution in the interests of public health and for the use of the inhabitants of St. John. As to the first point, it appears that the plaintiffs are owners in fee of five lots of land fronting on the Mispec River near its head, and it is claimed that as an incident to that property ownership they are entitled as of right to have the defendant restrained from polluting the water of the lake, even though they may not themselves be using the water in connection with the property, and though they may not be able to shew any actual damage. As the Mispec River is the only outlet to Lake Lomond, and as the natural flow of the water is down that river, it must necessarily pass along the plaintiffs' property, which is below the defendant's property. The defendant describes that part of the river between Lake Lomond and Robertson's Lake as a rapid running

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stream with a gravelly bottom, and, except in dry weather, very turbulent, so that it is open during the winter, and that it has a width varying from about one to four rods, and a depth varying from three to ten feet. It appears that on the 1st of September last, some time before this action was commenced, the plaintiffs made a formal demand upon the defendant to stop discharging the sewage from her premises into the lake. She, however, did not do so. I agree with the plaintiffs' contention, and think that as the fact of pollution is not denied, the plaintiffs, as riparian owners lower down on the stream, are entitled to the intervention of this Court notwithstanding there is no evidence of actual damage. As riparian owners they have the right to have the waters of the river flow through or past their land in their natural state, undeteriorated in quality, unless the defendant can shew, and there is no pretence that she can, a justification for her act by grant or prescription or some other way.

In *Wood* v. *Waud* (1), Pollock, C. B., says: "The fact, as found by the jury, is, that the defendants (whose works have been erected within twenty years, and who have no right, by long enjoyment or grant, so to do) have fouled the water of the natural stream by pouring in soap suds, woolcombers' suds, etc.; but that pollution of the natural stream has done no actual damage to the plaintiffs, because it was already so polluted by similar acts of mill-owners above the defendants' mills, and by dyers still further up the stream, and some sewers of the town of Bradford; that the wrongful act of the defendants made no practical difference, that is, that the pollution by the defendants did not make it less applicable to useful purposes than such water was before. We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the watercourse flowed, as will be hereafter more fully stated; and that right continues,

(1) 3 Ex. 748, 772.

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except so far as it may have been derogated from by user or by grant to the neighboring land owners. This is a case, therefore, of an injury to a right. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging, into the stream, the foul water from their works."

In *Crossley & Sons, Limited* v. *Lightowler* (2), it appeared that the plaintiffs, wishing to prevent the water of a river from being fouled by some dye works, purchased, from the owners of the dye works, a piece of land on the bank of the river, without communicating their object to them, and it was held that they could maintain a suit to restrain them. Lord Chelmsford says: "Where there are many existing nuisances, either to the air, or to water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the defendants add to the former foul state of the water and yet are not to be responsible on account of its previous condition, this consequence would follow, that if the plaintiffs were to make terms with the other polluters of the stream so as to have water free from impurities produced by their works, the defendants might say, 'we began to foul the stream at a time when, as against you, it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now, by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to.'" As against a riparian owner, it is not in my opinion necessary, in the case of a natural stream polluted under a claim of right by another riparian owner further up the stream, to shew actual damage. In cases of pollution it is oftentimes difficult to shew it—in fact, it may be impossible to do so. It exists all the same—it may be to an extent detrimental to the health of those who have a right to use the water. If it were otherwise what would be the effect? Take the present case. The defendant says, 'I have had this water tested by experts and they report that it is not polluted.'

(2) L. R. 2 Ch. 478.

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Suppose that within the next ten years ten other riparian proprietors erect houses with water closets discharging into the lake but in no greater volume than is discharged from the defendant's hotel now. An application of the same test then shews a positive pollution. Against whom are the plaintiffs to proceed? Each has the same answer as that now set up by this defendant, and if one can succeed why not all? And in this way the plaintiffs would be without remedy, and the water supply secured to them for public uses would be injurious to health and unfit for use.

There is another feature of this case which may conveniently be mentioned here. The regulations of the Provincial Board of Health, confirmed by the Lieutenant-Governor in Council, were put in evidence. Rule XVIII. is as follows: "No sewer drain shall empty into any lake, pond or other source of water used for drinking or culinary purposes, or into any standing water, within the jurisdiction of this Board." And a penalty is provided for any disobedience to these rules. In *Attorney-General* v. *Cockermouth Local Board* (1), it appeared that the defendants were prohibited by their Act of Parliament from sending sewage water into a natural stream until it had been purified and the noxious matter taken from it. Jessel, M. R., said: "The Legislature is of opinion that it is desirable to preserve our natural streams in at least their present state of purity; it therefore has said that you shall not affect or deteriorate the water at all; and the Court must assume that the deterioration of the water is an injury which is prohibited by the Legislature for good and sufficient cause."

In my opinion the plaintiffs are entitled as riparian owners to have the defendant restrained from causing or allowing sewage or foul water to flow or be discharged from her premises into Lake Lomond, above or within the limits of the plaintiffs' land, as was done in the case of *Crossley* v. *Lightowler*, already cited. And perhaps for all

(1) L. R. 18 Eq. 172

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practical purposes that would attain the plaintiffs' object, inasmuch as none of the water so polluted, can reach Lake Latimer without flowing along the plaintiffs' property on the river. The plaintiffs, however, take higher ground and claim that their rights are not restricted within these narrow limits. And in view of a declaration of their rights under the Act of the Legislature, to which reference was made at the argument, I have thought it as well to express my views on this part of the case so that the whole matter might, if the defendant wishes, go up on appeal and be determined without delay.

It may be stated as a general proposition that in cases of pollution to natural streams of water, where at all events the pollution is not a public nuisance, the right to complain is confined to the riparian owners below the point on the stream where the pollution takes place. It is a right incident to the property itself, and is inseparable from it, so that a mere right to use the water under license or grant from a riparian owner would not confer upon the licensee or grantee a right in himself to bring an action for damages arising from the pollution of the stream by any other riparian owner. It was upon this ground that the injunction originally granted in *Crossley* v. *Lightowler* was varied on appeal. In that case the plaintiffs claimed as riparian owners, and also under rights acquired under other owners. Their works were not on their own land fronting on the stream, but the water supplied for them was supplied from a point higher up the stream through pipes. Had they not been riparian owners they would not have succeeded in the action. That part of the order, made by Wood, V.-C., restraining the defendants from causing or suffering foul water into the river so as to affect the water drawn by the plaintiffs from the river for the use of their dye works, was omitted from the order of the Court on appeal, though the injunction went as to the water above or within the limits of the land owned by the plaintiffs as riparian owners. (See L. R. 3 Eq. at page 298).

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The same doctrine is laid down in *Stockport Waterworks Co.* v. *Potter* (1); *Ormerod* v. *Todmorden Mill Co.* (2), and many other cases. The present case is, however, not governed by those I have just mentioned. Whatever rights the plaintiffs have beyond those which they enjoy as incident to their riparian holdings, they have by statute. By Act 5 Edw. VII., chap. 59, the plaintiffs are given important rights in reference to these waters altogether beyond and in excess of any which an ordinary riparian proprietor has. Section 2 authorizes them to erect and maintain the reservoir, which I have already alluded to, and to build the dam necessary for the purpose. Section 3 authorizes the plaintiffs to abstract from Lake Lomond a quantity not exceeding 7,500,000 gallons of water daily into Lake Latimer for the purpose of being transmitted therefrom to St. John for the use of the citizens. The case of *Swindon Waterworks Co.* v. *Wilts & Berks Canal Navigation Co.* (3), is similar in principle to the present. In that case it appeared that the plaintiffs, the canal company, were by certain Acts of Parliament authorized to take water from streams within a distance of 2,000 yards for the purpose of making and maintaining their canal. On one of these streams was a mill which the canal company purchased, thereby becoming a riparian owner. The defendants (the waterworks company) also purchased a mill property on the upper part of the same stream and also became a riparian owner. They built a reservoir, into which they collected the water of the streams and supplied it to the inhabitants of an adjacent town. In consequence of this abstraction of the water, the supply required for the canal was interfered with to such an extent that at one time it was said the traffic was stopped. In a suit brought against the waterworks company by the canal company it was held that as against the canal company the storage of the water by the defendants in

(1) 3 H. & C. 300. (2) 11 Q. B. D. 155.
(3) L. R. 9 Ch. 451, and on appeal, L. R. 7 H. L. 697.

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their reservoir was not a reasonable use of the stream, and that the canal company were entitled to come into a Court of Equity and have them restrained from doing so. In the report of the case in L. R. 9 Ch. 451, it will be seen that Malins, V.-C., before whom the case was originally heard, dismissed the bill and held that the canal company's Acts gave them no rights as riparian owners. On appeal the Lords Justices reversed this decision and granted an injunction by which the waterworks company were restrained from diverting the waters of the stream into their reservoir, and also from diverting the waters of the stream so as to interfere with the supply of water required by the canal company for the navigation of their canal. (See a minute of the order at page 462.) James, L. J., says: "I am of opinion, notwithstanding the decision of the Vice-Chancellor, that there is a clear legal right in the canal company, whether as owners of the canal or as owners of the stream diverted into the canal, to say to the defendants, 'You must let the water flow down in its ordinary course.'" Lord Justice Mellish, after expressing the opinion that the canal company had no right to take the water for any other purpose than supplying the canal, says: "If they do so, any person lower down the stream, who was prejudiced by being deprived of the water, would probably have a right of action at law against them; but I think that, if they took the water into their canal really for the purposes of navigation and then happened to have a surplus of water in any particular place, it would be very difficult to say that they might not legally sell that surplus quantity. That, however, is quite immaterial for the purpose of this suit; for although I agree they have the ordinary rights of a riparian proprietor, yet this suit is really brought in respect of their rights as canal proprietors for the purpose of supplying their canal with water." It appeared that when the suit was brought the canal company did not require any water for their canal, and this was put forward as an answer to the claim to an injunction. As to this Lord Justice Mellish says: "But that proposition is in my opinion not correct; for although

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the canal company have by Act of Parliament only a right to take the water for the purposes of navigation, yet, having taken it, and having legally made a junction between the stream and their canal for the *bona fide* supplying their canal with water, in my opinion they could maintain an action against the proprietor above who illegally diverted the water, notwithstanding that, at the time, they did not actually want the water for the purposes of navigation. The test is this: Supposing the person who had so diverted the water had done so, and had used it for 20 years, could he have claimed a right? In my opinion, he clearly could. If he had kept up the diversion for 20 years, although they never wanted the water, yet, when they came to want it at the end of 21 years, having allowed him to divert it, their right would be lost, just the same as the right of any other landed proprietor would be lost. For the purpose, therefore, of maintaining their right they would be entitled to bring such an action." The Lord Justice is here discussing the rights of the canal company as such, in respect of which, as he had before said, they had brought the suit. And when he speaks of an illegal diversion of the water by an upper proprietor, he clearly means illegal as against the canal company as such, and not as a riparian owner by virtue of the mill they had bought.

When this case came before the House of Lords (1), though the order was altered, it was merely in form, and the decision of the Lords Justices was affirmed. In his opening remarks the Lord Chancellor says: "Your Lordships desired to hear a few observations with regard to the form of decree; not, I think, because there was any doubt as to the correctness in point of substance of the judgment of the Lords Justices, but because the decree had, probably *per incuriam*, assumed a form which was scarcely apposite, having regard to the nature of the issues which were raised." After stating the position of the canal company as riparian owners, and as proprietors of the canal, the Lord Chancellor says: "They complained, therefore, that the rights which had been given

(1) L. R. 7 H. L. 697.

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by Parliament for the purpose of making and maintaining the canal had been interfered with, and farther, that their rights as riparian owners had been interfered with by the operation of the defendants (the appellants) higher up the stream." He then discusses the company's rights as riparian owners, and later on he discusses their rights as canal proprietors. He says: "Now I turn to the position of canal proprietors under their parliamentary powers;" and after mentioning the powers, he proceeds: "If in taking that water for the supply of their canal, they stopped it from flowing in its accustomed course to any tenement lower down upon its course, they would be obliged to compensate the owner of that inferior tenement under their Act of Parliament. My Lords, with regard to the upper owners, it appears to me that the canal proprietors stepped into all the rights which a riparian owner at their point in the stream would have, as against the upper owners, with this qualification, and with this only, that these rights were to be exercised, not absolutely, not capriciously, but merely and only for the purpose of supplying their canal. Therefore, coming to complain, under their parliamentary powers, they must shew that something has been done by the upper owners which has interfered with the supply that their canal properly derived from this stream." Lord Hatherley, after discussing the matter at length, says, that as the Legislature had not limited the supply of water to which the canal company was entitled, the continuous use of the water for the purpose of the canal must be regarded, and in that case, "the canal company would have the right which every riparian proprietor would have, namely, a right to the flow of the stream for the purpose of satisfying their requirements." After pointing out that the rights of upper proprietors were not affected or taken away, Lord Hatherley continues: "They are just as they were before; they were bound, as regards those lower down the river, not to do any act so as to interfere with their enjoyment of the river, such as is here complained of; and all that happens to them is that there is the substitution of the canal proprietors for the

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riparian owner; not, as has been said, with all the rights of riparian proprietors, but with certain rights limited to the purposes of their canal traffic, without in any way interfering with the higher proprietors." In the order made in this case as settled by the House of Lords—there are the declarations of right—one as to the right of the canal company as a riparian owner to the natural flow of the stream, subject to the ordinary and reasonable use of the streams and waters by the riparian owners higher up; and the other as to the company's rights under their Acts of Parliament. The latter declaration is as follows: "And it is declared, that the plaintiffs, under and by virtue of the powers contained in the Acts of Parliament in the pleadings mentioned, are entitled to use the said stream and waters as the same have been accustomed (before such interference as aforesaid) to flow down to and into their canal so far as the said stream and waters are required for the supply and navigation of their canal, and subject to such ordinary and reasonable use by upper riparian owners as hereinbefore mentioned." And the injunction went to restrain the defendants from diverting the stream into their reservoir or otherwise so as to interfere with the supply of water required for the navigation of the said canal.

The case from which I have so freely quoted had reference to the quantity of water—the present one has reference to its quality. In principle they are, however, the same. The right to have water flow unimpeded in its natural channel, subject to its ordinary and reasonable use by the riparian proprietors, is no different or superior right than that it should be permitted to flow without being contaminated. In the case cited there was nothing in the Acts of Parliament expressly conferring upon the canal company a right to have the water flow unimpeded, nor is there anything in the present plaintiffs' Acts which in words confers upon them a right to have the water authorized to be taken pure and uncontaminated. In both cases, however, they have by virtue of the powers conferred upon them, so far as is reasonably necessary for their purposes, the rights of riparian owners as to the waters which

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they are entitled to use; in the one case sufficient to supply the canal, subject to the legal rights of owners above them on the stream, and in the other case sufficient to supply the daily maximum of 7,500,000 gallons of the water in its natural pure state. Otherwise it would be useless to the city for the purposes contemplated by the Legislature.

In *Milnes* v. *The Mayor, etc., of Huddersfield* (1), the Earl of Selborne says: "Upon the question of law, I cannot for a moment doubt that the object with which the general and special Acts were all passed ought throughout to be borne in mind. That object was that the consumers should be supplied with water, a prime necessity of life, for drinking—not indeed the only purpose, but a primary one, which must be, and which alone need be here regarded. To be fit for drinking the water must be wholesome and not poisonous to those who drink it. It is a paradox little short of absurdity to suppose that water not fulfilling that condition could be such as the legislature intended to be supplied."

The plaintiffs are therefore entitled, in exercising their riparian rights as arising out of and incident to the powers conferred upon them, to say to this defendant, you have no right as against us to pollute these waters as you are doing, for we have the right for the purpose of extending our water system and supplying the inhabitants of Saint John with water for drinking, and domestic and manufacturing purposes, to have the water flow down unimpaired in quality and in its natural pure state. Any other view would, as it seems to me, render the whole legislation useless.

I think the plaintiffs are entitled to an injunction restraining the defendant from fouling the water above or within the limits of the plaintiffs' land on the Mispec River, and from fouling the water of the lake or river, flowing into the plaintiffs' reservoir, constructed by the plaintiffs under the powers given by the Act of Legislature as mentioned in the bill.

Reserve question of costs till hearing.

(1) 11 A. C. 511.

BARNHILL v. THE HAMPTON AND SAINT MARTINS RAILWAY COMPANY.

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October 16.

Railway—Mortgage—Working expenditure—Lien—Priorities—Dominion Railway Acts, 1888 and 1903.

The Railway Act, 1888 (D.), after providing that a railway may secure its debentures by a mortgage upon the whole of such property, assets, rents and revenues of the company as are described in the mortgage, provides that such rents and revenues shall be subject in the first instance * * * to the payment of the working expenditure of the railway. By the Railway Act, 1903 (D.), the lien is enlarged to apply to the property and assets of the company, in addition to its rents and revenues. A mortgage by the defendants, made in 1897, was foreclosed and the property sold, the proceeds being paid into Court. In a claim for a lien thereon in priority to the mortgagee for working expenditure made after the commencement of the Act of 1903:—

Held, that the lien under the Act of 1903 was not retroactive, and that as the lien under the Act of 1888 was limited to rents and revenues, and did not apply to the fund in Court, the claim should be disallowed.

Claims of lien upon a fund in Court, being proceeds of sale in a suit for foreclosure and sale of the defendants' property, in priority to the plaintiff. The facts sufficiently appear in the judgment of the Court.

Argument was heard October 4, 1906.

C. N. Skinner, K. C., for the plaintiff:—

The Crown has no lien unless conferred by statute. *The Railway Act*, 1888 (51 Vict. c. 29, (D.)), under which the mortgage to the plaintiff was given, by sect. 94, after providing that a railway may secure its debentures by a mortgage upon the whole of such property, assets, rents and revenues of the company, present or future, or both, as are described in the mortgage deed provides that such rents and revenues shall be subject in the first instance * * * to the payment of the working expenditure of the railway. The lien is here restricted to rents and revenues, and cannot attach to the proceeds in Court which wholly arose from the sale of the railway. By *The Rail-*

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way Act, 1903, sect. 112, the lien is extended to the property and assets of the company. The Act is, however, not given a retroactive operation, and it is submitted that the question must be disposed of under the former Act. Were the Act of 1903 held to have a retrospective effect, it would have no application to the present road. Moreover, under sect. 6, the Act is not applicable to a railway constructed under Provincial legislation until declared by special Act of the Parliament of Canada to be a work for the general advantage of Canada. The declaration in sect. 7, that every railway constructed under an Act of a Province connecting with or crossing a railway which at the time of such connection or crossing is subject to the legislative authority of the Parliament of Canada, is a work for the general advantage of Canada in respect only to such connection or crossing, would relate to but so much of the road as connects with the Intercolonial at Hampton.

E. H. McAlpine, K. C., and *E. G. Kaye*, for the Crown :—

Sect. 306 of *The Railway Act*, 1888, declares the Intercolonial Railway, among other enumerated railways, to be a work for the general advantage of Canada, and that each and every branch line or railway "now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada" Such declaration was not limited in its effect to the currency of the Act. Sect. 7 of the Act of 1903 does not contemplate that a fresh declaration shall be made. It is dealing with railways thereafter to be constructed or that already had not been declared to be works for the general advantage of Canada. In chap. 75 of Act 50-51 Vict. (D.), empowering the Saint Martins and Upham Railway Company to sell the road, the preamble recognizes that the road is a work for the general advantage of Canada by virtue of sect. 121 of chap. 109, R. S. C. In *MacMurchy & Denison's* Canadian Railway Act, page 24, it appears to be accepted that the railways mentioned in sect. 306 of the former consolidation remain subject to the jurisdiction of the Dominion

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Parliament. Having a lien, we have priority as a Crown claim over those of the other claimants.

H. A. McKeown, K.C., for claim of Walter E. Foster and others:—

Our view has never been that presented by the Crown. The words of the Act of 1888 appeared to us to prevent us from setting up a lien on money derived from a sale of the road. If, however, it is considered that a lien does exist, we submit that the Crown has no prerogative right of priority, and that it should rank *pari passu* with the other claimants.

Skinner, K.C., in reply.

1906. October 16. BARKER, J.:—

This suit was brought for the foreclosure of a certain mortgage dated October 30, 1897, made by the defendants to the plaintiff as trustee for bondholders to secure an issue of debentures, and for the sale of the mortgaged property. A decree was made for the sale of the property, but before the sale took place an application was made on behalf of the Dominion Government for an enforcement of a lien for the sum of $1,470.42, which they claimed on the property in priority to the mortgage. By consent the property was sold under the decree with the understanding that if the claim had not been settled in the meantime the purchase money should be paid into Court to represent the property and be dealt with accordingly. The amount was not paid, and the fund is now in Court to be dealt with as this Court may order. After the sale had taken place two other applications of a similar character were made. One on behalf of Isabella J. Wilson, who claims a lien for $602.16 for repairs to rolling stock, and the other on behalf of Walter E. Foster and others, who claim a similar lien for $2,451.89, of which $1,233.89 is for advances of cash to the company to pay wages, and the remainder for the rental of one passenger and one freight car. All of the two claims

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last mentioned and all of the Goverment claim, except three charges amounting to $154, arose since February 1, 1904, when *The Railway Act*, 1903, came into force by virtue of the proclamation of January 18, 1904. The defendants were incorporated in the year 1897 by an Act of the Provincial Legislature, 60 Vict. chap. 89, which authorized the purchase of what is there spoken of as the southern division of the Central Railway, and which extends from Hampton where it connects with the Intercolonial Railway to St. Martins, a distance of about 29 miles. The defendants acquired this railway property and in order to secure an issue of bonds amounting to $1,450.00, they made the mortgage in question, dated October 30, 1897, and registered in the county of King's, October 30, 1897, and in the county of St. John, November 24, 1897. The railway in question is a part of what was originally known as the St. Martins and Upham Railway, and the company then owning that road was authorized by an Act of the Dominion Parliament passed in 1887 (50-51 Vict. chap. 75), to sell its railway and franchises upon the conditions therein set forth. In the preamble to that Act it is recited that the railway connects with the Intercolonial Railway at Hampton, and that it is declared a work for the general advantage of Canada by sect. 121 of chap. 109, R. S. C. This section was re-enacted by sect. 306 of *The Railway Act*, 1888, and continued in force until that Act was repealed by *The Railway Act*, 1903, which contains no similar provision.

The mortgage in question conveys "All and singular the line of railway of the party of the first part, extending from its terminus at Hampton station on the Intercolonial Railway, through the parishes of Hampton and Upham in the county of King's, and through the parish of St. Martins in the county of St. John, to its terminus in the town of St. Martins, on the shore of the Bay of Fundy, at Quaco harbor, a distance of twenty-nine miles, more or less, together with all lands, buildings, bridges, fixtures, telephone or telegraph lines and structures of every kind and nature whatsoever, and all sidings, side tracks and turnouts now owned by the party of the first part, or

which may be hereafter acquired by it for the use of the said line of railway, and also all rolling stock, cars, engines, rails, ties, machinery, tools and personal property of every kind and nature whatsoever, now held or hereafter to be acquired for the use of the said line of railway, and also all powers, privileges and corporate rights and franchises, including the franchises to operate the said line of railway now held or hereafter to be acquired for the use of the said line of railway."

The railway legislation, both Dominion and Provincial, of the past twenty-five years is so voluminous, and the Statutes enacted during that period are so numerous, that I am compelled to rely largely in deciding the questions now under discussion, upon the legislative provisions to which Counsel directed my attention.

The Railway Act, 1888, which I understand is the first Dominion Statute containing general provisions as to the borrowing of money by railway companies, and giving security on their property and franchises to secure it, provides by sect. 95 that such bonds—that is, bonds issued under the authority of that Statute—shall be a first preferential claim and charge upon the company and the franchise, undertaking, tolls and income, rents and revenues, and real and personal property at any time acquired, except as provided by sect. 94. That section authorizes the company to secure payment of its bonds by mortgage on all its property, assets, rents and revenues, present or future, but it provides—and this is the exception referred to in sect. 95—that the rents and revenues shall be subject in the first instance to penalties incurred by reason of non-compliance with the requirements of the Act as to returns, "and next, to the payment of the working expenditure of the railway." The special lien thus created by the Statute operated in a much more limited area than the power to mortgage did. The one is confined to the rents and revenues, while the other extends to the company's property and assets as well as its rents and revenues. The difference between the two is important. See *Gardner* v.

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London, Chatham & Dover Railway Co. (1), and *Central Ontario Railway* v. *Trusts and Guarantee Co.* (2). This continued to be the law until the Act of 1903 came into force, and by which the Act of 1888 was repealed. By sect. 111 of the later Act provisions were made by which companies might issue bonds or other securities for the purpose of obtaining money, and sect. 112 authorizes the company to secure such securities, that is, the securities spoken of in sect. 111, by a mortgage on the whole of such property, assets, rents and revenues of the company, present or future, or both, as are described therein, but that such property, assets, rents and revenues shall be subject in the first instance to the payment of any penalty then or thereafter imposed upon the company for non-compliance with the requirements of the Act, and next, to the payment of the working expenditure. Sub-sect. 3 of sect. 112 provides that the company may except from the operation of any such mortgage any assets, property, rents or revenue of the company by specifying expressly in the mortgage the assets, property, rents or revenue so excepted. The statutory lien for working expenditure is thus extended, and is now co-extensive with the statutory authority to mortgage. The argument put forward by Counsel for the Government was that by virtue of the Acts to which I have referred the defendant company and the line of railway (being a work for the general advantage of Canada) are subject to the Dominion Railway Acts, and the lien attaches under both Acts. On the contrary, the Counsel for the plaintiff contends that it does not attach under either. He contends, as a part of his argument, that the defendant company is not subject to *The Railway Act*, 1903, for reasons which in my view of the case it is not necessary to discuss, because I think his contention is made out irrespective of that altogether. Assuming that this company was a work for the general advantage of Canada and subject therefore to the Act of 1903, how do third claims stand? The lien created by the Act of 1888, and

(1) L. R. 2 Ch. 261. (2) [1905] A. C. 576.

which covers that part of the expenditure made before the Act of 1903 came into force, is expressly limited to rents and revenues. The fund in Court is in no way either the one or the other—it is the proceeds of a sale of the railway property itself with its franchises, conveyed by the mortgage. There was nothing sold under the decree upon which, before the sale, these claimants could have claimed a lien as being either rents or revenues of the company. The expenditure was, however, practically all made after the Act of 1888 was repealed, and the mortgage was made long before the Act of 1903, under which the lien is claimed, was passed. It was never intended that sect. 112 should be retroactive in its operation, so as to impair the security on which the bondholders had lent their money by making the working expenditure a prior lien to theirs. That, as it seems to me, would be contrary to all canons of construction. The mortgage was not made under the Act of 1903, and it would require very clear language to destroy or impair an existing security such as this mortgage was. See *Western Counties Railway Co.* v. *Windsor & Annapolis Railway Co.* (1). An attempt was made to sustain the Government lien on the ground of the Crown's prerogative. I am, however, not aware of any prerogative right in the Crown to take away the property of a subject in the manner proposed. If the liens were all sustained and the fund proved insufficient for their payment, as I understand would be the fact, it may be that in the competition which would thus arise between the Crown and the subject, some question might arise such as that suggested, but that is a different matter, and one on which I express no opinion.

Entertaining the opinion which I have expressed, it is unnecessary to go into evidence as to the claims in order to determine whether the charges are for an expenditure such as the Act mentions.

Applications dismissed.

(1) 7 A. C. 178.

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October 19.

EASTERN TRUST COMPANY v. THE CUSHING SULPHITE FIBRE COMPANY, LIMITED.

Mortgage—"Plant," meaning of.

The word "plant" in a mortgage of a mill, held not to include office furniture, or a horse and carriage used for occasional errand purposes in connection with the mill, or material kept on hand for repairs to machinery; but held to include scows used for lightering the output of the mill from its wharf to steamers, and in lightering coal for the use of the mill, and also to include such stores as axes, shovels and files and other articles complete in themselves, used in carrying on the mill business.

Subsequently to a decree for foreclosure of a mortgage by the defendants to the plaintiffs to secure an issue of debentures, and for sale of the mortgaged premises, a winding-up order was made against the defendants. A sale under the decree being advertised for October 20th, 1906, the liquidators under the winding-up order, now applied for directions to the Referee conducting the sale to exclude from the sale certain articles as not passing by the mortgage or included in the decree. The additional facts are sufficiently stated in the judgment.

Argument was heard October 17, 1906.

J. D. Hazen, K. C. (*W. A. Ewing* with him), for the liquidators:—

The words of the mortgage are, "together with all the mills, mill buildings, machinery, fixtures and plant of the said company in or about the said lands and premises." The use of compendious terms does not permit of an interpretation in a liberal sense where it is apparent that they were intended to bear a restricted meaning. "Plant," as a generic word, has tolerably hard and fast limits, and while its definition is not perhaps capable of exhaustive statement, it is not difficult to practically apply it. It is

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plain that office furniture does not fall within it, and the same may be said of the horse and carriage. The horse was not a necessary adjunct in carrying on the operations of the mill. The utmost that can be said of it is that there were occasions when it was convenient to have it about. In *Middleton* v. *Flanagan* (1), by a clause in a railway contract for excavation, "all machinery and other plant, materials and things whatsoever" provided by the contractor, were until the completion of the work to be the property of the company. It was held that horses were not included in the word "plant." As pointed out in *London and Eastern Counties Loan Co.* v. *Creasey* (2), where it was held that horses were not "plant" within the meaning of the word in an Act there under construction, the word refers to things more or less similar in kind to trade fixtures or trade machinery Of course, if the business is of such a nature that the use of a horse is indispensable to carrying it on, and the horse can be accurately described as a part of the equipment or plant by which it is carried on, then it could be said to fall within the term. See *Yarmouth* v. *France* (3). Tested by the same reasoning, scows must be held not covered by the mortgage. It may be convenient to have them, but they are not "plant" in the sense that the mill business cannot be prosecuted without them. It was formerly the practice to hire them as needed, and this can still be done. Of the articles in the stores account but a small proportion can be said to be "plant." What are called "spares," to be used in renewal of worn out or defective parts of machinery, are "plant," if they have actually been fitted to the machinery with which they are to be used, though not then put in use. If they have not been so tested, they do not form part of the mill plant. See *Ex parte Astbury* (4). The collocation in which the word "plant" occurs in the mortgage shews that plant of a character similar to machinery

(1) 25 O. R. 417.
(2) [1897] 1 Q.B. 442.
(3) 19 Q. B. D. 647.
(4) L. R. 4 Ch. 630.

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was intended to be referred to. [Reference was made to *In re Montgomery* (1).]

A. O. Earle, K. C., and *M. G. Teed*, K. C., for the plaintiffs:—

The argument just made would deprive the word of all meaning, and would eliminate it from the sentence. It must be taken to mean something else than machinery and fixtures or its insertion was needless. The argument is stronger for a comprehensive interpretation of the word than for a narrow one. The canon of construction for words of conveyance is to give them as liberal an intendment as they reasonably can bear. Especially should this be done here, where the words coupled with the word in question might be regarded as what was intended were they not present. In its ordinary sense, says Lindley, L. J., in *Yarmouth* v. *France* (2), "'plant' includes whatever apparatus is used by a business man for carrying on his business, * * * all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business." In *Ogilvie's* Scientific Dictionary, quoted in *Middleton* v. *Flanagan* (3), "plant" is defined as "the fixtures, tools, apparatus, etc., necessary to carry on any trade or mechanical business." This definition, with the inclusion of "machinery," is adopted by the *Am. & Eng. Ency. of Law* (4), and is also to be found in the *Century* Dictionary, with the like addition. Then in the *Century*, "apparatus" is defined as "an equipment of things provided and adapted as means to some end; especially, a collection, combination, or set of machinery, tools, instruments, utensils, appliances, or materials intended, adapted and necessary for the accomplishment of some purpose." In this view everything incidental and necessary to the furtherance of the work of the mill can be described as "plant." The office furniture is as much contributory to that object as any of the machinery. The scows are like-

(1) N. S. Eq. Dec. (1873-82), 154.
(2) 19 Q. B. D. 647, 658.
(3) 25 O. R. 417.
(4) Vol. 22 (2nd ed.) p. 834.

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wise seen to be a necessity. Whether purchased or hired they are such, and the question is not whether they should be hired rather than purchased. The horse cannot be dispensed with. The case of *Middleton* v. *Flanagan* (1), is distinguishable. There horses were held not to be "plant" because plant by the context there under review was such as might be used and converted into the works. All stock in stores is aptly described as plant. The test is not whether it is in use as plant, but whether ultimately it can be so used. It is there to be used as occasion arises. If not immediately available, delay would ensue in carrying on the work of the mill. The efficient up-keep and prosecution of the work of the mill required that it should be kept on hand.

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The sole question involved in this application is whether or not certain personal property, which will be specifically mentioned later on, passed to the plaintiffs under their mortgage from the defendants, as being included in the word "plant." The mortgage conveys a piece of land, describing it by metes and bounds, "together with all the mills, mill buildings, machinery, fixtures, and plant of the said company, in or about the said lands and premises, * * including all machinery, fixtures and plant hereafter acquired." There does not seem to be anything in the mortgage itself suggesting any other meaning to the word "plant" than it would ordinarily have in an instrument of this kind relating to a mill property such as the defendants' mill is. Judges as well as lexicographers, have formulated definitions of the word in its general and ordinary sense. In *Yarmouth* v. *France* (2), a case under the Employers' Liability Act, Lindley, L. J., says that the word "plant," "in its ordinary sense, includes whatever apparatus is used by a business man for carrying on his business —not his stock in trade which he buys or makes for sale;

(1) 25 O. R. 417. (2) 19 Q. B. D. 647.

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but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business." Kekewich, J., in *In re Brooke* (1), draws a distinction between the word "machinery" and the word "plant," and in *Re Nutley and Finn* (2), a case arising out of a contract for the sale of a brewery, the same learned Judge says that, "speaking generally, 'machinery,' includes everything which by its action produces or assists in production; and that 'plant' might be regarded as that without which production could not go on, such things as brewers' pipes, vats and the like." The editor of the "Imperial Dictionary" defines the word as meaning "the fixtures and tools necessary to carry on any trade or mechanical business." And *Worcester* defines it as "the machinery, apparatus, or fixtures by which a business is carried on." *Bouvier*, *Wharton*, and *Stroud* follow their lay brethren, except in the case of *Bouvier*, who introduces the word "appliances" in conjunction with the words "machinery, apparatus or fixtures." I am not sure that these judicial definitions do not require more explanation than the word itself, before they can always be used to advantage. It is perhaps easier to decide what in the particular case in hand is not included in the word than to attempt any definition covering all cases.

There are four classes of property which the plaintiffs claim under their mortgage as "plant." The first is the office furniture, consisting of desks, chairs, a safe and such other articles as are usually found in such a place. I do not think they can be considered as plant in any sense of the word. The second class is a horse and carriage owned by the company, and which are used for sending messages from the works to the city, or for errands to the city in connection with the business. When not otherwise occupied the manager utilizes them for his own convenience. I do not think these are included in the term "plant." The third class comprises two or three scows with waterproof canvas covers, which are used in lightering pulp, shipped to Europe, from

(1) 64 L. J. Ch. 27. (2) [1894] W. N. 64.

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the company's wharf to the steamer, and also in lightering cargoes of coal from ships to the company's wharf, where it is discharged by a steam apparatus used for the purpose. These I think are a part of the plant, though possibly not included in the words "mill machinery," or the word "fixtures." They are altogether independent appliances, complete in themselves, contributing an important and necessary share in the work in the prosecution of the business of the company.

The fourth class of property claimed gives rise to more difficulty. The company has in stock about $6,000 worth of what its officers call stores, and what I understand is known by that name in works of a similar character. They consist of a great variety of articles, which are used, or at all events the greater part of them is used, for making repairs to the engines and various parts of the machinery, to keep it in running order. If not kept on hand so that repairs could not be made until the necessary material could be procured, the engine or machine must be shut down, and loss would result. Among other things is a large and varied stock of packing, nuts, valves, oil, pieces of machinery, files, axes, shovels, and various other articles of a similar character, used and purchased solely for the purpose I have mentioned. With the exception of some minor articles which I shall refer to directly, all these stores are of no use in operating the mill, or in carrying on the business, until they have been actually connected with some of the machinery used in the mill, and thus become incorporated as a component part of it. Can it be said that as these stores accumulated for the purpose the company was adding to its plant? Would it be so understood ordinarily? I think not. They did not of themselves in any way add to the manufacturing capacity of the mill. In fact, they could not be used in any way to do so until the existing machinery had become disabled, when they were used for repairs, and thus the disabled machine was again fit for its work. Had these goods been made on the premises by machinery owned by the company, that machinery would, I think, pass as a part of the plant; but I cannot

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agree that the stores I have mentioned would pass under the mortgage as "plant." They are not machines, they are not fixtures, they are not appliances or apparatus, of themselves capable of use in carrying on the work, and only useful when they have become a part of the machinery in the way I have endeavored to point out. The axes, shovels, and, I imagine, the files and some other articles, and which seem to me to be similar to tools of a trade, would, I think, pass. They are ready for use as they are, complete in themselves, as tools or appliances used in carrying on the business.

The contention of the plaintiffs would, if it could be sustained, have the effect of transferring practically all the personal property of the company, except manufactured goods, as a part of the plant. I cannot give to the word so wide a meaning, neither do I think any of the cases go to this extent.

NEW CUMBERLAND TELEPHONE COMPANY, LIMITED v. CENTRAL TELEPHONE COMPANY, LIMITED.

1906.
November 16.

Telephone Company—Sale of charter—Outstanding agreement—Right of third party to object to sale.

By agreement, which was to be in force for ten years, the Cumberland Telephone Co. and the Central Telephone Co. were to have the use of each other's lines and of any connections either then had or might thereafter acquire over the lines of any other company. Shortly after the making of the agreement the Central Co. sold its property to the New Brunswick Telephone Co. By its charter the Central Co. had power to amalgamate with any other company, and the Act of incorporation of the New Brunswick Co. empowers it to acquire other telephone lines. The agreement of sale provided that the Cumberland Co. should have, by virtue of its agreement with the Central Co., the use of so much of the New Brunswick Co.'s lines as were acquired from the Central Co. The Cumberland Co. sought to restrain the sale unless provision were made in the agreement of sale that it should have the use of the whole system of the New Brunswick Co.:—

Held, that the bill should be dismissed.

Held, also, that the sale and purchase being within the powers of the companies, could not be objected to, and even if it were *ultra vires*, the plaintiffs had no status entitling them to raise the question.

Semble, that the sale should not have been enjoined even if the New Brunswick Co. had not assumed the contract of the Central with the Cumberland Co.

Bill for an injunction to restrain the New Brunswick Telephone Company, Limited, from purchasing from the Central Telephone Company, Limited, and the Central Telephone Company, Limited, from selling its property, franchises and charter to the first named company. The facts are sufficiently stated in the judgment of the Court.

Argument was heard November 7, 1906.

C. N. Skinner, K.C., for the plaintiffs:—

The agreement between the Central Company and the plaintiffs provides for the use by either of them of any connections either of them might thereafter acquire over the

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lines of any other company. The effect of the merger between the Central and the New Brunswick companies is an extension of the lines of the former as well as of the latter, and entitles the plaintiffs to the use of the New Brunswick Company's lines. A declaration that such is our rights should be made by the Court, and the amalgamation should be restrained unless the agreement between the two companies is widened so as to give effect to them, or an undertaking for the purpose is given by the New Brunswick Company. It is also submitted that the merger is *ultra vires* of both companies. It involves, so far as the Central Company is concerned, a transfer of its franchises as well as its assets to the New Brunswick Company. In *Thomp.* Corp., ss. 5352, 5353, it is laid down that neither the franchise of a corporation created for the performance of public duties, nor property necessary to the discharge of them, is alienable.

W. Pugsley, A.-G., *A. A. Stockton*, K.C., *A. P. Barnhill*, K.C., and *A. W. MacRae*, for the defendants:—

The Act to incorporate the New Brunswick Telephone Company, 51 Vict., c. 78, empowers the company to purchase any telephone line established or to be established in the Province, connecting or to be connected with the lines of the company. The letters patent of the Central Company give to it power to make connection with any other telephone company, or to amalgamate with any other telephone company. A power to amalgamate is the same as a power to sell: *Wall* v. *London and Northern Assets Corporation* (1); *Imperial Bank of China* v. *Bank of Hindustan* (2); *Manners* v. *St. David's Gold and Copper Mines, Limited* (3); *Clinch* v. *Financial Corporations* (4); *New Zealand Gold Extraction Co.* v. *Peacock* (5). The sale may be for shares in the purchasing company: *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (6). The transaction between the two companies is a

(1) [1898] 2 Ch. 469.
(2) L. R. 6 Ch. 91.
(3) [1904] 2 Ch. 593.
(4) L. R. 5 Eq. 450.
(5) [1894] 1 Q. B. 622.
(6) [1892] 3 Ch. 454.

matter *inter se*, and cannot be objected to by a third party, such as the plaintiffs. Even a dissentient shareholder in either company could not invoke the Court's interference, provided it was not being stipulated that he should take shares in the purchasing company. See *Higgs's Case* (1); *In re Empire Assurance Corporation* (2); *Era Company's Case* (3). The New Brunswick Company, by its purchase of the property of the Central Company, became liable in law to perform the contracts of the latter, but the burden is not made more onerous: *Pullman Car Co.* v. *Missouri Pacific Co.* (4); *Tolhurst Co.* v. *Associated Cement Manufacturers* (5). The agreement of the two companies moreover gives effect to the plaintiffs' agreement with the Central Company. No question can be raised here as to the right of the Central Company to sell and of the New Brunswick Company to buy its assets. See *Ernest* v. *Nicholls* (6); *Wilson* v. *Miers* (7); *Featherstonhaugh* v. *Lee Moor Porcelain Co.* (8); *Pulbrook* v. *New Civil Service Co-operation* (9).

1906. November 16. BARKER, J.:—

This is a motion to continue an interim injunction granted on the 25th September last. The plaintiffs are a company incorporated in Nova Scotia, having their head office in Amherst. The defendants are companies incorporated in New Brunswick—one having its head office at Sussex, and the other at Fredericton. All of these companies are carrying on the telephone business—the plaintiffs in Nova Scotia, and principally in the county of Cumberland, and the defendants in New Brunswick. On the 15th June, 1906, the plaintiffs and the Central Company entered into a written agreement for the transmission of messages over their respective lines between all points in Nova Scotia reached by the plaintiffs' system and all points in New

(1) 2 H. & M. 657.
(2) L. R. 4 Eq. 341.
(3) 1 DeG. J. & S. 29.
(4) 115 U. S. 587.
(5) [1902] 2 K. B. 660.
(6) 6 H. L. Cas. 401.
(7) 10 C. B. N. S. 348.
(8) L. R. 1 Eq. 318.
(9) 26 W. R. 11.

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Brunswick reached by the Central system. By the terms of the arrangement, which was to be in force for ten years, it was agreed that for the purposes of the joint business each company should give to the other the use of its lines and instruments, and the services of its employees, and also the use of any connections which either of the parties then had or might thereafter acquire over the lines of any other company doing business in either of the two Provinces. The tolls to be charged were not fixed by the agreement, nor was any basis determined for their division; but it was agreed that the rates were to be fixed at a later date by the managers or other officers of the companies, and they were to continue in force for the ten years, or until changed by a mutual agreement between the companies, "their officers, successors or assigns." The basis of division of the tolls was also to be determined later on by the companies, and the division on that basis was to be made either annually or semi-annually as might be agreed upon. The agreement also contained this clause: "It is also further understood and agreed that these presents and everything herein contained shall enure to the benefit of and be binding upon the parties hereto their successors and assigns respectively." The two companies commenced working under this arrangement in July last, and they are now, or at least were when this suit was commenced, working under it. The bill alleges that negotiations had been going on for some time between the two defendant companies for the purchase of the Central Company's property by the New Brunswick Company; that these negotiations had resulted in an agreement for this purchase by the directors of the two companies, and it only required the ratification of the shareholders to make it binding, and that notices of meetings of shareholders had already been issued. The necessary ratification has, I believe, been obtained, and it may be assumed that the terms of the purchase will be carried out without further delay. The bill alleges that by the terms of the proposed agreement for the merger of the Central Company into the New Brunswick Company, no

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provision was made for carrying out the contract between the plaintiffs and the Central Company of the 15th June, and that unless that was done the plaintiffs would suffer great loss in its business, and its stock and property would be materially lessened in value. I presume that allegation is intended to refer to matters as they stood on the 17th September when the summons in this suit was issued, for by a subsequent section in the bill it is alleged that the two defendants on the 24th September agreed in connection with the future management or position of their companies that they would carry out the agreement of the 15th June so far as to continue to the plaintiffs the reciprocal use of the Central Company's lines in New Brunswick, but would not, after the merger, allow the plaintiffs the use of the New Brunswick Company's lines, and that the defendants disclaimed all liability to give the plaintiffs the use of the New Brunswick Company's lines in connection with their business. The bill also alleged that by law the two companies had no authority or power to enter into their proposed arrangement by which the Central Company would be absorbed by the New Brunswick Company; that the New Brunswick Company by law had no authority to make the proposed purchase, and the Central Company by law had no authority to transfer its property as proposed; and an injunction was asked for to restrain the completion of the amalgamation arrangements and any transfer by the Central Company of its property, not absolutely, but unless provision was made for the protection of the plaintiffs' rights under the agreement of the 15th June. The agreement between the defendants, which was ratified by the shareholders on the 25th September, and which was made on the 21st August, is an agreement for the purchase by the New Brunswick Company from the Central Company of all its property, both real and personal, consisting of its poles, wires, telephones, and all other property of every kind and description; subject to a right or privilege for the term of ten years from the 15th day of June, 1906, in the plaintiffs to connect their lines and exchanges with the lines and exchanges of the Central Company agreed to be con-

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veyed to the New Brunswick Company, and to use the same for the transmission of messages over and upon such lines and delivery of the same to all persons to whom such messages were transmitted at the stations and exchanges of the Central Company, which had been located, established and in operation on the 21st August, and which lines and exchanges were to be used by the plaintiffs when and so soon as an agreement should be entered into fixing the basis of the tolls. The agreement is also for the purchase of all the franchises of the Central Company, its charter and all charters of other companies owned by it and the franchises thereof, etc.

The Attorney-General, as Counsel for both these defendants, states that this clause in the agreement was inserted specially to secure to the plaintiffs all the rights and privileges to which at the time they were entitled under their agreement with the Central, and that if there is any doubt as to the language being sufficient for that purpose, the defendants are willing to make it so. Mr. Skinner has not contended that the language is not sufficient for this purpose, but he contends that the plaintiffs' privileges should extend to the whole system of the New Brunswick Telephone Company and not merely to that part of it acquired from the Central. It is unnecessary to discuss whether or not by the merger or purchase of the property with notice of this contract, the New Brunswick Telephone Company became liable, altogether irrespective of express contract to do so, to carry out this contract with the plaintiffs (as to which see *Tolhurst* v. *Cement Co.* (1) and *Werderman* v. *Société Générale D'Électricité* (2)), because they have bound themselves to do so, and in no case could they be compelled to do more. See *Pullman Car Co.* v. *Missouri Pacific Co.* (3).

I do not wish to be considered as thinking that the plaintiffs, simply because of their contract with the Central, could prevent that company from selling its property ex-

(1) [1902] 2 K. B. 660; on appeal, [1903] A. C. 414.
(2) 19 Ch. D. 246.
(3) 115 U. S. 587.

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cept upon the condition that the purchaser would agree to assume the liability of that company under the contract. My opinion is against any such view, but discussion has been rendered unnecessary by the New Brunswick Company as purchaser voluntarily assuming the responsibility.

There is nothing, I think, in the point that the Central Company cannot sell, or the New Brunswick Company buy, their franchise or property. These companies are only ordinary private business corporations, and under no limitation as to the sale of their property. I should therefore have thought there was no good objection to this sale. Such companies are under no obligation to continue in business until they are wound up for insolvency. The corporate franchise I presume they could not part with. But what right have these plaintiffs to complain? They are not shareholders and have no interest whatever in the company, and are not even residents in the Province within which these companies do business and from which their corporate rights have been acquired. If no shareholder or creditor complains, and the Attorney-General does not intervene, I cannot see how the plaintiffs can do so, even if the defendants had not the powers which they are exercising. The New Brunswick Company, by section 10 of their Act of incorporation, 51 Vict., chap. 78, seem to have ample power to do all that they apparently are doing in taking over the property and business of the Central Company, and the Central Company, by their letters patent, have express power to make connection with any other telephone company, or to lease the system of or amalgamate with any other telephone company, and that seems to be ample authority for doing all that they are apparently doing. This is a question which could not very well arise except in a suit brought for the purpose of setting aside the amalgamation by some person who has an interest in the question and which I think the plaintiffs have not. See *Stockport Waterworks Co.* v. *Corporation of Manchester* (1).

I think the application must be refused with costs.

(1) 1 Jur. (N. S.) 267.

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Mortgage—Interest—Acceleration clause.

Bonds dated July 1, 1902, provided for payment of the principal in ten years from date, and that in the meantime interest thereon should be paid at the rate of 10 per cent. Default having been made in payment of the interest, the trustee under a mortgage given to secure the bonds, made on January 1, 1905, a declaration calling in the principal and interest, under an acceleration clause in the mortgage:—

Held, that interest at the rate provided for, and not at the statutory rate, was payable after the date of the declaration.

Motion on summons. The facts sufficiently appear in the judgment of the Court.

Argument was heard November 2, 1906.

W. Pugsley, A.-G., for George S. Cushing, a bondholder:—

Effect must be given to the language of the mortgage and bonds. The principal is repayable in ten years from July 1, 1902, and the rate of interest is fixed in the meantime at 10 per cent. The ground upon which after the maturity of a mortgage the interest is placed at the legal rate, is the want of words providing for a continuation of a higher rate. See *Hanford* v. *Howard* (1); *King* v. *Keith* (2); *People's Loan and Investment Co.* v. *Grant* (3); *In re European Central Railway Co.* (4). The declaration by the trustee calling in the mortgage before its maturity did not affect the rate of interest, or the agreement to pay interest at the specified rate. The mortgage not having been paid when called in, continued to bear interest at the rate fixed by the agreement.

H. A. Powell, K. C., for Thomas McAvity, purchaser of the equity of redemption:—

(1) 1 N. B. Eq. 241.
(2) 1 N. B. Eq. 538.
(3) 18 Can. S. C. R. 262.
(4) 4 Ch. D. 33.

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The effect of the declaration was to accelerate the due date of the mortgage and bonds, and an agreement to pay interest at 10 per cent. up to July 1, 1912, became an agreement to pay interest at that rate up to 1st January, 1905, the date of the notice. After that date any interest allowed is as damages for the detention of the debt, and becomes the rate fixed by the Statute.

M. G. Teed, K. C., for the plaintiffs:—

The words "in the meantime," in the bonds, mean interest at 10 per cent. up to the time the mortgage is payable.

J. D. Hazen, K. C., for the liquidators of the defendant company, took no part.

1906. November 16. BARKER, J.:—

The question involved in this application is whether the bondholders are entitled to be paid out of the proceeds of the sale of the mortgaged premises, interest at the rate of 10 per cent. as fixed by the bonds and mortgage, or only at the rate of 5 per cent. as fixed by the Statute.* The mortgage in question, which is dated June 25, 1901, was given by the defendants to secure an issue of their bonds, amounting to $280,000, with interest at the rate of 10 per cent. per annum, payable every six months according to the coupons attached. The company by the terms of these bonds, which are dated July 1, 1902, undertook to pay the principal in ten years, and "to pay in the meantime interest thereon at the rate of 10 per cent. per annum, half yearly on the first day of January and July in each year, upon presentation of the annexed coupons as they shall respectively become due, and to make such payments at the Bank of New Brunswick, St. John." The coupons are in the following form:—

* R. S. C. 1886, c. 127, amended by Act 63-4 Vict., c. 20.

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The Cushing Sulphite Fibre Company, Limited, will pay the bearer hereof at the Bank of New Brunswick, St. John, New Brunswick, Canada, Dollars, the day of A.D. , being six months interest on their debenture No. .

The defendants are a corporation created under *The New Brunswick Joint Stock Companies' Act*, having their chief place of business in the Parish of Lancaster, in the City and County of St. John, where their mill and property, comprised in the mortgage, are situated. The proviso for payment in the mortgage is as follows: "Provided always that if the said party hereto of the first part shall well and truly pay, or cause to be paid, the interest on the said bonds when such interest shall become due and shall also pay the principal amount of each of the said bonds to the holder thereof when each amount shall become due, and shall pay, satisfy and discharge the whole of the said sum of $280,000, and all interest thereon, by payment of all the said bonds as aforesaid, and shall well and truly also keep, do and perform all other the covenants, conditions and agreements herein contained on the part of the said party hereto of the first part, to be kept, done and performed, then this indenture and every matter and thing herein contained shall cease and be void." Then follows a covenant by the defendants with the plaintiffs—the trustees under the mortgage, for the bondholders—to pay the bonds to the holders or owners thereof when and as the same shall respectively become due and payable, together with all interest thereon when due, as set forth in the proviso. The mortgage also contains covenants for insurance and for the payment of taxes and other charges liable to become a lien on the property, and it provides that "in case default should be made in payment of the principal money or interest due or agreed to be paid under or upon the bonds aforesaid or any or either of them," or if default should be made by the defendants in payment of the insurance premiums or any other of the amounts therein agreed to be paid by the company and such default should continue

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for ten days, the plaintiffs, as such trustees, were authorized at any time after the expiration of ten days from the time the amount in default was demanded to sell the premises in the usual way. The proceeds of such sale were to be appropriated (1) in payment of certain expenses, (2) in payment of moneys paid for insurance premiums, etc., (3) in payment of all overdue coupons, and lastly in payment of the principal moneys until all were paid. The mortgage also contains a further proviso by which in case the defendants should become insolvent, or any order for winding up should be made, the whole of the said bonds and interest to that date should immediately become due and payable although the time for payment had not expired; and the power of sale and right of foreclosure might be exercised as in the case of a default under the proviso already mentioned. Then follows the clause upon which this application depends: "And it is hereby further agreed and understood that in case of any default being made by the said company upon or by reason of which the power of sale hereinbefore written may be exercised, then the said trustee may, and upon the request of the majority in value of the said bondholders so to do, shall elect and declare the whole of the principal money of $280,000, and interest thereon, made payable under and by the said bonds and secured by these presents, and the bonds given therefor, to be due and payable, and upon service of notice of such declaration upon the said company, or upon advertisement of the same in any newspaper published in the City of St. John, the whole of the said bonds and all the principal moneys and interest accruing on the same up to the date of the said notice shall immediately become due and payable, notwithstanding the time for the payment thereof has not expired according to the tenor and date of the said bonds."

The defendants made default in payment of interest, and in consequence thereof the plaintiffs, on the request of a majority in value of the bondholders, made the declaration and gave the notice provided for in the clause which I have just mentioned. The contention made on the part of those who now represent the defendants is that the

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effect of this election on the part of the bondholders to accelerate the payment of the bonds and make them payable at the date of the notice of the declaration, operates in point of law, so far as the rate of interest is concerned, in the same way as though that were the actual due date fixed by the bonds themselves, it being conceded that neither the mortgage nor the bonds make any provision for the payment of interest after their due date, and that anything recoverable in the nature of interest after that time is recoverable only as damages for the detention of the debt, and only at the rate fixed by the Statute, which at present is 5 per cent. See *St. John* v. *Rykert* (1); *People's Loan and Deposit Co.* v. *Grant* (2).

This is not a suit on the bonds or on the defendants' covenant to pay them. It is a suit to enforce the mortgage security, and as this application has reference simply to the distribution of the fund produced by a sale of the mortgaged property made under the decree in this suit, regard must be had to the terms of the mortgage so far as it makes express provisions bearing upon the distribution. The mortgage contains an express covenant by the defendants to pay the principal of these bonds in ten years, and in the meantime to pay the interest half yearly on presentation of the coupons. I am asked to imply a covenant wholly inconsistent with this express one, to the effect that the company will pay the whole loan at such other date as, under any authority contained in the mortgage, the plaintiffs, as trustee, may declare it to be due. This would virtually alter the defendants' covenant to pay the $280,000 in ten years to one for its payment it might be a few days after the most trivial default. In *Palmer's* Precedents, Part III. 96, the author says: "Usually, however, as we have seen, a debenture is made payable at a fixed date, or at such earlier time as the principal moneys thereby secured shall become payable in accordance with the conditions endorsed thereon." He further says that two of the usual conditions endorsed on the debentures

(1) 10 Can. S. C. R. 278. (2) 18 Can. S. C. R. 262.

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are (1) one by which the holder has the right on default to call in the principal amount, and (2) one which makes the principal due in case of a winding-up order being made. It is this covenant, which Mr. *Palmer* says is a usual covenant in cases of this kind, but which has been omitted from this mortgage, which I am asked to incorporate into the mortgage by implication. Had the defendants in fact made such a covenant, however onerous it might seem, it would be one of the conditions upon which the loan was made, and this Court would not consider it in the nature of a penalty so as to grant any relief. But I can see nothing which requires me to imply any such covenant in order to carry out the intention of the parties. See *In re Railway and Electric Appliances Co.* (1); *Hamlyn* v. *Wood* (2). There is certainly no express covenant either in the mortgage or the bonds or coupons except to pay the principal moneys in ten years, and the interest in the meantime at specified dates and at a specified place. It was no default in the defendants that they did not pay the principal and interest at the date upon which notice of the plaintiffs' declaration was given. They probably, by the plaintiffs' election, were entitled to redeem under that notice, but they were under no obligation to do so. The non-payment was not a default by the terms of the mortgage. The election thus to accelerate the payment had reference, in my opinion, solely to an enforcement of the security; it accelerated the time of payment, but it had nothing to do with the amount which the defendants had agreed to pay, and for which they were liable. Let us look at the rights of these parties, supposing no such provision had been in the mortgage at all. If under an ordinary mortgage the mortgagor makes default, the estate which was originally one on condition, becomes absolute, and the mortgagee can immediately file his bill for foreclosure. *Burrowes* v. *Molloy* (3) is an express authority to this effect, and is so recognized by all text writers. The right to foreclose had nothing whatever to do with the time

(1) 38 Ch. D. 597. (2) [1891] 2 Q. B. 488.
(3) 2 J. & Lat. 521.

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fixed for payment of the loan. Whether it was due or not was immaterial. *Coote* states the rule thus: "Supposing that the principal had been made payable on a given day, no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon half yearly in the meantime, and that before the day of payment of the principal money default had been made in payment of the interest thereon, the mortgagee would at any time after that event have a right to file his bill for a foreclosure because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled." See *Seaton* v. *Twyford* (1). There was, however, one right which the mortgagor always had. He could come to this Court before a decree absolute and get relief on such terms as the Court might think right—usually the payment of the costs of suit and the money which was due.

In *Cameron* v. *McRae* (2) a question arose as to the form of the decree in such a case; whether the mortgagee was entitled by reason of the default to call in the whole principal money, or whether the decree should be for foreclosure upon the defendant's failure to pay that portion of the principal already due according to the terms of the mortgage. And the decree was that if the mortgagor paid the whole principal, interest and costs within a certain time, he should be entitled to a reconveyance, but, in default of that, he was to be foreclosed of his equity of redemption. There is not, in my opinion, any question that in such a case the mortgagee is entitled to interest up to the due date of the loan at the rate secured to him by the mortgage, and not to interest in the nature of damages for the detention of the debt. If it were not so, all the mortgagor would have to do in order to get rid of paying interest at the rate agreed upon would be to make default and pay none.

Take another case. This mortgage contains a proviso that in case a winding-up order is made against the company,

(1) L. R. 11 Eq. 591. (2) 3 Gr. 311.

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the whole of the bonds should become due and payable, and the power of sale and right of foreclosure might be exercised in order to realize the security. As to the right of foreclosure and sale the same result would have happened without the provision: *Hodson* v. *Tea Co.* (1); *Wallace* v. *Universal Automatic Machines Co.* (2). In the latter case, the debentures contained no provision making the whole principal due on default of payment of interest or in the event of winding-up, but the Court held that although the debt was not due the security could be realized. *Lindley*, L. J., says: "The time for the payment of the principal not having yet arrived, it is clear that it is not a debt for which any action at law can now be brought, but it is equally clear that as the company is being wound up, the plaintiff and the other debenture holders can, if they choose, prove against the company in respect of all the moneys secured by the debentures whether due or not. * * * The plaintiff, however, is not seeking to prove his debt, nor is he bound to do so. On the other hand, he is not content simply to rest on his security, nor is he content to have his interest kept down; he wants to realize his security and to apply its proceeds in paying off the principal and interest, although the time fixed for paying off the principal has not yet arrived. The undertaking, on the security of which the money was borrowed, has in fact come to an end by the winding-up, and this circumstance entitles the debenture-holders to realize their security at once." In the decree that was there made there was a declaration of the plaintiff's right, and an account was ordered to be taken on that footing, of what was due for principal and interest on the bonds to the time of actual payment. There is no suggestion that the interest should be calculated at any other rate than that mentioned in the debentures, or that it was recoverable otherwise than as interest agreed to be paid. This acceleration clause is, however, in the mortgage, and the question very naturally is asked, What is its effect, or is it altogether useless? The argument was that if it was good for any-

(1) 14 Ch. D. 859. (2) [1894] 2 Ch. 547.

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thing it was good for everything; and that therefore for all purposes, the mortgage money was to be treated as due under the declaration, and the agreement to pay interest must be treated as an agreement to pay interest up to that time only. It is certain that without the aid of this clause in any way this bill could have been filed and the usual decree in such cases made as provided for in section 203 of chap. 112, C. S. 1903. Under such a decree the proceeds of a sale of the mortgaged premises would have been used in payment of principal not due as well as that which was due. By section 204, however, the mortgagor has a statutory right to relief which this Court always gave without any such Statute, that is, to have proceedings in a case like this stayed by paying the amount due and costs. That is an equitable relief which the mortgagor gets in order to avoid the effect of his own default. If, however, in a case like this where the principal money will not be due for ten years, if the mortgagor could defeat every suit instituted for foreclosure by payment of the overdue interest and costs, the clause in question, if it was designed, as I assume it was, to accelerate the payment of the whole loan, would largely fail in its purpose. I can understand, however, that it may be contended that when the mortgagor came to pay the amount due in order to stay the foreclosure proceedings, he might be told that he must pay the amount which he had authorized the plaintiffs to say was due as principal, and that any other meaning to the clause would be inequitable, especially if the defendants' contention is right, that as a price of utilizing this clause they must abandon one-half of their interest. I can understand, therefore, without expressing any opinion on the question one way or the other, that this argument might be urged with force. At present I am only interested in seeing whether the clause has any bearing on the point under discussion. I do not think it has. The rule by which interest is computed is this. The parties may stipulate for any rate of interest while the loan is current as well as after it is due, and so long as it remains unpaid, whether it is paid at

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maturity or later. In such a case there is no question as to the rate, for the parties have themselves fixed it. But unless it is specially provided otherwise in the mortgage, the covenant for interest only covers the period up to the due date of the principal. It is a covenant to pay *ad diem* and not *post diem*. That is the case here. There is an express agreement to pay interest at the rate of 10 per cent. for ten years. An amount—generally spoken of as interest—but in reality damages for the detention of the debt after its maturity, which in this case would be after the expiration of the ten years, may be recovered, and as no rate has been fixed, Parliament has fixed it at 5 per cent. Formerly—and, even now, it is the case I believe in England—there was no rate in such cases fixed by Statute but the Courts had a rate as a part of their practice. The Statute has no bearing on the case except to fix the rate in cases to which it applies. It provides that "whenever interest is payable by agreement of the parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be 5 per cent. per annum." How can it be said that there is no agreement fixing the rate for the whole ten years? It is not an agreement to pay interest up to the maturity of the bonds; it is an agreement to pay interest at the rate of 10 per cent. up to the year 1912. The defendants, by the interest coupons, expressly promise to pay a specific sum of money, which is six months' interest on a specific debenture, on a specified day at a specified place. The rate of interest is not affected in any way by a default occurring within the period covered by the agreement for interest. The declaration by the trustee accelerating the payment of the principal, as I have pointed out, created no new liability on the company. Non-payment by the defendants in accordance with that declaration was no default on their part for they never, either expressly or impliedly, agreed to pay the principal at that time. They were not detaining the debt any more after that declaration than before, and it is only where the party is detaining the debt beyond the period during which a rate of interest is agreed upon, that

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the statutory rate applies. If the rate had been agreed upon not only for the whole ten years but after that so long as the money remained unpaid, could it be argued that the whole covenant would be swept out of existence by this declaration, and the interest rate reduced? I do not think so. The covenant was not made with a view to a default on the part of the covenantor. Whatever interest is recoverable during the ten years, is, I think, recoverable as interest at the rate of 10 per cent. per annum under the company's agreement to pay and not as damages in the nature of interest for a detention of the debt, to be assessed on the statutory basis.

In *Gordillo* v. *Weguelin* (1), the debentures provided for annual drawings of the bonds for redemption, and they contained an express proviso that no interest should be payable on any drawn bond after the day fixed for its redemption. It was nevertheless held that for the purposes of paying interest such bonds stood in the same position as undrawn bonds where the money to redeem was not provided for the purpose, and interest was recoverable notwithstanding the provision I have mentioned. I have pointed out why, in my opinion, I could not import into this mortgage the covenant suggested by the defendants' Counsel, but if I could I am disposed to think the case would not be altered so far as the present question is concerned. Supposing that added to the existing covenants in the mortgage there was one by the defendants that on the declaration provided for they would pay the whole $280,000 and interest at the date fixed by the notice. That would not in any way change the rate of interest or the agreement that 10 per cent. per annum should be charged until the expiration of the ten years. If the due date were in such a case the date of the declaration under the acceleration clause, the rate would still be fixed up to 1912, and the covenant would be a covenant to to pay *post diem* to that extent. If, on the other hand, the due date is at the expiration of the ten years, the rate is

(1) 5 Ch. D. 287.

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fixed for that period. To hold otherwise would prevent the bondholders from taking advantage of a proviso in their security apparently intended for their benefit, and which became operative only by the defendants' default, except under the penalty of losing one half their interest, although the company was still in default.

I think the bonds bear interest at the rate of 10 per cent., and there will be an order accordingly. No order as to costs.

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November 27.

EDGETT v. STEEVES.

Insolvency—Assignments and Preferences Act, c. 141, C. S. 1903—Statutory presumption—Rebuttal—Evidence of pressure.

Sect. 2 (3) of the Assignments and Preferences Act, c. 141, C. S. 1903, provides that in a suit brought within sixty days from the making of a transfer of property, to have it set aside, it shall be presumed that it was made with intent to give the preferred creditor an unjust preference, and to be such, whether made voluntarily or under pressure:—

Held, that the presumption is rebuttable, but that evidence of pressure is not admissible for the purpose.

Motion for a receiver and to continue an interim injunction order restraining the defendant Steeves from acting under an assignment to him by the defendants Norman and John Jones of their book debts and part of their stock-in-trade, on the ground that it is an unjust preference within chap. 141, C. S. 1903. The facts are sufficiently stated in the judgment of the Court.

Argument was heard November 23, 1906.

M. G. Teed, K. C., in support of motion:—

Sect. 2, sub-sect. 2, of chap. 141, C. S. 1903, declares to be void an assignment or transfer of property made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, to or for a creditor with intent to give such creditor an unjust preference over his other creditors, etc. Sub-sect. 3 provides that if such transaction with or for a creditor has the effect of giving him a preference over other creditors of the debtor, it shall, in or with respect to any suit or proceeding which, within sixty days thereafter, is brought to impeach or set aside such transaction, be presumed to have been made with such intent, and to be an unjust preference, whether the same be made voluntarily or under pressure. The injunction will be con-

tinued if it sufficiently appears in the bill and affidavits that the debtors were insolvent within the meaning of the chapter; that the defendant Steeves had knowledge of it, and there was an intent to prefer him over the other creditors. A debtor is insolvent if he does not pay his way or is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent. See *Warnock* v. *Kleopfer* (1). In *National Bank of Australasia* v. *Morris* (2), Lord Hobhouse says, speaking of the Act there under construction, that if the creditor who is preferred has knowledge of the circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows within the meaning of the Act that the debtor is insolvent. The defendants Jones, at the time of the assignment to Steeves, owed upwards of $1,200, and their total assets, even if their book debts were collected in full, would not realize more than $850. Steeves is shewn to have knowledge that they were in financial straits. So great was his apprehension over their affairs, he instructed his solicitor to issue bailable writs against them. He was made aware, if he had no other knowledge of their distress, by taking an assignment of their book debts and a large part of their stock-in-trade, how far gone they were in insolvency. The suit having been brought within sixty days, the intent to give Steeves an unjust preference need not be proved.

H. A. Powell, K. C., for defendant Steeves, *contra*:—

The Act does not aim at a preference that is not fraudulent. In this respect it does not modify the common law. There a fraudulent intent had to be made out. This must still be shewn. In the absence of it the transaction stands. That the liabilities of the debtor exceed his assets is immaterial. It may be useful in helping to shew intent; it does not conclusively establish it. The intent must be brought home to the creditor. It is not proven

(1) 14 O. R. 288; 15 A. R. 324; 18 Can. S. C. R. 701.
(2) 1892] A. C. 287.

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from the fact that he demands security or that he gets it, and that he is aware that its effect will be to hinder other creditors. The presumption of intent created by the Act may be rebutted even where the suit is brought within sixty days. The words in sect. 2 (3) presuming the transaction to be an unjust preference, etc., "whether the same be made voluntarily or under pressure," do not exclude proof of pressure, and if such is brought forward the presumption is displaced. There is a catena of authorities, beginning with *Molson Bank* v. *Halter* (1), establishing that the preference provided against in the Act is a voluntary preference, and that a conveyance obtained by pressure from the grantee is not within its terms. Had the Act provided that "every gift, conveyance, etc., *whether made owing to pressure or not*," etc., the presumption could not be defeated by proof of pressure. These words are necessary in order to overcome the effect of those cases. See *Benallack* v. *Bank of British North America* (2). A mere demand by the creditor without even a threat of, much less a resort to, legal proceedings is sufficient pressure to rebut the presumption of a preference. See per Strong, J., in *Stephens* v. *McArthur* (3). See also *Gibbons* v. *McDonald* (4) and *Amherst Boot and Shoe Co.* v. *Sheyn* (5). A fraudulent intent in the mind of the creditor as well as that of the debtor is necessary: *Hepburn* v. *Park* (6); *Ashley* v. *Brown* (7); *Benallack* v. *Bank of British North America* (*supra*). If there is pressure it is immaterial that the conveyance is of the whole of the debtor's property: *Davies* v. *Gillard* (8). *Dana* v. *McLean* (9) is authority for the position that the statutory presumption is rebuttable. In *McLaughlin Carriage Co.* v. *Wickwire*, unreported, it was held by the Supreme Court of Canada that the presumption is not an absolute one. In order that there may be intent there must be collusion and want of good faith.

Teed, K. C., in reply.

(1) 18 Can. S. C. R. 88.
(2) 30 Can. S. C. R. 120.
(3) 19 Can. S. C. R. 446.
(4) 20 Can. S. C. R. 587.
(5) 2 N. B. Eq. 236.
(6) 6 O. R. 477.
(7) 17 A. R. 500.
(8) 21 O. R. 431; 19 A. R. 432.
(9) [1901] 2 O. R. 466.

1906. November 27. BARKER, J.:—

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This is a suit brought to set aside, as an unjust preference, an assignment dated October 10th, 1906, from the defendants, Norman Jones and John Jones, to the defendant Steeves, the consideration for which was the sum of $576 then owing to Steeves on overdue drafts and for goods sold. The assignment transferred all the book debts and choses in action which the Messrs. Jones had at the time, and also practically all of their stock. Steeves took possession of the stock and proceeded to collect the debts. The plaintiff Edgett is a creditor of the Jones' for the sum of $221.66, and their total indebtedness at that time, which is stated to be about $1,200, admittedly was in excess of the value of their assets. This is a motion to continue an injunction restraining Steeves from proceeding under his assignment, and the plaintiff also asks for a receiver.

There is substantially no dispute as to the facts. The affidavits clearly shew that the Jones', when they made the assignment, knew perfectly well that they were in insolvent circumstances and unable to pay their debts in full. Steeves' knowledge as to their position may or may not be an important factor in the case. There is no doubt, however, that he also knew of their insolvent circumstances, and he must have known that when he took all their book debts and practically all of their stock in order to satisfy his claim, little, if anything, remained for the other creditors. See *National Bank of Australasia* v. *Morris* (1). There is no doubt, therefore, that while Steeves was only getting his pay for a debt honestly due him, he did get a preference over the other creditors, and that the bill of sale was made with that object in view. It is also clear from the evidence that the assignment was made not voluntarily but under pressure from Steeves. It would therefore not be an unjust preference within the meaning of those words in sect. 2 of chap. 141, C. S. 1903, relating to preferences by insolvent persons, as Statutes of that character have been

(1) [1892] A. C. 287.

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judicially interpreted. I had occasion to refer to these cases in *Amherst Boot and Shoe Co.* v. *Sheyn* (1), and need not discuss them here. If an assignment is made by an insolvent to his creditor by way of preference, and that assignment is his own voluntary act done on his own motion, it is a prohibited act where it is given to secure an overdue indebtedness. If, however, it is not done voluntarily, but on the demand of the creditor and under pressure from him, the transaction loses its fraudulent character and the preference is not unjust: *Stephens* v. *McArthur* (2). And if this suit had been commenced after the expiration of sixty days from the time when the assignment was made, I should have thought that it could not be maintained. Sub-section 3 of section 2, however, provides that when an action to impeach the transaction is brought within the sixty days, the assignment shall be presumed to have been made with the intent of giving the creditor an unjust preference, and to be an unjust preference within the meaning of the section, whether the same be made voluntarily or under pressure. Two questions arise under this sub-section, and as to both of them judicial opinion in Ontario and elsewhere where similar Statutes are in force, has varied considerably. In the first place, is this presumption rebuttable or is it *præsumptio juris et de jure?* The most of the cases on the point were referred to on the argument; and in addition to these, Mr. Powell mentioned an unreported case, in which he was counsel, before the Supreme Court of Canada, where it was held or taken for granted that evidence could be given to rebut the presumption. If that be the case I am bound by the decision, but altogether apart from that, I am prepared to hold that the presumption can be rebutted.* Without repeating the arguments in favor of that view to be found in the reported cases referred to, it would, I think, be going an unwarrantable length to impute to the Legislature, from the words used in the section, an intention to render the

(1) 2 N. B. Eq. 236. (2) 19 Can. S. C. R. 446.

* See *Craig* v. *McKay* [1906] 12 O. R. 121.—REP.

transaction actually void if a suit to impeach it was brought within the time limit. If that was intended there was no presumption about it; a declaration to that effect was all that was required. Such, however, was not the intention of the Legislature. In the second place, can the presumption be rebutted by evidence of pressure? I think it cannot. On this point I agree with the judgments of the Court of Appeal of Ontario in *Webster* v. *Crickmore* (1) and *Beattie* v. *Wenger* (2). Mr. Powell contended that the words "whether the same be made voluntarily or under pressure," mean simply that in all cases the presumption should exist. If that is the only effect of them, they are altogether useless, for if they are taken out of the section the description of cases to which the section applies would not be limited in any way. The doctrine of pressure, as applied to preferential assignments by persons in insolvent circumstances, is not a modern doctrine; it was well known to those who took part in this legislation, and when they used the words in question they in effect said this presumption shall arise in all actions brought within the time limit, whether the transaction impeached was the voluntary act of the debtor or was procured under pressure from the creditor. It necessarily follows, I think, that evidence of pressure would not rebut the presumption. That would produce the somewhat anomalous result that a Court bound by Statute to presume as a fact that the transaction was made with a fraudulent intent, even where it was procured under pressure, should at the same time find the presumption rebutted by proof that the pressure actually existed. Many other circumstances may exist which would rebut the presumption. Instances of them are furnished by many of the cases cited, but no such circumstances exist here.

I think the injunction should be continued, and that a receiver should be appointed.

(1) 25 A. R. 97. (2) 24 A. R. 72.

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December 18.

PICK v. EDWARDS.

Statute of Limitations—Agency—Receipt of rents—Right to an account.

Where defendant received the rents of a property for a period of twenty-five years without during that time accounting to plaintiff, it was held that the right to an account was not barred by the lapse of time, defendant having taken possession of the property under an agreement with plaintiff, which had never been terminated, to hold the property for him and to account to him for it.

Bill for an accounting. The facts fully appear in the judgment of the Court.

Argument was heard October 30, 1906.

W. B. Chandler, K.C., for the plaintiff.

L. A. Currey, K. C., and *R. W. McLellan*, for the defendant.

1906. December 18. BARKER, J.:—

This suit was brought to obtain an account which the plaintiff claims from the defendant, as his agent, of the receipts and profits of a lot of land on Queen street, in Fredericton, and generally for an account of his dealings as such agent in the management of the property. Edward Pick, the plaintiff's father, seems to have owned the land in question for some years previous to his death in 1840. He died intestate, leaving a widow and two children—the plaintiff, and his sister, Mrs. Gregg. James Mount, a widower, with one daughter, Sarah E. Mount, subsequently married the widow Mrs. Pick. Some time after that marriage the plaintiff and Mrs. Gregg, his sister, sold their interest in the property to their step-father, James Mount. Mrs. Gregg conveyed her interest in 1848, and the plaintiff conveyed his in 1857. Mount died in 1873 intestate, leaving a widow but no issue of his last marriage. On his

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death his daughter, Sarah E. Mount, became entitled to the property, subject to Mrs. Mount's right of dower. She entered into possession of it and carried on a millinery establishment in it until her death, which took place in February, 1880. She died intestate, without having been married and without any next of kin so far as is known. She died quite suddenly at the house of the defendant's father, between whose family and her own a close intimacy had existed for many years. The defendant undertook the charge of her funeral and assumed the expenses connected with it. The circumstances being somewhat unusual, the plaintiff, who was then living in Moncton, but had gone to Fredericton to attend Miss Mount's funeral, and the defendant, went to the present Mr. Justice Gregory, who was then practising there, to consult him as to the best course to adopt in reference to the estate. Under his advice the defendant applied for administration as a creditor by reason of his having become responsible for the funeral expenses, and letters of administration were afterwards granted to him. He took possession of the personal property, disposed of it, and I believe had his accounts passed in the Probate Court. So far there does not appear to be any dispute as to the facts. The plaintiff says that, as a result of an agreement then arrived at between him and the defendant, Judge Gregory was instructed to prepare, and that he did in fact prepare, a power of attorney from the plaintiff to the defendant, by which the defendant was to take possession of the lot in question for him, the plaintiff, and as his agent, to hold possession for him, and to account to him for it. He further alleges that this power of attorney was actually executed by him and the defendant, and that the defendant has since that time managed the property and received the profits of it for him as his agent, but that he refuses to account for it in any way. In answer to this case the defendant says that he never was the plaintiff's agent in reference to this property; that there never was any such power of attorney executed by him or acted upon by him; but that he entered into possession of the property after Miss Mount's death in his

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own right, and has since that time been in the exclusive and continuous possession of it, whereby he has acquired a statutory title, good against every one except possibly the Crown, and that he is therefore in no sense accountable to the plaintiff for the profits of it. The defence is not that there was an agency originally which was subsequently terminated. Had that been the case the inactivity of the plaintiff during all these years would have seemed almost conclusive against him. The defendant, however, says there never was any such agency, and therefore there was none to abandon or terminate. Neither does the defendant in any way set up the *Statute of Limitations* in bar in whole or in part to the account asked for. On the contrary, he says, "I never was an accounting party to the plaintiff." I confess to the greatest difficulty in deciding which is the more improbable thing to happen—that the arrangement set up by the plaintiff should actually have been made in 1880 and been altogether forgotten by the defendant, or that it should have been made, and that the plaintiff himself should for over twenty-five years never receive an account, never ask for one, and have taken so little interest in the matter. The only difference between the two is that the plaintiff admits his apparent want of interest, while the defendant does not admit his apparent want of memory.

Whether the arrangement set up by the plaintiff was actually made or not depends principally on the evidence of Mr. Justice Gregory, and that of the plaintiff. Mr. Justice Gregory, after speaking of his personal acquaintance with both parties and their respective families, says, that on or about the 25th February, 1880, which was the date or about the date of Miss Mount's funeral, he attended at an interview of the plaintiff and defendant, at the instance, he thinks, of the defendant, at the defendant's father's home, to discuss the best course to adopt as to Miss Mount's property. It was agreed by the parties at that time, on his suggestion and advice, that the defendant should take out administration of the estate as a creditor, resting his claim to administration upon the fact that he had become a creditor by

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paying her funeral expenses as a necessity. A petition was prepared on that ground, a citation was issued and letters were subsequently granted to the defendant. As to the real estate, Judge Gregory's evidence is as follows: "In regard to the real estate it was agreed that I should prepare" (Mr. Currey:—I would like you to state as near as you can what took place rather than from conclusion). "I don't know how I could tell any better. I think it was my own suggestion, because they were talking over the real estate, and there being no heirs and the probability or possibility of its being claimed by the Crown, because they did not know of any, there were certainly none living in the Province and they didn't know there were any living, and the fact that the Crown might claim this real estate at the same time was discussed, and finally I was instructed by the two of them to prepare a power of attorney from George Pick to John A. Edwards to take possession of the property and care for it and hold it for him, George H. Pick, he having been in some way connected with Miss Mount. George H. Pick's mother was married to old Mr. Mount after she became a widow and the two families, as I recollect, at first lived together as one family, Mr. Mount and Mrs. Pick then having become his wife, and George Pick and Miss Mount. So Mr. Pick made known that he was intending to claim the real estate and I spoke of the possibility of the Crown making a claim, and this plan was adopted between them by a common understanding between them, that Mr. Pick should appoint Mr. Edwards, who would go into possession, take possession and hold possession for him when he should become administrator of the personal estate. * * * Shortly after that, pursuant to the instructions I got I drew a power of attorney and the two gentlemen met in my office and it was executed and delivered in my presence by—well that I am not going to be sure about—I will take back that part, delivery; I don't remember actually handing over, but they two met in my office and it was signed in my office.

"Q. And it was drawn in accordance with instructions, I presume? A. Yes, pursuant to instructions.

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"Q. Did you make a copy of it? A. That I can't speak of with any positiveness, although my impression is there was but one copy of it prepared.

"Q. And I presume it did not remain with you? A. If it did I have not seen it. I have made some search for it and I have not found it in my papers."

On his cross-examination, Judge Gregory was asked as to his recollection as to the defendant having signed the power of attorney. His evidence on that point is as follows:—

"Q. The plaintiff signed it, did he? A. He did, and I also think Mr. Edwards signed it.

"Q. Are you sure of it? A. Well, I feel sure of it in my mind.

"Q. Why should he sign it? It is not usual. A. No, but I can recollect what I had in my mind at the time I drew the power of attorney and reasons why Mr. Edwards would sign it, and I think Mr. Edwards did sign it in my office at the same time Mr. Pick did.

"Q. But you will not undertake to say he did sign it? A. I cannot certainly remember his taking the pen and writing, but I know what point I had in my mind when it was drawn and why he should sign it. I endeavored to make one document do. I think there were covenants in it for Mr. Edwards to account to Mr. Pick, and I think more than that, the time to account, and how often and when he should do it, and I was making one document do the appointment of Mr. Edwards and the accounting. This I am speaking of from my recollection, and while I cannot remember distinctly his taking the pen and signing, but drawing the document that way I do not think I would let them out without it."

Judge Gregory's charge for the power of attorney is entered in his book under date February 26, 1880, as follows:—

"George H. Pick, Dr. To consultation with him at Mr. Edward's house *re* Miss Mount's property, drawing power of attorney to Mr. John A. Edwards, etc., $10.00."

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The plaintiff's evidence on this point is as follows:—

"Q. Give us your best recollection as to what was said if you can? (This was at the consultation with Judge Gregory). A. After discussing the points in connection with the matter, and my relation to the property and my connection with the family, and being the only person who could stand at all to look after the interests of Sarah Mount in any way, there being no known heirs of any kind, Mr. Gregory was asked his advice as to the best course to pursue, and on his recommendation that Mr. Edwards administer the personal estate and I give Mr. Edwards a power of attorney to act and hold the property for me.

"Q. You asked Mr. Gregory his advice? A. Yes.

"Q. And this is what he told you? A. Yes.

"Q. What was it? A. That John A. Edwards administer on the personal estate, and that I give John A. Edwards a power of attorney to hold the property and act for me.

"Q. When you say 'the property,' what do you mean? A. I mean the house and land on Queen street, near Carleton, in this city.

"Q. Formerly occupied by Sarah Mount? A. Formerly occupied by Sarah Mount."

The plaintiff says there was another meeting at Judge Gregory's office the following day. Mr. Edwards consented to administer, and afterwards the power of attorney was made out. His evidence then proceeds:—

"After the power of attorney was made out Mr. Gregory read it over; it was satisfactory.

"Q. Read it aloud to both of you? A. Read it out and handed it to me to sign and I signed it, and I have no recollection of Mr. Edwards signing it, no positive recollection, but after the whole business was done I made the remark, 'Now what shall I do with this?' and Mr. Gregory said, 'Give it to John,' and I handed it to John Edwards in his presence.

"Q. That is the defendant? A. The defendant."

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The plaintiff says that he has never seen the power of attorney since. He left Fredericton for Moncton immediately afterwards, and, according to his own account, from that time to this has never had any conversation with the defendant on more than two occasions.

In addition to this direct and positive evidence, we have the testimony of Mr. Smith and Mr. Allen, both professional men, without any interest whatever in the result of this suit. It seems that in December of last year the city treasurer of Fredericton, finding the taxes on this property for the years 1901, 1902, 1903, 1904 and 1905 in arrears, and having heard that the plaintiff had some interest in the property, wrote to him about the taxes. The result was that he paid the whole amount—$183.35—on the 16th January last. He had, however, consulted Mr. Smith in December, and as a result Mr. Smith, at his instance, went to Fredericton to see the defendant. The precise object of the visit is not very clear. It certainly could not have been to accomplish any settlement, for up to that time there had not been a word between the parties; they had neither met nor corresponded, and the defendant's present attitude as to the property he had not made known; at all events, directly or indirectly, to the plaintiff, or, so far as there is any evidence, to any one else. Smith, however, did go to Fredericton on the 18th December, and after making some searches at the Registry Office in order to find the power of attorney, and inquiries at the City Treasurer's office in order to find out about the taxes, he brought about an interview with the defendant. His account of what took place is as follows:—

"I first passed the time of day with Mr. Edwards and so on. He and I had been old friends, and then I asked him if he was aware that there were certain taxes due upon this property in dispute, but I mentioned the property, and Mr. Edwards said that there were no taxes due that were not to be met by bills that he held against the city, and he informed me that he was an alderman; and then I asked him if he proposed to account to Mr. Pick for the

rents and profits, and for the disbursements. He said he did not. Then I asked him if he did not know he had taken a power of attorney from Mr. Pick, and that he had entered into possession of the property as agent for Mr Pick, and he said he did. Then I asked him if he had the power of attorney. He said no, he could not say he had; it might be among his papers somewhere, but he could not remember anything about it. Then I asked him, to the effect, if he thought Mr. Pick was a fool, and he did not express any opinion on that point. Then I said to him, or words to this effect, 'Mr. Edwards, how does it happen that the assessment in the clerk's office is put 'Mount Estate, per J. A. Edwards, agent?' 'Why,' he said, 'I am agent.' 'Well,' said I, 'for Mr. Pick?' 'No,' said he, he did not wish to be considered as having answered that in the affirmative. Then I asked him whom he was holding for if he was agent for someone. He did not answer that question except to say he would not answer me anything further until he had seen his lawyer. Then I asked him when he would see his lawyer, and then he said he wanted to see George Gregory, and I told him that I had seen Mr. Gregory the night before on the train, and that Mr. Gregory had told me that he had drawn a power of attorney which he, Mr. Edwards, had executed. 'Yes,' he said, 'but I want to see what George Gregory has got to say about it;' said that two or three times and finally he said he would not recognize any right of Mr. Pick's to an account, but that he would see a lawyer, and that he would meet Mr. Pick and myself at the Brunswick House, a hotel in Moncton, on the 5th day of January, that he was coming up to be at Moncton by appointment with someone—did not say who—that is last January; and upon my asking him what time we could meet him, he said 12 o'clock, noon; if Mr. Pick and I would go to the Brunswick House he would be there, and that closed the conversation." On his cross-examination, Mr. Smith made some important additions to this narrative, which he said had escaped his recollection at the time. He said, "that in the first interview when I asked him if he had not taken a power of attorney and

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gone in under that power of attorney, he said, 'Yes,' and it was signed in George Gregory's office and that he had accepted it and taken it from Mr. Pick.

"Q. Will you swear he said he had accepted it? A. I will swear most emphatically. * * *

"Q. You know that Mr. Edwards said, in addition to what you have said, that he had accepted the power of attorney? A. Yes, and had had it given to him by Mr. Pick, in Mr. Gregory's office—George Gregory's office is how he called him.

"Q. Can you explain how you recollect that? A. Well I can not say I did forget it, but it had not come to mind. It is now firmly fixed in my mind and as a matter of recollection I state it.

"Q. Were there any others present at the time? A. No, there were none present but him and me at the time, and I think that was the second time.

"Q. How did you come to make the statement he had accepted it? A. I do not know.

"Q. Was it not in answer to a question you put to him? A. No, it was not. He just said it that way, that he had accepted it and that Mr. Pick had given it to him, and that he had entered under it. He did not use the words 'I entered under it;' 'I went in under it.'

"Q. You change that now? A. That is what he said, 'I went in under it.'

"Q. All these odd terms you have forgotten until both Counsel have got through examining you, and now it occurs to you to remember he said he not only accepted it but entered under that power of attorney? A. I say he did not say 'entered,' 'went in.'

"Q. He used that term, did he? A. Yes, he did not use that till I asked him. I asked him if he entered under it and he said, 'Yes, I went in under it.'

"Q. But the accepting part was his own statement? A. He used that word without any suggestion from me whatever.

"Q. But the entering under was stated at your sug-

gestion? A. The going in, in answer to a question of mine; then I asked him if he thought Mr. Pick was a fool."

The defendant did not keep his appointment for the 5th January, at Moncton, but he wrote a letter to Mr. Smith, dated January 4, explaining that he was prevented from doing so. No other time having been arranged, Smith came to Fredericton on the 23rd January to see the defendant again. I think I may safely say that his object in making a second visit was to bring about a settlement between the parties, for he came armed with a written offer, which, however, is not in evidence and is unimportant. A second interview took place, but it resulted in nothing, for at that time the defendant seems to have repudiated all liability.

Before commencing this suit, a formal demand for an account and a formal notice cancelling the power of attorney were served on the defendant by Mr. Charles H. Allen, at the instance of Mr. Chandler, the plaintiff's solicitor in the suit, on the 7th March last. On his examination by Mr. Chandler at the hearing, Mr. Allen said as follows: "I went into the Post Office and saw Mr. Edwards, and asked him if he was the agent of George H. Pick in connection with the Mount property, and he said he was, and I handed him the two copies of the papers, revoking the power of attorney and demanding an accounting, and I waited for a reply, and I told him what they were. I think that I was serving them for you, and he said that you were going to a lot of trouble for nothing; he said he would look into it.

"Q. This was on the 7th March? A. The morning of the 7th March.

"Q. What you asked him was whether he was agent for George H. Pick in connection with the Mount property? A. Yes.

"Q. He said he was? A. Said he was."

Mr. Allen says that the defendant was not engaged with any other people at the time, though he is not prepared to say that there were not others present in the apartment at the time. The defendant meets the evidence

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of Mr. Smith by denying the truth of it, except in some minor matters, and he meets the evidence of Mr. Allen by saying that he never heard any such question asked him as Mr. Allen speaks of.

I shall not attempt the impossible task of reconciling the statements of Mr. Smith and those of the defendant. They relate to incidents of so recent a date, and to matters in which both—one professionally, the other personally—were at the time so interesting themselves, that it would be little less than a farce in the administration of justice to charge up these discrepancies to the mere frailties of human memory. The defendant's account of the interview between the plaintiff, Judge Gregory and himself differs in some respects from Judge Gregory's recollection of it. He speaks of the consultation at his father's house immediately after Miss Mount's funeral, the meeting at Judge Gregory's office on the following day, and the reasons of his selection as a petitioner for letters of administration. His evidence as to the real estate is as follows:—

"Q. What else was talked of at your father's house? A. Well, the property was talked of.

"Q. Do you mean the real property? A. I mean the real property, by Judge Gregory, for Mr. Pick to get hold of it in some way, and there was a power of attorney talked about, and I listened to everything, and Judge Gregory about conducted the whole business, suggested everything and moved in everything. I did not have very much to say about it; but this power of attorney was talked about in my father's house. * * *

"Q. And did you meet, subsequently, with Mr. Pick, or Mr. Gregory, or anyone about the matter, and if so, where? A. Well, I have not a clear recollection, but I have a recollection of being in Mr. Gregory's office the next day, and I have a recollection of this document being talked about or prepared—a power of attorney—but I have no recollection of the document being read there, or having signed or being handed to me. I have no recollection of ever having the document, or ever seeing it, or ever hearing it read, from that day to this."

In other parts of his evidence the defendant swears positively, that he never signed any power of attorney, never acted under one and never had any in his possession.

The evidence, from which I have quoted at some length, leads me to the conclusion that the power of attorney was, in fact, executed by plaintiff and defendant, and delivered as the plaintiff and Judge Gregory say, and I so find as a fact in this case. Judge Gregory's recollection of the facts seems clear and positive. Unaided, altogether, except as to the date of the transaction, he is able to recall the circumstances out of which this dispute has arisen. In fact the circumstances are so exceptional in their character that even after a lapse of so many years they could scarcely be forgotten, even by one who had no more than a professional interest in them. We have the defendant's own admission that Judge Gregory, who had known both parties for a long time, was called in to advise them what to do about the estate. Neither of them had or pretended to have any legal right to the land. The plaintiff did put forward a reason why in the failure of next of kin, he should have it. The defendant at that time neither objected to this claim nor put forward any of his own. He admits that one of the subjects discussed, and submitted for Judge Gregory's opinion, was that the plaintiff wanted "to get a hold of this land in some way," and it was in this connection that this question of a power of attorney came up. In other words, I should say, that was the means which Judge Gregory suggested for the purpose. It is reasonable to suppose that when the Judge advised the course to be adopted, and which was adopted, to secure the administration of the personal property to the defendant, his advice as to the means to be adopted to enable the plaintiff to get a hold of the real estate would also be adopted. He says it was so, the plaintiff says the same, and the entry in the book corroborates it. I think, therefore, and so find, that when the defendant went into possession, he went into possession for the plaintiff as his agent, under this power and subject to a liability to account for the property. I shall briefly refer to evidence relied on

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by the plaintiff as shewing positive acts by the defendant under the power of attorney. In addition to the admission proved by Mr. Allen and the more important and circumstantial admissions proved by Mr. Smith, and which if accepted in their entirety are ample evidence of agency, there is a piece of testimony by Judge Gregory to which I shall refer. He says that on the 21st April, 1880, by instructions of the defendant he drew a special lease of this property, in duplicate, as between George H. Pick and Annie Williams, and that he attended to the execution of that lease by Miss Williams. The entry in his book is as follows:

"George H. Pick, per J. A. Edwards, Dr. To drawing special lease of property in Queen street in duplicate to A. Williams, $6.00."

Miss Williams was a milliner who had purchased Miss Mount's stock and was then commencing a business on these premises where she continued for some years.

On his cross-examination Judge Gregory was asked as follows:—

"Q. He never acted on it, did he? (*i. e.*, the power of attorney). A. Well, he did; one act was upon it, I would say. That lease to Miss Williams was on it.

"Q. Was not that lease J. A. Edwards to Miss Williams? A. No, it was not; at least it is George H. Pick by J. A. Edwards.

"Q. Is your memory pretty certain as to that? A. My memory is pretty clear and my entry confirms me.

"Q. Would it not be more from your entry than your memory of it? A. No; when it was just done and for a while afterwards my mind often referred to the transaction of the property, and I know Mr. Edwards had that done, and I did not think Mr. Edwards got me to do anything more afterwards with respect to the property."

In view of this evidence and the entry in Judge Gregory's books, the defendant was compelled to admit its correctness, and that this lease had actually been prepared

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by his direction and executed. In addition to this, later on in the same year Judge Gregory, on the defendant's instructions, searched the title to this property, furnished him with an abstract of it, which he sent to the plaintiff, and which the plaintiff produced at the hearing. The plaintiff also produced two letters from the defendant to him, one dated March 4, 1880, and the other dated April 26 of the same year. In the first, among other things, the defendant says: "The matter is only about as you left it, as the Probate Court has ordered a citation, which you will see by to-day's *Telegraph*. I look in the store every day to see that all is right, but have not touched anything as yet. I have had some applications for the shop and house, but will not be able to get over $200 for it this year, as there are a great many vacant shops on the front street and likely to be more; but if I can get a tenant suitable I will be well satisfied just now. After a time, when I have funds to improve the place with, there will be no trouble, and even now, if a party I am negotiating with takes it, I will have to do a little in the fall. Whenever I am in a position to give you further information I will write. * * * Mrs. Mount wrote up a very sensible letter, and altogether different from what I expected. She looks upon your claim most favorably and justifies your action. I shall take care of the letter, as it may be useful some time." In the other letter the defendant speaks of his appointment as administrator, his sale of the stock, and some other matters in reference to the estate. He says: "I have sold the greater part of the stock, a portion of it to a Miss Williams, to whom I have rented the house and shop for one year for $200, the very most I could get for it, and when I see a dozen or more good shops vacant, I think it is not so bad. I have had to reinsure the property, one-third payable to Mrs. Mount in case of loss. I have sent her the balance due her on the quarter's rent due 1st May. * * * I will have to give these tenants some paper for two of the rooms, and some other little things will have to be done." These letters are said to be of no importance, but do they not support the plaintiff's case? Are they

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such letters as one who had just taken possession of this property, to use the defendant's statement in his answer, as "owner in fee," who was holding it for himself adversely to the plaintiff and all the world, who was accountable to no one, would naturally write to the plaintiff, who, according to him, has not now, had not then, and never had since, the slightest interest in the property whatever? Place the defendant, however, in the position which, according to the plaintiff, he actually occupied, and what is more natural than that he should inform him of the renting of the property, the name of the tenant, the amount of the rent and how it was disposed of, the insurance on the house, the allowance to the tenants for the room paper, and tell him that whenever he was in a position to do so he would give him further information? Then there is the other fact that the defendant actually, from 1880 to 1902, kept an account of this property, not in his own private books, but in a book for the special purpose and for the estate account. That is altogether in the way of his duty if he was an accounting party such as the plaintiff claims, but unusual if he was not.

The fact being then ascertained that the defendant in fact did enter into possession of this land under the plaintiff as his agent to hold it for him and to account to him for it, what terminated that relation before the plaintiff himself cancelled it, and if not terminated, how can the defendant as against the plaintiff dispute his title? In *Smith* v. *Bennett* (1) it was held that so long as an agent is in receipt of the rent of land, the *Statute of Limitations* will not run against his employer; and if a person commence to receive rents as the agent for another, and afterwards continue to receive such rents without paying them over, he must be presumed to receive as agent till the contrary is shewn. In *Burdick* v. *Garrick* (2), Giffard, L. J., says: "I do not hesitate to say that where the duty of persons is to receive property and to hold it for another, and to keep it until it is called for, they cannot discharge them-

(1) 30 L. T. (N. S.) 100. (2) L. R. 5 Ch. 243.

selves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it." In *Lyell* v. *Kennedy* (1), Lord Macnaghten approves of that proposition and adds: "I do not think it can make any difference what the nature of the property may be, whether it is a lump sum, or collected in the shape of rents accruing from time to time. I do not think it can make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self-imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken, and that property has been received by a person assuming to act in a fiduciary character, the same consequences must, I think, in every case follow."

In my view it is quite impossible for one acting in a fiduciary position as to property as this defendant was towards the plaintiff to acquire any right growing out of its possession such as this defendant sets up in this case until that fiduciary position has been terminated. To hold otherwise would be to permit a trustee holding a possession for his *cestui que trust* in direct violation of his trust to go on building up a title in himself. In *Williams* v. *Pott* (2), Lord Romilly, M. R., says: "In the first place, I am of opinion that the possession of the agent is the possession of the principal, and that in this case the Rev. Walter Jones Williams could not have made an entry as long as he was in the position of agent for his mother, and that he was not in possession and could not get into possession or make any entry for that purpose, without resigning his position as her agent; and then he must have written to his mother, saying, 'The property is mine; I claim the rents and I shall apply the rents for my own purposes;' and thereupon he might have made an entry and so would have altered the position of principal and agent." In *Attorney-General* v. *Corporation of London* (3), the Lord Chancellor says: "An agent cannot get an adverse title unless he can very dis-

(1) 14 A. C. 437. (2) L. R. 12 Eq. 149. (3) 14 Jur. 207.

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tinctly shew that what he has done is in respect of title and not in respect of his agency." In *Dixon* v. *Hamond* (1), Abbott, C. J., says: "If in order to maintain this action, it were necessary to shew that the legal title to this ship was in the present plaintiffs there can be no doubt that the defendant would be entitled to our judgment. For it is clear that the ship never belonged to the partnership at all. It was originally the property of Flowerden alone, and by him the legal interest was first transferred to Hart, and subsequently vested in the present defendant. He, however, in 1815, receives an order to effect an insurance on the ship and freight on partnership account, and he does effect it and accounts with the partnership for the premiums. After this the ship is lost and he receives the money from the underwriters. Then, in truth, the legal title to the ship has nothing to do with this question. The right of the plaintiffs to recover here depends on a settled rule of law, that an agent shall not be allowed to dispute the title of his principal, and that he shall not after accounting with his principal and receiving the money in that capacity afterwards say, that he did not do so, and did not receive it for the benefit of his principal, but for that of some other person. Here the defendant has received the money as agent for the partnership, and he cannot now be permitted to say that he received it for the benefit of Flowerden alone. All the rest of the world, except the defendant, might dispute the legal title of the plaintiffs to the ship, but he cannot do it." See also *Zulueta* v. *Vinent* (2).

Though the *Statute of Limitations* is not set up as a defence, the defendant's Counsel did contend that the delay in taking proceedings and the lapse of time amounted to laches or acquiescence such as to be a bar to the plaintiff's claim, and that in determining that question this Court would act by analogy to the Statute. That the plaintiff, ever since the inception of this transaction, has shewn an indifference in regard to this property and its management

(1) 2 B. & Ald. 310. (2) 1 DeG., M & G. 315.

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by the defendant is certainly a strong circumstance, unexplained as it is, to shew that the transaction itself was not what he sets up. And in determining that question of fact I have not lost sight of that point. I cannot, however, agree that this amounts either to acquiescence or laches such as to defeat this action. The contest is between the original parties, no rights of third parties have intervened; the defendant has the account and can give it, and prove it as well to-day as ever he could. He, at all events, has not been injured by the delay. Proceedings were taken so soon as knowledge came to the plaintiff that the defendant had disregarded his duty by permitting the taxes for five years to be in arrears, and when he had on a demand for an account refused to give it and repudiated his agency altogether. Besides this the relation in which the parties stood to each other under the power of attorney must not be lost sight of. It is settled by a long series of authorities that when an express trust has been created, as I think is the case here, lapse of time is no bar to an action for an accounting. *Burdick* v. *Garrick* (1), is a leading authority on this point.

In *Soar* v. *Ashwell* (2), Bowen, L. J., says: "One thing seems clear. It has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is colored from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence: *Chalmer* v. *Bradley* (3); *Marquis of Cholmondeley* v. *Lord Clinton* (4); and this confidence or trust imposes on him the liability of an express or direct trustee." See also *North American Land*

(1) L. R. 5 Ch. 233.
(2) [1893] 2 Q. B. 390.
(3) 1 Jac. & W. 51, 67.
(4) 2 Jac. & W. 1, 190.

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and Timber Co. v. *Watkins* (4). These last two cases seem to have arisen after 1890, when section 8 of the *Imperial Act*, 51 & 52 Vict., chap. 59, of which section 50 of chapter 162, Con. Stat. 1903, is a copy, came into force.

There must, I think, be a decree declaring that the defendant has held the property up to the 6th March last, when the power of attorney was cancelled, as an express trustee for the plaintiff, and that it be referred to a Referee to take an account of the defendant's dealings with the property during that period on that footing.

(4) [1904] 1 Ch. 242: affirmed on appeal, [1904] 2 Ch. 233.

PATCHELL v. THE COLONIAL INVESTMENT AND LOAN COMPANY.

1907.
January 9.

Mortgage — Power of sale — Abortive sale — Redemption — Costs of sale.

Mortgaged property sold under a power of sale, default having arisen, was bid in by an agent of the mortgagee, and subsequently conveyed by him to the mortgagee. In a suit for redemption :—

Held, that the mortgagee was entitled to be paid the costs of the abortive sale, except an amount charged for the conveyance.

By indenture of mortgage bearing date August 4, 1897, Catherine Patchell, the plaintiff, conveyed to the Globe Savings and Loan Company certain lands and premises situate in the city of St. John to secure the sum of $500 advanced to her by the company, and interest thereon. Payment of principal and interest was to be made by equal monthly instalments, extending over a period of 120 months. In event of default being made at any time in the payment of the instalments, or any part thereof, the mortgage provided that the whole amount of the money secured should become due and payable, and that it should be lawful for the mortgagees, their successors or assigns, either to proceed in equity for the foreclosure and sale of the mortgaged lands and premises, or on giving one calendar month's notice in writing to the mortgagor, or on notice being published in one or more of the newspapers published in the city of St. John four times during one calendar month, absolutely to sell and dispose of the mortgaged lands and premises, either by public auction or private contract, for such price as the said mortgagees, their successors or assigns, might consider reasonable. Default having been made by the plaintiff in the payment of the monthly instalments, the defendants, to whom the mortgage had been assigned, caused the mortgaged premises to be advertised for sale by public

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auction, and at a sale held under the advertisement on January 31, 1903, they were bid in by Mr. Herbert J. Smith for $435. The amount then due under the mortgage, including $47.26 for costs of sale, was $589.96. Mr. Smith was at the time the agent of the defendants at the city of St. John. A conveyance of the property bearing date March 4, 1903, was executed by the defendants to Smith, and by indenture of the same date he re-conveyed the property to them. In a bill for redemption the plaintiff alleged that the sale to Smith was by collusion with the auctioneer, and that the property was bid in by him at the instance of the defendants for the purpose of injuring and defrauding the plaintiff, and for the purpose of enabling Smith to hold himself out to the plaintiff as the *bona fide* and actual purchaser of the property, while in fact the purchase was made by him for the defendants. Subsequently to the sale a tender of $500.00, which was refused, was made by the plaintiff to the defendants as an amount sufficient to satisfy all that was due under the mortgage, and they were requested to discharge the mortgage and to reconvey the premises to the plaintiff. The bill asked for an account, and that it might be declared that on payment of the amount found to be due, the mortgage should be cancelled and the conveyance from the defendants to Smith and from Smith to the defendants be set aside. On a reference to take an account, the Referee found that $869.92 was due under the mortgage, including $52.26 for costs of the proceedings held under the power of sale. Certain exceptions taken to the report and which are sufficiently referred to in the judgment of the Court, which also sets out additional facts, now came on for argument.

December 28, 1906.

F. R. Taylor, for the plaintiff:—

The sale to Smith was a fraud upon the plaintiff, entitling her to costs of suit: *LeTarge* v. *DeTuyll* (1). If

(1) 3 Gr. 595.

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that is not so, as the plaintiff's tender, though insufficient, was made in good faith, and as the amount claimed appeared unreasonable and oppressive, no costs should be ordered against the plaintiff. See *McLeod* v. *The Queen* (1). The exception to the allowance of the costs of the sale to the defendants should be upheld. The expenditure proved useless owing to the defendants' conduct, and was of no benefit to the plaintiff. It was incurred by the defendants for objects of their own.

W. W. Allen, K.C., for the defendants:—

Defendants are entitled to be paid the costs of the sale. The sale failed for want of a purchaser. If the defendants, instead of bidding in the property, had withdrawn it, there could be no question of their right to charge up the expenditure. The different course taken by them did not add to the expense, nor was the suit rendered necessary by it. Defendants are entitled to costs of suit: *Cotterell* v. *Stratton* (2).

1907. January 9. BARKER, J.:—

Though the bill in this case contains allegations altogether inappropriate to a redemption bill, the suit has been regarded throughout as a redemption suit. The plaintiff claims a right of redemption which the defendants admit, but she makes charges of fraud and collusion, and allegations that the plaintiff executed the mortgage in question in ignorance of its more important provisions, all of which charges and allegations are entirely without proof to support them. The plaintiff, in her bill, has offered to redeem, and in order to ascertain the amount due the matter was sent to a Referee who has reported that on the 18th December, 1906, the date of his report, there was due by the plaintiff to the defendants on the mortgage, the sum of $869.92. To this report the plaintiff has filed certain exceptions which came on for argument on the defendants'

(1) 2 Exch. Ct. Rep. 106. (2) L. R. 8 Ch. 295.

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motion to confirm the report. The account seems to be a very simple one. The defendants were never in possession of the premises or in receipt of the rents and profits. The amount found due consists simply of the principal and interest due on the mortgage, less the amounts actually paid by the plaintiff, and a charge for expenses of an attempted sale under the power contained in the mortgage. In November, 1902, the plaintiff being then admittedly in default, the defendants gave notice of sale under the power, and on the 31st January, 1903, the premises were offered for sale at auction, and bid in by H. J. Smith, at a price considerably less than the amount due, and a conveyance was executed to him. There is no question that Smith bid in the premises for the defendants as their agent. He, in fact, executed a reconveyance to them of the same date as his own deed bears. The sale was therefore abortive as an execution of the power, and did not in any way prejudice the plaintiff as to her right to redeem.

One of the exceptions arises from the refusal or neglect by the defendants to file a debtor and creditor account with the Referee, as is required to be done by accounting parties. Whether, strictly speaking, on a reference of this kind the mortgagee is an accounting party where he has never been in possession of the premises or in receipt of the rents and profits, and where the amount due on the mortgage is merely an arithmetical calculation of principal and interest due after deducting the payments made by the mortgagor, and which is therefore as easily ascertainable by the one party as the other, it is not necessary to decide. For the defendants did in fact file an account; and even if it were imperfect, as the plaintiff contends, later on they filed a supplementary account, to which there is no objection, and no one has been injured or prejudiced in any way. There is only one of the exceptions which is of any importance. The others were disposed of at the hearing; some of them were abandoned, and I intimated an opinion as to the others adverse to the plaintiff's contention. There was some disagreement between the plaintiff and other witnesses as to the payments.

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She was either mistaken or they were. The Referee had the witnesses before him; he had the advantage of seeing them under examination, and under such circumstances it is not the practice of this Court to disregard his findings as to facts in dispute. I have looked over the evidence and listened to the arguments on both sides, and so far from disagreeing from the Referee, I think I should have arrived at the conclusion he reached. It is, however, sufficient to say that he had ample testimony to warrant him in finding as he did, and his finding should not, in my opinion, be disturbed. See *Thomas* v. *Girvan* (1). This covers all the questions as to the amounts paid by the plaintiff.

The only exception of any importance in point of principle is that which relates to the allowance by the Referee of the costs of the proceedings under the power of sale, amounting to $52.26, including $5 paid for the conveyance to Smith. I think the Referee was wrong in allowing the $5, but that he was quite right in allowing the remainder of the sum, $47.26. In *In re Wallis* (2), Fry, L. J., says that it is well settled that under the ordinary contract which arises out of the relation between mortgagor and mortgagee, if the mortgagor wishes to redeem the mortgaged property he must pay (1) the principal debt; (2) the interest thereon; (3) all proper costs, charges and expenses incurred by the mortgagee in relation to the mortgaged debt or the mortgage security; (4) the costs of litigation properly undertaken by the mortgagee in reference to the mortgage debt or the security; (5) the mortgagee's costs of the redemption action. *Seton* lays down the rule thus: "Both in foreclosure and redemption actions the mortgagee is entitled to the costs of action, and also to all costs properly incurred by him in reference to the mortgaged property, for its protection or preservation, recovery of the mortgage money, or otherwise relating to questions between him and the mortgagor, and to add the amount to the sum due him on his security

(1) 1 N. B. Eq. 257. (2) 25 Q. B. D. 176.

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for principal and interest." This passage from *Seton* on Decrees (1), is cited with approval by Cotton, L. J., in *National Provincial Bank of England* v. *Games* (2). See also *Henderson* v. *Astwood* (3).

A sale of the mortgaged property under the power of sale was one of the means given to the mortgagees by which they could realize their money. It was therefore a perfectly legitimate proceeding on the defendants' part to give the notice which they did, and to do all that was done except executing the conveyance to Smith. If the plaintiff had intervened before the day of sale, filed her bill to redeem, and obtained, as she could have done, an injunction staying the sale, there can be no doubt that the costs incurred up to that time would have formed a part of the redemption money which she would have been compelled to pay. How does the fact that the conveyance was executed to Smith make any difference? If the defendants derived no benefit by it the plaintiff was not injured by it, and why should she be placed in a better position by it. There is no suggestion, or at all events there is not the slightest foundation for suggesting, any fraud in this transaction, or that the proceedings as to the sale were not *bona fide* in every respect. What is a mortgagee to do in such a case? If no sufficient bid is made for the property, must the mortgagee sacrifice it, and not only lose his money, but incur the liability of accounting to the mortgagor for its full value? It is true that where a conveyance is made purporting on its face to be made in execution of the power, the mortgagor might, in ignorance of the real fact, be led into the belief that the right of redemption was gone; and it may be said that in such a case the mortgagee should notify the mortgagor that the equity of redemption is still available. In this case—and I am only dealing with this case—there is not only no evidence or pretence that the plaintiff has in fact been in any way prejudiced by the conveyance, but there is the positive evidence of Mr. Smith himself, who was the defendants' agent at St.

(1) 5th Ed. p. 1613. (2) 31 Ch. D. 582. (3) [1894] A. C. 150.

John, that about a week after the sale he told the plaintiff that by the terms of the mortgage if she failed in her payments the property would become the property of the company, but if she paid the balance, that is, the amount due on the property, the company would give it back to her. The defendants' right to their expenses arises out of their contract with the plaintiff; it is not in the discretion of the Court whether they shall be allowed or not. The right to them, resting as it does substantially upon contract, can only be lost by some inequitable conduct on the part of the mortgagee amounting to a violation or culpable neglect of duty under the contract. See *Cotterell* v. *Stratton* (1).

The exceptions will all be disallowed, except as to the $5. The report will be varied by making the sum due $864.92 instead of $869.92, and it will be confirmed in other respects. The amount will be paid into Court before 1st May next to the credit of this cause, and on such payment, and payment of the taxed costs, the defendants will reconvey to the plaintiff. In case of default in payment, then the bill will stand dismissed with costs.

(1) L. R. 8 Ch. 295.

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February 19.

THIBIDEAU v. LEBLANC.

Creditors' deed—Balance in hands of trustee—Repayment to debtor—Collection of debts due estate—Negligence of trustee—Employment of attorney—Findings of Referee.

A trustee under a deed of assignment for the benefit of creditors ordered to pay to the debtor balance of estate in his hands, where eighteen years had elapsed from the time of the assignment, though but two creditors had executed the deed, it not appearing that other creditors, if there were any, had ever shewn an intention of assenting to the deed and the Court being of opinion that they would now be precluded from doing so.

A trustee under a deed for the benefit of creditors may employ an attorney to collect debts due the estate.

Where an attorney employed for the purpose by a trustee under an assignment for the benefit of creditors collected $211.38 of $1,028.45 book debts due the estate, and it appeared that mostly all of them were for small amounts, many being for less than a dollar, and that one of the reasons for making the assignment was the difficulty experienced by the assignor in collecting even good debts, it was held that the trustee should not be charged with a sum as for debts that he should have got in.

The finding of a Referee upon questions of fact depending upon evidence taken *viva voce* before him will not be disregarded except in case of manifest error.

Exceptions to report of Referee on bill for an accounting. The facts are fully referred to in the judgment of the Court.

Argument was heard August 25, 26, 1906.

James Friel, for the plaintiffs.

W. B. Chandler, K.C., and *H. A. Powell*, K.C., for the defendants.

1907. February 19. BARKER, J.:—

The defendant LeBlanc died after an answer had been put in, and the suit was amended by substituting the present defendants who are his devisees. Personally they are under no responsibility as to the transactions involved in

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the suit, so I have for convenience preserved the original title of the cause, and to avoid misapprehension I shall refer to the original defendant LeBlanc, when I use the word defendant. This matter comes before me by way of exceptions, filed by both parties, to the Referee's report on a special inquiry made as to the dealings between them. It seems that at the time that the arrangement between the plaintiffs and defendant was made, the plaintiffs owned certain marsh and uplands in the county of Westmorland, which they had for sometime occupied and farmed, and upon a portion of which they had carried on the business of manufacturing brick. In March, 1889, the plaintiffs, who apparently had not much business experience or capacity, found themselves unable to meet their payments; not, as they alleged, that they were insolvent in the sense of their liabilities being in excess of the value of their assets, but from their inability to procure such ready money as they required for immediate use. They then applied to the defendant, who was a brother-in-law to the plaintiff Thibideau, for assistance, and as a result of the negotiations which then took place, the plaintiffs conveyed all their real estate absolutely to the defendant for an expressed consideration of $2,000, the amount at which the plaintiffs then estimated their liabilities, and at the same they executed to the defendant a chattel mortgage on all their personal property to secure the sum of $2,000 and interest at seven per cent., payable in six months. It was a part of the arrangement made at the time, that the defendant was to borrow on the security of the property and such of his own property in addition as might be necessary for the purpose, the sum of $2,000, with which he was to pay the plaintiffs' debts or settle with their creditors in some way. The defendant did borrow this $2,000 from Judge Wells, and as a security for its repayment he gave a mortgage on all the plaintiffs' real estate which had been conveyed to him, and some land of his own. This mortgage is dated March 14, 1889. The defendant gave $500 of this money to one of the plaintiffs and he retained the balance. On the 10th of April following—that is, a month after which the original

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transaction took place—the plaintiffs executed an assignment for the general benefit of their creditors to the defendant. The assets professed to be conveyed by this assignment are thus described: "Their books of account, book debts, sums of money due or coming to them on notes, bills of exchange or books of account and the sum of money due them from Theophilus B. LeBlanc (that is, the defendant) of the town of Moncton, balance of the purchase money for brick-yard land and goods and chattels conveyed to said LeBlanc by them in March, A.D. 1889, and all other property, effects and credits wheresoever situate of them the said party of the first part, except household furniture, and all the right, title, interest, claim and demand whatsoever of them the said party of the first part, of, in and to the said debts, book debts, accounts, moneys, property, notes and bills." This assignment contains a provision by which the moneys realized from the assets conveyed by it, are to be appropriated, first, in payment of the expenses of collection and a commission of five per cent. on the sum realized, and secondly, in payment of the claims of such of the plaintiffs' creditors as should execute the assignment within sixty days. Public notice of this assignment, and of the right of the creditors to come in and participate in the fund, was duly given. In my opinion the description in this last assignment is sufficiently broad to include all the plaintiffs' rights in their real and personal property conveyed to the defendant by the first two conveyances or the balance of moneys realized from them after the trusts upon which these conveyances were made had been performed and the objects for which they were made had been realized. This residuum, if I may so call it, would be held by the defendant under the general assignment for the benefit of creditors and subject to the trusts declared in that instrument. The first question to be determined is one of fact; that is, What were the purposes and objects for which the first two conveyances were made and accepted, and for whose benefit and with what object was the brick-making business carried on by the defendant, as it in fact was carried on during the years 1889, 1890 and 1891? The

plaintiffs in their bill allege that the defendant during these years had full charge of the brick-yard and carried on the business, though they and a son of the plaintiff Cormier worked at the business; and in the tenth section they allege that the defendant said he would manage the business for them, and that they would have an opportunity of redeeming their property; and in the eleventh section they allege that "during the time he ran the brick business for the plaintiffs" he made large profits. The defendant admits that he did agree with the plaintiffs to assist them in the running of the business; that he sold most of the bricks and collected money for them, and paid the wages and expenses. He says: "I was anxious to help the plaintiffs, and we hoped that between us we could run the business and pay off the debts due by the plaintiffs and the mortgage against the property out of the profits of the business, and was willing to do what I could to assist the plaintiffs to carry this out." In the twelfth section of his answer he says that "the business was not carried on after the end of 1891, as it was unprofitable, and I could not carry it on any further myself, and the plaintiffs themselves were unable to carry it on." I shall not stop here to define the exact relation then created between these parties as to the business, so as to determine the principle upon which liability for losses should fall, further than to say that I think there was no partnership created. I think the plaintiffs correctly describe the business as being carried on by the defendant *for them*, in the sense that he was the legal owner of the property, took the control, and had the management of the business for the same purpose as that for which the property was transferred, that is, to realize a fund for the payment of the plaintiffs' creditors, and in that way for the plaintiffs themselves. For the property itself and the profits of the business, if there were any, the defendant must in any event be accountable. If from all sources the business and property realized more than enough to meet the debts and other legitimate charges so that they are paid, or for the purposes of this suit, must be so regarded, what remains, whether in the nature

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of property undisposed of or in money, must go back to the plaintiffs.

After so long a lapse of time, and in the absence of any very well-kept account by the defendant, there are necessarily difficulties in the way of reaching accurate results as to some of the transactions involved in this account. The defendant is not charged with default in the management of the brick-making business; it is only alleged against him that as between him and the plaintiffs he has satisfied, by the use or disposal of the property conveyed to him for that purpose, the plaintiffs' liabilities, and that whatever remains in his hands, subject to charges for interest or remuneration, should be handed back to them. The object of the account-taking is to ascertain what amount of money came into the defendant's hands under these assignments for the purposes for which they were made, and what the defendant has done with it. I shall not deal with the exceptions separately, for the account can be more conveniently dealt with in a more general way. It naturally divides itself into four divisions: (1) the moneys derived from the brick-making business; (2) the money derived from a sale or disposal of the personal property not involved in the brick business; (3) the money chargeable against the defendant for debts collected under the trust deed; and (4) the money for which the defendant is accountable by way of rent or otherwise by reason of his use and occupation of a portion of the real estate. Taking these in their order, what are the facts as to the business? In the schedule of property assigned by the chattel mortgage it will be seen that, in addition to the plant for carrying on the business, there was on hand 50,000 bricks and 150 cords of wood. These bricks were sold and the wood was used in the business and go to make up the so-called profits. It is in my view of no importance in what account this stock on hand is included, for, as I have already pointed out, it is clear to my mind that the understanding was, and the object of the plaintiffs in making the assignments was, to secure by the assistance of the defendant from the use or disposal of the property money

to pay their debts; and it is of no importance whether the money was realized as profits of the business or as proceeds of the sale of property, or otherwise. The Referee has made up the account on the basis of the defendant retaining all the property, but I think it should be stated on a different basis. He has reported a profit on the three years' transactions of $2,649.74—that is, a profit in 1889 of $2,682.28, a loss in 1890 of $591.79, and a profit of $559.25 in 1891. Both sides agree that these figures are wrong, especially as to the wages' account the plaintiffs charged to the defendant. As I state this business account it shews a profit, or rather a net surplus, of $743.77, after allowing the defendant credit for the moneys actually paid on the plaintiffs' account and charging him with $210, the value of the wood on hand when the business closed.

BUSINESS FOR 1889.

Total expenditure as per Referee,		$4,717 55
Add cash paid plaintiffs,		135 92
		$4,853 47
Deduct item 50,000 brick,	$500 00	
" " cordwood,	300 00	800 00
Expenditure,		$4,053 47
Total receipts as per Referee,	$7,399 83	
Deduct wages,	766 08	$6,633 75
Surplus,		$2,580 28

1890.

Total expenditure as per Referee,		$2,942 99
Add cash paid for plaintiffs,		282 46
		$3,225 45
Total receipts as per Referee,	$2,351 23	
Deduct wages,	619 54	1,731 69
Deficit,		$1,493 76

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1891.

Total expenditures as per Referee		$1,536 81
Add cash paid for plaintiffs		432 39
		$1,969 20
Total receipts as per Referee	$2,096 06	
Deduct wages	469 61	1,626 45
Deficiency		$342 75

Wood on hand, $210.00, charged to defendant.
Net surplus, $743.77.

The business was not carried on afterwards, and if I am correct in my statement of the results, the stock on hand in 1889, as well as that manufactured afterwards, had all been disposed of. $734.77 stood to the credit of the fund for the payment of debts, and the plant used in the business still was on hand though depreciated in value by the wear and tear of three seasons' work. The plaintiffs had contributed to that result by their labor for which they received something in return, and the defendant had given his services whatever they were without remuneration.

We come now to the money derived by the defendant from the sale of the property, and first as to the real estate. The Referee reports that six acres of marsh were sold in 1895 to Rupert Kinney, and eight and a quarter acres of upland were sold to one Ganong, but at what particular time he was unable to ascertain. No evidence of the actual price paid for the lands was given, but the Referee has reported that the value of the Ganong lot is $80 and of the other, $420, in all $500, and I think the defendant must be charged with this sum. It seems also that in 1896, the defendant borrowed $600 for which he gave a mortgage to McSweeney, which is unpaid. As to the disposal of the personal property conveyed by the chattel mortgage, the Referee reports as follows: "The 50,000 bricks were sold by the defendant during the brick-making season of 1889 for the sum of $10 per thousand. The 150 cords of wood were used at the brick-yard during the brick-making

season of 1889, and all other personal property mentioned in said bill of sale was left on the said property deeded by said plaintiffs to said T. B. LeBlanc, and used on said farm or in said brick-making business from the date of the said assignment until the spring of 1892, when the said defendant took and removed therefrom the following articles mentioned in the bill of sale, that is to say, the bay horse, which he afterwards disposed of to one Thomas Ganong for 30 cords of wood, of the value of $1.50 per cord; the one single truck wagon; the four sheep and their increase up to the spring of 1892, which at that time had increased to ten, and which were of the value of $3 each; one of the sets of bob sleds and the 10,000 feet of boards. The plaintiffs retained the black horse, the single driving wagon, the double truck wagon, the red cow, the brown cow and the calf, and used and converted the same to their own use. All the remainder of the personal property mentioned in the bill of sale, consisting of the following articles: two sets of double harness, one set of single harness, one plow, one pung, one cart, one cart-saddle, the brick-making machine and the wheel barrows were left on the farm or in the brick-yard from the spring of 1892 without being under the apparent control of any one, with the exception of the brick-making machine, a portion of which the said defendant afterwards loaned to one Cummings, to be used in his brick-yard, and some of the wheel barrows, which were taken away by a man named Boss, and removed to Bathurst, and said last-mentioned articles, including that portion of said brick-making machine left in said brick-yard, and the remainder of said wheel barrows are at the present time in such a delapidated condition that no portion of the same is of any value whatever." There seems to be no doubt as to the defendant having actually taken for his own use the property as the Referee has found. The Referee has charged him $355 for the bay horse, a truck wagon, the sheep, a set of sleds and the boards, and this sum is said to be much beyond their value. Except the sheep, all of this property had been used in the brick-yard for three years. Twelve dollars a

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thousand for boards of that class does seem excessive, and that the defendant would sell a horse worth $150 for $45 worth of cordwood seems unreasonable. I think the $355 should be reduced to $250. The Referee has also charged the defendant with $400 as the value of the brick-making machine, and with $24.50 as the value of seven wheel barrows. The former sum seems to be excessive. It was a second-hand machine when the plaintiffs bought it, and I think $300 is full value for it. As to the wheel barrows, I think the defendant ought not to be charged with them. The plaintiffs were there on the ground; they took and retained a considerable portion of the property, and if these barrows were of any value I think they ought themselves under the circumstances to have taken care of them.

As to the third division—the debts collected—I think the Referee has also erred. He has reported that there was no wilful neglect on the defendant's part, but he has at the same time charged him with $616.49 for debts which might have been collected in addition to $211.38 actually collected. The book debts assigned by the trust deed amount in all to $1,028.45, distributed among eighty-five persons. One amount is $381, but the others are all for small amounts, many of them less than a dollar. The defendant gave the list over to Mr. Girouard, a solicitor, for collection. He collected the $211.38, but no more. He was examined by the Referee and gave some explanations as to the difficulties he met with; the amounts were small, and in many instances there were contra claims practically balancing the account. Mr. Girouard's explanations naturally, after a lapse of some seventeen years, are somewhat general and not so satisfactory as one would like, but it is worth remark that in the case of debts so easily collectable as the Referee seems to have thought these were, it is a wonder the plaintiffs themselves, pressed as they were for money, had not made some effort to collect these debts before assigning; $616.49 would have been a respectable payment on an indebtedness of $2,000. There is no doubt, I think, that the defendant was quite within his right to employ an attorney to collect these accounts, and

there is no question made as to the propriety of selecting Mr. Girouard for the purpose. In that case the onus is upon the plaintiffs to shew the liability: *In re Brier* (1). The difficulty of collecting good debts is put forward by the plaintiffs themselves in their trust deed as one of the reasons rendering the assignment necessary. I think the defendant ought not to be charged with this sum.

This brings me to the last division—the charge for the use and occupation of that part of the premises which the defendant occupied and practically used as his own for several years. The permanent improvements placed on them the Referee reports as worth $627.80, and as he has stated the account, there was a balance of $435 due by defendant to the end of 1903. Owing to two clerical errors, this balance should be $245. The item of $1,314 should be $1,404, and the item of $160 is a mistake for $180. There are some items in the account for 1894 and 1895 about which there may be some question, and to which objections have been filed. They are, however, small in amount. In reference to these, as well as other matters with which I have already dealt, I desire to say that the finding of a Referee as to questions of fact should not lightly be set aside. Referees are the sworn officers of this Court to whom, except in special cases, matters of accounting go for investigation. They have the witnesses before them, and their conclusions upon questions of fact depending in whole or in part upon oral testimony submitted to them, ought not to be disregarded except in cases of manifest error: *Thomas* v. *Girvan* (2). I have already pointed out that whatever property remains undisposed of after the trusts of these assignments are satisfied should go back to the plaintiffs as they have asked by their bill, and the present value of that property is therefore unimportant. The addition to its value by reason of permanent improvements is accounted for as well as any diminution properly chargeable against the defendant. A motion was made by the plaintiffs to amend their bill by striking out

(1) 26 Ch. D. 238. (2) 1 N. B. Eq. 257.

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certain words in sections 11 and 12 which allege that the brick business was to be carried on for the plaintiffs. I must refuse that motion, for I think the allegation as it is is entirely supported by the evidence. If it were otherwise it would be difficult to establish any fiduciary relation as to that method of using the property between the parties, or to understand why all the expense of taking the account of the business was incurred. The defendant was a mere volunteer in this matter, doing the best he could in the supervision he gave to the business, and the plaintiffs were there themselves at work all the time and found no fault with the management. If, under these circumstances, there was a loss, it would be as unreasonable that the defendant should bear it as it would be that he should, in the case of profits, hold them for any other purpose than for the payment of the plaintiffs' debts. I think there is a balance due to the plaintiffs of $912.48, stated as follows:—

TOTAL ACCOUNT.

Receipts.

Amount borrowed from Judge Wells,	$2,000 00
Sale of real estate, Kinney & Ganong,	500 00
Amount borrowed from McSweeney, for which property mortgaged,	600 00
Cash from Bliss Thibideau,	150 00
Debts collected,	211 38
Surplus of brick account,	743 77
Horse, wagon, sheep, bob-sleds and boards,	250 00
Brick machine,	300 00
Use and occupation to end of 1903,	345 00
" " " 1904,	220 70
" " " 1905,	271 30
15,000 feet pine logs at $8.00,	120 00
8,000 feet spruce and hemlock at $4.00,	32 00
8,000 feet spruce framing at $4.00	32 00
40 yards building stone at $1.50,	60 00
	$5,836 15

Expenditures.

New barn,	$ 400 00	
Clearing land,	208 00	
Ditching land,	19 80	
Stevenson, cash,	12 00	
Cormier's note,	23 00	
Patrick Cormier,	500 00	
Debts,	926 04	
E. Girouard,	4 00	
Wells' mortgage and interest,	2,830 83	4,923 67
Balance due,		$912 48

There remains but one other question which is not set up in the answer but which was raised at the hearing; that is, that the creditors are not in any way parties to this suit, and therefore no decree can be made by which the property in the defendant's hands for the benefit of creditors can be ordered to be reconveyed to the plaintiffs unless all the debts had been fully paid or are to be so treated as between the parties to this suit. I think it right to state, in view of any appeal which may be taken from the decree about to be pronounced, that in my opinion the property ordered by it to be transferred to the plaintiffs is held by the defendant in trust for the unpaid creditors who have placed themselves in a position to take a benefit under the trust deed, if there are any. The evidence shews that it was executed by two alleged creditors at the time it was executed by the parties in April, 1889, now nearly eighteen years ago. The two creditors who executed the deed are Toombs and Girouard, as assignees of one William J. LeBlanc, who was then an insolvent, and B. Toombs & Co. Strange to say I cannot find either of these names in the list of the plaintiffs' creditors in March, 1889, or in the list of debtors paid. It appears that Toombs & Co. also failed. Girouard, who acted as the solicitor in making all these transfers by the plaintiffs, who was a witness to the execution of the trust deed and collected for the defendant such sums as were collected of the debts, says in his evidence: "I do not remember that

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Toombs & Co. rendered me an account in this case. I do not remember making inquiries of the plaintiffs as to how they stood with Toombs & Co. Toombs & Co. failed. I did not inquire into their estate. I do not remember that I ever filed any account with the assignees of Toombs & Co. in this matter. I do not know who the assignee was." Earlier in his evidence he speaks of there being cross accounts between Toombs and the plaintiffs. Speaking of the other claim, Girouard says that the money which he as attorney for the defendant collected on the plaintiffs' account, and which I have allowed at $211.38, he appropriated in payment of the William J. LeBlanc claim as assignee of that estate, which he says amounted to $360.08, as appeared from LeBlanc's own books. The Referee does not seem to have been impressed with the industry displayed by Mr. Girouard in his collection of the plaintiffs' debts, and he expresses the opinion that their estate has made a loss of $616.49 through his negligence in this respect. While there may be some foundation for this view, it is to be recollected that not only were the amounts small and distributed among a large number of persons, but in many instances there were contra accounts which reduced the claims, and many of the persons had themselves become bankrupt and gone out of business. The assignment for the benefit of creditors was made in April, 1889, now nearly eighteen years ago, and upwards of fourteen years before this suit was commenced, and, with the exception of the two alleged creditors who executed the deed at the time it was made, there has been nothing to shew on the part of the others anything amounting to acquiescence in the deed or indirectly an intention on their part to participate in its benefits one way or the other. They have remained altogether inactive. This suit was commenced in December, 1903, and it is not an unfair inference to draw that the nature and object of it has become well-known to many of the so-called creditors. Notwithstanding this, and the fact that the litigation has now been pending for over three years, no one creditor has intervened in any way with a view of enforcing his claim under the

trust deed or otherwise. Under all these circumstances I feel justified in dealing with this estate on the basis that all unpaid creditors, if there are any, have long since abandoned any right which they may have had to come in under the trust deed, and that the rights of the parties to this suit should be determined on that basis. The deed itself was only made for the benefit of those who should come in and execute it within sixty days from its date. While that period is not exclusive, it is a provision which has some significance after so long a period has elapsed. In *Gould* v. *Robertson* (1), the creditor was not permitted to come in under the deed where a much less time had elapsed than in the present case. The Vice-Chancellor says: "This is not a trust of which the plaintiff is entitled to claim the benefit. I have never intended to say that actual execution of a composition deed by a creditor was necessary if the creditor had clearly expressed his intention to accede to it. But I am not aware of any case which has gone the length of deciding that time is to go for nothing; and that, although the deed prescribes a fixed time for its execution, the creditors are to be allowed all time or any time. That is not the law. The time prescribed by this deed is six months. The plaintiff did not shew any intention to come in under the deed for a period of several years after she had notice of it." In *Nicholson* v. *Tutin* (2), the Vice-Chancellor says: "The Court requires it to be shewn first that the person claiming is a creditor, and then that he has acted under the deed." And in *Biron* v. *Mount* (3), the Master of the Rolls says: "The principle is very well laid down by Lord St. Leonards in *Field* v. *Lord Donoughmore*(4), where he states that 'it is not absolutely necessary that the creditor should execute the deed; if he has assented to it, if he has acquiesced in it or acted under its provisions and complied with its terms, and the other side express no dissatisfaction, the settled law of the Court is that he is entitled to its benefits.'" "About that,"

(1) 4 DeG. & S. 509.
(2) 2 K. & J. 18.
(3) 24 Beav. 642.
(4) 1 Dr. & W. 227.

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says the Master of the Rolls, "I entertain no doubt, but I apprehend he must for this purpose, do some act which amounts to acquiescence. It is not sufficient for him merely to stand by and take no part at all in the matter." That is precisely what all these parties seem to have done, and I see no reason why these plaintiffs should not get their property back, because it is possible that some creditor may hereafter wish to participate in this fund, when no such creditor has, during all these years, actually done so, where there is no reason for thinking that any will come forward, and every reason for thinking that if he does his right to do so at this late date would, under all the circumstances, not be recognized or sustained.

Provision, however, must be made for the two persons who have executed the deed, that is if they really are creditors. Mr. Girouard seems to have appropriated the $211.38 collected by him for the defendant, in payment to himself as trustee of William J. LeBlanc of an indebtedness due by the plaintiffs, amounting, as he said, by LeBlanc's books, to $360.08, in which case there would be a balance coming to the LeBlanc estate and all of the Toombs' claim for which provision should be made. The defendant does not seem to have given much, if any, attention to his duties or responsibilities as trustee under the deed for the benefit of creditors, and he must be held responsible for the proper appropriation of this $211.38. I have already pointed out that in the list of persons to whom the plaintiffs were indebted in March, 1889, there is no reference either to William J. LeBlanc or Toombs, and as that information is furnished this Court in reply to a special inquiry, I must infer that the plaintiffs did not owe either of them when they assigned. Neither does either of these persons appear in the list of the plaintiffs' debtors, also furnished by the Referee in reply to a special inquiry. In addition to this the Referee does not include the LeBlanc estate among the debtors paid. I can only conclude that according to the Referee's finding there was no outstanding account between them, in which case the defendant would be properly chargeable with the $211.38, and not entitled to

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any credit for payment to William J. LeBlanc estate. I have gone through LeBlanc's evidence and in it while he says his books shew a balance due him of $360.08 as due from the plaintiffs on April 9, 1889, he immediately adds, "Bliss Thibideau (that is, the plaintiff) owed me at the time he failed over $160." And it is evident from his cross-examination that these were credits to which the plaintiffs were entitled which would materially reduce that sum, if the balance was not really the other way. The plaintiff Thibideau, who kept such accounts as were kept by the plaintiffs, says that he could not make up the account between them and LeBlanc; that they were in the habit of giving him notes for his accommodation; and that he did not think that when they failed they owed LeBlanc anything. The plaintiff Thibideau also says that he thought Toombs owed them something when they failed. According to Toombs' evidence an open account had been running between these parties for over ten years, and he says that the plaintiffs owed him $53.88 on May 16, 1889. He admits, however, that he has not credited the value of several sales of bricks charged against him by the plaintiffs, which he says are not correct. On his cross-examination he seems to admit that the amount was not $53.88, but something less. The fact is that so mixed up were all these transactions, and so carelessly were the accounts kept, that at this late date even the parties themselves can tell very little about them or get at their true balance. Girouard was Toombs' assignee, and he never seems to have even filed a claim for anything, or in any way done anything to get anything from the plaintiffs' estate. Neither is there any exception to the finding of the Referee as to the list of creditors and debtors to which I have referred, or that the amount paid to creditors should be increased by any claim of W. J. LeBlanc's estate. As to the remaining questions of interest to be allowed to the plaintiffs, or remuneration to the defendant, I shall make no order except as to interest on the balance found due, which should bear interest at five per cent. from the date of decree. The data are altogether too uncertain for any

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satisfactory calculations as to the allowance of interest if there were no other objections. As to the remuneration, I do not think the defendant has shewn that he is entitled to much consideration; any interest account would be against him, and of that he has the benefit, as I have not allowed any. In addition to this his accounts have not been satisfactorily kept, and whatever may have been the plaintiffs' laches in bringing this suit, and for which they offer a want of means as an explanation, the defendant has no good reason to give for not having closed this matter up long ago.

The defendants must have their costs of these exceptions, and the plaintiffs must pay the costs of their exceptions, which will be overruled. The report will be varied by substituting as the balance due $912.48 instead of $5,660.87, as found by the Referee, which the defendant will pay the plaintiffs, together with costs of suit. Order also a re-conveyance of the property unsold and delivery of possession.

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—No. 3. See *ante*, p. 173.

Bills of Sale Act—Secret trade agreement—Power to seize goods and book debts of debtor.

Plaintiffs in 1898 agreed to supply M. & S., dry goods dealers, with goods under an agreement in writing that such goods should remain the plaintiffs' property, and that should the plaintiffs at any time consider that the business of M. & S. was not being conducted in a proper way or to the plaintiffs' satisfaction, plaintiffs should be "at liberty to take possession of our stock, book debts and other assets, and dispose of the same, and after payment in full of any amount then owing to you by us, whether due or to become due, the balance of the proceeds shall be handed to us." The agreement was not filed under the *Bills of Sale Act*, chap. 142, C. S. 1903. Goods were supplied from time to time under the agreement. On February 17th, 1905, the business not being conducted to the plaintiffs' satisfaction, and M. & S. being insolvent, plaintiffs entered the store of M. & S. by force and took possession of all the stock and effects on the premises, and of the books of account. The stock seized was made up of goods supplied by the plaintiffs of the value of $5,000, and of goods supplied by other unpaid creditors of the value of upwards of $10,000. The account books shewed debts due M. & S. of the estimated value of $2,000. Later on the same day M. & S. made an assignment for the general benefit of their creditors:—

Held, (1) that plaintiffs were not limited to taking possession of goods supplied by themselves.

(2) that as to goods supplied by the plaintiffs as the property therein did not pass to M. & S., the agreement was not within the *Bills of Sale Act*, and that as to goods not supplied by plaintiffs as the agreement was not intended to operate as a mortgage but as a license to take possession, the Act did not apply.

(3) that while the license in the agreement to take possession of the book debts did not amount to an assignment, and the powers given by it had not been exercised by notice to the debtors, plaintiffs were nevertheless entitled to them as against M. & S.'s assignees.

The defendants, J. Otty Morrell and J. Leishman Sutherland, formed a partnership in the fall of 1898 for the purpose of carrying on business as dry goods merchants in the city of St. John, under the firm name of Morrell & Sutherland. The plaintiffs agreed to supply them with goods on credit upon the terms of the following agreement

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in writing, dated December 13, 1898, addressed by them in the form of a letter to the plaintiffs:

Referring to our proposed line of credit with your firm, and to the terms on which goods are to be supplied by you, as discussed and arranged during an interview with your Mr. Rodger last month, we beg to confirm what we then promised, and we further agree and bind ourselves to be governed by the following terms and conditions, in consideration of which you agree to supply us from time to time with such goods as may in your judgment be reasonable and necessary for the proper carrying on of our business, so long as our business relations are mutually satisfactory.

1. We shall each draw from the said business in goods or cash, or both, not more than $700 per annum.

2. We shall transfer to you as collateral security for advances to be made two policies of insurance now in force amounting to $3,000. The premiums on said policies we will continue to pay out of our annual drawings above referred to.

3. We will at once take out policies on our respective lives for a sum aggregating $5,000, payable to you as your interests may appear, to be held by you as collateral security, in addition to policies now in force. The premiums on said $5,000 to be paid out of and charged to the ordinary expenses of our business.

4. We will insure and keep insured our stock to the fullest extent possible; loss, if any, payable to you as your interests may appear. Policy to be sent to you as soon as received.

5. We will keep you thoroughly posted regarding the state of our business, and for your satisfaction and information will fill up certain printed forms to be supplied by you, and forward same to you weekly.

6. We will permit anyone deputed by you to examine our books and inspect our stock at any time, and will give such person all the assistance he may require for such purpose.

7. We will take stock and prepare a statement of our position once a year, and furnish you with full particulars of same, and if necessary allow such stock-taking and statement to be checked and confirmed by one authorized by you for the purpose.

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8. It is understood that all goods supplied by you shall belong to and remain the property of your firm until paid for, and should you at any time consider that our business is not being conducted in a proper way or to your satisfaction, or that the foregoing agreement is being in any way disregarded, you shall be at full liberty to take possession of our stock, book debts and other assets, and dispose of same without let or hindrance on our part, and after payment in full of any amount then owing to you by us, whether due or to become due, and any expenses incurred in the realization of said assets, the balance of the proceeds of same then remaining in your hands, if any, shall be handed to us, together with any securities held by you.

9. We will sign and return to you any notes you may require in settlement of goods purchased by us from you, and will also send weekly remittances on account of such notes, or on any open account which you may have against us, you to furnish us statements from time to time showing interest *pro* and *con*. You will also allow us discounts on all payments made before the maturity of note or purchase, and we agree to pay interest at the rate of seven per cent. per annum for any extra time required by us.

The agreement was accompanied by a letter from Morrell & Sutherland to the plaintiffs' manager, Mr. Rodger, in which it was stated that they had noted what he had said in regard to supplying them with such goods as might in his judgment be reasonable and necessary, but that feeling that it was to their mutual interest that the stock should be as well-assorted and complete as possible, they had no hesitation in placing themselves in his hands, having confidence that he would supply them with the best goods obtainable at the lowest possible figure; that in regard to paragraph number 8 of the agreement, that it gave him almost unlimited power, but in the event of their relations not being mutually satisfactory, should he think it advisable to close the account, they had no doubt he would be quite willing to allow them a few days in which to try and effect a satisfactory settlement of his claim. On May 12, 1899, the plaintiffs wrote to Morrell & Sutherland, in reply to a request by the latter that their line of

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credit should be increased, that they were depending too much upon them, the plaintiffs, to stand aside while the defendants were taking discounts on outside bills. They pointed out that the defendants should buy from others on the usual terms, and that by so doing they would be enabled to make plaintiffs better payments. Towards the close of 1904 plaintiffs notified Morrell & Sutherland that the balance due plaintiffs was large; that their business relations had become very unsatisfactory; that they considered the business was not being conducted in a proper way and to their satisfaction, and that the terms of the agreement were not being performed by them, Morrell & Sutherland. In January, 1905, they again notified Morrell & Sutherland of their dissatisfaction with the state and conduct of the business, and of their intention to take possession of the stock-in-trade, book debts, and other assets of the business. On January 30th the plaintiffs demanded possession of the stock-in-trade, book debts and assets of the firm, which was refused. On February 17th the plaintiffs took forcible possession of the store and premises, and of the goods and effects therein, and of the books of account, but later on the same day they were forcibly dispossessed by Morrell & Sutherland. Subsequently on the same day Morrell & Sutherland made an assignment to the defendants, Thomas H. Somerville and Frederick W. Roach, for the general benefit of their creditors. By agreement between the plaintiffs and the assignees it was agreed that the latter should convert the assets into money, and hold the same subject to the order of the Court. The stock and fixtures taken over by the assignees were of the value of $15,422.14, of which goods supplied by the plaintiffs were of the value of $5,470.77; the book debts were of the estimated value of $2,229.66, and shop fixtures were appraised at $991. The stock and fixtures were sold by the assignees for $6,785.74, and the book debts realized $1,068.94. On February 4, 1906, a judgment had been recovered against Morrell & Sutherland by one Cohen for $156.45, and an execution issued under which a levy had been made by

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the Sheriff upon the whole of the stock-in-trade prior to the date plaintiffs had entered into possession, but the matter had not been proceeded with to sale. At the date of the assignment Morrell & Sutherland owed the plaintiffs $9,486.16, and their total liabilities were upwards of $20,000. Additional facts are sufficiently referred to in the judgment of the Court.

Argument was heard January 25, 1907.

M. G. Teed, K. C. (*C. S. Hanington*, with him), for the plaintiffs:—

The agreement is not a bill of sale, but if it were, and were void for non-filing, the possession taken before the date of the assignment perfected our title as against the assignees. The agreement cannot be a bill of sale, for when made no indebtedness had been created for which a bill of sale could be given. A similar agreement was upheld in *Francis* v. *Turner* (1). The agreement is not to be restricted to goods purchased from the plaintiffs, but extends to all the stock-in-trade. It is also effective to vest the debtors' book debts in the plaintiffs. See *Bennett* v. *Cooper* (2); *Gurnell* v. *Gardner* (3). Under our *Bills of Sale Act*, chap. 142, C.S. 1903, any invalidity in a bill of sale as against assignees is cured by possession. See *Parkes* v. *St. George* (4); *Ex parte Fletcher* (5); *Cookson* v. *Swire* (6). The agreement will be upheld in equity within the doctrine of *Holroyd* v. *Marshall* (7). Where actual possession is taken under a power to enter and seize goods, the grantee obtains a title as against the grantor and his assignee: *Congreve* v. *Evetts* (8); *Hope* v. *Hayley* (9). The judgment obtained by Cohen is vacated by the assignment: sect. 9 of chap. 141, C. S. 1903.

(1) 25 Can. S. C. R. 110.
(2) 9 Beav. 252.
(3) 4 Giff. 626.
(4) 10 A. R. 496.
(5) 5 Ch. D. 809.
(6) 9 A. C. 653.
(7) 10 H. L. Cas. 190.
(8) 10 Ex. 297.
(9) 5 E. & B. 829.

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A. I. Trueman, K. C., and *J. King Kelley*, for the assignees :—

The agreement is void as a secret and fraudulent arrangement to prefer the plaintiffs as against the debtors' other creditors, and is also a fraudulent preference within the *Assignments and Preferences Act*, chap. 141, C. S. 1903. It was not to be acted upon by the plaintiffs unless or until Morrell & Sutherland became crippled or insolvent. The firm's other creditors having no knowledge of it, it became a device enabling the firm to acquire a false credit. If it was given in good faith it would have been filed as a bill of sale. Where the giving of a bill of sale is purposely postponed until the debtor is in a state of insolvency, or until the creditor has lost confidence in the debtor, in order to uphold his credit and to give him a false standing, the transaction is held to be fraudulent as against his general creditors. See *Ex parte Burton* (1); *Ex parte Fisher* (2); *Breese v. Knox* (3); *Ex parte Kilner* (4); *In re Gibson* (5). In *Ex parte Conning* (6), traders, in consideration of goods being supplied to them by brokers on credit, signed a written document addressed to the brokers, by which they undertook and agreed "to hold at your disposal all our stock of soap and raw materials, and from time to time, whenever required by you so to do, to execute a valid and effectual transfer and assurance of the same to you * * to the intent that out of the premises all claims and demands for the time being owing from us to you may be fully paid and satisfied." The document was not registered under the *Bills of Sale Act*. A few days before the traders filed a liquidation petition the brokers demanded possession of the stock, but without success. It was held that the document was void as against the trustee under the liquidation. Dealing with the argument that the document amounted to an equitable assignment, Sir James Bacon said that if it were such it required registration as much

(1) 13 Ch. D. 102.
(2) L. R. 7 Ch. 636.
(3) 24 A. R. 203.
(4) 13 Ch. D. 245.
(5) 8 Ch. D. 230.
(6) L. R. 16 Eq. 414.

as the most formal bill of sale. See also *Manchester* v. *Hills* (1). As a secret and void instrument it is of no avail that possession of the stock was taken by the plaintiffs prior to the assignment: *Ibid.* In *Clarkson* v. *McMaster* (2), Strong, C. J., dealing with the authorities that lay it down that a mortgagee may at any time validate a mortgage invalid for want of possession or registration, by taking possession of the mortgaged property, says that he is unable to see how a void security can be revived by the creditor simply taking possession of the goods. By section 5 of the *Bills of Sale Act*, chap. 142, C. S. 1903, the failure to file a chattel mortgage within the time prescribed by the Act, renders it void as against the grantor's assignee. Strong, C. J., was also of the opinion in the same case that where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession, the mortgage is, on grounds of public policy, void *ab initio*. That the plaintiffs kept the agreement secret for a fraudulent purpose is disclosed from the fact that they urged the debtors to buy goods elsewhere on credit, though the agreement contemplated that all their credit was to be obtained from the plaintiffs. The agreement only applies to goods supplied by plaintiffs. It is wholly ineffective as an assignment of the book debts. In *Francis* v. *Turner* the questions raised here were not discussed. Gwynne, J., however, pointed out that if the agreement there under discussion could be upheld, a most ingenious device had been contrived which would have the effect of overriding and rendering nugatory all provisions of the law and all decisions of the Courts relating to chattel mortgages, bills of sale, and frauds upon creditors. That case is also distinguishable on the ground that the title to be made out was for the purposes of a replevin suit, and was not required to be absolute as here. The possession taken by the plaintiffs was too late after the Sheriff had taken possession under the Cohen judgment. Possession taken when the debtors had become insolvent must be regarded as a

(1) 34 N. S. 512. (2) 25 Can. S. C. R. 96.

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conveyance or assignment falling within the *Assignments and Preferences Act*. The agreement should have been filed under chap. 143, C. S. 1903.*

Teed, K. C., in reply.

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The material facts upon which this case turns have been agreed upon and stated in the nature of a special case filed in Court. The defendants, Morrell & Sutherland (whom I shall refer to as the defendants), previous to their entering into the agreement out of which this litigation arises, had been clerks in a dry goods establishment at St. John. They were anxious to start a business of their own, and they entered into partnership for that purpose. As their combined capital consisted of only about $400, they were obliged to make arrangements for procuring goods on credit. For this purpose they applied to the plaintiffs, who carry on a large wholesale business as dry goods merchants at Montreal, and as a result of that application the agreement of December 13, 1898, was made. It is in the form of a letter addressed by the defendants to the plaintiffs, accepted by them, and acted on by both parties from that time until the defendants' failure. During that period—a little over six years—the plaintiffs supplied the defendants with goods to the value of about $55,000, and on the 17th February, 1905, when the plaintiffs took possession, the defendants owed the plaintiffs for goods then supplied $9,486.16. The stock then on hand consisted of goods supplied by the plaintiffs of the value of $5,470.70, and goods obtained elsewhere and shop fixtures of the value of $9,941.44, making the total value $15,422.14; besides which there were book debts of the face value of about $2,000. These values were fixed by the defendants' assignees on taking the inventory made by consent of all parties imme-

* See Stat. 21 Jac. 1, c. 19, s. 11, and 6 Geo. IV., c. 16, s. 72 (Imp.) as to property in possession of bankrupt at time of bankruptcy passing to his creditors as against the real owner.—REP.

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diately after the assignment and in pursuance of the agreement then made, as is set out in the special case. The defendants' indebtedness was in round figures $20,000. On the 17th February, 1905, but after the plaintiffs had taken possession under their agreement, the defendants made an assignment for the benefit of creditors to the defendants, Roach and Somerville, and under the arrangement to which I have just referred they sold the property and realized for it $6,785.74, that is 40 per cent. of the inventoried value; and in addition they collected $1,068.94 of the book debts. These sums are now in the hands of the assignees under the terms of the arrangement as representing the defendants' assets, to be dealt with accordingly.

The questions involved are by no means free from difficulties. Before going into a discussion of the three separate classes of liability into which the case naturally divides itself, I must say a word as to the agreement itself, because a question has been made as to its true construction. The defendants' Counsel contended that the license contained in the eighth clause was confined to that part of the stock which might at the time of taking possession be on hand and have been supplied by the plaintiffs—their own goods—and not to stock procured elsewhere. That is not in my opinion its true meaning. Taken as a whole, I think the contract means this. The goods were to be *supplied*—the word is not *sold*—to the defendants to enable them to establish and carry on a business on their own account. By express agreement, however, and as one of the conditions upon which the goods were supplied, the property in them was to remain in the plaintiffs until they were paid for. Notwithstanding the legal title was thus expressly reserved, the transaction necessarily involved an authority for the defendants to remain in possession of the goods until default, and to sell them in the ordinary course of their business, for without that the whole object of the arrangement would have been defeated. Purchasers from the defendants, therefore, on delivery, took the plaintiffs' legal title in the goods, whether the defendants ever paid

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the plaintiffs for them or not: *Dedrick* v. *Ashdown* (1). It is obvious, therefore, that it might happen that none of the goods supplied by the plaintiffs would be in stock, and yet the defendants would be considerably in debt to the plaintiffs for them. As a security for any indebtedness arising from transactions under the agreement, the plaintiffs were also to have the life insurance policies mentioned in clauses 2 and 3, and the benefit of the insurance mentioned in clause 4, and the right to take possession and sell given by clause 8, which I think covered the defendants' entire stock, book debts and assets. Such an agreement is, I think, perfectly valid, and one which this Court will aid in enforcing unless the Statutes relied on by the defendants prevent it. This agreement was not filed either under the *Bills of Sale Act* nor under the Act relating to conditional sales; and the contention here is that for want of such registry the contract is void as against the assignees of the defendants. This raises three separate and distinct questions: (1) as to the goods supplied by the plaintiffs; (2) as to the goods procured from other merchants; and (3) as to the book debts. And somewhat different considerations arise as to each. First, as to the goods supplied by the plaintiffs, how are they affected by reason of the contract not being registered? Assuming that this agreement is one of that class of documents referred to in the original Act passed in 1899 (62 Vict., chapter 12), and which, with some amendments, was subsequently re-enacted as chapter 143 of the present Consolidated Statutes, 1903, it was made some months before the original Act passed, and there is nothing to indicate that these Acts in their general effect were to be retroactive. The express provision in sub-section 2 of section 8 of the original Act, coupled with the requirements of section 2 and other sections of these Acts, point to an entirely different conclusion. Apart, however, from this, these Acts have sole reference to competitive claims between the original vendor claiming by his reserved title and a subsequent

(1) 15 Can. S. C. R. 227.

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purchaser or mortgagee from his vendee without notice and for valuable consideration. The failure to register only operates against the real owner in favor of a purchaser or mortgagee from the vendee to whom the owner had given the possession, and thus clothed with the apparent ownership which possession carries with it. No purchaser or mortgagee is claiming here, and the Act does not invalidate the transaction in favor of an assignee in insolvency. So far, therefore, as chapter 143 is concerned, it has no bearing on this case. Treating the agreement for the present solely in its relation to the plaintiffs' own goods, how is it affected by the *Bills of Sale Act?* The Act which was in force in December, 1898, when this agreement was made, was 56 Vict., chapter 5, which, for all questions arising here, was re-enacted as chapter 142 of the present Consolidated Statutes, and to that I shall refer. That Act only refers to mortgages or conveyances intended to operate as such, but conditional sales, where the vendor reserves the title, have never been considered within the scope of Bills of Sale Acts. They are not mortgages. See *McEntire* v. *Crossley* (1); *Ex parte Crawcour* (2). Such documents were made the subject of special legislation, and the persons for whose protection the legislation was had, and as against whom the documents were made void for non-registry, are entirely different in the two cases. The two Acts were designed to remedy distinct evils. As to the first question, I think it must be decided in the plaintiffs' favor.

As to the second question, that is as to stock not supplied by the plaintiffs, they say (1) that the agreement was not within the *Bills of Sale Act*, and did not require registry; and (2) that if it was, they took actual possession of the goods before the assignment was made, and in that way perfected their title and cured all defects arising from non-registry. The original *Bills of Sale Act*, re-enacted as chapter 75, Consolidated Statutes, 1876, defined the meaning of the expression "Bill of Sale" (section 6), and among other

(1) [1895] A. C. 457. (2) 9 Ch. D. 420.

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things it was thereby made to include "powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt," a provision apparently copied from the English Act. See section 4 of Act 41 & 42 Vict., c. 31 (Imp.). There is no similar provision in subsequent Acts. They contain no interpretation clauses, and so the words in them must be given their ordinary and natural meaning. Section 2 of chapter 142, upon which the whole question turns, relates solely to mortgages and conveyances intended to operate as mortgages of goods and chattels. Is this agreement included in that section, and did these defendants, when they executed it, convey by way of mortgage, or with the intention that it should operate by way of mortgage, goods and chattels? To answer this question it is necessary to see what the instrument really is, for I do not think it was intended to be anything different from what it really is. It conveys nothing; it does not profess to assign a present interest either in existing property or in property to be subsequently acquired. It is a mere authority given for a valuable consideration, and, as I think, irrevocable so long as any indebtedness existed by the defendants to the plaintiffs, on a certain condition of things arising, to take possession of goods capable of identification and dispose of them, and out of the proceeds to pay themselves their indebtedness and account to the defendants for the balance. Can such a document be called a mortgage? I think not. In *Ex parte Parsons* (1), Lord Esher, M. R., in speaking of a similar document, said: "That the document is not a bill of sale at common law cannot be disputed. The question is whether any Statute has made it a bill of sale. It seems to me that it is a bill of sale under the Act of 1878, as being within the words of section 4, 'a license to take possession of personal chattels as security for a debt.'" That is the interpretation clause to which I have referred, and this decision would be a direct authority against the plaintiffs on this point if

(1) 16 Q. B. D. 532

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their rights were governed by the original *Bills of Sale Act*. That same clause provided "that declarations of trust without transfer" should be included in the term "bill of sale"; and that fact is assigned by Mellish, L. J., in *Edwards* v. *Edwards* (1), as a reason for holding that equitable titles were within the scope of these Acts. In *Ex parte Official Receiver*; *In re Morritt* (2), Cotton, L. J., is thus reported: "A mortgage of personal chattels involves in its essence, not the delivery of possession, but a conveyance of title as a security for the debt." In the same case Fry, L. J., says: "A mortgage conveys the whole legal interest in the chattels; a pawn conveys only a special property, leaving the general property in the pawnor. A pawn is subject in law to a right of redemption, and no higher or different right of redemption exists in equity than in law; a mortgage is subject not only to the legal condition for redemption, but to the superadded equity. A pawn involves transfer of possession. * * * A mortgagee, having the whole legal title to chattels, can of course sell them at law." See *Franklin* v. *Neate* (3); *Ex parte Hubbard* (4), per Bowen, L. J. Those were cases of legal titles, where the property was *in esse* at the time, but precisely the same doctrine applies to equitable titles. Where the property to be affected by the instrument is not in existence at the time, a conveyance which in terms conveys a present interest, while it cannot give and does not give any legal title, does operate so as to pass the title in equity so soon as the property included in the scope of the instrument comes into existence: *Holroyd* v. *Marshall* (5). Now, what is the position of persons holding a security such as these plaintiffs have? They have no conveyance of any kind; they have no contract for any conveyance. They have simply an authority to take possession and sell and until they have actually exercised that authority by taking possession they have no title. The defendants, up to the time of possession being taken, had both the title

(1) 2 Ch. D. 297.
(2) 18 Q. B. D. 232.
(3) 13 M. & W. 481.
(4) 17 Q. B. D. 698.
(5) 10 H. L. C. 191.

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and possession of these goods. In *Congreve* v. *Evetts* (1) it appeared that a debtor gave a bill of sale by which he conveyed to his creditors by way of security certain crops and other chattels. In addition to this the mortgagee was authorized, as a further security, to take possession of and sell after-acquired property which might be brought on the premises. There was as to the latter no assignment of it, but only as here a license to take possession and sell. Parke, B., in giving the judgment of the Court says: "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title nor even an equitable title to any specific goods; but when executed not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops. Whether the debtor give the possession of a chattel by delivery with his own hands, or point it out and direct the creditor to take it, or tell him to take any he pleases for the payment of his debt by the sale of it, the effect, after actual possession by the creditor, is the same." In *Reeve* v. *Whitmore* (2), it appeared that an assignment of existing chattels by way of mortgage had been made, accompanied by a license to the mortgagee to enter and seize after-acquired chattels, and it was held that it neither operated as an equitable assignment of the after-acquired chattels nor did it give the mortgagee any present equitable interest in them. Lord Westbury says: "If there had been, either upon the face of the deed expressly, or there could have been collected from the provisions of the deed by necessary implication, a contract or agreement between the parties that the mortgagee should have a security attaching immediately upon the future chattels to be brought on the premises, the mortgagee would have had a present interest in all those materials, whether manufactured or raw, which after the date of the security might have been brought on the brick-field. * * * A

(1) 10 Ex. 299. (2) 4 DeG. J. & S. 1.

present contract that the mortgagee shall have a right and an interest attaching immediately by force of the contract upon all that property which *in futuro* may be brought on the premises, is clearly different from a contract that the mortgagee shall have a power of entering upon the premises for the purpose of seizing and taking possession of that future property; and I think that the true extent and operation of the deed now before me was simply this: viz.: that the mortgagee has passing to him by virtue of the contract a right to and a security on and an interest in all the property in existence at the date of contract; and that the security is accompanied by a power enabling him at any time to enter upon the premises and take the future property that may be found there. A power, however, is very different from an interest; and if the extent and limit of the contract be merely that the mortgagee shall have such a power, then an interest will not arise under the power till the power is exercised." It is obvious, therefore, that there are numerous and substantial distinctions between the rights and remedies acquired by a mortgagee of chattels and a mere licencee, such as the plaintiffs are. See *Patterson* v. *Kingsley* (1). It may be said that instruments by which creditors are authorized to take possession of their debtors' goods and sell them in order to realize their debt, though not mortgages in form nor in all respects mortgages in their effect, are nevertheless as capable of being used for the disposal of the debtor's property as a mortgage can be, and therefore, unless registered, they lead to precisely the mischief which Bills of Sale Acts are designed to prevent. That may be so, but that cannot convert such instruments into mortgages, especially in construing a Statute from which the legislature, apparently by design, omitted an interpretation clause which would have covered the case. In *McEntire* v. *Crossley* (2), a discussion arose over a lien agreement, by which the chattels were to remain the property of the lessors until paid for, and it was sought to establish the

(1) 25 Gr. 425. (2) [1895] A. C. 457.

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proposition that the instrument was a mortgage and void for non-registry under the *Bills of Sale Act*. Lord Herschell says: "No doubt to some extent that may have the effect of giving to the sellers a security such as they would have as mortgagees. It may to some extent, as I say, give them that security; but I know nothing to prevent such a contract as that being made or having full effect given to it. If a contract of that description is within the mischief of the *Bills of Sale Act*, then the *Bills of Sale Act* needs amendment. I do not say whether it is so or is not; but it seems to me impossible to bring this case within the *Bills of Sale Act*, because the transaction may bear a resemblance to a transaction which would be within it on the ground that it is within its mischief, when the initial step to bringing the *Bills of Sale Act* into operation at all fails, namely, that there should have been an assurance, or an assignment, or a license to seize, or any of the other matters referred to in the *Bills of Sale Act* given by the bankrupt to some other person."

This case does not therefore come within section 2 of the Act. Is it within section 7? That section provides that mortgages of chattels given to secure advances to be made to a person to enable him to enter into or carry on a business, unless executed in a certain way and filed in the registry office, shall be void as against certain persons. Assuming that the word "advances" includes goods as well as money, the argument is answered simply by the fact that the plaintiffs have no mortgage and do not claim to have one. It is unnecessary, in my view, to consider the effect of an actual taking of possession of chattels by a mortgagee whose mortgage is not registered. Whether such a possession taken before the rights of third persons have intervened excuses the failure to register is a question upon which it is unnecessary for me to express an opinion, as I think the title of the plaintiffs is not affected by the *Bills of Sale Act*. It is admitted that they did take actual possession on February 17, 1905, before the defendants executed their assignment. There is no question as to the right to take possession having accrued to them at that

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time under the license by reason of the defendants' default, and as a result of that possession the plaintiffs' title became absolute to the chattels and property seized, which admittedly included the remainder of the stock and the fixtures. The plaintiffs are therefore entitled to the money represented by their sale.

This brings me down to the last point, as to the moneys represented by the book debts. In the first place, does a license to take possession of book debts and dispose of them for the purposes of realizing money to pay an indebtedness create a right capable of being enforced? Book debts are neither goods nor chattels; they are not capable of transfer by delivery, and are not within the scope of the *Bills of Sale Act*. That future book debts may be assigned so as to create an equitable interest in them is settled by authority. *Tailby* v. *Official Receiver* (1), determines that. In case of an assignment of book debts or choses in action, whether they are then *in esse* or are to be acquired at a future time, it is necessary in order to perfect the title that notice should be given to the debtor. Without that the debtor is not bound, and a payment by him to his creditors would be good. If, therefore, the assignee wishes to transfer the debtor's liability to a liability to himself, he must give notice of the assignment to the debtor. That is analogous to the case of an assignment of a future-acquired chattel; the contract itself assigns a present interest which, on the chattel coming into existence, fastens upon it. In the case of a mere license to take possession, as here, there is no such assignment; the efficacy of the right consists in the execution of the power. That it was the intention of these parties that the book debts should be made available for the purpose of paying the indebtedness to the same extent as the chattels is beyond question; and in such a case the precise form of the instrument used for the purpose is immaterial. In this case it has taken the form of a license, but why should that prevent their intention being carried out? The case

(1) 13 A. C. 523.

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which I have just cited (*Tailby* v. *Official Receiver*) arose out of a debt paid by a debtor to whom notice had been given. Lord Watson says: "In the case of book debts, as in the case of choses in action generally, intimation of the assignee's right must be made to the debtor or obligee in order to make it complete. That is the only possession which he can obtain, so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor. In this case the appellant's right, if otherwise valid, was, in any question with the respondent, duly perfected by his notice to Wilson Brothers & Co. before Izon became a bankrupt." Lord Macnaghten says: "Yet no one can doubt that if Izon (the bankrupt) had attempted to receive outstanding book debts after the mortgagee had intervened, the Court would at once have lent its assistance by the appointment of a receiver." What constitutes a taking of possession must of course vary according to the nature of the property being dealt with. I can see no reason, however, why an assignee of book debts cannot as completely perfect his title to them by giving notice to the debtors as he can to chattels by taking actual possession of them. *Dearle* v. *Hall* (1) and other cases may be cited in support of this view. In that case the Master of the Rolls says: "Whenever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which a Court of Equity considers tantamount to possession, namely, notice given to the legal depositary of the fund. Where a contract respecting property in the hands of other persons who have a legal right to the possession is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of, that is, by giving notice of the contract to those in whom the legal interest is. By such notice the legal holders are converted into trustees for the new purchaser, and are charged with res-

(1) 3 Russ. 1, 12.

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ponsibility towards him. * * * To give notice is a matter of no difficulty, and whenever persons, treating for a chose in action, do not give notice to the trustee or executor who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons." In *Ryall* v. *Rowles* (1), the Lord Chief Baron says: "If a bond is assigned the bond must be delivered and notice must be given to the debtor; but in assignments of book debts notice alone is sufficient, because there can be no delivery, and such acts are equal to a delivery of goods which are capable of delivery. *Domat* says, 'things incorporeal, such as debts, cannot properly be delivered.' This is to shew the nature of assignments of debts by notice to the debtor. This clause therefore extends to things in action; and all has not been done by the assignee to vest the right of them in himself and to take away from the bankrupt the power and disposition of them, for no notice has been given to the debtors." I cite these cases chiefly to shew that book debts are a species of property of which possession, or at all events what this Court regards as equivalent to possession, can be taken by giving notice to the debtors. There was therefore in point of law no difficulty, so far as I can judge, in the way of these plaintiffs acting under their license and perfecting their title to the book debts by giving notice of their right to the debtors, requiring them to pay to them as assignees, and in that way seizing and taking possession of these debts. In fact, neither the plaintiffs nor the assignees gave notice to the debtors except what may have been done under the arrangement which was made. The case therefore resolves itself into a contest between the plaintiffs on the one side and the assignees on the other as to which of them has the superior right to the fund. When I say the plaintiffs gave no notice to the debtors, it must not be thought that they remained inactive. It is necessary to determine the relative position of these parties

(1) 1 Ves. Sr. 367.

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at the time the assignment was made. On the 2nd February, 1905, the plaintiffs commenced this suit with the object of enforcing their rights, and among other things compelling the defendants to permit them to take possession of the goods and restraining them from collecting the debts, the defendants at that time being in default, as was alleged, and as the admissions seem to shew was the fact, and asking for a receiver. On that day an *ex parte* interim order was granted restraining the defendants from assigning the property, and from collecting the debts. This order ran until the 21st February, at which time the plaintiffs had leave to move to continue it. On the 16th February, the defendants (that is, Morrell & Sutherland) moved to dissolve or vary the injunction, and after hearing the parties, I did, on the 17th February, vary the order so as to permit the defendants to make an assignment for the benefit of creditors, which, it was alleged, they were anxious to do. They accordingly made the assignment on that day. On the 21st February, the plaintiffs amended their bill by adding Roach and Somerville, the assignees, as defendants, and adding the allegations necessary to shew the change of interest. On the 3rd March, the plaintiffs on notice moved among other things for a receiver, and in consequence of a discussion which then took place between counsel who represented not only the parties to the suit but individual creditors as well, Sheriff Ritchie was by consent added as one of the assignees, and the arrangement as to the taking stock and selling it was arrived at. The plaintiffs then further amended their bill by adding the Sheriff as a defendant, and adding the necessary allegations as to his appointment and the arrangement for the disposal of the assets. This of course obviated the necessity of further action until the fund should be in hand for distribution. So far as the assignees are concerned, it is admitted that when the assignment was made both of the assignees had notice that the plaintiffs claimed the stock and assets under the agreement, and that Somerville had previously seen the documents particularly mentioned in the case; that is the agreement and some correspondence which

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took place between the plaintiffs and defendants about the time the arrangement was made and knew their contents. And so far as the book debts were concerned, they must also have known that the defendants had been restrained by injunction order of this Court from collecting them, and that, but for the arrangement arrived at, would also have restrained them as assignees from collecting them. Some question has been made as to the title of the assignees being superior to that of the defendants, whose title they took. There are of course cases in which the assignee can set aside certain so-called fraudulent transactions in reference to the insolvent's property which he could not himself call in question, and in that way acquire property for the creditors which otherwise would not have been available for general distribution. This is not one of those cases, and the assignees here took this property subject to the equities to which it was subject in the defendants' hands at the time. And I think this would have been the case whether the assignees had notice or not: *In re Atkinson* (1); *In re Barr's Trusts* (2); *Tailby* v. *Official Receiver* (3). When this assignment was made the plaintiffs, in reference to these book debts, had an irrevocable authority from the defendants to take possession of them and collect them in order to pay themselves a debt for the non-payment of which the defendants were in default. The voluntary assignment made by defendants for the benefit of their creditors could not, in the absence of some statutory authority for the purpose, deprive the plaintiffs of their right and hand over the debts to the assignees for the benefit of the creditors generally. The plaintiffs had lost no right by laches. Immediately on their right accruing by giving notice of their dissatisfaction at the manner in which the defendants were carrying on their business they attempted to assert their rights and take possession. The defendants, in disregard of their contract, hindered the plaintiffs from taking possession,

(1) 2 DeG. M. & G. 140. (2) 4 K. & J. 227.
(3) 13 A. C. 538, per Lord FitzGerald.

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and they then sought for the interposition of this Court in aid of their rights. I should be disposed to think that where a suit is instituted as this was, long before the assignment was made, having for one of its objects the appointment of a receiver to take possession of the property and have the rights in reference to it determined and administered by this Court, the plaintiffs were active in trying to obtain possession, and at all events had rights superior to those of voluntary assignees of the debtor who had been enjoined from collecting them. The rule in such cases is that the equities of the parties ought to be determined by a reference to what might have been done by any one of them under the powers given them, and their priorities will be regulated in reference to these powers: *Reeve* v. *Whitmore* (1). In that case one Simpson was lessee of a brick-yard; he mortgaged (1) to Hendrick (2) to Green, and Green gave a mortgage or charge on the property to Reeve. Green's mortgage contained a power to enter and take into his possession and sell certain future-acquired property. Reeve entered and took possession. The Lord Chancellor (page 19) says: "Reeve was the mortgagee of the equity of redemption which remained in Simpson after the securities of Hendrick and Green, and by virtue of his security he entered into possession of the property on the brick-field at the time of his entry; but Reeve had express notice of the security in favor of Green and therefore of the power thereby given to Green. Whilst Reeve continued in that position, the property not being converted into money, I apprehend that it would have been competent to Green and the assignees of Green (either the appellant or his assignees in bankruptcy) to enter upon Reeve being so in possession." That is an authority for holding that if these assignees were subsequent incumbrancers for value with notice of the plaintiffs' rights, the plaintiffs would have a prior equity. *A fortiori* they would have priority over mere voluntary assignees of an insolvent. It is in this case agreed that in case this Court

(1) 4 DeG. J. & S. 1.

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is of opinion that the plaintiffs are under the agreement and facts entitled to have possession of all of the goods, chattels, assets and book debts and choses in action, then an order is to be made for the payment over to the plaintiffs of the money in the assignee's hands. There will be an order to that effect. As to the judgment it is, I think, unnecessary to say anything. The judgment creditor is not claiming here; he is not a party to the suit, and the effect of section 9, chapter 141, C. S. 1903, is to give the assignment priority over the judgment.

As to the costs, I do not think under the circumstances I ought to make any order. The plaintiffs get the entire estate. I also reserved the question of costs as to the varying the injunction, and as to these I shall make no order either.

There will be an order for the payment of the whole fund to the plaintiffs.

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March 22.

THE CANADIAN PACIFIC RAILWAY COMPANY v. NASON.

Injunction order—Suppression of material facts—Interpleader bill—Affidavit denying collusion.

The rule that on an application for an *ex parte* injunction order a full and truthful disclosure must be made of all material facts, must be strictly observed.

Where, in an interpleader suit, an *ex parte* injunction order was dissolved for suppression of material facts, leave was granted to move again for the order, together with the right to file an affidavit denying collusion.

Motion to discharge an interim injunction order granted in an interpleader bill. The facts sufficiently appear in the judgment of the Court.

Argument was heard March 19, 1907.

M. G. Teed, K. C., and *L. P. D. Tilley*, for the defendant Nason:—

Plaintiffs have obtained an injunction restraining us from proceeding with an action they asked us to bring in their own interests. Had this information not been suppressed, the order would not have been granted. The order should be dissolved for non-disclosure and misrepresentation of material facts. There is no jurisdiction in this Court to grant the relief sought by the bill. If it is held by the Maine Court that the money due by the plaintiffs to Nason is properly attachable at the instance of Nason's creditors, no decision by this Court to the contrary would be of any avail to the plaintiffs. So far as the Maine Court is concerned, the only question is whether there is money owing by the plaintiffs to Nason which may be attached by the Steens under the Maine law. An interpleader suit in this Province could not interpret the Maine law finally for a Maine Court. Neither should the

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action at law in this Province be restrained pending the decision of the Maine Court. The bill should have been accompanied by an affidavit by some authorized person having the direction of the suit denying collusion.

F. R. Taylor, for the plaintiffs:—

The letter of Beattie must be read in conjunction with surrounding circumstances. The defendant's solicitor had written a number of letters urging payment of the claims and threatening suit: The plaintiffs were in a dilemma. They could not settle in New Brunswick without regard to what might be the result of the proceedings in Maine. They had to invite an action by Nason. But by doing so they were not to be taken as giving up any rights they might have with respect to contesting it or as descarding whatever remedies were open to them for safeguarding their interests. All the questions between the parties may be determined in this suit. See *Stevenson* v. *Anderson* (1); *Nelson* v. *Barter* (2). An affidavit denying collusion may be supplied after an interim injunction order is granted. See *Nelson* v. *Barter* (2). The objection of want of the affidavit cannot be taken on a motion to dissolve an injunction, but should be taken on demurrer: *Hamilton* v. *Marks* (3).

Teed, K. C., in reply.

1907. March 22. BARKER, J.:—

On the 21st February last I granted an *ex parte* order restraining the defendant Nason from proceeding in an action at law against the plaintiffs brought for the recovery of $79.50 said to be due to him for wages. That action was commenced on the 17th September, 1906; a declaration was served on 29th January last, so that at the time the injunction was granted the time for pleading had about expired. The defendants, Alex-

(1) 2 V. & B. 407. (2) 2 H. & M. 334.
(3) 5 DeG. & S. 638.

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under and William Steen, were also by the same order restrained from proceeding in a certain action brought by them in the State of Maine against the plaintiffs, in which, under the laws of that State, this same debt from the plaintiffs to Nason was attached in order to compel the plaintiffs to pay it to the Messrs. Steen, to whom Nason was indebted. The plaintiffs, under the order of this Court, paid the money into Court. There is no dispute about the debt being due, and so far as the affidavits disclose the facts, there is none as to the indebtedness from Nason to the Steens. The plaintiffs finding themselves in danger of being held liable to pay the money twice, filed this bill by way of interpleader, that the parties might be driven to settle their own disputes as to the money, about which the plaintiffs raise no question. This is a motion on the part of the defendant Nason to dissolve the injunction, and one of the grounds is that the bill was not accompanied by any affidavit denying collusion. As to this point, the plaintiffs had taken out a summons calling upon the defendants to shew cause why the affidavit should not be filed. I shall dispose of that application now. So far there does not seem to have been any judicial decision in Maine covering this particular case, and opinions seem to differ as to the extent of the jurisdiction given by the Maine statute. To the plaintiffs the question is of no moment so long as they are only bound to pay once. To the defendant Nason the only difference which I can see is whether the money will go to the Steens to pay them or go to Nason himself. This individual case is, however, one of many likely to arise—in fact others have arisen already—owing to the plaintiffs' line of railway running through a portion of Maine, and the likelihood of their being harassed in a similar way in the future. Before Nason commenced his action here there was quite a correspondence between his solicitor and the plaintiffs' solicitor at Montreal, as well as their legal representatives at St. John, in reference to the situation and the desirability of obtaining a decision on the questions involved by a Maine Court. There seem to have been delays in the

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proceedings there and no decision has been given. The parties there seem to have agreed that a test case might be made of the Nason claim and a decision obtained in the Court here. In a letter dated September 5, 1906, from Mr. Beattie, the plaintiffs' solicitor at Montreal, to Nason's solicitor here, he says: "The question is being raised in another action, but that will not be returnable until the end of this month, and I have thought it well that we should bring the question before the New Brunswick Court in order to find out the view taken there, and if necessary plead this in actions brought in Maine Courts. If you will issue your writ Messrs. Weldon & McLean will accept service on behalf of the company. They have been instructed to expedite the matter as much as possible. I am very much disappointed that we have not been able to get the matter judicially determined in Maine, and sooner than hold the matter any longer, I prefer to have an action brought in New Brunswick and the question determined there, so far as the New Brunswick Courts are concerned." Of course Nason could bring his action without the plaintiffs' consent, but it is obvious that the proceedings were taken—perhaps not at the suggestion of Mr. Beattie, but certainly with his full concurrence, so that the question, which was of greater interest to them than what arises from this individual case, might be determined so far as a judgment of a New Brunswick Court could determine it. None of this correspondence was disclosed to me when the injunction was obtained. Had it been, it would have had a material bearing on the course I should have taken. On this ground, if on no other, I think the injunction must be dissolved. No rule requires a stricter observance than that which insists upon a full and truthful disclosure of all material facts by those who seek the interposition of this Court by way of injunction orders granted on *ex parte* statements.

As the injunction is dissolved there seems no reason why the plaintiffs should not have the right to supply the affidavit denying collusion if they wish to continue the suit in its present form. They must, however, pay the costs

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of both motions, and they are entitled to have the money paid into Court returned to them. There will be orders accordingly. Plaintiffs will have leave to move again for an injunction if they desire to do so. See *Fitch* v. *Rochfort* (1); *Phillips* v. *Prichard* (2). Defendant Nason to have order dissolving injunction with costs. Plaintiffs to have leave to take bill off file and file it anew with affidavit denying collusion, on payment of costs of application.

(1) 18 L. J. Ch. 458. (2) 1 Jur. N. S. 750.

WINSLOW v. THE WM. RICHARDS COMPANY, LIMITED.

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May 21.

Agreement—Option—Assignment—Renewal and modification of option—Rights of assignee.

An option was held by R. upon property of defendant Co. for the sum of $562,586. By agreement dated August 7, 1903, reciting the option and that the company had arranged through R. to execute an option to P. and C. for $640,000, it was witnessed that if the property was purchased in accordance with such option, "or mutual modification of the same," the company would pay to R. or his assigns, any excess realized above the option price of $562,586. R. immediately afterwards assigned a one-half interest in the agreement to the plaintiff. By agreement of same date, the company gave an option on the property to P. and C. for $700,000, who in case of a sale by them under that option or any mutual modification thereof, were to be allowed $60,000. This option expired March 1, 1904. On October 27, 1904, a new option was given by the company to P. and C., and this by subsequent agreement was extended to June 15, 1905. On June 10 P. and C. agreed to sell the property to I. P. Co. for $725,000. This agreement fell through. On October 2, 1905, a sale was made to I. P. Co. for $675,000. By agreement of the same date the defendant Co. agreed to pay P. and C. $100,000 for their services in connection with the sale, leaving $575,000 as the net amount to the company from the sale. Prior to the sale the company, having no notice of the assignment by R. to the plaintiff, had agreed with R. that his option should be for $580,000. The plaintiff claimed one half of the difference between the sum realized by the company from the sale and $562,586:—

Held, that under the circumstances the option given after the expiry of the first option to P. and C. was a modification of it within the meaning of the agreement with R., but that the company, having no notice of plaintiff's assignment, were free to deal with R., and that consequently the change made by R. in his agreement with the company was binding on the plaintiff, to whom therefore there was nothing coming.

Bill for an accounting. The facts fully appear in the judgment of the Court. Argument was heard March 1, 1907.

L. A. Currey, K. C., and *R. W. McLellan*, for the defendants:—

The agreement under which plaintiff claims came to an end on March 1, 1904, the date of expiry of the Potter

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and Chapin option. After that date the plaintiff ceased to have an interest in the transactions between the parties. Even if the agreement under which plaintiff claims was in force at the date of the sale no excess was realized to the company above the amount named in the Rundle option. The original amount named in the Rundle option, $562,586, was increased by agreement between the company and Rundle to $585,000. The net proceeds of the sale to the company was $565,000. The company were entitled to deal with Rundle in making this change, as they had no notice of the plaintiff's interest in the Rundle option until October 11, 1905, a date subsequent to the sale. The amount of $562,586 in the Rundle option was by assent of the plaintiff increased by $6,000, the cost of camp supplies, thus raising the amount of the option above the amount produced to the company from the sale.

A. O. Earle, K. C., for the plaintiff:—

Under the sale for $675,000, made under the agreement of October 2, 1905, and completed January 4, 1906, the plaintiff is entitled to half the surplus above the option price, after deducting the commission to Potter and Chapin and $6,000 for camp supplies. In this view the plaintiff would be entitled to $23,207. The contract of June 10, 1905, for $725,000 should have been carried out. Had that been done the plaintiff would have been entitled to $42,217. The option of August 7, 1903, was kept in force and acted on by the parties continuously to the date of the sale. The $100,000 allowed to Potter and Chapin as commission is not binding upon the plaintiff. The amount was fixed at $60,000 in the original option, and could not be enlarged without the plaintiff's consent. The defendant company had notice of the assignment to the plaintiff, and of his interest in the sale, even though it appeared that no written or specific notice had been given to them.

1907. May 21. BARKER, J.:—

The facts upon which a decision of this case must rest, seem to me to lie altogether outside of the mass of

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correspondence which was put in evidence. If it was a matter of importance to shew that the plaintiff did a lot of work and spent a lot of time in connection with the matters out of which this dispute arises, I think the evidence shews that he did. To my mind, however, that is an altogether irrelevant inquiry. The case rests largely upon documentary evidence, about which there can be no dispute; and as to the other material facts, there is little or no difference between the witnesses. In 1903 the defendants, The Wm. Richards Co., owned and operated a large milling and lumbering business on the Restigouche river, which was managed by David Richards, a member of the company, who resided and had his office at Campbellton. The company also owned and operated a large milling and lumbering business on the Miramichi river, and the head office of the company was at Boiestown. The defendant Rundle was not an officer, or, so far as I know, even a shareholder in the company, but he had charge of the company's office at Chatham. He had charge of the shipments at that place, and was paid a salary at the rate of 30 per cent. per standard shipped. He subsequently became a shareholder in and the president of the Miramichi Lumber Company, which was organized in Maine, and took over the Miramichi properties on their sale by the Richards Company in 1906. This suit relates exclusively to that sale. There seems to have been a movement on foot for a sale of the Restigouche properties also, but that was abandoned at an early period in the negotiations. In February, 1903, the company gave Rundle an option on these properties, exclusive of the Boiestown property, for $522,586. This option was for three months, but it was extended until August 12, 1903. By a memorandum of agreement, dated February 12, 1903, Rundle gave the plaintiff, who claims to have had a half interest in the option from the company, an option on the same properties for $650,000 to enable the plaintiff to exhibit it to intending purchasers as his authority to sell. The plaintiff seems to have placed himself in communication with several persons likely to be interested in such transactions, and at some period, the precise date is not given,

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he assigned the option to a Mr. Aitken, who resided, I think, at Halifax. Mr. Potter, who resides at Pittsburg, and Mr. Chapin, who resides at Toronto, and who were at this time associated together in the purchase of lumber properties, were in St. John in the early part of August, 1903, in reference to some of the New Brunswick Railway lands, and while in the Province, they casually met Mr. Gunter, who succeeded William Richards as president of the Richards Company and the result of this meeting was that Potter and Chapin went to Chatham on the 7th August to meet Gunter. Mr. Aitken was there at the same time, though the meeting of the three seems to have been in no way arranged. A conference took place between Gunter, Rundle, Aitken, Potter, and Chapin, which resulted in an option being given to Potter and Chapin. Before entering into any negotiation, however, Potter insisted that the option held by Aitken, and which had then but a few days to run, should be released, and that he and Chapin should be expressly released from all claims by the plaintiff and Aitken under that option. This was done, and the remuneration which they were to get for their work was agreed by them at $5,000. There is some difference as to whether it was $5,000 each or $2,500 each; but as no question arises in this action on that point it is not necessary to discuss it. Mr. Potter having, as he thought, cleared the way of all outstanding options, so that he could deal directly with the company, obtained an option on the properties, including the Boiestown mill, for $700,000, payable as follows: $300,000 in cash, $200,000 in two years, and $200,000 in four years, with interest at 5 per cent. per year. This option is dated August 7th, 1903. It ran till March 1, 1904, and it was signed simply by Gunter as secretary of the company, there being no other official there, and the seal being at the office at Boiestown. It was also agreed, as part of the same transaction, that in case the property was purchased in accordance with that option, or any mutual modification of the same, the Richards Company were to pay Potter and Chapin for their services $60,000 out of the first cash payment of $300,000,

thus yielding them $640,000 net. These papers being informally executed, so far as the company was concerned, they were left with Rundle, and Mr. Winslow was directed by Mr. Potter, immediately on his return to Pittsburg, to take the papers to Boiestown and have them regularly executed under the corporate seal of the company. He did go to Boiestown, but the agreement which was there executed differed so materially from the original one that, according to Mr. Potter, it was useless to him for his purposes. There are, I believe, some minor changes, but the two important ones are, first, that the option was not binding on the company until it should be ratified by the William Richards Company shareholders, at a general meeting to be called for that purpose; and second, that the agreement was to become inoperative unless Potter and Chapin notified the company one month previous to March 1st, 1904, of their intention to complete the purchase, and accompanied the notice by a deposit of $10,000 with the company, to become forfeited in case of failure on their part to complete the contract. Neither of these provisions was in the original arrangement as agreed upon at Chatham. As it was, the papers were only forwarded by the plaintiff to Potter on the 5th September, 1903. Among other persons whom Potter sought to interest in this purchase, was a Mr. Lacy of Chicago, whose firm were largely engaged in the lumber business. In October he went, at Potter's instance, to Campbellton, having ten cruisers with him to cruise the land. When Potter shewed him the option he refused to have anything to do with it, on account of the clause requiring ratification by shareholders. And it was only when Potter himself offered to assume the total cost of the cruising that it was proceeded with. He was induced to take this risk by reason of conversations he had had with individual members of the Richards Company, which led him to believe that a satisfactory adjustment of the agreement might be made, in which case the cruising would be so much work done. This cruising cost some $6,000. Potter says that he did nothing under this option after he received the papers, and that in fact, except the cruising

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nothing was done at all. It was never ratified by the shareholders, and it expired in March, 1904. Nothing more was done until the following October. So far as the subsequent transactions are concerned, and which terminated in the sale which was completed in January, 1906, the plaintiff does not seem to have had any connection whatever with them. The renewal of the negotiations in October, 1904, after a period of over seven months during which there was no outstanding option, and nothing whatever done, was not in any way brought about by the plaintiff, nor was he in any way consulted about it. On the 27th day of October, 1904, two agreements were entered into by the company and Potter and Chapin. One is an option on the timber lands owned in fee—some 165,553 acres—for $625,000; the other is an option for the whole property for $600,000, net cash. They were separated in order to facilitate the sale of the lumber lands to pulp manufacturers. These agreements in terms abrogated all previous options in force between the parties, and they extended to January 1, 1905. They were extended to 19th May, 1905, and again to June 15th of that year. The anticipated sale to the pulp manufacturers fell through. Negotiations were opened up by Potter and Chapin with the International Paper Company, a large and wealthy corporation of New York, of which the defendant Hugh J. Chisholm, was president. The negotiations were, however, principally with a Mr. Oak, who was president of one of the subsidiary companies of the International Company, and they resulted in a sale of the properties to Chisholm for $725,000. On the 10th of June, 1905, an agreement was entered into by the company and Chisholm, by which the one agreed to sell and the other to purchase the property in question for the sum of $725,000, to be paid as follows: $25,000 on the execution of the agreement; $175,000 on September 1st, 1905, and the balance of $525,000 in negotiable coupon bonds, of the denomination of $1,000, to be made by a company to be organized by the party of the second part, that is, Chisholm, to own and operate the property. The bonds were to be dated September 1st, 1905, to aggregate $525,000, to

bear interest at 5 per cent., and to be secured by a mortgage to some satisfactory trust company. The cash balance was to be paid and the bonds delivered at Chisholm's office on September 1st, 1905. Provision was made for the working of the mills until September, and Chisholm agreed that he would, on demand, within sixty days from the completion of the purchase, buy from the company $100,000 of these bonds at par and accrued interest. This agreement was not carried out. On the 1st September, as I gather from the evidence, neither party was ready. The company had some difficulty in producing a title to some of the property, and Chisholm, or rather the new company which was organized, had not the bonds engraved or ready for delivery, and so the purchase was off.

Later on Mr. Gunter, the president of the Richards Company, got the matter re-opened with Mr. Oak, and the parties met in Portland on October 2nd, 1905, when a new agreement was entered into, of that date, between the company and Chisholm. The gross purchase price was $675,000. In addition, Chisholm was to pay all sums of money expended by the company in building dams and getting out of lumber for the seasons of 1905 and 1906. The transfer of property was to take place December 31st, 1905, and on that day $225,000, with the $25,000 paid on execution of the June contract, and other sums shewn to be due, were to be paid in cash. Subject to these changes, the other contract was to be carried out. This sale was completed in the early part of January, 1906. On the same day as that on which the last sale was made, October 2nd, 1905, the company entered into an agreement with Potter and Chapin, by which they covenanted, in consideration of their services in closing the said sale, to pay them $100,000—that is, $25,000 in cash, and $75,000 in the bonds of the new company. This agreement was also carried out. When the June sale was concluded, the company agreed to pay Potter and Chapin $140,000, but when the price was reduced they agreed to reduce their remuneration to $100,000.

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When the plaintiff obtained the Potter option under the company's seal, which was late in August, 1903, although it is dated on the 7th of that month, he obtained from the company an agreement as follows:—

MEMORANDUM OF AGREEMENT. Whereas William Richards & Co., Limited, had, under date the 12th day of February, 1903, and extension thereof, given an option to purchase the lands, leases and assets belonging to said company in Northumberland and York and Carleton counties, excepting the Boiestown properties, to John T. Rundle, of Chatham, N. B., Lumber Agent, for the sum of $522,586; and a further option to purchase the Boiestown properties and the Morrison mill properties for $40,000 additional, making in all the price for said properties $562,586. And whereas said company has arranged, through said John T. Rundle, to execute an option agreement to Potter-Cobb Company, of Pittsburg, Pa., and F. B. Chapin, Toronto, Canada, bearing date the 7th day of August, 1903, for the net option price to said Potter-Cobb Company and F. B. Chapin, of $640,000. Now, therefore, for services rendered, and in accordance with understanding this company agrees that if the property is purchased in accordance with option referred to, or mutual modification of the same, to pay the said John T. Rundle, or assigns, the excess realized over and above the said option price to said John T. Rundle out of the first cash payment of $300,000 received by the parties selling the stock and assets of said William Richards & Co., Limited, immediately upon receipt of same. In witness whereof the said William Richards Company, Limited, hath hereto set its hand and seal the 7th August, 1903.

This agreement is executed under the company's seal, and on it is endorsed the following assignment: "For value received, I hereby assign and transfer and set over to Warren C. Winslow, his executors, administrators or assigns, one-half share, benefit, advantage, right, title and interest of and in the within agreement, and of any money which may accrue due thereunder." This assignment was executed by the defendant Rundle, under his hand and seal, and though it has no date, the evidence is that it was executed within a few days after the agreement was,

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which would be about the 1st September, 1903. It is under this agreement and assignment that the plaintiff claims one-half of the difference between the sum realized by the company for the property and the $562,586 mentioned in the Rundle option. Plaintiff and Rundle, according to the plaintiff's account, seem to have been jointly interested in this business from the first, though the plaintiff's name does not appear in any of the papers, except in the assignment which I have just mentioned. The plaintiff gives some evidence of loose conversations designed to shew that the Richards Company, or members of it, knew this fact. This is denied by the directors and the company, and so far as the expressions are relied on, as shewing notice to the company so as to affect them, they failed, I think, in proving any such notice. There is a question in dispute as to the time when actual notice of this assignment was given. The plaintiff says that he sent a letter dated August 21, 1905, to the company, addressed to them at Boiestown, a copy of which he produced from his letter book. In this he gave notice of the assignment of a half interest in the Rundle agreement, and asked for information as to the particulars of the sale to Chisholm, which he had heard of in some way. This letter the company say was never received by them, and the officials who were produced at the hearing deny all knowledge of it. On the 11th October the plaintiff sent another letter to the company, alluding to his former letter, and again asking information as to the particulars of the sale. The company say this was the first notice or knowledge they had that the plaintiff had any interest whatever in the option or the sale to which they relate.

The plaintiff, by his bill, seeks a discovery as to the facts in reference to the terms of sale and the amount realized by the company for the property, and he bases his claim on the contention that the purchase was made under a modification of the Potter option of August, 1903. The answer set up to that contention is that, in the first place, the Potter option of August, 1903, was never binding on the company, because it was never ratified by the sharehold-

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ers, and its validity depended, by its terms, upon that being done. Then it is contended that the whole matter was abandoned after the expiration of that option in March, 1904, as nothing whatever was done for over seven months from that time, and the option given after that time must be regarded as an entirely new arrangement, and in no sense a modification of the old one. A modification of a contract like this means something more than an extension of it. An extension has reference to time; a modification has reference to terms. And I cannot see any substantial reason for not holding that an option given by one person to another for the purchase of a specific property should not, in construing an agreement such as the one under discussion, be properly described as a modification of a previous option between the same parties, and in reference to the same property, although the terms of the two may differ as to price, and although some time may have elapsed between the termination of the one and the beginning of the other. At no time after August, 1903, so far as I can discover from the evidence, did the company abandon the idea of selling their property, and at no time, so far as I can discover, did Potter and Chapin abandon the idea or give up the expectation of finding a purchaser for it. I think the fair meaning of the agreement under which the plaintiff claims is, that the company were to pay to Rundle the difference between the price fixed by his option and the sum which might be realized by the company on a sale brought about by Potter and Chapin in the terms of the original agreement, or any modification of it which might, previous to the abandonment of the negotiations altogether, be mutually agreed upon between them. The object of the company was to sell; the object of Potter and Chapin was to find a purchaser, and the interest of them, as well as Rundle, was to secure as large a price as possible, in order to increase their profits. It is true that there was a period of over seven months during which no option was running at all; and much stress is laid upon that fact, as shewing an end to the transaction out of which this claim arises. I do not think that is

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a fact, nor do I think it a reasonable inference from the circumstances. It is true that Potter says that his option of August, 1903, was of no use to him, because it had never been ratified by the shareholders, and that it differed from the terms agreed upon at Chatham. It is equally true, however, that Potter entertained the expectation of procuring satisfactory changes in that option. He risked $6,000, the expense of the cruising done in 1903, on that expectation, founded on verbal assurances from members of the company. It appears that during that winter and the summer of 1904 lumber business was dull—lumber properties were not in demand; and it was not until October of 1904, when the market had recovered, that the second option was secured. There was, however, no abandonment on the part of the company of their intention to sell their property, or any abandonment on the part of Potter and Chapin of their efforts to secure a purchaser. In my opinion, the plaintiff is entitled to take the price ultimately realized by the company as a basis of determining the sum, if any, for which they are liable under the Rundle agreement. In fact, the officers of the company have not disputed a liability on that basis in their dealings with Rundle. Their answer has been, You have nothing coming to you, as the surplus has been all absorbed in commissions; not that your agreement was ended before the sale was made, and you had no further interest in the result.

The method adopted in carrying out transactions of this kind, or at all events the method which was adopted in the present case was this. When an option is given it simply binds the owner of the property to transfer it to the purchaser, or to whomsoever the holder of the option may nominate, in payment of so much money. At the same time, and as a part of the arrangement, the owner gives the holder of the option an agreement to pay him so much money in case a sale takes place under the option. The plaintiff was entirely conversant with the details of such transactions, and frankly recognized the fact that in determining the amount to which he was entitled, this

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Rundle option price was to be deducted from the net purchase price—that is, the gross price, less the amount agreed to be paid for remuneration. The first option price was $700,000, with a remuneration agreement for $60,000, making the net price $640,000. When the sale to Chisholm was concluded under the October option, the remuneration agreed upon to Potter and Chapin was $140,000 and under the modification which resulted in the completion of the sale it was $100,000, making the net price in the one case $585,000, and in the other $575,000. The plaintiff himself says that he agreed to increase the $562,586 in the Rundle agreement to $572,586 on account of some stores not included, or something of that kind; and if there is nothing else to alter the result I should think the plaintiff would be entitled to one-half of the difference between that sum and the $575,000 received by the company, that is, $1,207. I have not taken into account the $10,000 which the company were obliged to pay in order to complete their title to the property, for I do not think the plaintiff has anything to do with that. The company undertook to give a good title, it was for that that the $575,000 was paid, and if they had to make an expenditure in order to complete their title, that is their matter.

Leaving these figures for the moment let us go back and see whether the plaintiff's position has been altered in any way by what has taken place between the company and Rundle. Taking the view most favorable to the plaintiff, he must be held bound equally with Rundle, as between himself and the company, by all agreements made between the company and Rundle in reference to this matter previous to August 21, 1905, the earliest date at which in any view of the evidence the company had any notice of the plaintiff's interest in this contract. Up to that time the plaintiff left the company entirely free to deal with Rundle without any reference to him, and entirely free to deal with Potter and Chapin and purchasers, on the basis that their liability under this contract was a question between them and Rundle, and between them alone. Now what took place before that? The Boiestown

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property was not included in the original option to Rundle for $522,586, but when the negotiations with Potter and Chapin were going on Gunter who seems to have had all to do with the matter, so far as the company was concerned, insisted upon that property being included in the arrangement and it was put in at a valuation of $40,000, and is so mentioned in the Rundle agreement. It was also included in the option price of $700,000 to Potter and Chapin. Gunter says that it was understood between him and Rundle, at the time, that this valuation was not final but subject to correction, and that soon afterwards and very shortly after the option was executed, that is about the last of August or first of September, 1903, he told Rundle that he had underestimated the value of the Boiestown property by $11,000, and that Rundle then agreed that this sum should be added, that is, that the $562,586 should be made $573,586. Mr. Gunter then explained that the property had to be sold as a going concern, that they had to go on and make the necessary outlays, and that it was agreed between Rundle and himself, acting for the company, that any expenditure on the property was to be paid for extra. He also says that in the following February, that is, February, 1904, there were supplies in the woods valued at $2,000, that repairs had been put upon Sister Brook and three new dams built, and other work done there which he and Rundle then estimated and agreed upon as worth $8,000. There were also repairs on the Boiestown mill amounting to $2,500. A new dam had been built on that stream, and other work done which they then agreed on at $1,000. Gunter says that he and Rundle then agreed that these expenditures should be added, and they settled upon $585,000, even money, as the sum which should be deducted instead of the $562,586. Rundle corroborates this evidence and says that he told the plaintiff about the arrangement. The plaintiff admits that he assented to an addition of $10,000 for stores, but he does not remember as to anything else. Now all this took place in February, or the spring of 1904, a year before the plaintiff gave any notice to the company of his assignment, and at a time when they had a

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right to deal solely with Rundle as to the contract, and with others on the basis that Rundle was solely interested in it. As the plaintiff neglected to perfect his assignment of a half-interest in this contract by giving notice of it to the company, he is as much bound by anything done in reference to it, or agreed upon, by the company and Rundle in reference to it, before such notice was given, as Rundle himself would be, for by neglecting to give notice he elected to trust Rundle instead of perfecting his right to the thing assigned. In *Dearle* v. *Hall* (1), the Master of the Rolls, in speaking of *Ryall* v. *Rowles* (2), says: "In that case it was the opinion of all the Judges that he who contracts for a chose in action, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice then is necessary to perfect the title—to give a complete right *in rem*, and not merely a right as against him who conveys his interest." The assignee of a chose in action takes it, I think, subject to all equities existing between the assignor and the debtor at the time the latter has notice of the assignment. See also *Stocks* v. *Dobson* (3). While it is true that Rundle is a party to this bill, there is, so far as I can see, no relief prayed specifically against him. It is alleged that he and the company had sold the property, and that they colluded together to withhold from him all information as to the particulars of the sale, but no case is set up here of a liability on the part of Rundle which is not equally a liability on the part of the company. The evidence shews that Rundle got none of the money. I must, therefore, treat this bill as a bill to intercept such portion of the purchase money as might be coming to the plaintiff, and prevent its payment by Chisholm to the Richards Company or to Rundle, and in fact the injunction obtained was for that purpose; and now that the money paid into Court has been, by consent, paid out, if the plaintiff was entitled to a decree at all, it would be for a payment by the company to the plaintiff of the amount due, and not a payment by Rundle. Unless, therefore, I am to altogether disregard

(1) 3 Russ. 1. (2) 1 Ves. Sr. 349.
(3) 5 DeG. & S. 760; 4 DeG. M. & G. 11.

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the evidence of both Gunter and Rundle, uncontradicted as it is, and unimpeached as it is by any circumstance disclosed by the evidence, I must hold that, so far as the company were concerned, they were under no liability of any kind whatever to the plaintiff until he gave them notice of the interest that had been assigned to him, which was certainly not earlier than August, 1905, and that up to that time the company were free to deal with Rundle in reference to this contract—to vary it or terminate it altogether, if the parties to it chose to do so. It was within the plaintiff's power, and it was his right, to have completed his title by notice at any time after he acquired it, but having neglected to do so, his rights against the company must be determined by the facts as they existed and were binding in equity between the company and Rundle at the time the company were notified of the plaintiff's interest. Precisely the same doctrine prevails when the assignee of a chose in action brings his action at law in his own name, as provided in the Supreme Court Act. It is subject to any defence or set-off in respect to the whole or any part of the debt or chose in action arising out of such contract existing at the time of the notice of assignment to the debtor, or person sought to be made liable, as if there had been no such assignment (sect. 157). The effect of that is that an assignee of a chose in action, who is in a position to bring an action at law in his own name, is subject to the same equitable defences as his action would have been if brought in this Court or if the assignee had brought his action in the name of his assignor. Taking $580,000 as the corrected amount of the Rundle option, and as the amount settled and agreed upon by the company and Rundle to be deducted from the surplus instead of of the $562,586, there would be nothing due. If the figures of the sale made in June, 1905, are taken, the net price is the same as the Rundle amount, and if the figures of the sale as actually carried out are taken, the balance would be $10,000 against the plaintiff. There is, therefore, nothing coming to the plaintiff.

Bill dismissed with costs.

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TOOKE BROTHERS, LIMITED v. BROCK & PATTERSON, LIMITED.

Debtor and Creditor—Bill of Sale—Advance under agreement to give bill of sale—Delay—Insolvency—Assignments and Preferences Act, chap. 141, C. S. 1903—Suit by creditors—Amendment of parties.

A trader when in insolvent circumstances to the knowledge of himself and the defendants executed to them a bill of sale of his stock in trade, pursuant to an agreement made with them nearly four years previously to give it whenever required, they advancing to him upon the faith of the agreement a sum of money for use in his business and giving him a line of credit. Shortly after executing the bill of sale he made an assignment for the benefit of his creditors under chap. 141, C. S. 1903:—

Held, in a suit by the assignee, that the giving and filing of the bill of sale having been postponed until the debtor's insolvency in order to prevent the destruction of his credit, the agreement was a fraud upon the other creditors, and that the bill of sale should be set aside.

Held, also, that the delivery of the stock in trade by the trader to the defendants, subsequently to the execution of the bill of sale, did not assist their title; sect. 2 of chap. 141, C. S. 1903, applying.

A preferential transaction falling within the provisions of chap. 141, C. S. 1903, may be impeached at the instance of creditors, where the debtor has not made an assignment.

Where, after the commencement of a suit by creditors to set aside a bill of sale, as constituting a fraudulent preference under chap. 141, C. S. 1903, the grantor made an assignment for the benefit of his creditors, the assignee was added as a plaintiff.

Bill to set aside two chattel mortgages. The facts fully appear in the judgment of the Court.

Argument was heard April 8, 1907.

M. G. Teed, K. C. (*L. P. D. Tilley*, with him), for the plaintiffs:—

The chattel mortgages are an unjust preference and are void under chap. 141, C. S. 1903, and they are void under 13 *Eliz.* c. 5. The evidence is conclusive that when they were given both the grantor and grantee had know-

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ledge of his insolvency. Roach from the beginning of the debtor's dealings with the defendants was kept informed of the difficulties with which his business was kept going. From time to time he applied to Roach for relief with respect to the defendants' account, and for assistance to meet liabilities owing elsewhere. When Roach demanded security it must be held that he was fully aware of the debtor's insolvency. See *National Bank of Australasia* v. *Morris* (1); *Edgett* v. *Steeves* (2). The instruments cannot be supported by the prior agreement made by the debtor with the defendants. To postpone the taking of a security until the debtor is insolvent or on the verge of bankruptcy has always been held to be a fraud upon other creditors, voiding the security. Roach's evidence is that the bill of sale was to be given when he (Roach) required it. The agreement was made in August, 1903, and the chattel mortgages were not asked for until January 16th, 1907. The long interval of delay was due to the defendants' wish not to impair the debtor's credit. See *Jones* v. *Kinney* (3); *Ex parte Fisher* (4); *Ex parte Burton* (5); *Ex parte Kilner* (6); *Breese* v. *Knox* (7); *In re Jackson & Bassford* (8). The agreement was silent as to the property the bill of sale was to cover, and as it therefore could not be enforced by a decree for specific performance, no title in any goods passed in equity to the defendants. An assignee under chap. 141 is in the same position as an assignee under the English bankruptcy laws. See *Clarkson* v. *McMaster* (9).

A. O. Earle, K. C., and *J. King Kelley*, for the defendants, Brock & Patterson, Limited:—

The title of the defendants relates back to the date of their agreement with the debtor. Where money is advanced and credit given upon the promise that security will be given, when the security is given, though at a later

(1) [1902] A. C. 287.
(2) *Ante*, 403.
(3) 11 Can. S. C. R. 708.
(4) L. R. 7 Ch. 644.
(5) 13 Ch. D. 102.
(6) 13 Ch. D. 245.
(7) 24 A. R. 203.
(8) [1906] 2 Ch. 467.
(9) 25 Can. S. C. R. 104.

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date, it will be sustained by the agreement. See *Ex parte Burton* (1); *Holroyd* v. *Marshall* (2); *Tailby* v. *Official Receiver* (3); *Embury* v. *West* (4). *Ex parte Fisher* (5), and the decisions following it, proceed upon the principle that a promise that a creditor shall have priority in the event of bankruptcy is contrary to the policy of the bankruptcy law and void. In the present case the transaction was an honest one; the money was actually advanced and credit given, and there was no consideration apart from these chattel mortgages. To come within the authority of *Ex parte Fisher* it would have to be shewn that the transaction was intended as a device to enable the debtor to acquire false credit. It is for the Court to judge from all the surrounding circumstances whether the agreement was a *bona fide* one, or whether the giving of the chattel mortgage was purposely postponed in order to protect the grantor's credit. See *Ex parte Kilner* (6); *Breese* v. *Knox* (7); *Embury* v. *West* (8). The possession taken by the defendants is effective to complete their equitable title, as from the date and according to the terms of the agreement: *Tailby* v. *Official Receiver* (*supra*) and *Holroyd* v. *Marshall* (*supra*). An assignee can take no better title than that possessed by his assignor. He can assert no rights which his assignor had parted with before the assignment. See *McMaster* v. *Clare* (9); *Parkes* v. *St. George* (10). There was no intent on the part of the debtor to give the defendants a preference. In its absence a conveyance cannot be impeached under the *Assignments and Preferences Act*. See *Codville* v. *Fraser* (11). The debtor's "dominant" motive in promising to give security was to obtain assistance and to keep his business going, and this dislodges the presumption of an intention to prefer within

(1) 13 Ch. D. 102.
(2) 10 H. L. C. 191.
(3) 13 A. C. 523.
(4) 15 A. R. 357.
(5) L. R. 7 Ch. 644.
(6) 13 Ch. D. 245.
(7) 24 A. R. 205.
(8) 15 A. R. 357.
(9) 7 Gr. 550.
(10) 10 A. R. 496.
(11) 14 Man. 12.

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the meaning of the Act. See *In re Lake*; *Ex parte Dyer* (1). Being under promise to give security, the existence of an intent to defeat creditors is negatived. *Stuart* v. *Thomson* (2); *Montgomery* v. *Corbit* (3). The amendment by which the assignees were made parties to the suit should not have been allowed. The original plaintiffs could not attack the mortgages under the *Assignments and Preferences Act*, the remedies provided by that Act not being available except where an assignment has been made. [Counsel also submitted an argument denying the competency of the local legislature to enact the *Assignments and Preferences Act*.]

Teed, K. C., in reply.

1907. May 21. BARKER, J.:—

This suit was commenced on the 26th January, 1907, by Tooke Brothers, Limited, and the John McDonald Co., Limited, on behalf of themselves and other creditors of Ernest W. Patterson, against Brock & Patterson, Limited, and Ernest W. Patterson; and its object is to set aside two chattel mortgages made by Ernest W. Patterson to Brock & Patterson, Limited, on the ground that they were fraudulent under the Fraudulent Preference Act (chap. 141, C. S., 1903), and that they were made with the intention of defeating and hindering and delaying creditors. The mortgages in question were made at the same time; they are both dated January 18th, 1907, and on that day they were both filed in the Registry office, under the *Bills of Sale Act*. On the 28th day of January, 1907, Patterson made an assignment under the *Assignments and Preferences Act* to Herbert J. Smith and J. D. Pollard Lewin, and thereupon the plaintiffs and the assignees, Smith and Lewin, petitioned for leave to amend the bill and proceedings by adding the assignees as plaintiffs. An order to that effect was made on the 31st January, 1907, and though the defendants had not appeared in the suit, this order of amendment was served

(1) [1901] 1 Q. B. 710. (2) 23 O. R. 503.
(3) 24 A. R. 311.

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on them. Tooke Bros. carry on business as wholesale dry goods merchants in Montreal. John McDonald & Co. carry on a similar business in Toronto. Brock & Patterson carry on a similar business at St. John, and the defendant, Ernest W. Patterson, for four or five years previous to the date of his assignment, carried on a retail dry goods business at No. 29 City Road, St. John.

Before going into the facts of the case, it will be as well to dispose of two or three points raised by Brock & Patterson's Counsel. In the first place, they object to this amendment, which was made by adding the assignees as plaintiffs, and the grounds of objection are that the defendants had a perfectly good defence to the suit as against the original plaintiffs, because the mortgages in question were made to secure a *bona fide* debt, and were, therefore, not fraudulent under the *Statute of Elizabeth*; and also because the mortgages could not be attacked under the Fraudulent Preference Act, except after an assignment under that Act, and then only by the assignee. At most this seems merely a question of costs. It would perhaps be a sufficient answer to this objection to say that the defendants, who were notified of the amendment before they appeared, have never made any application to set aside the order. If they had a good defence to the suit as originally framed, and none to it as amended, they were foolish to appear to the suit at all, and if they have now the same defence as to the claim under the *Statute of Elizabeth* which they had before, there is only a question of costs involved, and the defendants are in no way injured. A similar order has been made under the same circumstances by Courts in Ontario, in suits arising under the Fraudulent Preference Act in force there, and which on all points involved in this objection, is precisely like our own. I myself see no objection to the amendment. In fact, where the assignees ask for it, as here, or where they assent to assuming the litigation, I think the proper course is to amend, as was done here. See *Gage* v. *Douglas* (1); *Bank of London* v. *Wallace* (2).

(1) 14 P. R. 126. (2) 13 P. R. 176.

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Neither do I agree that the action was misconceived as far as it was based on the Preference Act. This is by no means a new question, though I believe it has not been directly decided in this Province. I am unable to see any good reason for holding that the first two sections of chap. 141, C. S., 1903, relating to assignments and preferences by insolvent persons, are altogether inoperative except where the debtor has made an assignment under that Act. If any such intention had been in the mind of the legislature, surely it would have been clearly indicated. Such an Act would be of comparatively little value if the debtor's preferences are fraudulent only at his pleasure, and when he chooses to set the machinery in motion by making an assignment. In my opinion these plaintiffs who commenced this suit as creditors of Patterson had a perfect right to do so on the sole ground that, as against them, these preferential mortgages were void under section 2 of the Preference Act. Such was the unanimous opinion of the Court of Appeal in Ontario, as expressed in *Molsons Bank* v. *Halter* (1), and there are numerous other cases where such suits have been brought without question. See *Edison General Electric Co.* v. *Westminster and Vancouver Tramway Co.* (2).

The other point raised by Mr. Earle is that the Preference Act is *ultra vires*. Whatever doubts may have existed on this point must, I think, be considered as settled by *Attorney-General of Ontario* v. *Attorney-General for Dominion of Canada* (3), which was an appeal from the Ontario Court of Appeal, to whom had been referred the constitutionality of what is section 9 of our Act—that is, the question of the section which, in case of assignment, gives the assignee priority over an execution creditor. That seems to have been the principal if not the only section in the Act out of which doubts had arisen. The Judicial Committee, however, affirmed the constitutionality of the section and the authority of the local legislature to enact it. As I

(1) 16 A. R. 323. (2) [1897] A. C. 193. (3) [1894] A. C. 189.

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read that case, the Act, though dealing with the distribution of insolvents' estates, is not in itself an Act relating to insolvency or bankruptcy. In fact, it lacks one of the essential features of statutes of that description—that is, the power of the creditor to seize the debtor's property, or to force him to become liable to the provisions of the Act. It is entirely voluntary on the debtor's part whether he will do so or not. But if he does make an assignment under it, whether insolvent or not, his estate will be dealt with as the Act provides; that is, in effect, a manner chosen by the debtor himself as arising out of his voluntary assignment.

Coming now to the merits of this present case, the facts, about which there is not much dispute, are these. At the time these mortgages were made, there is no doubt that Patterson was insolvent and unable to pay his debts in full. And if he knew anything about his business at all, he must have known of the embarrassed position in which it was. His assets at that time consisted of stock, which, at cost price, amounted to $2,155.24; fixtures, $300, and book debts, $154—in all, $2,609.24; and his liabilities were about $6,000. These assets, according to Mr. Roach's estimate, would be worth at a cash sale about $1,600. The fact of Patterson's insolvency and inability to pay his debts in full is clearly established—in fact, the defendants raised no question as to that. Now, how do Brock & Patterson stand as to their knowledge of Patterson's position? And when I speak of that company, I refer to its secretary and manager, Mr. Roach, who had the entire control and management of this transaction. As the debtor's assignment was made within the sixty days from the date of the mortgages, there is a presumption against their validity. To rebut this presumption, Brock & Patterson seek to shew their ignorance of Patterson's insolvent condition and his inability to pay his debts in full, and also to shew that in giving these securities he was carrying out an agreement to that effect made in 1903. The onus is upon them to shew such facts as will rebut the presumption of fraud. This alleged agreement rests

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upon a conversation which took place between Roach and Patterson in August, 1903. It seems that previous to that time Patterson had been purchasing principally from Vassie & Co., but to a small extent from Brock & Patterson. Vassie had a chattel mortgage on record covering all of Patterson's stock, on which there was a balance of $300 due. Patterson went to Roach and asked for credit. Roach, who seems to have known all about the Vassie bill of sale, asked about it, and Patterson told him that it was all paid, except $300. He also told him his objections to dealing with Vassie & Co. were, that they would not advance him any goods without he paid cash for them—that he had to make payments at certain times (I presume he meant on the mortgage), and pay cash for any goods he got. He also had to make daily returns of the cash he took in. Mr. Roach's examination at this point proceeds thus:

"Q. Then was it proposed in effect that you should take Vassie's place? A. He wished us to make advances to him of merchandize and the $300. Q. What was said about the bill of sale, and by whom? A. I told him I would do this if he agreed to give me a bill of sale when I required it. Q. When you say 'me,' you mean whom? A. I mean the firm. Q. What, if any, reply did he make to that? A. He agreed to do it eventually. Q. (By the Court) When required to do it? A. When I required it of him."

Roach says that he paid the $300 due to Vassie on the 26th August, 1903, and from that time up to the date of Patterson's assignment he sold Patterson goods amounting to about $2,000 a year. Nothing was said about the bill of sale until Roach asked for it on the 16th January, 1907. Now, what was Patterson's position at that time, as known to Roach himself? He knew that Patterson was then being pressed for small claims, amounting in all to $350, which he was unable to pay, and for which he was then asking for a cash advance from Roach himself. He knew that there were claims in the hands of at least two or three lawyers for collection. He knew that as to the claims of two creditors Patterson had arranged to make weekly pay-

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ments of $25. He knew that in September, 1906, he had to hold Patterson's cheque for $100 from September 9 until the 4th of October for payment, and that he held two other cheques of his in October for some days for payment. He knew that his own account, which commenced in August, 1903, with a cash advance of $300, had increased to $1,834.36, and he knew that of this amount all except $489.73 was represented by promissory notes and an I O U for $61.45, and that of these notes, as appears by the schedule to the bill of sale on record, five, amounting to about $800, were overdue, and that one or two of them had been overdue for nearly a month. Mr. Roach with this knowledge went to Patterson to get payment of his I O U for $61.45, and instead of paying it Patterson asked for a cash advance of $350 to meet some small claims that were pressing him; and Mr. Roach very naturally felt that he required his security. In *National Bank of Australasia* v. *Morris* (1), Lord Hobhouse, in delivering the opinion of the Judicial Committee, says: "Their lordships conceive that if the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent." It is no doubt true that Patterson deceived Roach as to the amount of his assets and liabilities, overestimating the one and understating the other. It is also true that Patterson was only trading in a small way and might be temporarily embarrassed by a comparatively small liability. But making allowance for all this, how can it be seriously contended that Mr. Roach, as an ordinary business man accustomed to dealing with transactions of this kind, could with the actual knowledge he had from his own account with Patterson, conclude that he was solvent and able to meet his liabilities? It was no temporary embarrassment from which, with some aid, the debtor might recover. The mortgage recites that Patterson was then unable to continue his business. There was every evidence which any reasonable man, much

(1) [1892] A. C. 200.

more a business one, would accept as conclusive that the debtor to whom in August, 1903, Vassie & Co. would not sell goods, except for cash, whom they required to make regular payments on his security, and to furnish daily returns of his cash sales, had on the 16th January, 1907, become hopelessly insolvent, and without any credit to be injured by the registration of a chattel mortgage on his stock. Mr. Roach had a perfect right to try to save his debt by getting any legitimate security, but it seems clear that when he asked for the security he felt sure that he would never save his debt without it.

It is said, however, that there was in fact this agreement made in August, 1903; that in fact the cash was advanced and the goods delivered on the faith of it, and that in fact the mortgages were given in pursuance of that agreement, and that in such a case equity will protect the security. This principle is stated in *Ex parte Fisher* (1), where the agreement was precisely as here, "If I required it at any time he should assign to me the said mill," etc., and the reason assigned for not giving it at the time was that it would cripple the business. Mellish, L. J., says: "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors." In *Jones* v. *Kinny* (2), the agreement was that the debtor was to give the security "in case anything should happen," and the Court held that this meant "in case insolvency should happen," and, therefore, when the security was given it must have been given in contemplation of insolvency. In *Clarkson* v. *McMaster* (3), it ap-

(1) L. R. 7 Ch. 636. (2) 11 Can. S. C. R., 708.
(3) 25 Can. S. C. R. 96.

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peared that the registry of the instrument was agreed to be postponed until default should be made by the debtor in paying $50 per week; and it was held by Strong, C. J., and apparently concurred in by the whole Court, that this was a contravention of the *Bills of Sale Act*, and the transaction was, therefore, void at the instance of an assignee under the Preference Act; and the cases I have just mentioned were relied on as authorities for that conclusion. The Chief Justice there says: "Not only was there a non-compliance with the condition of the Act in respect of registration and taking possession, but there was a distinct agreement between the mortgagor and mortgagee that there should be neither registration nor immediate possession; in other words, that a transaction which the law required should be open and notorious, to be made so either by registering the mortgage or taking possession of the goods, should be concealed from subsequent creditors, purchasers and mortgagees." The Chief Justice, in that case, holds the principle of *Ex parte Fisher* applicable to cases where assignments are attacked under the Preference Act, and I can see no difference in principle where, in order to avoid the destruction of credit which results from a registry of a chattel mortgage, there is an agreement not to register, and where there is an agreement not to give the bill of sale until it was required, as in the case of *Ex parte Fisher* and this case, in order to avoid the destruction of credit by registry. The underlying principle of the Statute is that bills of sale must, for the protection of creditors and purchasers, be made public by registration where the chattels are left in the visible possession of the debtor. Under the authority of these cases, I think the agreement cannot be relied upon as in any way assisting the defendants, or as in any way rebutting the presumption of fraud which they have to meet.

It was contended that as Brock & Patterson took possession of the stock their position was improved in some way. I am unable to see how. The mortgages were both duly registered, and the possession was taken distinctly under the authority of the second one, or perhaps of both.

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The act relied on as justifying the taking of possession was the issue of a writ by the plaintiffs, in an action for the recovery of their debt. If the mortgage is itself void under the Act, a possession taken under it, and by reason of a default, cannot place the mortgagee in any better position. If, on the other hand, it is claimed that Patterson gave possession, and delivered the chattels by way of creating a distinct and new title in Brock & Patterson, though there is not the slightest evidence to support it, that delivery would be equally as fraudulent and void under the Statute as an assignment of the chattels would be, section 2 covering both cases.

It is unnecessary, after what I have said, to discuss the validity of these mortgages, in view of the *Statute of Elizabeth*, nor do I wish to be considered as expressing a considered opinion on that point. I cannot, however, refrain from drawing attention to the extraordinary nature of the second mortgage. It is so overloaded with provisions and conditions which to me seem so unnecessary and so unusual in an ordinary mortgage, designed simply to secure a debt, that one is tempted to think that the protection of the debtor's property from the claims of his other creditors, and an intention to delay, if not altogether to defeat, them in the prosecution of their legal remedies, was an inducing motive in the debtor in executing the instrument, and in the creditor in taking it.

There must be a decree for the plaintiffs, delaring the two mortgages void as against the assignees under the Fraudulent Preference Act, and the defendants must pay the plaintiffs' costs.

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FARRELL v. PORTLAND ROLLING MILLS COMPANY, LIMITED.

Company—Prospectus—Misrepresentation—Agent—Liability of directors—Rescission of contract to purchase shares—Delay—Competency of witness—Religious belief.

Where a broker employed by a company to sell shares in its capital stock, issues, though without the knowledge or authority of the company, a prospectus containing untrue material statements, on the strength of which shares are purchased, the purchase money being paid to the company, the purchaser may rescind the contract as against the company, the broker's statements being binding on his principal as made within the scope and course of his employment.

A broker employed by a company to sell shares in its capital stock, issued a prospectus stating, among other things, that while in the past the company's earnings had been applied to the improvement of its property, "henceforth it is the intention to declare regular half-yearly dividends as the net earnings of the business will warrant. In view of past results, and the very favorable prospects for increased earnings, shareholders can with confidence look forward to receiving satisfactory returns on their investments in the shape of dividends." No mention was made of the debts or assets of the company. It owed a large sum to its bankers, but its assets considerably exceeded its liabilities:—

Held, that the statement amounting to no more than an announcement of policy, and which the directors were at liberty to pursue, a company having power, though in debt, to pay dividends out of profits, the failure to disclose the indebtedness to the bankers did not render the statement misleading, there also being no duty to disclose in the prospectus the assets and liabilities of the company.

Directors adopting a resolution to sell shares in the capital stock of the company and to employ a broker for the purpose held not responsible in damages for misrepresentation in a prospectus issued by a broker employed by them under the resolution, at the instance of a purchaser of shares who had purchased in reliance upon the prospectus, the prospectus having been issued without their knowledge or authority, and the broker being the agent of the company.

The plaintiff learned on January 24, 1904, that material representations, upon which he had been induced to purchase shares in the defendant company on June 24, 1903, were untrue. On February 16, and on March 8, he demanded at meetings of the company a return of the purchase money. Neither demand was assented to, and on April 13, the company communicated to him a formal refusal. A suit for rescission was commenced by him on December 27, following:—

Held, that the suit was barred by delay.

Where a person stated that he believed in a Supreme Power—a God as defined by Christ's teachings; in heaven and hell, and

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in a future state of rewards and punishments, but, that he did not believe he was under any greater obligation to tell the truth by reason of taking the oath and that he did not believe that a person who swears falsely will be punished in the hereafter, it was held that he was competent to be sworn as a witness.

Bill for rescission of purchase of shares in the defendant company, and for repayment by the company and the defendants Manchester and Elkin of the purchase money, $3,000. The facts fully appear in the judgment of the Court.

Argument was heard April 26, 1907.

Geo. V. McInerney, K. C., and *J. M. Price*, for the plaintiff:—

The defendant company must be held to have issued the prospectus and to be bound by the statements contained in it. Sharpe was the company's agent. It was within the scope of his employment and authority that he should prepare it. Information concerning the condition and prospects of the company could not otherwise be conveniently given to the public. Access was given to him to the company's books in order that he might prepare a statement of the company's affairs. For the truth of whatever representations he should make the company made themselves liable. They put him as their agent in their place to make them, and even though it can be said that the particular false statements made by him were not authorized by them, and they were ignorant of the fraud and free from all moral guilt, they are answerable for them as having been made by him in the course of the business he was employed to transact. See *Swire* v. *Francis* (1); *Barwick* v. *English Joint Stock Bank* (2); *Houldsworth* v. *City of Glasgow Bank* (3); *Mackay* v. *Commercial Bank of New Brunswick* (4); *Udell* v. *Atherton* (5); *Henderson* v. *Lacon* (6).

(1) 3 A. C. 106.
(2) L. R. 2 Ex. 259.
(3) 5 A. C. 317.
(4) L. R. 5 P. C. 394.
(5) 7 H. & N. 192.
(6) L. R. 5 Eq. 249.

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[Barker, J :—In what way do you set up liability as against the directors?]

We claim rescission of the contract as against the company and damages against the directors.

[Barker, J.:—Do you make the claim against the directors on the ground that Sharpe was their agent?]

On the ground that they authorized the prospectus and must be taken to have issued it.

[Barker, J.:—In that respect, then, the case is one of fraud.]

Though we should fail in our claim against the directors, we are entitled to relief as against the company. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract having been obtained by misrepresentation cannot stand: *Derry* v. *Peek* (1). The evidence is very clear that Manchester and Elkin had knowledge that Sharpe was preparing a prospectus to be used in marketing the shares. It was their duty to have examined it and to have ascertained that it contained no false information. They could not remain passive and disclaim responsibility for it. Having allowed it to go forth, they must be held to have considered it and to have adopted it. Elkin is shewn to have had positive knowledge of its terms. He suggested and actually made changes in it. He told Sharpe that he would rather he would not use it. That was not enough. He should have peremptorily prohibited it from being used. The evidence of Perkins establishes that Manchester was shewn the prospectus before Sharpe made use of it, and that he made no objection to it. There can be no doubt of the materiality of the false representations made to the plaintiff. See *Henderson* v. *Lacon* (2). The direc-

(1) 14 A. C. 359, per Lord Herschell.
(2) L. R. 5 Eq. 249.

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tors of the company were known to him to be capable and successful men of business. The statement in the prospectus, "with the exception of a small outside interest, the present paid-up capital is held by the directors of the company, and it is understood they will increase their holdings by taking up most, if not all, of the treasury stock remaining to be disposed of," was singularly well adapted to appeal to him. That they were willing to adventure further capital in an enterprise in which they already were so largely interested, afforded conclusive evidence to him that the business was a sound and profitable one. The plaintiff's evidence is that it was this statement that largely led him to buy, but even if he had not been induced by it to enter into the contract, its falsity would entitle him to have the contract rescinded. See *Redgrave* v. *Hurd* (1); *Capel and Company* v. *Sims Ships' Composition Co. Ltd.* (2). The plaintiff should have been told of the company's liabilities, and especially its liability of $120,000 to the Bank of New Brunswick. The prospectus stated that hitherto the earnings of the company have been applied to the improvement of the company's property, but that "henceforth it is the intention to declare regular half-yearly dividends, as the net earnings of the business will warrant," and that "in view of past results, and the very favorable prospects for increased earnings, shareholders can with confidence look forward to receiving satisfactory returns on their investments in the shape of dividends." That statement could not have been made if the company's liabilities had not been suppressed. Their existence made the statement false and fraudulent. It is no answer that the plaintiff had the means of discovering and might, on inquiry at the office of the company, have learned the financial condition of the company: *Redgrave* v. *Hurd* (*supra*); *Capel and Company* v. *Sims Ships' Composition Co. Ltd.* (*supra*). In *New Brunswick and Canada Railway Co.* v. *Muggeridge* (3), Kindersley,

(1) 20 Ch. D. 1. (2) 57 L. J. Ch. 713.
(3) 1 Dr. & Sm. 363.

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V.-C., lays down the rule as to the duty of those who issue a prospectus inviting the public to take shares on the faith of representations therein made, that such representations must be made "with strict and scrupulous accuracy." It is true that there is no legal liability for concealment. But this is not a matter of concealment. The representation as to the company's prospects was a positive representation that there were no liabilities and nothing to prevent dividends from being paid. The plaintiff's delay in bringing the action should not be held to bar his title to relief. The plea of laches cannot be raised by the defendant directors. As against them the suit is similar to an action at law for deceit, in which the only amount of delay which would bar the action would be that fixed by the *Statute of Limitations*, by analogy to which equity generally proceeds where the question of laches is raised. With respect to the company, the defence of laches must be disposed of on principles substantially equitable. See *Erlanger* v. *New Sombrero Phosphate Co.* (1). It is not unjust to grant relief. The position of the company has not been altered by the delay, and no shareholder has been prejudiced by it. His conduct forbids laches being set up against him. From the earliest moment that the plaintiff learned of the falsity of the prospectus he repudiated the sale to him and asked for a return of his money.

M. G. Teed, K.C. (*A. H. Hanington*, K.C., with him), for the defendants:—

No liability has been established against the directors. The prospectus was not issued by them nor for them and they are not shewn to have authorized it, or to have approved of it. Sharpe was the agent of the company who alone would be bound by the prospectus. Did the suit lie against the directors, it could not be maintained without proof of actual fraud. It is not enough in an action of deceit that statements in a prospectus are untrue. There must have been an intention to deceive; or it must be

(1) 3 A. C. 1279.

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shewn that the false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false: *Derry* v. *Peek* (1). In *Weir* v. *Bell* (2), a company formed to work a mine was compelled from want of funds to cease working; money was then advanced by some of the directors, amongst whom were Barnett and Baldwin. Afterwards, at a general meeting of the company, held in order, amongst other things, to provide for the existing deficit and for working expenses, the directors were authorized to issue debentures on such terms and for such amounts as they in their discretion might think fit. The directors accordingly authorized the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus bearing the names of Bell and others as directors and containing statements as to the condition and prospects of the company, on the faith of which the plaintiff and others purchased debentures. The money they raised was paid to the company's bankers; and part of it was applied by the directors on behalf of the company to repay the advances made by Barnett and Baldwin. The debentures having become worthless, the plaintiff brought an action for damages against Bell in respect of the statements in the prospectus, some of which were alleged to be fraudulent. The jury found that the prospectus contained statements of fact which were false to the knowledge of the brokers, and by which the plaintiff was induced to part with his money; that none of the false statements were made by Bell personally, or by his authority; that the brokers had authority to issue a prospectus but no authority to include in it statements which were fraudulent. It was held by Cockburn, C. J., Brett and Bramwell, L. JJ., Cotton, L. J., dissenting, that Bell was not liable. Cockburn, C. J., and Brett, L. J., put their judgments on the ground that Bell had no knowledge of the statements, while Bramwell, L. J., held that Bell had been guilty of no moral fraud, and not being the principal of the brokers, could not be held responsible

(1) 14 A. C. 337. (2) 3 Ex. D. 238.

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for the prospectus. As against both company and directors the plaintiff has failed to shew misrepresentation. The statement here that "it is understood they (the directors) will increase their holdings by taking up most, if not all, the treasury stock remaining to be disposed of," is a speculative matter of opinion, constituting no ground whatever upon which a charge of fraud can be founded. There was no duty, even had the prospectus been issued by the company or on the authority of the directors, to set out the liabilities of the company. The statement as to the prospects of the business was not put forward as a statement of fact, but as an expectation. The plaintiff could not, and did not rely upon it, and though it had turned out to be fanciful, it would not be a ground for setting the contract aside: *New Brunswick and Canada Railway Co.* v. *Conybeare* (1). Rescission will not be granted for concealment unless material facts are suppressed which rendered untrue the statements made. In the last mentioned case, Lord Chelmsford says: "If a party makes a false representation it may be no answer to a person complaining of being misled by it to say to him, You had the means of ascertaining the untruth of my statements if you had thought proper to use them. The reply to this might probably be, Your representations put me off my guard; I was entitled to place faith and reliance upon it. * * * But when the fact is not misrepresented, but concealed, and there is nothing done to induce the other party not to avail himself of the means of knowledge within his reach, if he neglects to do so, he may have no right to complain, because his ignorance of the fact is attributable to his own negligence." See also *Peek* v. *Gurney* (2). The prospectus was not issued as that of the company, but was a private memorandum prepared by Sharpe for his own use. In order that the plaintiff could rely upon it as against the company, it would have to be shewn that he was misled into believing that it was issued by them. To succeed as against the directors, proof of damages should have been given.

(1) 9 H. L. C. 711. (1) L. R. 6 H. L. 377, per Lord Cairns.

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There is no allegation of these in the bill. The delay in bringing the action is fatal: *Kent* v. *Freehold Land Co.* (1); *Reese River Co.* v. *Smith* (2); *Skelton's Case* (3); *Oakes* v. *Turquand* (4); *Sharpley* v. *South, etc., Co.* (5). The plaintiff became a shareholder in June, 1903. He did not raise any objection to the purchase until February, 1904, and it was not until ten months later that he began these proceedings.

McInerney, K. C., in reply.

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The defendant company was incorporated in March, 1899, by letters patent issued under *The New Brunswick Joint Stock Companies' Act*, and soon after it commenced the business of manufacturing bar iron at the city of St. John, which business it has continued up to the present time. In 1903, and at the particular period during which the transaction involved in this suit took place, the defendant James Manchester, was president and a director of the company, and the defendant Elkin was its treasurer and managing director. The capital stock of the company was $90,000, divided into shares of $100 each, of which 453 shares, representing $45,300, had been taken up and paid for in full. The remaining 447 shares remained in the treasury. In 1903 the directors were desirous of extending the company's business, and found it necessary, in order to do so, to erect some new buildings and instal some new plant, which, according to the estimate given to the company by its manager, would involve an outlay of from $18,000 to $20,000. In order to raise the money it was resolved to place 200 shares of this so-called treasury stock on the market for sale at par. The resolution to that effect was passed at a meeting of the directors held May 26th, 1903, and it is as follows: "After discussion on the subject, R. C. Elkin moved, seconded by Joseph

(1) L. R. 3 Ch. 493.
(2) L. R. 4 H. L. 79.
(3) 68 L. T. 210.
(4) L. R. 2 H. L. 235.
(5) 2 Ch. D. 663.

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Allison, and resolved that the company do sell $20,000 of stock (200 shares) at par." At this time the other directors, besides Manchester and Elkin, were D. J. Purdy, who was vice-president, Joseph Allison, James F. Robertson and T. H. Bullock. These gentlemen, I need scarcely say, are all men of the highest standing in the community; they are all shrewd, prudent and successful business men, and they occupy prominent positions commercially and otherwise. The holdings of these directors at this time were as follows: Manchester, 50 shares; Robertson and Allison, 50 shares each; Bullock, 25 shares; Purdy, 30 shares, and Elkin 25 shares; in all 280 shares. Of the remaining 173 shares 150 of them had been originally taken by the late George F. Baird, who was a director of the company from its organization up to the time of his death in 1901. They then passed into the possession of his widow and son, who held them at the time in question. At this same meeting of directors held on May 26th, 1903, another resolution was passed which is as follows: "R. C. Elkin moved, seconded by Joseph Allison, and resolved that the president and treasurer be authorized to employ a broker or other person to sell the stock above mentioned at a reasonable commission." They employed F. S. Sharpe, a broker, for the purpose at a commission of 3 per cent., and they reported what they had done at a meeting of directors held on the 9th June, 1903. Sharpe, who was a chartered accountant, was given access to the company's books in order to obtain such information as they afforded as to the company's affairs, and he prepared a prospectus for the information of purchasers, several copies of which in typewriting seem to have been prepared. Among other persons applied to was the plaintiff. Sharpe died some time before or about the time this suit was commenced, so we have not his evidence, but according to the plaintiff's account—and there seems no reason to doubt its accuracy—Sharpe gave him a copy of this prospectus, which he produced at the hearing; and he says that on the faith of certain material statements in it being true he purchased 30 shares of the stock, for which he paid $3,000. He paid

the money to Sharpe, who paid the amount ($2,910), less his commission, to the company. The precise date of the payment to Sharpe is not given, nor is the precise date of the payment to the company given. The latter, however, was about the 24th June, 1903. A certificate under that date was issued by the company to the plaintiff, and his name was entered on the list of shareholders as a holder of 30 shares. The certificate is under the seal of the company and signed by Mr. Manchester as president and by Mr. Elkin as treasurer. The prospectus is headed "Private Prospectus," and signed "F. S. Sharpe, chartered accountant and financial agent." It was also accompanied by a letter dated June 1st, 1903, written by Perkins, the manager of the company, to Sharpe, in which some particulars were given as to the contemplated extension of the works for which the money was required. The plaintiff complains that the statements in the prospectus, on the faith of which he invested his money, were false, and that they were fraudulently made with a view of deceiving purchasers; that he was in fact deceived by them, and he has therefore filed this bill in which he prays that the purchase be rescinded and the money be returned to him with interest. The bill sets out some twelve distinct statements in the prospectus which the plaintiff alleges were made by the defendants—that is, both the company and the two directors—wilfully, falsely, fraudulently and deceptively, for the purpose of deceiving the public and inducing them to invest in the stock. On the hearing all these charges were abandoned except two, which are included in the following paragraph in the prospectus: "With the exception of a small outside interest, the present paid-up capital is held by the directors of the company, and it is understood they will increase their holdings by taking up most if not all of the treasury stock remaining to be disposed of." A third ground relied on by the plaintiff is an alleged fraudulent suppression of fact which, though not set forth in the bill, is relied on from the evidence. Section 5 of the prospectus states that up to that time the earnings had been applied to the improvement of the company's property,

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and it then proceeds thus: "Henceforth, however, it is the intention to declare regular half-yearly dividends, as the net earnings of the business will warrant. In view of past results, and the very favorable prospects for increased earnings, shareholders can with confidence look forward to receiving satisfactory returns on their investments in the shape of dividends." The company in fact at this time owed the Bank of New Brunswick some $120,000, and the suppression complained of is that without the statement of this liability the statement as to prospect for future dividends is altogether misleading and deceptive.

The case is divided into two distinct parts—the relief as claimed against the company alone, that is the rescission, and the relief as claimed against the company and the directors jointly, that is the repayment of the $3,000. There is in reality very little in common between the two. They differ as to the nature of the liability itself; they differ as to the principles upon which that liability is to be determined; and they also differ as to the evidence by which the liability must be established. The liability of directors differs as between themselves and the company, as between themselves and outsiders, and as between themselves and the creditors of the company. And it is not to be wondered at that in these various complications the numerous cases which arise should now and again lead to some confusion. The plaintiff's right to relief against the company itself—speaking without reference to that right having been lost by delay or acquiescence—lies, I think, within comparatively narrow limits. The company in no way authorized the preparation or the use of this prospectus, and for the purposes of this part of the case, at all events, I may assume that no director ever saw it or knew anything about it until after the plaintiff's purchase had been entirely completed. The company, however, did employ Sharpe as their agent to sell these shares for them, and in the discharge of that employment he adopted what is a usual course in such cases—that is, he made a written statement, call it a prospectus or whatever you like, prepared with a view of its being submitted to investors in

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order to induce them to purchase. In that respect he was acting within the scope and course of his employment. And if in doing so he made misrepresentations to the plaintiff as to material facts, by which he was misled and induced into making the purchase, this Court will not allow the company to retain the benefit of a contract so brought about, but will rescind it at the plaintiff's instance. The company did not authorise the prospectus, it did not make it, and its officers knew nothing about it; but its agent, when acting within the scope of his employment, made the representations, and the company took and still has the benefit of the contract. See *Houldsworth* v. *City of Glasgow Bank* (1). If, therefore, the plaintiff was induced to purchase, and did in fact purchase, by reason of these representations, and they were material and untrue, I think it follows that the contract must be rescinded. Now the plaintiff swears, and there is nothing to lead me to suppose he is not stating the truth, that he was induced to purchase, and did in fact purchase, by reason of these representations. That they were untrue is admitted, and that they were material cannot, I think, be disputed. The directors only held 280 shares out of 453, and as to an agreement or understanding that they would increase their holdings by taking the balance of the treasury stock, there was no such agreement, whether the ambiguous language of the prospectus means the balance of the $20,000, as the defendants contend, or the balance of the whole unissued stock, as the plaintiff swears he understood it. See *Smith* v. *Chadwick* (2). As to the suppression of fact relied on as a third ground, I do not myself attach any importance to it. In the first place it is not put forward in the bill as a ground of relief. In his bill the plaintiff relies on untrue statements, not statements rendered misleading by the suppression of facts. But apart from this, I think the contention is not well founded. In the first place there is nothing said in the prospectus at all about the company's debts or its assets. Such statements are, I think, not usual

(1) 5 A. C. 317. (2) 9 A. C. 187.

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in a prospectus. If the plaintiff desired to form an opinion of his own in reference to the future of the company, and some information as to the amount of the company's indebtedness was necessary for that purpose, he was at liberty to inquire and ascertain. What is the statement? After speaking of the directors in the past not having paid dividends, but having devoted the net surplus profits of their business towards improving their property, the prospectus says: "Henceforth, however, it is the intention to declare regular half-yearly dividends as the net earnings of the business will warrant." This is nothing more than saying that the directors' present intention was that in the future, when they thought the net earnings of the business warranted them in declaring a dividend, they intended adopting that course instead of doing as they had done in the past, and they express the opinion that shareholders can confidently look forward to a good return for their money. What is wrong about that? It is a mere indication of the policy of the directors as to the future disposal of the net surplus profits of the company. How is that statement rendered misleading by reason of an omission to state that the company owed the Bank of New Brunswick $120,000? It might have altered the plaintiff's views as to the value of the investment, and deterred him from purchasing the shares, but that does not make the statement misleading. It may indicate a difference between the opinion of the plaintiff and that of the directors as to what would be a prudent course to pursue in case the profits were earned, but that is to my mind irrelevant. In *Aaron's Reefs* v. *Twiss* (1), Lord Watson says: "The duty of disclosure is not the same in the case of a prospectus inviting share subscriptions as in the case of a proposal for marine insurance. In an honest prospectus many facts and circumstances may be lawfully omitted, although some subscribers might be of the opinion that these would have been of materiality as influencing the exercise of their judgment." That seems to meet the plaintiff's contention, unless it can be laid down

(1) [1896] A. C. 287.

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as a matter of law that no company ought to declare a dividend unless it is out of debt. The plaintiff may be timid as to the nature of his investments, and he may refuse to risk his money in a company which countenances a declaration of dividends out of surplus profits while the company is indebted. If so, I think he should, in the absence of any express statement that the company was free of debt, inquire and obtain the information. If he chooses not to adopt that course, I do not think he can throw back upon the company shares which he has held, and upon which he has received no dividend, on the ground that he was not told that the company had an indebtedness so large that if he had known it he would not have purchased. It is perhaps not necessary to allude to the expression of confidence with which shareholders might look forward to dividends in the future, and which perhaps, as we find it in a "private prospectus" signed by Sharpe, may fairly be considered his opinion rather than that of any one else; but there was, in my opinion a reasonable ground for entertaining such an expectation. I do not know that the directors' intentions as to the future was a matter ever discussed by them, but the financial standing of the company at that time justified the language of the prospectus. According to the company's balance sheet made up in April, 1903, its total liability to the public was $136,515.31, and its assets amounted to $225,482.16, leaving a surplus of $88,966.85. The value of the unissued stock is not included in this. So, if you deduct from this the amount due shareholders—$45,300—there is a clear surplus of $43,666.85. The business each year shewed a profit—$9,613.66 in 1902 and $14,691.65 in 1903. In addition to this, the works were being extended, and an increased business was anticipated from that. Upon the other grounds, I think the plaintiff had a right, as against the company, to have the contract rescinded, and the money repaid with interest.

Newbigging v. *Adam* (1) may be referred to as shewing the nature and extent of the relief given in an action

(1) 34 Ch. D. 582.

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like this, for the rescission of a contract procured by misrepresentation. It is restitution, and involves the restoration, so far as possible, of both parties to the position they respectively occupied before the contract was made, so far as their positions have been changed by the contract itself. As Cotton, L. J., says in that case, "This is an altogether different thing from damages recoverable by reason of deceit; it is working out the proper result of setting aside a contract in consequence of misrepresentation." I call attention to this because at the hearing there seemed some confusion or uncertainty as to the precise ground upon which the plaintiff rested his claim against the directors as distinct from his claim against the company. It was described as a claim for damages at one time and by some more general term at another. It is clear that the bill does not claim damages, and it is equally clear that the purchase money is not recoverable from the company as damages in a suit for rescission, but merely by way of a restitution to the plaintiff of what was obtained from him by the company through the misrepresentation of its agent, and which for that reason it is inequitable for the company to retain, the plaintiff electing to avoid the contract and restore to the company all benefit derivable by him under it. There is certainly no question of damages involved in this case as against the company. The bill is not so framed, even if it were possible to join in the one suit a claim to rescind as against a company and a claim against directors for damages for deceit, and the evidence has not been adduced with any such view.

Coming now to the case of the two directors, upon what ground can this suit be maintained against them for the recovery of this $3,000? As I have pointed out, the company makes restitution of it as an incident to the rescission of the contract. But the directors had no contract to rescind, they had no restitution to make for they derived no benefit from the contract and had nothing to restore to the plaintiff and he had nothing to restore to them. The company was liable by reason of a misrepresentation made by its agent in doing the company's business, as a result of

which the company received the money as a direct benefit. But the directors had neither business, nor benefit, nor agent. Numerous cases were cited to shew that in suits like the present, directors have been held liable. No doubt that is so, but I think all of those cases proceed upon the principle that the directors have been guilty of fraud and dishonesty in themselves making representations which induced the contract. Whether the remedy was sought in this Court by a bill asking for indemnity, or in the common law Court by way of an action for deceit, the principles upon which the liability was established were the same.

In *Peek* v. *Garney* (1), the bill was filed by an allottee of shares against the directors of a company and the executor of a deceased director to be indemnified against loss by reason of being bound by the contract. The company itself had been wound up. The Master of the Rolls had dismissed the bill because the plaintiff had by his delay and acquiescence elected to retain the shares. Lord Chelmsford says: "The suit in the present case is not for the rescission of the contract, but is founded upon the loss the appellant has sustained, and may sustain, in consequence of his being bound by the contract he has entered into. It is a proceeding similar to an action at law for deceit; and the only amount of delay which could be a bar to the relief is fixed by the *Statute of Limitations*, by analogy to which Equity generally proceeds in questions of laches." At page 390, Lord Chelmsford is thus reported: "This case is entirely different from suits instituted either to be relieved from, or for the enforcement of, contracts induced by the fraudulent concealment of facts which ought to have been disclosed. * * It is a suit instituted to recover damages from the respondents for the injury the appellant has sustained by having been deceived and misled, by their misrepresentations and suppression of facts, to become a shareholder in the proposed company, of which they were the promoters. It is precisely analogous to the common law action for deceit. There can be no doubt that Equity exercises a con-

(1) L. R. 6 H. L. 377.

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current jurisdiction in cases of this description, and the same principles applicable to them must prevail both at Law and in Equity." See also *Derry* v. *Peek* (1); *Arkwright* v. *Newbould* (2); *Smith* v. *Chadwick* (3). The next question in the inquiry is what is the nature of the misrepresentation necessary to be established in an action of deceit. A reference to the cases I have just cited will shew that there is a marked difference in this respect between an action for deceit and a suit to rescind a contract for misrepresentation. I need only refer to *Derry* v. *Peek* (1), as containing the latest and final authority on this point, and it is there determined that to support an action of deceit the plaintiff must prove actual fraud. The false representation must be made knowingly, or without belief in its truth, or recklessly without caring whether it is true or false. A false statement made through carelessness and without any reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. Such a statement is not fraudulent and does not render the person making it liable to an action of deceit, if it was made in the honest belief that it was true. To render the director liable, however, he must have himself made these false statements, or they must have been made in some way to render him liable for them. In the present case the defendants Manchester and Elkin certainly did not propose this prospectus—they certainly did not direct or authorize its preparation, and they knew nothing about it until after or about the time the plaintiff purchased, and they certainly did not adopt it in any way. It does not on its face profess to be more than a private prospectus of Sharpe's, which was binding on the company in the way I have mentioned, but was in no way binding on the two directors. He was not in my view their agent in any way. On this point I refer to *Weir* v. *Barnett* (4), and on appeal at page 238 of the same report. The facts in that case and this are similar in many respects. The directors of an estab-

(1) 14 A. C. 337. (2) 17 Ch. D. 320.
(3) 9 A. C. 193, per Lord Blackburn.
(4) 3 Ex. D. 32.

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lished company were authorized by the shareholders to issue the company's debentures in order to raise money to pay these directors certain moneys advanced by them to pay the working and other expenses of the company. For this purpose they employed a firm of brokers, who prepared and issued a prospectus bearing the names of the directors, in which statements were made, false to the knowledge of the brokers, but which the jury found were not made by the defendants personally, or by their authority. The debentures were sold, the money paid to the company, and by it the directors were repaid their advances. The company failed and went into liquidation, the debentures proved worthless, and the plaintiff, as holder of some of them, brought this action for damages. Seven Judges took part in the decision of the case, and although they differed somewhat in their reasons, and one differed as to the conclusion, the opinions of all are adverse to the plaintiff's contention in this case. Cotton, L. J., who dissented, did so on the ground that it was a part of the duty of the directors confided to them by the resolution of the shareholders which authorized the issue of the debentures, and that the brokers, in preparing and issuing the prospectus, must be considered as discharging this duty confided to the directors. He also held that the statements in the prospectus must be taken as the statements of the directors, and as a ground for that conclusion he relied on the fact that the prospectus did not on its face purport to be the prospectus of the brokers. All the other Judges held that the brokers were not the agents of the directors but the agents of the company, and that they derived no personal benefit from the transaction. In the present case the prospectus purports to be the private prospectus of Sharpe, thereby carrying the inference that the statements in it were his, and the directors had nothing to do with the sale of these shares beyond proposing and voting for their sale when convened in a meeting of the board and exercising the powers and functions of the corporation itself. This case was followed by Fry, J., in *Cargill* v. *Bower* (1).

(1) 10 Ch. D. 502.

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Among the other grounds upon which the plaintiff's Counsel rested the liability of the directors is that of negligence, though it is not very clear how they apply the doctrine to this case. Mr. Elkin gave evidence at the hearing and I assume it is on that evidence that the so-called negligence is based. It seems that sometime in June, 1903, but whether before the plaintiff had bought or afterwards the evidence does not shew, Sharpe brought the propectus to Elkin. I will assume—and that is putting the case most strongly in the plaintiff's favor—that this interview took place before the plaintiff actually purchased the shares and that Sharpe, during the conversation, mentioned the plaintiff's name as that of a probable purchaser. Elkin at first refused to look at the prospectus, he told Sharpe that he had no authority whatever to get up any such paper either from him or the company, and that he objected to prospectuses generally. He finally consented to take the prospectus and look over it. This he did, and when Sharpe returned the next day, Elkin pointed out to him the inaccuracies in it of which the plaintiff now complains, that is, the statement as to the directors' holdings and their agreement to increase them. He also pointed out to him the want of clearness in the statement as to the balance of the shares which the directors were said to be willing to take, and objected altogether to the use of the prospectus in that form. Sharpe in reply put forward that the prospectus was his own and not that of the company or any one else and that it so appeared on its face, and that the statements to which Elkin objected, though strictly inaccurate were not materially so and that he could explain to purchasers the exact truth in reference to them, and Sharpe did then in the copy of the prospectus which he submitted to Elkin, and which is in the evidence, make at least one correction in it in his own writing. Elkin was asked as follows:—

Q. "What did you tell him as to using it (*i. e.* the prospectus.)? A. I said, 'As far as I am concerned I would rather you wouldn't use the thing at all, that would be the

best way.' And as he left me he said he didn't know as he would use it at all, 'the most I will sell or have sold will be to my customers that I have sold stocks to before.' He said 'they will take my word for it.'" I do not see how it can be argued that Elkin in this conversation shewed any intention of in any way adopting or approving of the prospectus. His language was altogether by way of disapproval. Now in what way was Elkin guilty or chargeable with negligence? Whatever may have been his duty to the company he certainly occupied no fiduciary relation to the plaintiff, he owed him no duty and was not bound to him by any obligation. I do not think there is anything in this contention. The case of Mr. Manchester is a still weaker one for the plaintiff. Perkins says that he gave Mr. Manchester a copy of the prospectus at the Bank of New Brunswick, but whether he received it or ever opened it he could not say. Mr. Manchester says he never saw it until he saw it when Mr. Elkin shewed it to him. He also made objection to it, but Elkin said: "It is a private thing got up by Mr. Sharpe, and we have nothing to do with it." I think the plaintiff's bill so far as it seeks any relief against the defendants Manchester and Elkin must be dismissed.

All of these defendants set up as an answer to this suit that, as to the rescission of the contract, the plaintiff by his delay in bringing this suit for that purpose, and by other acts in reference to the shares consistent only with an intention to hold them, has lost all right to have the contract rescinded. In which case the other branch of the suit fails also. See *Heymann* v. *European Central Railway Co.* (1). I have come to the conclusion that this defence must succeed.

In *Lindsay Petroleum Co.* v. *Hurd* (2), the general doctrine is thus stated: "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that

(1) L. R. 7 Eq. 155. (2) L. R. 5 P. C. 221.

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which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." In *Erlanger* v. *New Sombrero Phosphate Co.* (1), Lord Blackburn says in reference to the rule which I have quoted: "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favor of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry." As an application rather than as an exception to this rule, it is said that in dealing with contracts in reference to shares in trading companies there are special reasons for requiring promptness in those who seek the rescission of them on the grounds of misrepresentation which do not exist in the case of other contracts. In *In re Scottish Petroleum Co.* (2), it appears that during the argument Fry, L. J., asked Counsel this question: "Why does rescission of a contract to

(1) 3 A. C. 1218, 1279. (1) 23 Ch. D. 425.

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take shares stand on a different footing from rescission of any other contract?" The answer was: "On the ground of the policy of the legislature as to companies. A shareholder's name goes out to the world, and creditors trust the company on the faith of his being a shareholder, and other people are induced to take shares because he has done so, and therefore an attempt to repudiate after the winding-up to the prejudice of their rights, comes too late." In giving judgment, Fry, L. J., says: "Whether it (the letter of repudiation) was sent in time, we need not determine, for this is not the case of an ordinary contract, but of a contract to take shares, which stands on a different footing. As regards such contracts the legislature has interposed and has provided that they shall be made known in a particular way to shareholders and creditors; notice of them is given to the world. Now the general principle is that no contract can be rescinded so as to affect rights acquired *bona fide* by third parties under it. It is true that the creditors and the other shareholders have not acquired direct interests under the contract, but they have acquired an indirect interest. The shareholders have got a co-contributory, the creditors have got another person liable to contribute to the assets of the concern. So that although in the case of ordinary voidable contracts simple repudiation is enough, there must in the case of a voidable contract to take shares be repudiation and something more before the winding-up commences." The learned Judge was there in part discussing the effect of an attempt to rescind after the rights of creditors had intervened under a winding-up. To that extent his language has no bearing on the present case, where the company is not in liquidation, and where the shares are all paid up, with no liability to contribute further. In *Smith's Case* (1), Turner, L. J., says: "Now certainly of late this Court has laid very great stress on the necessity for parties coming here within a reasonable time in cases of this description, and I am not disposed to cast any doubt upon that principle. I think that parties

(1) L. R. 2 Ch. 612.

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who are in the position of shareholders in companies, if they come to this Court to be relieved from their shares on the ground of fraud practised upon them, must come with promptitude." In *Directors of Central Railway Co. of Venezuela* v. *Kisch* (1), Lord Romilly says: "On that subject I would observe that a contract between a company and an individual differs from a contract between two individuals alone in this respect, that upon the faith of his becoming a member of the company various persons are induced to deal with the company and to become shareholders, which they would not do except upon the belief that he was a member of it. The result is, that it becomes necessary for him, in order to set aside a contract of this description, that he should come with the utmost diligence for that purpose, so that no person may be misled by the fact of his remaining a member of the association." In *Lawrence's Case* (2), Lord Cairns says: "It is difficult to disembarrass these cases of the effect which a man's name being on the register has in inducing other persons to alter their position." Baggallay, L. J., in *In re Scottish Petroleum Co.* (3), lays down three rules by which cases of this kind are governed. Shortly stated, they are these: 1. Every person who has agreed to become a member of a company, and been registered as a member, is liable as a contributory in the case of a winding-up. 2. That is subject to the right of the member to have the contract rescinded, if he has entered into it through the fraudulent conduct of those with whom he has contracted, but proceedings for the rescission must be taken within a reasonable time after the fraud is discovered. 3. And in cases where there is a winding-up, the proceeding for rescission must have been taken before the commencement of the winding-up. At page 434, Baggallay, L. J., says: "The cases appear to establish that to enable a shareholder to escape, there must, before the commencement of the winding-up, be a repudiation of the

(1) L. R. 2 H. L. 125. (2) L. R. 2 Ch. 417.
(3) 23 Ch. D. 429.

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shares, and that it must be followed up by active steps to be relieved from them, unless there is some agreement with the company which dispenses with the necessity of proceedings being taken by this particular shareholder." These extracts have special reference to cases where the companies have gone into liquidation, and the contract is one between shareholders and creditors. In such cases the Court seems to have laid down an arbitrary rule. The principle by which promptness is required as a condition of obtaining relief is by no means confined to such cases. In that case the information upon which the party based his right to repudiate, and which the Court held to be a sufficient ground for the purpose, was communicated to him on the 12th November, 1880, and on the 27th of the same month he wrote withdrawing his application for shares and requesting a return of his deposit. Baggallay, L. J., says: "The delay of a fortnight in repudiating the shares makes it, to my mind, doubtful whether the repudiation in the case of a going concern would have been in time." In *Lawrence's Case* (1), a delay from the 16th May to the 27th September was held fatal. In *Kincaid's Case* (2), a delay from the 25th of April to the 18th of July was also held fatal. It is unnecessary to multiply instances, because in none of them has the party been allowed to escape his contract after a delay less by many months than that with which the plaintiff has to contend in this case. This suit was commenced on the 22nd December, 1904. The purchase of the shares was made and completed on the 24th June, 1903, just eighteen months before. The time, however, would only begin to run from the time the plaintiff received the information by which he learned that he had been deceived. When he received knowledge of the fraud upon which he relied as a ground for repudiating his contract he was in a position to make his election, and bound, as I think in a case like this, to act with promptitude if he desired to get rid of his contract. There does not seem to have been anything here to put the plaintiff

(1) L. R. 2 Ch. 412. (2) L. R. 2 Ch. 412.

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on inquiry, and he states, and I accept his statement as correct, that it was not until the 24th January, 1904, when he attended a meeting of shareholders, that he became conversant with the facts which he now relies on as a ground for his right to succeed in this suit. He states that at that meeting he learned about the indebtedness to the Bank of New Brunswick, and that the directors had not taken any more stock, and that only $85,000 of the $20,000 required had been taken up. He was asked, "What did you then conclude from all that—what did you do?" He said, "I concluded I would withdraw my share, and sometime after I called into a meeting they had, I think in February, and demanded my money." That meeting was held on the 16th February. He attended another meeting on the 8th March. He says he went to these meetings to get his money back. He says that at the March meeting, at which only the defendants Manchester and Elkin were present, he said, "Gentlemen, I did not come here to attend the meeting. I came here to demand my money; the conditions I bought my stock on have not been carried out and I want my money." He also says that at that time he tendered back his certificate of shares. On the 5th February, 1904, the plaintiff sent the company a formal letter addressed to Mr. Manchester as president, in which he says: "As the company did not succeed in disposing of only a portion of the twenty thousand dollars stock offered for sale, and the plan and conditions which I bought my interest in the company are considerably altered, I would be pleased to have my money returned to me, and if I understood at the meeting held on 24th January that I gave my consent to have my interest mortgaged I withdraw my assent under these circumstances." The precise object or effect of this letter is perhaps not clear. The defendants rely upon it as a dealing with the shares with knowledge of all the facts. For the present I am dealing with it as indicating a desire to get back his money as a result of a previously formed intention to repudiate. The plaintiff's Counsel contended that he repudiated the shares in February. Whether he did so or not is perhaps not neces-

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sary to determine, for he was then as I have said possessed of the information which rendered it necessary for him to define his course. It is clear that the company had no intention of assenting to his demand. If nothing else their letter of April 13, 1904, shews that. From the 24th January, 1904, to the 22nd of the following December, is a period of 11 months—from April 13 to the same date is a period of 8 months. Either period is so much longer than any which Courts have recognized as satisfying the condition of prompt action that it makes no difference which you select. Mere repudiation is not enough where the company refuses to assent to it. It must be followed by proceedings to give effect to the intention and have the contract avoided and the register corrected. There is one consideration in this case which should have induced the plaintiff to act promptly. His name had already appeared on the list of shareholders for over six months as one having a respectable sum invested in the business, and during that period such influence as his name would carry had been operative upon those dealing with the company. If he intended to repudiate his position as a shareholder, he should, so soon as he ascertained the facts upon which he relies, have been active to set matters right.

I think there has been such delay in commencing this suit that the plaintiff in the absence of all explanation or special circumstances to warrant it, has lost his right to rescind the contract. In that case, as no action would lie against the company for the recovery of the purchase money, this suit would not, as framed, lie against the directors either: *Kent* v. *Freehold Land Co.* (1); *Heymann* v. *European Central Railway Co.* (2).

But one other point remains for decision. Eben Perkins who was for some years the manager of the company was examined in Illinois, under a commission. After he had been sworn, but before he gave any evidence, his competency as a witness was challenged on the ground of his religious faith. *Bell* v. *Bell* (3) was cited as shewing that

(1) L. R. 3 Ch. 493. (2) L. R. 7 Eq. 154.
(3) 34 N. B. 615.

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his evidence should be rejected. In order to guard against all possibility of Mr. Perkins' views on this subject being misrepresented I shall make an extract from his evidence.

"Q. Mr. Perkins, the oath that you have just taken by which you have sworn by God to tell the truth, I am instructed to ask you do you believe in God? A. Well, that you will have to define what you mean.

"Q. I just asked you that, do you believe in God, you know what is ordinarily accepted in this country? A. I believe in a Supreme Power.

"Q. Do you believe in God? A. Well that question can not be answered without a definition of what you mean by God.

"Q. Well do you believe in God as taught in the Bible? A. As taught in the Old Testament?

"Q. As taught in the Bible? A. Oh! well it is taught in the Old Testament in one way—a revengeful God, and in the New Testament in another way, which one do you mean?

"Q. Well, which one do you believe in? A. I believe in the one that is defined by Christ's teaching.

"Q. Do you believe that you are under more obligation to tell the truth by reason of the oath that you have taken than you would have been if you had not taken that oath? A. No sir, I do not.

"Q. Do you believe in hell? A. Well, you define hell for me so that I will know what you mean. No farther than what I have stated. I—well I refuse to answer ecclesiastical questions.

"Q. You believe in a future state of rewards and punishments? A. Certainly.

"Q. You do? A. Yes.

"Q. Do you believe if persons swear falsely they will be punished in the hereafter? A. No.

"Q. Do you believe in Heaven? A. Yes."

Mr. Perkins does not seem to have answered the inquiry as to his belief in the existence of hell. But as he later on in his examination expressed a very positive

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opinion that the gentleman whom he considered responsible for this catechising would certainly go there, I feel at liberty to assume that he believes in its existence. We have, then, Mr. Perkins stating his belief as follows: "I believe in a Supreme Power—a God as defined by Christ's teaching in the New Testament—I believe in Heaven and hell, and in a future state of rewards and punishments. I do not believe that I am under any greater obligation to tell the truth by reason of taking the oath, and I do not believe that a person who swears falsely will be punished in the hereafter." It would be a mistake, I think, in this age, with its almost endless variety of religious thoughts and beliefs, to refine too much in determining as to the competency of a witness. The taking of an oath implies a belief in a God, to whom an appeal is made. The two important points, I think, are a belief in a God and a belief in a future state of rewards and punishments. Mr. Perkins believes in both. The witness in *Bell* v. *Bell* did not believe in either. I think Mr. Perkins was a competent witness.

The bill must be dismissed with costs.

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Will—Construction.

Testator by his will conveyed property to trustees upon trust to pay to his daughter an annuity of $1,000 during her life, and on her death to invest the securities set apart to pay said annuity and to divide such investment among his daughter's children on the youngest coming of age. The will then provided that should the daughter be alive on her youngest child coming of age, the daughter, if she should see fit, might have and receive from the trustees the fund set apart to yield said annuity, and the same should be absolutely assigned to her free from all control of her husband. The youngest child came of age in the lifetime of the daughter, who died without making a request to have the fund transferred to her:—

Held, that there was an absolute trust in favor of the children, which would not have been defeated had the request been made.

Application by trustee for advice. The facts are fully stated in the judgment of the Court.

Argument was heard August 9, 1907.

J. A. H. L. Fairweather, for J. W. Fisher:—

By the will Rebecca Fisher was to receive $1,000 annually for her sole use and benefit during the term of her natural life. If she died before her youngest child attained the age of twenty-one years the securities which were held or set apart to yield the said sum were to be invested in mortgage securities on unincumbered real estate, and upon the youngest child attaining the age of twenty-one years the investment was to be divided among her children share and share alike. If, however, Mrs. Fisher was living at the time her youngest child reached the age of twenty-one years, the will provided that if she should see fit she might have and receive from the executors the securities which might be held or set apart to yield the annuity, and the same should be absolutely assigned to her. If the words "if she shall see fit" were left out of the will, Mrs. Fisher would take absolutely the securities so set

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apart. At the time of the decree Mrs. Keator (to whom securities were given on exactly the same terms as to Mrs. Fisher) was entitled to and did receive an absolute conveyance of the securities to herself. There is nothing in the decree as to any demand having been made, and it seems to have been taken as a matter of course that Mrs. Keator was entitled to the absolute conveyance, her children having reached the age of twenty-one years. Mrs. Fisher was not, however, entitled to an absolute conveyance at that time, three of her children being under age. Her share was conveyed to J. Gillies Keator as trustee to carry out the terms of the will. These in the first place would be to convey to the children of Mrs. Fisher equally upon the youngest reaching the age of twenty-one years, provided Mrs. Fisher died before that time; and second, if she were living at the time her youngest child attained the age of twenty-one years, to convey the securities to her absolutely. The mere fact of the trustee not executing a conveyance does not affect the question. Upon the youngest child attaining the age of twenty-one years the securities vested in the mother absolutely. As her property they now pass to her husband.

A. O. Earle, K. C., for children of Rebecca Fisher:—

By the first clause of the will the children of Rebecca Fisher took a vested interest on her death. The absolute terms of the gift are not qualified by the later words providing for a transfer of the trust assets to the life tenant. It is, however, sufficient to say that the request for a transfer was not made.

H. H. Brittain, for J. Gillies Keator.

F. R. Taylor, for Bank of Montreal.

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This matter comes before me with the consent of all parties, who agree to be bound by my decision. I treat

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the application as made on behalf of J. Gillies Keator, trustee under the conveyance to him, dated April 28th, 1898, for advice as to the conveyance of the property therein described.

The facts are briefly these. The late John Gillis died in October, 1872, leaving a will by which he conveyed all his property, real and personal, to trustees upon certain trusts which may be shortly stated as follows. An annuity of £500 was secured to the widow during her life; certain provisions were made for the two daughters, Mrs. Keator and Mrs. Fisher, and the residuary estate all went to his son John. The trust in reference to Mrs. Keator and Mrs. Fisher is the same, and declared in the same language. The clause as to Mrs. Fisher is as follows: "Upon trust to pay to my daughter Rebecca, by equal quarterly payments, the clear yearly sum of $1,000 for her sole use and benefit during the term of her natural life, free of all control of any husband she may have, and her receipt and receipts therefor, or for any part thereof, shall, notwithstanding coverture, be a good and sufficient release to my said executors for any payment made to her under this bequest, and on the death of my said daughter Rebecca I direct my said executors to invest in mortgage securities, on unencumbered real estate, the securities which may be held or set apart to yield the said annuity or sum of $1,000, and the same and the accumulations thereof shall be divided share and share alike to and among any children which my said daughter Rebecca may leave, on the youngest child living attaining the age of twenty-one years, and until such child shall attain such age, I direct that my said executors may, if they shall see fit, apply the interest arising from such mortgages towards the support, maintenance and education of such child or children instead of re-investing the same; but should either or both of my said daughters be alive on her youngest child living attaining the said age of twenty-one years, I will and direct that such daughter or daughters, if she or they shall see fit, may have and receive from my said executors the several securities which may he held or set apart to yield the said an-

nuities or sums of $1,000, and the same shall be absolutely assigned to her or them respectively, free from all control of her or their respective husbands, and in case of the death of either or both of my said daughters during my life leaving issue her surviving, I will and direct that such issue shall have and take the provision hereby made for my said daughter or daughters so dying, and to which she or they should respectively have been entitled had she or they survived me." Then follows a provision that if either of the daughters died without leaving issue, the securities held for her should fall into the residuary estate. To this will there was a codicil which relates chiefly to the residuary estate given to the testator's son, and which under the will was to come into his possession on his attaining the age of thirty years. By the codicil it was provided that if he died before attaining that age, and without issue, the income and profits of the residuary estate should be equally divided between the daughters Mary (Mrs. Keator) and Rebecca (Mrs. Fisher) free from the control of their husbands, and in case of the death of either of them, her share was to go to her children. It was then provided as follows: "And in the event of my said son dying without issue, I will and direct that at the time he would have attained the age of thirty years, had he lived, that my residuary estate and the whole of my property, including the securities set apart to yield the annuities for my said daughters, as provided by my said last will, shall be equally divided between them, share and share alike, free from all control of any husband that they may respectively have, and in the event of the death of either or both of them, the share of the daughter or daughters so dying shall be conveyed to her respective children, it being my will and desire that at the time before mentioned my said estate should be wound up and closed, except as to the wife's annuity, if she was then living."

Some years ago a bill was filed in this Court by Mrs. Keator and her children, and Mr. and Mrs. Fisher and their children, against the then trustees under John Gillis' will, and others, for the administration of the trusts therein

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declared, and it was alleged in the bill that application had been made on behalf of the plaintiffs to the trustees to set apart a sufficient portion of the estate to pay the annuities to Mrs. Keator and Mrs. Fisher, and that the plaintiffs had offered and agreed to accept the lot of land on the corner of King and Prince William streets, in the City of St. John, which belonged to the Gillis estate, and yielded an annual ground rent of $2,000, and another lot which would yield a sufficient net income to pay the necessary fire insurance premium; but that this arrangement was objected to by the representatives of John R. Gillis, who was then dead, and in consequence thereof the trustees refused to act. In this suit a decree was made on the 11th March, 1898, by which it was ordered that the lot of land on the corner of King and Prince William streets, should be conveyed one-half to Mrs. Keator and "one-half to John Gillies Keator (the present applicant) in trust for the use and benefit of Rebecca Fisher and her children, as declared in and provided for by the will of the said John Gillis, deceased" and the remainder of the trust property was ordered to be conveyed by the trustees to Susan Gillis, executrix and trustee under the will of her husband, John R. Gillis, who had died after attaining the age of 30, leaving issue, all of whom were parties to that suit. By the same decree the trustees under the will of John Gillis were discharged, their accounts passed and allowed, and they were relieved from their trust. Mrs. Fisher died September 25, 1906, intestate, leaving five children (all of whom were then of age) and her husband, James W. Fisher, who is domiciled and resident in England.

In pursuance of this decree the trustees under John Gillis' will, made a conveyance of a half interest in the lot of land to John Gillies Keator. This conveyance is dated April 28, 1898, and it was made "upon trust for the use and benefit of the said Rebecca Fisher and her children, as declared in and provided for by the said last will and testament and codicil of the said John Gillis, deceased."

The effect of all this was to wind up the John Gillis estate so far as his trustees were concerned. Mrs. Keator

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agreed to take a half interest in this lot as representing an investment of her annuity of $1,000, and it was conveyed to her. Mrs. Fisher agreed to take the other half and it was conveyed to John Gillies Keator, as I have mentioned, and the residue was conveyed to John R. Gillis' representatives. Mrs. Fisher's one-half was not conveyed to her, but to a trustee who holds it on precisely the same trusts as it would have been held if retained by the trustees of John Gillis.

The question now is between James W. Fisher, the husband of Rebecca Fisher, and the children, as to the person entitled to the property. The will seems to contemplate a setting aside by the trustees of securities sufficient to realize the annuity of $1,000 payable to Mrs. Fisher during her life, and on her death leaving children, these securities were to be invested in mortgages on unencumbered real estate and these were to be divided among the children on the youngest becoming of age. Now the trustees did not set apart this fund, but the Court did. It is represented by the half-interest in this land and is in the hands of John Gillies Keator to do with it, I think, precisely what the trustees under the will would have been obliged to do with it, that is, invest it in mortgages and transfer them to these children. Something has been said as to this amounting to a conversion of the property into personalty. That seems to me altogether immaterial for the fund goes to the children whether it is personalty or not. I think as the children are all of age it is quite competent for them to waive the investment of the property in mortgages and take it as it is. Taking this will altogether, there is nothing whatever in it to indicate that the children of Mrs. Fisher living on her death should not be entitled to the fund out of which the annuity of $1,000 was payable, and the time for distributing it was when the youngest child became of age. On the contrary there are several provisions of the will which point to this as the right of the children. There is but one clause which suggests a different construction, and that is the one which provides that the daughter, if alive on her youngest child becoming of age, may, if she

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sees fit, have and receive from the executors the securities set apart to yield the annuity. The clause says: "And the same" that is, the securities, "shall be absolutely assigned to her free from all control of her husband." There seems to me to be two answers to this argument. In the first place Mrs. Fisher never requested a transfer of the fund—she never saw fit to take it and in fact never did take it. Apart from that it would, I think, be a most unreasonable construction to place on this clause, that the daughter, by expressing a wish to take over the fund and having it assigned to her, would take it absolutely for her own use, defeating the evident intention of the testator to benefit the children after their mother's death and all the other clauses making provision for the ultimate disposal of the fund. I should say the clause was only intended at most, if acted upon, to give the mother possession of the securities and the management of the fund, but that it would still be subject to the trust in favor of the children on her death. I think Mrs. Fisher's children are entitled to this half interest in the property in equal shares—and there will be a declaration to that effect.

The trustee will have his costs out of the income.

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1907.
October 18.

River—Riparian owner—Use of water—Prescriptive title—Mill dam—Interruption of water—Statutory powers—Remedies—Injunction—Ex post facto legislation—Construction.

A riparian owner has a right to have the water flow to his land in its natural channel without material diminution in its volume or sensible change in its quality; and to use it for all ordinary and domestic purposes; he has also a right to the reasonable use of it for commercial or other extraordinary purposes incident to the enjoyment of his property, provided he does not cause material injury or annoyance to other riparian owners.

A prescriptive title to the uninterrupted use of the water of a river will not be obtained by a riparian owner who has made no use of the water different from that to which he was entitled as a riparian owner.

Defendants, an electric lighting company, owning lands on both sides of a river, and having power by their Act of incorporation to build and maintain dams on the river, erected a dam thereon in connection with their power house. Plaintiff is the owner of a water grist and carding mill, situate lower down on the same river Defendants ran their machinery at night time, and in the morning it was their practice, without having regard to the length of time required for the purpose, to store the water until the dam was again full. In consequence the plaintiff was deprived of water, and his mills were forced to shut down for a long number of days at a time:—

Held, (1) that defendant's use of the water was unreasonable, and should be restrained.

(2) that the statutory powers conferred upon the defendants to build the dam for the purposes of their business did not authorize them to make an unreasonable use of the water, to the injury of the plaintiff, in the absence of proof, the onus of establishing which was upon the defendants, that their business could not be carried on except with that result.

(3) that a provision in defendants' Act, that they should be liable to pay damages to any owner of property injured by the construction of their dams or works, did not apply to damages resulting from an unreasonable use of the water; that the loss sustained by the plaintiff in the enjoyment of his property was continuous and substantial, and that, under the circumstances, he was entitled to relief by injunction.

Defendants were empowered by Act to build a dam upon complying with certain formalities, including the filing of a plan thereof with and obtaining approval of the same by the Governor in Council. A plan was filed with the Governor in Council, but owing to misapprehension its approval was not obtained. The dam having been built, an Act was passed

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approving of the dam, and providing that the approval should have the same force and effect as if given by Order in Council of the date of the filing of the plan:—

Held, that the Act, as *ex post facto* legislation, was not to be construed as legalizing the dam.

Bill for an injunction and damages. The facts fully appear in the judgment of the Court.

Argument was heard July 30, 1907.

Geo. Gilbert and *J. M. Price*, for the plaintiff:—

A riparian owner is not entitled to more than a reasonable use of the water of the stream. He may not detain it or use it for extraordinary purposes, if by so doing he inflicts injury upon another proprietor. See *Miner* v. *Gilmour* (1); *Ellis* v. *Clemens* (2); *Sampson* v. *Hoddinott* (3); *Wright* v. *Howard* (4). The defendants' Act of incorporation confers upon them no higher rights than those of a riparian owner. Nor can their rights be enlarged from the circumstance that their business is of utility to the public: *Broadbent* v. *Imperial Gas Co.* (5); *Attorney-General* v. *Council of Birmingham* (6); *Spokes* v. *Banbury Board of Health* (7). The company is given power to maintain dams for the storage of water at a point or points four miles above the head waters of the plaintiff's mill: Sect. 4 (2) of Act. They cannot use their working dam, which is situate two miles above the plaintiff's mill, for this purpose. The provisions in the Act that before erecting any dams or waterways a plan and description of the same should be approved of by the Lieutenant-Governor in Council, etc., not having been complied with when the dam was erected, the defendants had no rights at the time the bill in the suit was filed. The legislation subsequently obtained approving the defendants' works (7 Edw. VII., chap. 117) does not deprive this Court of the jurisdiction it had when the suit was brought

(1) 12 Moo. P. C. 131.
(2) 21 O. R. 227.
(3) 1 C. B. N. S. 590.
(4) 1 S. & S. 190.
(5) 3 Jur. N. S. 221.
(6) 4 K. & J. 528.
(7) L. R. 1 Eq. 42.

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to award the plaintiff damages though his right to an injunction to have the works removed may be gone. See *Crisp* v. *Bunbury* (1). The defendants' use of the water is an invasion of the plaintiff's prescriptive right to have it flow to him in an uninterrupted volume.

[Barker, J.:—Do you contend that you have rights beyond those of a riparian owner?]

Yes. Plaintiff's mill has had the use of the water uninterruptedly for over twenty years.

[Barker, J.:—The user has not been artificial so as to adversely affect the rights of another owner.]

M. G. Teed, K. C., and *N. A. Landry*, for the defendants:—

Defendants' dam is not a storage dam within sect. 4 (2) of the Act of incorporation. The power to build a storage dam has never been exercised. The dam that has been built is a power dam, and was erected by virtue of sect. 4 (1). It does not lose its character as a power dam because of having incidental storage. Defendants' works were built and their business carried on under statutory authority. In such a case, in the absence of negligence, the plaintiff has no redress. The existence of statutory powers does not deprive us of our rights as a riparian owner: *Swindon Waterworks Co.* v. *Wilts Canal Co.* (2). We have not made an unusual or unreasonable use of the stream. If there has been an unreasonable use, the allegations in the bill do not set it up. The Legislature has impliedly conferred upon us authority to make whatever use of the water is necessary in order to properly carry on our business, even if in so doing an injury may be inflicted upon the plaintiff. Otherwise the object of our incorporation would be defeated. The interests of the public were deemed by the Legislature to outweigh private considerations. As a riparian owner we had a right to detain the water, the detention not being unreasonable and taking

(1) 7 Bing. 398. (2) L. R. 7 H. L. 697.

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place at night. See *Keith* v. *Corey* (1). In order to establish a prescriptive user the plaintiff must have used the water in a manner not justified by his natural rights, and so as to raise the presumption of a grant: *Sampson* v. *Hoddinott* (2). The Act 7 Edw. VII., c. 117, has made the defendants' works lawful and has extinguished plaintiff's cause of action. As the right to an injunction or other equitable relief is gone, the Court has no jurisdiction to award damages. See *Durell* v. *Pritchard* (3). The Act of incorporation imposes upon the company liability to pay damages to owners of property in certain specified cases. The language comprehends damages arising from an unreasonable use of the water. The section is exhaustive and excludes relief by injunction.

Gilbert, in reply.

1907. October 18. BARKER, J.:—

The plaintiff is the owner of a water-power grist and carding mill, situated on the Tetagouche river, a few miles from the town of Bathurst. The precise time when these mills were built does not appear, but from the evidence it must have been over forty years ago. The plaintiff acquired the property, which extends to both sides of the river, from one Samuel Bishop, in 1902. The Tetagouche river is a small but rapid stream, and though not navigable for boats, there are large quantities of logs driven down it each year. The defendants are a company incorporated by an Act of the Provincial Legislature, passed in 1904 (4 Edw. VII., Chap. 71) and under the authority of that Act, they erected a dam across the river, about two miles above the plaintiff's mill, and completed an electric light plant which they are operating by means of this water power and supplying the town and village of Bathurst with light. These works were completed in December, 1904, and the company commenced operating them on the 15th of that month. John P. Leger, who is the president

(1) 1 P. & B. 400. (2) 1 C. B. N. S. 590. (3) L. R. 1 Ch. 244.

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of the company and owns all its stock, except two or three shares, was the chief promoter of the enterprise. Neither he nor any of his associates owned land on the river at the time the company was incorporated. Subsequently, however, the defendants acquired the property on which their dam and works are situated. On the 19th August, 1904, one Comeau gave Leger a lease of the land on one side of the river for 25 years, with a right of renewal for a similar term. This lease was registered March 11, 1907, and though it is to Leger, it appears on its face to be for the benefit of himself and associates, and he says he holds the property for the benefit of the company. On the 14th December, 1903, one Kelley, the owner of the land on the opposite side of the river, executed a conveyance of it to the defendants, which was registered on the same day. There is no dispute as to the land on which the defendants' dam is being owned by them under these two conveyances, or that the land on both sides of the river, at this point, is comprised in the land included in them, thus making the defendants riparian owners of their dam as the plaintiff is of his. This bill was filed in December, 1906, and by it the plaintiff not only seeks damages for injuries alleged to have been sustained as the result of the defendants' operations; but also an injunction restraining the company from continuing such injuries in the future. He rests his right to this relief on two grounds. In the first place, he says, that the company, by its Act of incorporation, was only authorized to construct its dam subject to certain conditions which it has never performed. And in the second place, he says, that the defendants made an unreasonable and illegal use of the water by which he was deprived of his right to use the water for his mills, and in that way sustained a serious loss. Sub-sect. 4, sect. 4, of the defendants' Act of incorporation required the company, before erecting any of the dams, etc., to obtain the approval of the Lieutenant-Governor in Council to the plan and description of them, and before undertaking any work under the Act the company was to file a plan in the office of the Registrar of Deeds, the Secretary-Treasurer, and the Provincial

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Secretary. The section then provided that the company should give four weeks' notice in the Royal Gazette of the deposit of the plan, and thereupon the Lieutenant-Governor in Council might approve of the work, and then the company were authorized to proceed with it. These were the conditions put forward in the bill which it was said had not been complied with, and for that reason the defendants' works were altogether illegal, so far, at all events, as their Act of incorporation was concerned. It appears that there was some mistake or misapprehension as to the approval of the plans by the Lieutenant-Governor in Council, and in order to remedy it, an Act of the Legislature was passed in 1907 (7 Edw. VII., Chap. 117). This Act recites at some length the reasons which rendered the legislation necessary and then enacts as follows: "The Legislature of the Province of New Brunswick does hereby approve of the works of the said The Bathurst Electric and Water Power Company, Limited, and hereby enacts that this approval has the same force and effect as if passed by Order in Council on the 6th day of July, A. D. 1904, at the time of the mailing or presentation of the certificates of registration of plans and specifications." Mr. Teed has sought to give this section a wider effect than I think it should have. He contends that it was intended to approve of and legalize the company's dam and works as they then stood, that is on the 13th April, 1907, when that Act was passed. I do not agree in this contention. *Ex post facto* legislation like this is never construed so as to extend beyond what is necessary to cure the defect, unless the language plainly and expressly requires it: *European & North American Railway Co.* v. *Thomas* (1). I think the effect and the sole intention and object of the Act was to cure the defect as to the approval of the Governor in Council, and to remove that as a ground for maintaining this suit. The plaintiff did not see fit to discontinue it on the terms contained in the Act; and as the Legislature has declared the approval

(1) 1 Pug. 42.

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contained in the Act as having the same force and effect as if it had been given by Order in Council on the 6th July, 1904, I can only give effect to that declaration. The evidence shews that the plans were filed as required, that the necessary notice was given in the Royal Gazette, and the Legislature has cured all objections as to the approval of the Lieutenant-Governor in Council. So far, therefore, as the plaintiff's case rests upon the non-performance of these conditions precedent it must fail.

The substantial grounds of complaint involved in this case the plaintiff has set out in sections 9 and 10 of his bill, and it is necessary to see precisely the scope and effect of these sections, especially in view of the admission of some evidence to which I shall refer later on, and some of which was pressed in contrary to my opinion. Section 9 alleges that the defendants wrongfully kept and continued to keep their said dam across the river (that is, as I understand it, wrongfully, because it had been built without first securing the approval of the Lieutenant-Governor in Council, as is alleged in the preceding sections), and that the gates of the dam were kept shut and closed for long spaces of time, thereby obstructing the water of the river and preventing it from flowing to the plaintiff's mill dam in its usual and proper course, flow and current, and thereby preventing him from using his mill as he otherwise could have done, whereby he was injured. Section 10 is as follows: "The plaintiff further complains and alleges that the user by the defendants of the water of the said Tetagouche river by means of their said dam, and works connected therewith, is unaccustomed, unreasonable and injurious to the plaintiff. The defendants' dam is a very high and deep one, and capable of storing very large quantities of water. The machinery run by the water of the said dam of the defendants is only run during the night, and during the winter and the summer seasons of the year, when the machinery of the defendants is shut down and the sluiceway closed, which is always the case during the daytime, the water of the said river is prevented by the dam of the defendants from flowing in its usual

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and accustomed way into the dam of the plaintiff, and the plaintiff is thereby prevented from using and operating his mill for long spaces of time, and during long spaces of time during the daytime each day no water escapes from the dam of the defendants until the dam is full, and every day during long spaces of time at such seasons the plaintiff has not sufficient water in his dam to operate and run his mill by reason of the unaccustomed and unreasonable user of the water by the defendants." Section 11 alleges that by keeping the water from the plaintiff's dam, as set forth in sections 9 and 10, it was injured in the winter time by ice which formed in consequence; that he was prevented from operating his mill in the daytime for want of water and in consequence of the defendants' manner of holding it back and using it in and through their dam, and that the great weight of ice and snow, which had no water to support it, pressed and fell against his dam and injured it. These sections do not put forward in any way that the injuries and inconveniences of which the plaintiff complains as the groundwork of this suit, arose from or were in any way attributable to any faulty or unscientific construction of the defendants' dam or machinery, or that the dam was higher or of any different capacity, or that it varied in any respect from the plans on file. On the contrary, he said there were no plans on file and none had been approved of, and his complaint arises out of the unreasonable use of the water by means of the dam and machinery as they are, causing the ice to form in his dam and compelling him to shut down his mills in the daytime for want of water.

I think the case must ultimately turn, as the most of such cases do turn, upon the question whether or not the injuries of which the plaintiff complains arose from a user of the water of the river which as between the two riparian owners was unreasonable. That is a question of fact difficult to determine even where the circumstances are less complicated than they seem to be here. The plaintiff's Counsel strongly contended that, by reason of his dam having been used and maintained in its present condition for a period long beyond twenty years, during which

time he and his predecessors in title had enjoyed the user of the water without any interruption to its natural flow or diminution in its natural volume, he had acquired a prescriptive right to a continuance of that condition of things. I cannot see how any such question can arise here. If the argument is, as I understood it to be, that the defendants cannot, under any circumstances, for the purposes of their business, interrupt the flow of the water, then I cannot agree to it. As a riparian owner the plaintiff's predecessor in title, when he built the dam, used the water for his mill in the exercise of a common law right incident to the ownership of the land on which the dam stood. That was a right to have the stream flow to and through his land in its natural course and volume, subject to his reasonable use of it for domestic or extraordinary purposes. It was, however, always subject to a similar right in every other riparian proprietor. Each was entitled to this reasonable use of the water while passing through his land. It is only where some right to the use or flow of the water different from that which the common law confers as incident to the property that the twenty years' uninterrupted user as of right is required to sustain it. In *Dickinson* v. *Grand Junction Canal Co.* (1), Pollock, C. B., in delivering the judgment of the Court, says: "We consider it as settled law that the right to have a stream running in its natural course is, not by a presumed grant from long acquiescence on the part of the riparian proprietor above and below, but is *ex jure naturæ*, and an incident of property as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighboring proprietor, who cannot dig so as to deprive it of the support of his land." *Embrey* v. *Owen* (2), *Chasemore* v. *Richards* (3), and numerous other cases may be cited to the same effect. Neither this plaintiff, nor, so far as the evidence goes, any previons owner of the property, ever exercised or pretended to exercise any rights as to the user

(1) 7 Ex. 282. (2) 6 Ex. 353. (3) 7 H. L. C. 349.

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of this river other than those which at common law were incident to the ownership.

For a considerable portion of the time within which the injuries complained of took place the company was a riparian proprietor, and notwithstanding its incorporation by the Legislature, is entitled to all the privileges as to the use of the water of a riparian owner, unless the Legislature has curtailed them in some way: *Swindon Waterworks Co.* v. *Wilts Canal Co.* (1). The defendants here have certain powers conferred upon them by their Act of incorporation upon which they are entitled to rely as authorizing what they have done. The common law rights of riparian owners, *inter se*, as to the use of the water in rivers such as the one in question, have long since been settled. Each owner has the right to have the water flow to his land in its natural channel without material diminution in its volume or sensible change in its quality, and he is under an obligation to see that it leaves his land in the same way. He has, however, a right to the use of the water while flowing through his land for all ordinary and domestic purposes, and to a reasonable use of it for commercial or other extraordinary purposes as may be incident to the enjoyment of his property, and which do not work any material injury or annoyance to his neighbor below him who has an equal right to the subsequent use of the water. In the case just cited (*Swindon Waterworks Co.* v. *Wilts Canal Co.*), the House of Lords made a declaration as to the respective rights which the canal company had under certain Acts of Parliament and as a riparian proprietor. By the minutes of the decree, which will be found at page 715 of the report, it will be seen that the company's rights as a riparian owner were "subject to the ordinary and reasonable use of the said stream and waters by the riparian owner higher up upon the said stream." See *Embrey* v. *Owen* (2); *Keith* v. *Corey* (3); *Roy* v. *Fraser* (4); *Caldwell* v. *McLaren* (5); *Ward* v. *Township of Grenville* (6). Such being the relative rights of these

(1) L. R. 7 H. L. 697.
(2) 6 Ex. 371.
(3) 1 P. & B. 400.
(4) 36 N. B. 113.
(5) 9 A. C. 392.
(6) 32 Can. S. C. R. 510.

parties from the standpoint of riparian ownership, it is necessary to see in what way, if at all, those rights have been changed by legislation. Section 4, sub-sect. 1, authorizes the company, subject to such conditions and regulations as the Lieutenant-Governor in Council might thereafter impose, "to purchase, build, erect and maintain dams, sluices, waterways and water, electrical and steam power and light machinery and appliances, at one or more places on the Tetagouche river * * * and to build, erect and maintain all other buildings, erections and appliances necessary therefor." Neither in this section nor in any other part of the Act, so far as I have been able to get at the intention of the Legislature in the obscure mass of words in which it is concealed, is the company given any express authority to use the water, much less to use it in any extraordinary or special manner. There is, of course, the implied authority to use the water, because without that it would be useless to build the dam, and the object of the incorporation would be defeated. In the absence of any such special authority the company's rights as to the use of the water cannot be extended beyond that ordinary and reasonable use to which a riparian owner is entitled. Otherwise it would necessarily deprive the plaintiff and other owners on the river of rights as to the use of the water which they enjoy as incident to their property. The principal value of their properties would in that way be confiscated and without compensation. No such result can ever be brought about except by plain and positive language, or where there is a positive necessity for implying it. In *Vernon* v. *Vestry of St. James* (1), James, L. J., says: "If private rights are to be interfered with, they must be interfered with by express legislation." See also *Lamb* v. *North London Railway Co.* (2). So far as this plaintiff is concerned the Legislature seems to have been specially careful to protect his property from injury by the company's works. Their dams were required to be not less than a mile above the plaintiff's mill-pond, and his mill

(1) 16 Ch. D. 467. (2) L. R. 4 Ch. 522.

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property was exempted from the operation of the general sections empowering the company to expropriate lands for their purposes. There is nothing in the Act which expressly or by implication authorizes the company to use the water in any way which as between riparian owners would be unreasonable. To establish any such implication it would at least be necessary to prove that the powers given to the company could not possibly be enjoyed without the implied one. There is no evidence to sustain any such contention, neither is any such defence set up by the answer.

I think the evidence shews that in the use of the water for their works, the defendants have considered their own interests altogether and operated their plant without any reference whatever to the requirements or convenience of the plaintiff in regard to his mill. I do not mean that any damage which may have resulted to the plaintiff was caused wantonly or wilfully, for there is no evidence to warrant that, neither do I mean that they were acting otherwise than they thought was within their legal rights. They used the water at night, commencing when the requirements of their business made it necessary, and closing their works in the morning when their customers no longer required their light. They then stored the water until their dam was full again without regard to the length of time required for the purpose, and so on from day to day. At present the company is only selling light, and the power required to generate the electricity necessary for that purpose must necessarily be used at night. The volume of water required to produce this power necessarily changes from time to time according to the number of lights used by customers, and according to the season of the year. The usual number of lights in use in July last, when the evidence was given, was about 900 of 16 candle-power, included in which were 120 street lights which were kept turned on all night. The works are started in December usually about 4 p.m., but sometimes as early as 3.30 p.m., and do not shut down until about 9 a.m.—say seventeen hours. In July last, the manager, when giving his evi-

dence, said they started their works the night before (July 22) at 6.30 and shut down that morning about 6 o'clock—say eleven and a half hours; and occasionally they find it necessary to shut down for a time in the night for want of water. Godin says this happened several times in 1906. The plaintiff's grist mill, which seems to be the more profitable part of his property, is principally working from December to March, at the time of year when the greatest demands are made upon the company's works. During that period substantially all the wheat is ground, and it seems to have been necessary, in order to do it, to keep the grist mill running both day and night. The carding, which is done from July till October, as a rule is done in the daytime. The reason given for this is the insufficiency of the available artificial lights, and the danger of fire from lamps where there is so much inflammable material. The plaintiff says his grist mill was shut down from December 13, 1904, until the 28th March, 1905, which he makes 91 working days, and again from December 8, 1905, until April 5, 1906, which he makes 101 working days. He also says, that the carding mill was shut down in the two years 51 days, 25, I think, in 1905, and 26 in 1906. This is not a case where the complaint is as to a diversion of the stream or an abstraction of the water. All the natural flow of the river comes to the plaintiff's mill at sometime. And when the company's works are running, that is, during the night, there is plenty of water to supply the plaintiff's mills. The plaintiff complains that in the winter of 1905, he could not use his grist mill at all, and for that reason he bases his loss for that year on the theory that his mill would have been running for that period at its full capacity both day and night. It seems that in December, 1904, so soon as the water was turned into the defendants' dam it began to leak and continued to leak so badly that it never filled, so as to overflow, until the freshet came in the spring of 1905. It was repaired in August, 1905, shortly before Mr. Wetmore, the Government Inspector, visited it. In December, 1904, the company's dam, without any notice to the plaintiff, was opened and the water ran into the plaintiff's pond in such

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a way as to cause the ice to jam in the dam and the water to freeze so that the mill could not be operated at all, nor could it be repaired until after the ice had gone out and the spring freshet had subsided sufficiently for the purpose. Although previous to the freshet, the only water running in the daytime to the plaintiff's dam seems to have been what leaked through the dam, and which would be insufficient for any useful purpose, the plaintiff does not base his complaint altogether on that fact, but upon the effect of the ice formed as a result of the company's careless use of the water in opening their dam at one time and closing it up at another without notice. The mill became useless on account of the ice, but it was not shut down for want of water or an unreasonable use of the water except as I have mentioned. I think the company must be held liable for the damages incurred in 1905 by reason of the grist mill being closed. The plaintiff has not, I think, made out any case for an injunction, based on the damages sustained by his grist mill being shut down for these 91 days. The circumstances which caused it were exceptional and the injury was temporary and not likely to occur again. He can be fully compensated for whatever loss he has sustained by way of damages. As to the 101 days in 1906, the plaintiff admits that during that period there was plenty of water, in fact more than the natural flow of the stream, during the night while the electric plant was running, and that he could use his mills then, and in fact did so. So that in estimating his damages for this period he makes no claim for loss or detention of water at night. He, however, says, that during this period he could only run the grist mill for an hour in the morning, and that for the 51 days he could not run the carding mill at all. There is no direct evidence and but little evidence of any kind to cast a doubt as to the substantial accuracy of the plaintiff's statement. In August and September, 1905, Mr. Wetmore, the Government Engineer, and Peter Leger, a son of the president of the company, and at that time in charge of the works, took certain observations as to the effect of the company's operations on the water. Mr. Wetmore gave an

explanation of the nature of these observations which it is as well to repeat, so that his evidence may be understood. The company's dam is about 125 feet long, about 23 or 24 feet high, and when full the pond extends about a mile up river. Mr. Wetmore ascertained that the water became constant when there were 5 inches of water running over the wasteway—that is to say, the inflow and the outflow were then equal in volume, and the natural flow of the stream would be then running over the dam down to the plaintiff's mill. He arrived there on the evening of Monday, August 23, 1905, and took an observation at 7.30 that evening, when he found the water 3 inches below the level of the wasteway. On the following morning, August 24, he took a reading of the guage at 6.45 and found the water had fallen 5 inches as a result of the night's running of the plant, and it was then 8 inches below the level of the wasteway. He made hourly observations during the day, and it was not until 6.15 p.m. that the water became constant. So that from the Sunday previous, when the dam was repaired, until the following Thursday night, four days, the natural flow of the water never went to the plaintiff's mill in the daytime, and for three of these days there was no water at all. The electric plant was then running about eleven and a half hours a day. Mr. Wetmore made another observation at 7 a.m. on Friday, August 25, and found that the water had fallen $2\frac{3}{4}$ inches during the night, leaving an overflow of less than one-half the natural volume. It recovered itself at about 10 a.m. It is true that the low level of the water in the pond which Mr. Wetmore found on his arrival there on the 23rd May was largely due to the fact that in order to make the repairs to the dam on the Sunday previous, the water level was reduced some 8 feet, and it is equally true that when Mr. Wetmore was there the water in the river was low, from absence of rain. On the other hand the dam had just been repaired and there was no leakage, and the electric plant was only running eleven and a half hours a day, while in the winter season it would be running probably five hours longer, and the water in the river would be at

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times, at all events, as low as it was in August. These observations were continued by Leger up to September 27, with the exception of three days, but readings were only taken in the morning and evening. They are not valuable because when the natural flow was not going over the wasteway in the morning, there is nothing to shew how long that continued, or when the water in the pond became constant. Speaking generally, Leger's observations go to shew an improved condition of things in September, attributable, I should say, to a rise of the water in the river caused by wet weather, which the evidence shews set in at that time. The answer sets up by way of defence that the plaintiff's dam was old, leaky, and out of repair, and that if it had not been for the water thus wasted, he would have had plenty of water to run his mills. It is true that his dam was injured by ice in 1905, and by the drive of logs in 1906, and that it leaked badly in consequence. It was, however, repaired, and these occurrences have nothing to do with the detention of the water. It is also true that there is evidence that the dam leaked, but all the witnesses agree that such dams all leak, more or less. If the plaintiff's inability to run his mill for want of water was caused by the water being wasted by reason of the dilapidated condition of his dam, that would be an important factor in settling the question of damages for which the company would be liable, but I connot see that it affects the plaintiff's right as to the flowage or use of the water. It may be true, and I dare say it is, that there was a considerable waste of water by leakage through the plaintiff's dam, which, if stored, would have enabled him to run his mill longer than one hour a day, but making all due allowance for that there seems ample evidence to shew that the defendants' use of the water has been unreasonable. I do not refer to those minor annoyances or inconveniences which are not caused by detentions of the water or derangements in its flow by reason of necessary repairs or other circumstances of a temporary and exceptional character which are likely to arise in operating machinery by water power and seem almost necessarily incident to its use.

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These may cause loss, but they do not call for the interposition of this Court. If they do not come within the rule which Bramwell, B., in *Bamford* v. *Turnley* (1) calls the rule of "give and take, live and let live," they involve simply a pecuniary compensation: *Ball* v. *Ray* (2); *Attorney-General* v. *Cole* (3).

It is unnecessary to cite cases shewing the various considerations which are involved in this question of "reasonable use." In *Davis* v. *Winslow* (4), which has been more than once cited with approval in this Court, a long list of them is given, to which may be added the state of mechanical and manufacturing advancement; or, as Shaw, C. J., puts it in *Thurber* v. *Martin* (5), "the state of improvement in the country in regard to mills and machinery and the use of water as a propelling power." See also *Keith* v. *Corey* (6). In *Barrett* v. *Parsons* (7), it was held that "an upper mill proprietor of a more ancient mill has not a right as against a more recent mill owner below to use the water as his own convenience or interest may dictate, but is bound to use it in a reasonable and proper manner, and a jury may find that the constant use of the water entirely by night and a detention of it during the day to be an improper and unreasonable use." The evidence shewed that the water was used there much the same as in the present case. *Gould* v. *Boston Duck Co.* (8) was a somewhat similar case, where the detention was in consequence of low water caused by extreme drought. Shaw, C. J., sums up the decision as follows: "As there was no detention of the water in ordinary stages of water, and no other detention of the water by the defendants in times of extreme drought than what was necessary to the reasonable use of their own mills, we are of opinion that it was not their duty, in point of law, to open their gates or leave them open without using the amount to such extent as they might, merely

(1) 3 B. & S. 65.
(2) L. R. 8 Ch. 467.
(3) [1901] 1 Ch. 205.
(4) 51 Me. 291.
(5) 2 Gray, 394.
(6) 1 P. & B. 400.
(7) 10 Cush. 367.
(8) 13 Gray, 442.

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because the plaintiff's works were of such a character that his necessities required such flow of the water." *Keith* v. *Covey* was also a case of detaining the water for the purpose of filling the pond in a case of drought, and it was admitted that the detention was not unreasonable.

So far I have discussed this case without reference to the expert testimony given at the hearing, subject to Mr. Teed's objection, some of which at all events was pressed in contrary to my own opinion. The object of the evidence was to shew that the dam was not in accordance with the plans approved of by the Governor in Council, and therefore illegal, and also to shew that the dam and machinery were constructed or set up in an unscientific manner, which resulted in a much more excessive use of the water than was requisite for the company's business. Objection was taken to this testimony on the ground that no such case was set up in the bill and the defendants were altogether unprepared to meet it. I thought the objection well taken and so stated, but at the same time said that if an application were made to amend I would grant it subject to terms, one of which would be to adjourn the hearing so as to enable the defendants to meet the amended case. The plaintiff's Counsel took time to consider what they would do, and, after consultation, they stated that they were of opinion the evidence was admissible as the case stood and did not require amendment, and that they would take the responsibility of its admission. I then admitted the evidence, and Mr. Teed declined cross-examining the witnesses, as he had no means whatever of being instructed for the purpose. The rule which prevails in this Court by which in bills the facts upon which the plaintiff relies are to be stated is too well known to require the citation of authorities. Section 30 of the present Equity Act, chap. 112, C. S. 1903, provides that the "bill shall contain a brief narrative of the material facts upon which the plaintiff relies," and in that form has existed in a statute in this Province since 1854. It is the rule which prevails as to pleadings under all Judicature Acts. See *Daniell* Ch. Pr. 368; *Odger's* Practice and Pleadings, Rule at page 79;

Byrd v. *Nunn* (1); *Brook* v. *Brook* (2); *Smith* v. *Halifax Banking Co.* (3). It is true that the plaintiff alleges that the defendants wrongfully detained the water and illegally maintained the dam, but as a matter of pleading under Equity rules these words are of themselves unimportant. They are, as Sir George Jessel calls them in *Day* v. *Brownigg* (4), only "epithets of abuse." The conclusion of law is not the important question, but the facts relied on as constituting the wrong or illegality complained of. And where facts are stated, the presumption is they are the only facts relied on for the purpose. Were it not so, a defendant would never know what case he had to meet, and the only object of the pleading would be defeated. The evidence, however, is in, and I must give such effect to it as I think it requires. Mr. Wetmore says the dam, according to the plan, is 21 feet. Mr. Daw, I think, says it is 20 feet, and the actual height of the dam is said to be about 24 feet. Admitting, for the purpose of the argument, that this difference amounts to a substantial disregard of the Act of incorporation, and that the dam has no legislative authority for its erection or maintenance, the objection, I think, ceased to exist as soon as the company became the riparian owner of the land on which the dam was erected. It was not *per se* a nuisance or an illegal structure, and the company were in no way limited by their Act of incorporation to any rights or privileges which as riparian owners they might have. It is argued that this issue was raised by the defendants themselves, as they alleged in their answer that the dam was built according to the plans. If there was any such allegation that might be a good answer, but I have not been able to find any. The bill alleges that the dam has a large storage capacity, and in order to obtain proof of that fact the plaintiff interrogated the defendants as to its dimensions, and in reply they stated its height. That is all I can find in the answer on the subject. Mr. Daw, who gave testimony, is an hydraulic

(1) 5 Ch. D. 784; 7 Ch. D. 284.
(2) 12 P. D. 19.
(3) 1 N. B. Eq. 17.
(4) 10 Ch. D. 302.

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engineer, and is apparently a man of experience and standing in his profession. He resides in Montreal. He made and produced in Court a model made to scale of the dam, shewing the location of the sluiceway and other details. He pointed out that the sluiceway was not properly constructed nor placed in the part of the dam indicated for the purpose on the plan. He described the practical advantages of letting the water out of the dam when repairs or other causes might require it, which existed in the one case and not in the other, and which enabled the water to be controlled so as not to injure or inconvenience the mill below. He also pointed out what he said was an improper arrangement of the suction pipe, and explained how the turbine and machinery as placed used more water than was necessary to develop the horse-power required for the defendants' business. He did not say that the defendants used more water than was necessary with the machinery as they had it. On that he expressed no opinion, but he gave it as his opinion that the machinery was inefficient for the reasons he gave, and as a result of it he said the water did not flow to the defendants' mill at so early an hour in the morning as it would. He said: "The amount of water used from the upper dam would be less, consequently the upper dam would recover its proper position at an earlier hour in the day. As it is now, the water has to go down to an unusual extent, and that has to be filled up before the water can pass out of the spillway and pass down to the complainant. If the proper machinery was in there would not be such a large usage of water, and the dam would recover itself earlier in the morning, so that the plaintiff would have the use of the normal flow at an earlier time of the day."

Mr. Bradley, a civil engineer, residing at Montreal, was also a witness. He is a man of considerable experience; he is engineer with the Ambursen Hydraulic Construction Company, and has had to do with the Chambly dam and other works of that kind. From data derived from the evidence and his own observations, he gave it as his opinion that the defendants are using water representing

170 horse-power, where 100 horse-power is all that is required and more than is actually used in practice to generate the electricity necessary to run 1,000 lights of 16 candle-power He says this large loss of water can only be accounted for by the inefficiency of the turbine in some way. This evidence goes to shew that the injuries of which the plaintiff complains are due in part, if not altogether, to causes entirely within the defendants' control, and which can be removed without in anyway interfering with their business. In my opinion it is not necessary for the plaintiff to go that length in order to make out his case, because, if the operations of the defendants' mill result in a nuisance to the plaintiff as affecting the enjoyment of his property, they must find some way of abating it. In *Baily & Co.* v. *Clark, Son & Morland* (1), Stirling, L. J., says: "The defendants' right to use the water is limited by this, that they must not use it as to cause sensible injury to the plaintiffs. Therefore the plaintiffs coming here to complain of the defendants' user, must prove sensible injury. Two classes of evidence have been adduced, as in all cases of nuisance. There is, first, what has been termed direct evidence of injury; and secondly, the evidence of experts and other persons who have not worked the mill, but have paid visits to it and drawn conclusions from what they have seen there. In my opinion the first class is that which we must regard, at any rate to begin with. I do not say that expert evidence is to be excluded; it is most valuable and useful, if once you arrive at the conclusion that the direct evidence establishes the existence of an injury to the plaintiffs' rights, for the purpose of tracing the origin of the injury to the defendants' operations. But, if the direct evidence of injury is unsatisfactory, it requires, to say the least, very strong expert evidence to prove a case for an injunction." In the present case there is no doubt that the plaintiff's injuries were directly caused by the defendants' method of using the water, and if I am correct in thinking that the direct evidence shews this was

(1) [1902] 1 Ch. 670.

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an unreasonable use, it seems immaterial whether it was caused from the use of inefficient machinery or the wilful or negligent use of efficient machinery. It strengthens the case of course where you not only shew an unreasonable use of the water by the defendants, but are able to go to their dam and point out the actual cause of it, especially when the cause can be remedied, but it does not seem to me absolutely essential to it.

Mr. Teed contended that the defendants were authorized by the Legislature to dam the river and use the water-power to operate their plant, and therefore they could not be liable for any injury which resulted to the plaintiff. No doubt, where the Legislature has authorized specific acts to be done, that is an answer to any action for damages resulting from such acts, except in case of negligence. See *Rex* v. *Pease* (1); *Vaughan* v. *Taff Vale Railway Co.* (2); *Hammersmith Railway Co.* v. *Brand* (3). An authority to build a dam and operate an electric light plant is no authority to permanently injure your neighbor's property or subject it to a continuing nuisance, unless such a result cannot be avoided, and the onus of shewing that is upon the party claiming the right. This is the rule with reference to public corporations, and it applies with as much if not greater force to companies like the defendants, designed solely for the profit of private individuals. See *Attorney General* v. *Colney Hatch Lunatic Asylum* (4); *Attorney-General* v. *Hackney Local Board* (5); *Attorney-General* v. *Birmingham Corporation* (6); *Rapier* v. *London Tramways Co.* (7). There was no attempt here to prove that the defendants could not have avoided what they did. They have authority to build storage dams, acquire land and water rights by expropriation, and do other things, all of which I must assume they considered necessary or useful for their purposes. There is nothing to shew that by the use of some of these powers all reason-

(1) 4 B. & Ad. 30.
(2) 5 H. & N. 679.
(3) L. R. 4 H. L. 171.
(4) L.R. 4 Ch. 146.
(5) L. R. 20 Eq. 626.
(6) 4 K. & J. 528.
(7) [1893] 2 Ch. 588.

able cause of complaint might not have been avoided. In *Shelfer* v. *City of London Electric Light Co.* (1), Lindley, L. J., says: "I will add further that it is clearly for the defendants to prove, if they can, the truth of their assertion that it is impossible for them to carry on their business without creating a nuisance. The evidence, as it stands, does not satisfy me that this is really true. The defendants have not proved that they cannot supply electricity properly if they multiply their stations and diminish the power of their engines at each station. It is not shewn that they cannot, in this way, avoid creating a nuisance at any of their stations." In *Geddis* v. *Proprietors of Bann Reservoir* (2), Lord Blackburn is thus reported: "For I take it, without citing cases, that it is now thoroughly well-established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence; but an action does lie for doing that which the Legislature has authorized if it be done negligently. And I think if by a reasonable exercise of the powers, either given by statute to the promoters or which they have at common law, the damage can be prevented, it is within this rule 'negligence' not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law."

Coming now to the remedy, what are the considerations which should govern in such cases? The defendants' Counsel very strongly contended that under no circumstances should an injunction be granted, and he based his argument, not only on what he alleged to be the general practice in such cases, but upon a special provision in the company's Act of incorporation. Sub-sect. 3 of sect. 4 enacts that the "company shall be liable to pay damages to any owner or owners of property injured by the construction or maintenance of such dam or dams, or the construction or maintenance of the works provided for in this section." There is no provision for the recovery of damages resulting from an unreasonable or unauthorized use of the water.

(1) [1895] 1 Ch. 287. (2) 3 A. C. 455.

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That was unnecessary, because as I have already pointed out, the Act does not give the defendants any special right as to the use of the water, and the plaintiff's remedy against the company by action for damages incurred by reason of any unreasonable use of the water remains as it always was. There is a distinction between damages recoverable as the direct result of the erection of a dam across a stream, and the consequential damages resulting from an unauthorized use of the water by means of the dam. The defendants contended that this section covered both descriptions of injury; and for that reason coupled with the fact that to some extent, at all events, the company was incorporated for public purposes, it was said that the recovery of damages was intended as the sole remedy and an injunction would not be granted. I give the section a more limited construction, and I think it was intended to preserve the right of action for damages resulting from the construction of the work, and which, but for such express reservation, it might be contended was necessarily taken away by the authority to construct the work conferred by the Act without providing for compensation for any injury caused by it. For the purposes of this case, it is, I think, unimportant which view is the correct one. It is true that this company has a power of expropriating land and water privileges, and that it has one or two other concessions not usually conferred upon private business corporations. There is, however, no duty to the public imposed upon it. It has no exclusive powers, and it is not under any obligation to supply light to any one. If it refused to do so, I do not see by what process or at whose instance it could be compelled. The company's business is simply a commercial venture for the pecuniary benefit of those who have chosen to risk their money in it. It is true that it is supplying light for the streets of the village and town of Bathurst, and for both public and private houses in these places, and some inconvenience would necessarily be caused to many if they were deprived of the use of the light even for a short time. But that is no good reason for subjecting the plaintiff to a continuous and substantial loss in

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the enjoyment of his property, even though he may have the right to bring an action from time to time, and recover such damages as a jury may assess. Under the old practice, the right was first established by an action at law, and then this Court interfered by injunction where the injury was continuous and substantial. Since the enactment now contained in sect. 33 of the *Supreme Court in Equity Act* (chap. 112, C. S. 1903) and which was copied from a section in *Lord Cairns' Act*, 21 & 22 Vict., c. 27, this Court, in a case like this, has the power to award damages in addition to, or substitution for an injunction. In *Shelfer* v. *City of London Electric Lighting Co.* (1), a case in many respects similar to this, Lindley, L. J., in alluding to the effect of *Lord Cairns' Act*, says: "But in exercising the jurisdiction thus given, attention ought to be paid to well settled principles; and ever since *Lord Cairns' Act* was passed, the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (*e. g.*, a gas or water company, or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it. Courts of Justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation and the deprivation of people of their rights with or without compensation. *Lord Cairns' Act* was not passed in order to supersede legislation for public purposes, but to enable the Court of Chancery to administer justice between litigants more effectually than it could before the Act." The Lord Justice cites *Martin* v. *Price* (2) and many other cases in which this view of

(1) [1895] 1 Ch. 288. (2) [1894] 1 Ch. 276.

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Lord Cairns' Act was acted upon. In the case from which I have just quoted it appeared that six and a half miles of the principal thoroughfares in London, the Royal Exchange, Bank of England, Mansion House, Guildhall, and some 1500 offices were lighted by electricity generated at the defendants' works. Kekewich, J., refused an injunction on much the same grounds as have been put forward here, but on appeal he was overruled and the injunction went.

In *Broadbent* v. *Imperial Gas Co.* (1), it appeared that noxious gases which issued from the defendants' works injured the flowers, fruits and vegetables of the plaintiff, who was a market gardener carrying on his business in the vicinity of the gas company's works. This company supplied gas to certain parts of London and its suburbs. Lord Campbell says: "It is argued that it is highly inexpedient in this case to grant an injunction. Why, this is the very case for an injunction, because it is a case in which an action cannot sufficiently indemnify the party who is injured. How can he prove to a jury the exact quantity of pecuniary loss he may have sustained? He may be able to shew the value of the flowers and trees that have been destroyed, but how can he shew the irreparable injury done to his trade by his customers leaving him, whom he may find it most difficult or impossible to get back. Then we are told that an action is to be brought, I know not how often, I suppose an annual action, that actions are to be multiplied indefinitely. I cannot but think that this would be a denial of justice to a person who has proved the injury he has sustained, especially when the party of whom he complains still obstinately persists in doing what produces effects so injurious to him. Well, then, what is the great inconvenience that is to arise to the appellants? It is said they have a duty to perform to the public. I consider that this is to be regarded as a mere commercial adventure; they have the liberty to make these works for their own profit, but no indictment would lie against

(1) 7 DeG. M. & G. 436; on appeal, 7 H. L. Cas. 600.

them for omitting to do so—no action could be maintained against them if they could not supply gas." This language seems entirely applicable to the present case. See also *Saunby* v. *London (Ont.) Water Commissioners* (1); *Leahy* v. *Town of North Sydney* (2); *Colwell* v. *St. Pancras Borough Council* (3). If I have taken a correct view of the evidence in this case there are ample reasons for the plaintiff to ask for an injunction and ample reasons for this Court to grant it. The damage to the plaintiff is substantial and continuous, and there is nothing to shew any intention on the defendants' part of changing their method of operating their works. In addition to this, the expert testimony at all events shews that the loss and inconvenience to the plaintiff can easily be greatly diminished by a simple readjustment of the company's machinery, and there seems good reason for thinking that they might be altogether obviated by an exercise of some of the powers conferred upon the company by the Legislature.

The plaintiff has made a claim for damages amounting to $1,244 for the two years, distributed as follows: Loss on the grist mill, $655 for 1905 and $334 for 1906, and $255 for loss in the carding mill for the two years. The first amount is arrived at in this way. The whole capacity of the mill for 24 hours is put at 72 bushels, which gives 6,552 bushels, worth $1 a bushel, of which the plaintiff was entitled to one-tenth, or $655. It is obvious, however, that the mill never ran for 91 consecutive working days for the whole 24 hours a day, and that basis of calculation cannot be accepted. Sixty bushels a day would, I think, be a fair allowance, which would make the damages $540.60. The $334 for 1906 is computed on the same basis, deducting 12 hours for the night and one hour a day during which the mill was worked. Taking 60 bushels as a fair average for a day of 24 hours, and deducting the 3,000 bushels which the plaintiff actually ground, and an allowance for the loss of water by way of leakage in the plaintiff's dam, I think $250 would be a proper amount

(1) [1906] A. C. 110. (2) 37 Can. S. C. R. 465.
(3) [1904] 1 Ch. 707.

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for 1906. The amount of wool carded in 1904 was 5,067 lbs. In 1905 the mill carded 3,672 lbs., shewing a difference of 1,395 lbs., which for the two years at 5 cents per lb., amounts to $139.50. I therefore assess the damages up to the commencement of the suit at $935.50.

It was made a distinct ground for relief in the bill that the defendants' dam was to have a fishway in it, and that it had been built without one. The plan approved of by the Governor in Council does not shew a fishway, but the memorandum of approval endorsed on the plans by the government engineer is as follows: "Approved, provided a suitable fishway is constructed in connection therewith to the approval of the Department of Public Works of New Brunswick." Section 9 of the defendants' Act of incorporation makes it incumbent upon the company to put such a fishway in the dam as may be required by the Lieutenant-Governor in Council or by any other lawful authority. There never has been any order in Council or by the Public Works Department as to such fishway; and if the matter is under the control of the Dominion authorities, section 46 of chapter 45, R. S. C., 1906, provides ample means for the plaintiff to secure the fishway if it is deemed to be necessary in the public interests. At all events it is not a matter with which this Court, on any evidence now before it, would interfere.

There will be an order assessing the damages sustained up to the commencement of the suit at $935.50, and in addition an injunction in the usual terms restraining the defendants from unreasonably using the water, not, however, to issue before January 1, 1908. The $935.50 will be payable within two months from service of this decree on the defendants. Defendants to pay costs.

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October 11.

Company—Sale of assets—Dissenting shareholder—Injunction.

The holders of the majority of the shares in the capital stock of a company authorized the selling of its property in order to pay its debts:—

Held, that the sale should not be enjoined at the instance of a dissentient shareholder.

Motion on notice to continue an *ex parte* interim injunction order restraining the defendant company and the defendants, James P. Sherry, A. D. Richard and Joseph A. Marvin, from selling or attempting to sell or completing a sale of mining property of the company situate at Maccan, Cumberland County, Nova Scotia. The defendant company was incorporated under *The New Brunswick Joint Stock Companies' Act* by letters patent bearing date November 10, 1902, and has its head office at Moncton. Its capital stock consists of 190,000 shares of the par value of $1.00 each, of which 100,000 shares have been issued. Of these the plaintiff holds 29,040 shares, and the defendant Sherry, the president of the company, 64,000 shares. A special general meeting of the company was called by order of the directors for August 24, 1907, for the purpose of considering any tender or offer to purchase the property of the company that might be made, and in case of sale to wind up the company's business. The plaintiff, by his bill, stated that he objected to a sale being made, on the grounds that the property was worth $60,000, that the market was unfavorable for a sale, that it was intended to sell at a sacrifice price, and that the defendants, Sherry and Richard, intended to buy in the property for themselves. He claimed that the company's liabilities would not exceed $1,000, and that there was no necessity for selling. From the affidavits of the defendants it appeared that in 1902 the defendant Sherry and one Frederick W. Givan (now deceased) purchased a two-third interest in the company's property, then

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known as the Jubilee Coal Mine, for $15,000, each of them contributing $7,500, the remaining one-third interest being held by the plaintiff; that the defendant company was thereupon formed and the mine transferred to it; that the company operated the mine thereafter down to February, 1907, Sherry and Givan making large advances for the purpose. The defendant Sherry, being then unwilling to make further advances, it was arranged that the plaintiff should take over the management of the mine for two months on his own account, he to pay all bills contracted by him and to reimburse himself from the output of the mine. This arrangement was subsequently extended to June 28, 1907, when the mine was shut down; the plaintiff had made default in paying miners' wages, and liens had been put by them upon the property. It was also set up that the plaintiff had contracted other liabilities for which the company was held responsible; that no profits had been made by the company, and that in addition to its other liabilities the company was indebted to Sherry in upwards of $10,000 for advances made by him in developing and operating the mine. At a company meeting, held July 27, 1907, stockholders holding a majority of shares in the capital stock of the company passed a resolution authorizing the raising of money from the sale or hypothecation of the company's stock or by mortgage of its property for the purpose of paying the company's debts, and these measures failing that the company's property be sold, any offer obtained, however, to be submitted to a further meeting of the company. The defendant Sherry tendered $8,500 for the property, and the meeting called for August 24, was for the purpose of dealing with it. It appeared that efforts had been made to sell the property, and that no other tender than the one made by Mr. Sherry could by obtained; that he was pressing for payment of amount due him by company, and that the shareholders, other than the plaintiff, were desirous of selling the property in order to meet its liabilities and to wind up its affairs.

Argument was heard October 8, 1907.

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M. G. Teed, K. C., for the plaintiff.

H. A. Powell, K. C., for the defendants.

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Now that the facts on this motion are fully before me, the only question which seems of much importance is whether or not a private business corporation, such as the defendant company is, can, under the circumstances disclosed by the affidavits, dispose of its property without the unanimous consent of the shareholders. The object of selling is to raise money to pay the company's debts. Admittedly it has not been a profitable business, and though the plaintiff objects to the proposed sale being carried out, it is more on the ground of the amount offered not being large enough than any other. There are two or three sections of the *New Brunswick Joint Stock Companies' Act*, Chap. 85, C. S., 1903, under which the defendant company was incorporated, to which reference should be made. Section 35 provides that the directors shall have full power to administer the affairs of the company and to make any description of contract which the company can legally make. By section 31 it is provided that at all general meetings of the company each shareholder shall have as many votes as he has shares, and that all questions proposed for consideration of the shareholders shall be determined by a majority of votes represented at the meeting, the chairman having a casting vote. There is nothing in the Act which prohibits this company from doing what it proposes to do, and there is no doubt that a large majority of the shareholders representing a large majority of the shares are in favor and have voted in favor of a sale. Unless, therefore, it can be demonstrated as a proposition of law that this is one of the cases where the majority does not bind the minority, and to which section 31 has no application, I do not see why the sale should be restrained on this ground. In *Australian Auxiliary Steam Clipper Company, Limited* v. *Mounsey* (1), a question arose as to the power of the directors

(1) 4 K. & J. 733.

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of the company to mortgage one of its vessels in order to raise money required for the purpose of its business. The directors there had precisely the same power which section 35 gives directors in companies incorporated by our Act. Acting for the company, they had borrowed the money on the security of the vessel. Wood, V.-C., says: "It was argued that it was not such an act; first, because in any partnership a majority of the partners would have no power to bind a minority by executing a deed; that the moment a deed under seal is required, the power of a majority is at an end. But that argument overlooks this most important distinction, that in an ordinary partnership firm the firm is not a body corporate; in the present case the plaintiff company are a body corporate. The question to be determined is, what are the powers of such a body? And it is clear that a majority of the members of a body corporate must have powers of this description, because except through the medium of a majority no incorporated company can act. I am not now considering the powers of a majority of a body corporate to effect a dissolution; that is a matter not falling within the scope of the corporate business. This is an act clearly falling within the scope of the corporate business, and is one which the company must clearly have the power to do. Otherwise, if a ship were once upon the register, it might be impossible to get her off; she might rot before it would be possible for the company to sell or exchange her." It cannot, I think, be contended that making provision for the payment of the debts of a company is not a legitimate part of the duties of directors in managing the company's affairs, and so long as the property of the company remains liable for its debts it cannot surely be that one dissentient shareholder can prevent a disposal of the property in order to realize the money necessary for the payment of the debts and compel it to be sacrificed at sheriff's sale. *Morawetz*, sect. 240, says: "It is the duty of the directors of a corporation to pay its debts, and they may apply all of the corporate assets to this end, although the corporation may thus be disabled from carrying on its business."

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Mr. Powell has handed me a note of several cases on this point from which I take the following: *Hovey* v. *Whiting* (1); *Sargent* v. *Webster* (2); *Ex parte Birmingham Banking Co.* (3). In the present case the directors do not seek to make a sale without consulting the shareholders. There is no evidence that the majority of the shareholders who favor the sale are acting with any other motive than that of disposing of the property for the purpose of paying its debts. The plaintiff suggests that it is being sold so as to "crowd him out," as he calls it, and it is possible that there are differences between him and the other shareholders, which render any harmonious working between them impossible. But there is nothing in the evidence to shew this to be a motive on the part of the defendants any more than there is to prove that the plaintiff's motive in filing the bill was to compel the other shareholders to buy out his shares at his own price. If the plaintiff thinks the figures at which it is proper to sell the property are so far below its value, it is quite competent for him to give more and thus benefit everyone. It seems to me these authorities shew that the abstract proposition that the whole of the assets of a private business corporation cannot, in the absence of all prohibitive enactment or agreement, be disposed of except by the consent of every shareholder, cannot be sustained. In circumstances like those of the present case other power exists; whether it shall be exercised or how it shall be exercised are not questions of power but questions of management. And in the exercise of the power, in the absence of fraud, the majority must rule. In reference to the alleged irregularities in the election of directors, appointment of a secretary, giving notice, and other matters of a similar character, I think they are all such irregularities as can be cured and ratified by the shareholders themselves, and so long as the company, as such, does not complain, it is not competent for a shareholder to do so. *Foss v. Harbottle* (4), which I mentioned at the argument, I think fully meets all these objections.

The motion to continue the injunction must be refused and with costs.

(1) 14 Can. S. C. R. 515.
(2) 13 Met. 497.
(3) L. R. 6 Ch. 83.
(4) 2 Hare, 461.

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October 18.

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Landlord and Tenant — Covenant to leave premises in repair — Lien upon lessee's machinery — Insurance by lessee — Fire — Re-instatement of premises — Application of insurance money — Act 14 Geo. III., c. 78, s. 83 — Insolvency — Unliquidated damages — Admission of to proof — Lumber operator — Advances to upon the security of logs — Bank Act, c. 29, s. 76, R. S. C. — Sale of lumber to be manufactured — Advances by purchaser — Lien on logs.

A lessee covenanted for himself and assigns that buildings of the lessor on the premises at the date of the lease would be left on the premises in as good repair as they then were; also that machinery of the lessee would not be removed from the premises during the term without the lessor's consent, but the same should be held by the lessor as a lien for the performance of the lessee's covenants and for any damage from their breach. Under a deed of assignment for the benefit of the lessee's creditors the lease became vested in the trustees. A fire subsequently occurring, which destroyed the buildings and machinery, insurance on the latter was paid to the trustees. The lessor demanded of the trustees that the insurance be applied to re-instating the buildings or the machinery. By Act 14 Geo. III., c. 78, s. 83, insurance companies are authorized and required, upon request of a person interested in or entitled unto a house or other buildings which may be burnt down or damaged by fire, * * * to cause the insurance money to be laid out and expended towards rebuilding, re-instating or repairing such house or buildings:—

Held, (1) without deciding whether the Act was in force in this Province, or not, that the lessor was not entitled to the benefit of it, the Act not applying to machinery belonging to a lessee, and the lessor not having made a request upon the insurance company, as provided by the Act.

(2) that even had the insurance been upon the buildings, the lessor would have had no equity to it, there being no covenant by the lessee to insure for the former's benefit.

(3) that the lessor was not entitled to prove for damages against the estate with respect to the covenant to leave the premises in repair, the term not having expired.

A bank made advances to a lumber operator upon the security of an agreement between him and a trustee that he should sell and deliver a specified quantity of logs to be cut by him, to the trustee, who should have the property therein as from the stump, and who should upon delivery pay for the same by, *inter alia*, paying the bank amount of its loans:—

Held, that the security was void under sect. 76 of the *Bank Act*, c. 29, R. S. C.

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By agreement by which E. agreed to sell a specified quantity of lumber to be manufactured by him, to M., it was provided that the latter should have a lien thereon, and upon the logs for the same, for all advances on account made by him. Advances were made under the agreement, when S. assigned for the benefit of his creditors. None of the lumber had then been manufactured, and while E. had in stream or in booms his season's cut of logs, none had been set apart in order to carry out the agreement:—

Held, that M. had not a lien upon the logs for his advances.

Bill for a declaration upon questions arising in the administration by assignees of the estate of Richard A. Estey, an insolvent. The facts sufficiently appear in the judgment of the Court.

Argument was heard September 25, 1907.

A. O. Earle, K. C., for the defendant George McKean:—

The assignment was made by Estey under a resolution of his creditors providing that his subsisting contracts should be carried out. The defendant was a party to the resolution and assented to it and to the assignment because of that provision. To now decline to recognize it would be a breach of faith. The *Bills of Sale Act* does not apply. It expressly exempts from its operation contracts and transfers made in the ordinary way of business. The transaction between the defendant and Estey was not a loan of money upon the security of logs, but was a purchase by McKean of so many logs out and out. The money having been advanced for the purpose of getting them out, an equitable lien in our favor at least attaches to them. If it is considered that the trustees are entitled to the logs they must take them subject to the lien.

A. S. White, K. C., and *A. P. Barnhill*, K. C.; for the defendant John E. Moore:—

The contract between Moore and Estey was one for work and labor. Moore held the timber lands, and the contract was that Estey should cut from them and deliver the cut to Moore, in St. John. The property in the logs, therefore, from the stump to the delivery was in Moore. The

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question is not one of lien. Besides being his property the logs were never out of his possession. His property in them was indicated by his mark. No third person could have obtained a good title as against him. Being his property a bill of sale was unnecessary.

J. W. McCready, for People's Bank of New Brunswick:—

Under the *Bank Act*, chap. 29, R. S. C. 1906, banks may advance money upon the security of lumber. The bank advanced $8,000 to Estey for the purpose of getting his lumber out. It is not necessary that the security should be in the form prescribed in the Act. See sect. 88, sub.-sect. 5, of Act. The security may be taken in the name of a trustee. See *Lamoureux* v. *Molleur* (1). If it is considered that the provisions of the Act are to be strictly construed, our failure to comply with them does not prevent the property in the logs passing to us. See *National Bank of Australasia* v. *Cherry* (2); *Rolland* v. *La Caisse d' Economie Notre Dame de Quebec* (3).

A. I. Trueman, K. C., and *W. H. Trueman*, for the defendant Frederick P. Thompson:—

The fire took place while the defendant assignees were assignees of the lease and were in occupation of the demised premises by virtue of it. The insurance money stands in the place of the boilers, engine and machinery, and the lien of the lessor upon them attaches to the insurance money. See *Garden* v. *Ingram* (4); *Parry* v. *Ashley* (5). Such lien is paramount to the claims of general creditors: *Joyce* on Insurance (6). If the Act 14 Geo. III., chap. 78, sect. 83, is held to be applicable to this Province, the landlord is entitled to have the machinery reinstated. The lease created a lien upon the machinery for the fulfillment of the lessee's covenants. The machinery thus formed part of the realty.

(1) Cassels' Dig. 71.
(2) L. R. 3 P. C. 307.
(3) 24 Can. S. C. R. 405.
(4) 23 L. J. Ch. 478.
(5) 3 Sim. 97.
(6) Vol. 4, sect. 3523.

Apart from the terms of the lease, being fixtures they could not be removed. See *Argles* v. *McMath* (1). By Act 14 Geo. III., chap. 78, sect. 83, insurance offices are "authorized and required upon the request of any person or persons interested in or entitled unto any house or houses or other buildings which may be burnt down, demolished or damaged by fire, or (without such request) upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings, shall have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating or repairing such house or houses or other buildings so burnt down, demolished or damaged by fire, unless the party or parties claiming such insurance money shall, within sixty days next after his, her or their claim is adjusted, give a sufficient security to the governors or directors of such insurance office that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be in that time settled and disposed of to and amongst all the contending parties to the satisfaction and approbation of such governors or directors of such insurance office respectively." This enactment is not limited to the metropolitan district, but has been held applicable to the whole kingdom. See *Ex parte Gorely; re Barker* (2). It must be admitted, however, that there are other decisions which question the applicability of the Act to any part of the United Kingdom outside of England. In *Stinson* v. *Pennock* (3), and in *Carr* v. *Fire Association* (4), the Act was held to be in force in Ontario. The Act is applicable to conditions in this Province, and should be held to extend here as part of the common law. For objects of Act, see *Porter* on Insurance (5), citing *Castellain* v. *Preston* (6) and *Niblo* v. *North America Insurance Co.* (7). The notice mentioned

(1) 26 O. R. 224; 23 A. R. 44.
(2) 11 L. T. N. S. 319.
(3) 14 Gr. 604.
(4) 14 O. R. 487.
(5) 4th Ed., pp. 284, 285.
(6) 11 Q. B. D. 380.
(7) 5 Sandf. N. Y. Ch. 551.

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in the Act is not obligatory. In *Ex parte Gorely* (*supra*) the insurance money was claimed by the landlord after it had reached the hands of the debtor's assignees. The Act is not limited to buildings, but applies to fixtures which form part of the freehold. See *Ex parte Gorely* (*supra*), and *Carr* v. *Fire Association* (*supra*). It is not necessary in order to claim the benefit of the Act that the lease should contain a covenant on the part of the tenant to insure for the benefit of the lessor. See *Stinson* v. *Pennock* (*supra*). The covenant with respect to the erection of permanent works has not been fulfilled. It calls for an outlay of $2,000. The amount actually expended was considerably below this, and the value of the wharves and water fronts now standing on the premises is about $800. If the whole amount had been expended the covenant would have been satisfied, even if the wharves were subsequently either wholly destroyed or carried away. In *Wood*, Landlord and Tenant (1), it is said that a covenant to build upon the leased premises is held not to involve a covenant to rebuild in case the building erected by the obligor is destroyed by fire or other casualty. In *Clemson* v. *Trammell* (2), a provision in a lease requiring the tenant to leave upon the premises, at the termination of the lease, buildings to be erected by him, was held not to require him to rebuild in case of accidental destruction of the buildings. The covenant in the lease with respect to yielding and giving up quiet and peaceable possession of the premises, etc., and that the buildings which may be put upon the premises shall immediately, upon the expiration of the lease, become the absolute property of the lessor, is merely a covenant not to hold over. See Vol. 18 Am. and Eng. Ency. of Law (3), where it is said that a covenant merely to return the demised property with its appurtenances is a covenant not to hold over and does not impose upon the tenant the obligation to rebuild in case the property is destroyed. In *Wood*, Landlord and Tenant (4), it is said that a naked stipulation to deliver up simply im-

(1) P. 493.
(2) 34 Ill. App. 414.
(3) P. 250.
(4) P. 602.

poses an obligation against holding over. The covenant by Estey "to leave the buildings on said premises in as good repair as they are now" obliges his assigns to reinstate the buildings, and their accidental destruction by fire or other cause does not relieve them of the liability. See *Wood*, Landlord and Tenant (1). This covenant applies to new buildings or improvements: *Cornish* v. *Cleife* (2); *Douse* v. *Earle* (3); *Worcester School Trustees* v. *Rowlands* (4). The covenant with respect to constructing permanent works and improvements in the nature of wharves and water fronts on the demised premises in an amount of not less then $2,000, provides that these shall be built during the term. The further covenant we are seeking to enforce is that the buildings on the premises shall be left in as good repair as they were at the date of the lease. These covenants, it will be said, are not at present enforceable either against Estey or the present assignees. While that is true, it does not meet our contention respecting our lien. It is also submitted that it would be inequitable to permit the assignees to rid themselves of their liability by assigning over to a man of straw. The assignees are officers of the Court and occupy a different position from that of an ordinary assignee. No injustice will be done to general creditors in allowing our claim. As the estate could not remove the machinery had the fire not occurred, neither should it be permitted to take the insurance money. Puting the lessor's claim at the lowest he is entitled to rank against the estate with respect to his damages.

J. H. Barry, K. C., for the plaintiffs:—

The resolution adopted at the creditors' meeting authorizing the assignees to carry out Estey's contracts did not direct them to carry them out otherwise than upon the terms of the deed of assignment. At a subsequent meeting of the creditors, so much of the resolution as directed the debtor's contracts to be carried out was rescinded. The

(1) P. 600.
(2) 3 H. & C. 446.
(3) 3 Lev. 264.
(4) 9 C. & P. 724.

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defendant McKean has no lien. At the date of the contract the logs were Estey's, and it was not then even known where they were to be cut. As a lien the claim is invalid under sect. 6 of the *Bills of Sale Act*, chap. 142, C. S. 1903. Before a bill of sale can be given the property must be in existence and capable of identification. With respect to the Moore claim: The logs, though cut upon Moore's land, on being severed from the soil became the property of Estey. That Estey contracted to sell them to Moore does not affect the question. The claim of the People's Bank of New Brunswick plainly cannot be entertained. Section 88 of the *Bank Act* is to be strictly construed. The contract between Estey and A. H. Randolph & Sons that out of the proceeds of the deals which they were to handle they would pay Estey's notes held by the bank, is in no sense a security under the Act.

A. O. Earle, K. C., for the plaintiffs with respect to the Thompson claim:—

No breach of covenant has been committed by the assignees, or even by Estey. Until a breach does occur no liability can exist. If a mortgagor insures the mortgaged premises in the absence of a covenant in the mortgage that he shall do so, the mortgagee cannot claim the insurance or ask that it be applied in reinstating the premises. The Act 14 Geo. III., chap. 78, is not in force in this Province. English Acts have been held in force in Ontario which have been decided not to be applicable here. The rule, as I understand it, is that no English statute extends to this Province which was passed later than the Restoration, and in the case of statutes passed previously to then it must be shewn that they are suitable to our conditions.

[*Trueman*, K. C.:—English statutes, down to the date of the creation of the Province, form part of our common law if they are applicable to our circumstances. See *Rex* v. *McLaughlin* (1).]

(1) Chip. MSS. 218.

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Richard A. Estey was a millowner and lumberman carrying on business at Fredericton. In the year 1903 he made three lumber contracts—one with the defendant George McKean, another with the defendant John E. Moore, and a third with the defendant Randolph, for the benefit of the People's Bank of Fredericton. From all of these he received large advances for his lumber operations for the winter of 1903-4, for which each claims a lien on the lumber or proceeds of it. His mill and the premises connected with it he held as lessee under the defendant F. P. Thompson. In May, 1903, he made an assignment for the benefit of creditors, under the provisions of the Act respecting Assignments and Preferences by Insolvent Persons, to the four defendants I have named (Randolph, McKean, Moore and Thompson), who were selected as trustees at a meeting of creditors. They entered into possession of the mill, and by direction of the creditors they proceeded to realize the estate, and they have disposed of it all, and they have now the proceeds in hand for distribution. Some time after the assignment had been made—in January, 1906, I think, but the precise date is immaterial—the mill was destroyed by fire, and the machinery was injured. The assignees had an insurance on the machinery, and they collected the insurance money; and this forms a part of the fund now held for distribution. Thompson, the landlord, claims a right to have this insurance money appropriated in reinstating the mill. Estey's total liabilities amount to about $135,000, and as this amount is considerably in excess of the realized assets, a question has arisen between the secured and the unsecured creditors, and to some extent between the secured creditors themselves, as to whether these alleged claims are enforceable against the fund, and if so, to what extent? As the Thompson claim differs from the others, it will be convenient to dispose of that first.

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THOMPSON CLAIM.

The lease in question is dated November 1, 1892; it runs for twenty-one years on an annual rental of $450, payable in quarterly payments. The rent was all paid by Estey previous to the assignment, and since the trustees have been in possession they have paid the rent out of trust funds up to 1st May, last. They are still in possession. The lease contains a covenant by the lessee to pay all rates and taxes on the property, and a covenant that he will during the term, at his own cost, erect upon the land demised permanent improvements in the way of wharves and water fronts, costing not less than $2,000. The lease also contains an option for the purchase of the property for the sum of $7,800, at any time during the term. There is no covenant in the lease either on the part of the lessor or lessee to insure, but there are two covenants upon which the lessor relies as giving him an equitable interest in the insurance money. They are as follows:—

"And the said Richard A. Estey, for himself, his executors, administrators and assigns, covenants and agrees to and with the said Frederick P. Thompson, his heirs and assigns, that none of the mill property or machinery, including boiler and engine, owned and controlled by the said Richard A. Estey, shall be removed from the lands and premises hereby demised, at any time during the continuance of this lease without the written consent of the said Frederick P. Thompson, his heirs and assigns, first being had and received therefor, and if at any time during the continuance of this demise any of the agreements or covenants herein contained to be done and performed by the said Richard A. Estey, his executors, administrators and assigns, shall be broken or unfulfilled, then the said mill property and machinery, including boiler and engine, shall be held by the said Thompson as a lien for the due performance of every and all such agreements or covenants, and for any damage sustained by the breach thereof.

And it is also hereby further covenanted and agreed by and between the parties hereto that he the said Estey, his executors, administrators and assigns, shall yield and give up quiet and peaceable possession of the premises

hereby demised to the said Thompson, his heirs and assigns, and of all such buildings and erections which may hereafter be put upon the said premises by the said Estey, his executors, administrators and assigns, at the expiration of this lease, and that all buildings which may be put thereon and all erections, constructions and improvements hereafter made by the said Estey, his executors, administrators and assigns, including the permanent improvements hereinbefore mentioned, shall immediately upon the expiration of this lease become the absolute property of the said Thompson, his heirs and assigns, and shall not be removable by the said Estey, his executors, administrators and assigns, and the said Estey, his executors, administrators and assigns also agrees to leave the buildings on said premises in as good repair as they now are, and to make good any damage or injury to the buildings or property aforesaid, occasioned by the removal therefrom of the machinery and other property which may be lawfully removed by the said Estey, his executors, administrators and assigns, at the expiration of this lease."

At the fire on the 20th January, the mill buildings and mill machinery were totally destroyed, and the boilers and their connections, and the engine and its connections, were damaged. There was no insurance upon the mill buildings, but the machinery, boilers and engine with their connections were insured in the name of the trustees of Estey. They received in settlement of the loss to the machinery $6,500, and $500 for damage to the engine and boilers. Estey had occupied the premises for some years previous to the date of this lease, and he estimates the value of the buildings on the property when he took the lease at $1,500. He afterwards built a wharf and some additions to the mill buildings, which according to his evidence cost the $2,000 agreed by him to be expended in permanent improvements. The wharf was subsequently injured to the extent of some $200, by the ice, and has not been repaired. Mr. Thompson claims that by reason of breaches of covenants in the lease he has been damnified in the sum of $7,000 and upwards, which he makes up as follows: $3,500 necessary to replace the buildings and improvements on the premises at the date of the lease, $1,500 necessary to be expended in

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replacing the improvements put on by Estey after the lease was made, over and above $500 spent on the wharf, and $2,000 necessary to be expended in the performance of Estey's covenant. And he claims not only to have a special charge upon the insurance money to replace the buildings and make good the covenants, but also a right to rank for his damages as a creditor against the general assets of the estate. It is immaterial for present purposes whether these figures are accurate or not. I only mention the claim to point out that it has reference solely, and under the covenants it could only have reference, to the buildings and improvements which were all destroyed by the fire, and on which there was no insurance at all. The claim put forward is based on two grounds. In the first place, it is said that section 83 of the Imperial Act, 14 Geo. III., chap. 78, is in force in this Province, and that by it Thompson, as landlord, has a right to have this insurance money used to rebuild the buildings. And, in the second place, it is contended that the landlord has an equity as against his tenant attaching to these funds, which entitles him to have them expended in making good his covenants in the lease, irrespective altogether of the rights of other creditors. I should require stronger reasons than any which I have heard to convince me that this section 83 is in force in this Province. It was never considered in force either in Ireland or Scotland, and its general application to England, as held by the Lord Chancellor in *Ex parte Gorely* (1), has been questioned by no less an authority than Lord Watson, in *Westminster Fire Office* v. *Glasgow Society* (2). It is, however, unnecessary to decide that point, because, for reasons which I shall state, I think the claimant's contention could not be sustained if the Statute were in force here. The section in question refers only to the insurance moneys realized from insurance on houses or other buildings, and there is no such fund here. The lease provides that at the expiration of the term, all the buildings and permanent improvements

(1) 10 Jur. N. S. 1085. (2) 13 A. C. 716.

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made under the special covenant for that purpose shall become the absolute property of the lessor; but this had no reference to the machinery. That was to be removed at the expiration of the lease, subject to all damages incurred in its removal. The claim, as I have pointed out, is altogether for the loss of buildings which were originally the property of the lessor, or which by the terms of the lease were to become his when the tenancy came to an end. Engine, boilers and machinery cannot here be said to come under the description of buildings or houses, especially where, by the terms of the lease, they are removable, and are not the landlord's property at all. See *Ex parte Gorely*, above cited. The second answer to the claim, as based on this section 83, is, that in order to obtain the advantage which it gives to landlords, notice must clearly be given to the insurance company before the money has been paid over to the assured. The company is the party upon whom the section casts the duty of rebuilding with the insurance money; and when, without the notice which the section requires, the money has passed out of the insurance company's control, they cannot apply it as the Act directs. There was no such notice here. See *Simpson* v. *Scottish Union Insurance Co.* (1). It is true that the trustees have been notified to appropriate the money in rebuilding, but that has nothing whatever to do with the Act. Wood, V.-C., in the case just cited, says: "The Act of Parliament points to a request of this kind in order that the company may cause the money to be laid out in rebuilding, and I think it clear that they could not pay the money to the owner. The object of the provision is in the interest of the public, to prevent persons from fraudulently setting fire to their houses, and this is a fraud which of course might be committed either by the owner or the tenant. The company themselves are the persons to rebuild, in order that they may see that the money is really laid out in reinstating the property, and that it is judiciously expended. It is quite true in this case that the value of the house is

(1) 1 H. & M. 618.

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stated to have been in excess of the insurance; but that does not affect the policy of the Act, which does not in any case give the owner the right to rebuild and claim the money, but requires the work to be done by the company. If this were otherwise, the purposes of the Act might be defeated by a landlord taking the policy-money when there was a covenant by the tenant to rebuild." In a case like this, where there is no covenant to insure by the lessee, I should think the landlord would have no right to compel either Estey himself or his assignees to expend the money in rebuilding, even if the insurance had been on the buildings instead of the engine and boilers. The lessor did not insist upon a covenant on the lessee's part to insure, and in case of a loss reinstate the buildings, and the lessee did not insist upon a covenant by the lessor to rebuild in case of fire, nor was there in such a case any abatement of the rent. Both lessor and lessee had an insurable interest in the property, but the lessor did not choose to protect himself in that way. He relied on the tenant's personal covenant to hand over the premises to him on the expiration of the lease, in like good condition as they then were. That was the security which he took in order to insure the delivery to him of the buildings and improvements at the termination of the lease. It is said that Estey's bankruptcy has rendered that security valueless. I do not think that is necessarily so, but if it were, that is a risk which the landlord assumed and against which he might have protected himself by insurance. How does this give him an equity to a fund created not at his instance, not for his benefit and in no way as the result of any contract with him? In *Andrews* v. *Patriotic Insurance Co.* (1), a question arose on facts somewhat similar except that both landlord and tenant had insured. In an action against the insurance company they contended that the two insurances were on the same property and therefore, under the usual clauses of policies, each company would be liable only for a *pro rata* proportion of the loss. The

(1) 18 Ir. Law Rep. 355.

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Court, however, held that the property insured was not the chattel but the assured's interest in the chattel, and that for that reason the policies did not cover the same property, and each company was liable for the whole amount. After reviewing several cases which had been decided under the Statute already cited (14 Geo. III., c. 78) and which was not in force in Ireland, Palles, C. B., in delivering the judgment of the Court, says: "That is the law of England, in consequence of the two Statutes to which I have referred. But the decisions, as I read them, are not based upon the ground that these Statutes were declaratory of the common law. On the contrary they are treated as enacting Acts; and I am not aware of any case in which it has been attempted to apply in Ireland the doctrine which was imposed upon England by them; and I have to express my decided opinion, and it is in my view a necessary part of our decision of this case, that there is no law in this country which entitles the landlord of a house destroyed by fire to insist, in the absence of express contract, on the money received by his tenant from an insurance company being specifically applied to the reinstatement of the premises. In my opinion the remedy of the landlord in this country is a remedy *in personam* against the tenant upon his covenant to repair, and is nothing more. He has no specific right such as the landlord in England has under the Statute." See also *Leeds* v. *Cheetham* (1), where it was held that the tenant had no equity against the landlord to make him appropriate his insurance money in rebuilding. Great reliance was placed on the latter part of the first covenant which I have quoted, by which it is provided that in a certain event the lessor is to have a lien for the due performance of all of the lessee's covenants. As I read the covenant it has no bearing on the questions now in dispute. That covenant is dealing with the removal of the machinery and other mill property on the premises, and it provides that it shall not be removed during the term without the landlord's consent in writing; and it

(1) 1 Sim. 150.

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then provides that if at any time during the term the lessee shall have been guilty of a breach of any of his covenants, then the mill property and machinery, including the boilers and engine, shall be held by Thompson as a lien for the performance of these covenants and for any damage sustained by a breach of them. Reduced into a few words, this covenant simply provides that without the lessor's consent this mill property and machinery shall not be removed during the term, and when the term comes to an end, and when the lessee would otherwise have the right to remove this mill machinery and property, he shall not have that right if any of his covenants have been broken and remain unperformed; until they are performed and damages paid, not until then, the lessor is to have a lien on the property and therefore a right to retain its possession. I am unable to see how that provision can create any obligation upon the lessee to reinstate his own property because of the possibility seven years hence, when this lease terminates, of there being some damage sustained for which, if the property were in existence, there would be a lien on it. No authority was cited for any such proposition and I have not been able to find any. I think this insurance money is part of the fund distributable among the creditors. Mr. Thompson also claims to rank on the estate for the same sum as damages sustained by him by reason of the destruction of the property. I cannot see how he is entitled even to do that. The Act under which this assignment was made is not an insolvent Act. It is simply an Act by which the property of debtors, who choose to make an assignment under it, is divided equally among their creditors. Debtors cannot be forced to make such assignments, and the Act makes no provision whatever, whereby they are released from their obligations. In what way was Thompson a creditor of Estey on the 27th May, 1904, under this lease? That was before this fire occurred, and it is not pretended that any of the lessee's covenants had been broken at that time. I cannot see that he has broken any of his covenants up to the present time; but if he had it would be contrary to the general rule, even in

bankruptcy, to admit a claim for unliquidated damages: *Ex parte Mendel* (1); *Green* v. *Bicknell* (2); *Boorman* v. *Nash* (3); *Rowan* v. *Harrison* (4). There is no covenant in this lease in the usual terms, "to repair and keep repaired." The covenant is simply that the lessee "shall leave the buildings on said premises in as good repair as they now are, and to make good any damage or injury to the buildings or property aforesaid, occasioned by the removal therefrom of the machinery and other property which may be lawfully removed by him at the expiration of the lease." That is a part of the covenant providing for the tenant giving up possession at the end of the term, and it relates to that time. Two questions, it seems to me, might arise as to the effect of that covenant. First, whether the agreement to repair, such as it is, has any reference to buildings other than those on the premises at the date of the lease, and second, whether such a covenant extends to the restoration of buildings destroyed by accidental fire. But giving the claimant the full benefit of a different construction, it seems to me impossible to say that the time to which the covenant refers is other than the date when the term ends, when the possession of the premises is to be restored to the owner, and if the buildings, whatever they are, are then in the repair required by the covenant, whatever that may mean, he will get all he is entitled to ask. How can he be said to be a debtor of the landlord for a claim which has no existence to-day; which may never exist at all, and which, under no circumstance, can come into existence for some six years, and then for a sum altogether incapable of being ascertained to-day. I do not think this claimant can rank on the estate.

PEOPLE'S BANK OF NEW BRUNSWICK CLAIM.*

There is no question as to the fact that the bank did make the advance of $8,000 to Estey on the security given to

(1) 10 Jur. N. S. 189.
(2) 8 A. & E. 701
(3) 9 B. & C. 145.
(4) 2 Pug. 503.

*By agreement of October 1, 1903, between Estey and A. F. Randolph & Sons, Estey agreed to sell and deliver to them four million superficial feet of spruce and cedar logs, and all above

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Randolph, and that the security was taken for the bank to secure these advances, and for that purpose alone. This was in contravention of sect. 76 of the *Bank Act* (Chap. 29, R. S. C.) and therefore the security is void: *Bank of Toronto* v. *Perkins* (1). I think it makes no difference whether the bank takes the security direct or through the medium of a third person as here. The late Mr. Justice *Palmer* acted on that assumption in the case of *McLeod, Assignee of The Petitcodiac Lumber Co.* v. *Vroom* (2), and I think rightly. The bank's right to rank as an unsecured creditor is not disputed.

GEO. MCKEAN CLAIM.

J. E. MOORE CLAIM.

It will be convenient to discuss these claims together. McKean claims a lien under a contract with Estey, dated December 31, 1903, by which Estey agreed to sell and McKean agreed to purchase three million superficial feet of merchantable spruce deals and battens of specified dimensions, which were to be manufactured at Estey's mill, at Fredericton, ready for shipment not later than June, July, August,

(1) 8 Can. S. C. R. 603. (2) N. B. Eq. Cas. 131.

that quantity that he might cut and haul during the fall of 1903 and ensuing winter from lands under lease to him, situate on the Tobique River, and to stream drive such logs to within the limits of the Fredericton Boom Company. It was provided that such logs should be the absolute property of A. F. Randolph & Sons as from the stump and should be specially marked. A. F. Randolph & Sons agreed to pay for the logs when placed within the limits of the Fredericton Boom Company and surveyed, paying first all liens, stumpage and other charges ranking against the logs; secondly, to pay to the People's Bank of New Brunswick all loans and advances made by the Bank to Estey, and to pay the surplus to Estey. In event of Estey being unable, for any reason, to complete the agreement, A. F. Randolph & Sons were empowered to take over Estey's lumber operations and complete the same upon the terms of the agreement. At the date of Estey's assignment the bank had advanced to him, under the agreement, $8,000. He had placed within the limits of the Tobique River Log Driving Company 4,031,007 superficial feet of spruce logs, and 1,177,210 superficial feet of cedar logs, all marked in accordance with the agreement. Logs delivered to the Tobique River Log Driving Company are delivered by them to within the corporation limits of the St. John River Log Driving Company, who in turn drive them to within the corporation limits of the Fredericton Boom Company.—REP.

September and October, 1904. The lien relied on, arises out of the following clause in the contract. "It is agreed that for and in consideration of any and all advances that may be made by the purchaser on the above named deals, etc., that the purchaser shall have a lien on the said deals, etc., either at the place of manufacture or in transit for shipment, and also on the logs from which the said deals, etc., are being manufactured, wherever they may lie." When Estey assigned, McKean had advanced $20,000 on the contract and none of the deals had been manufactured.

The Moore claim is in reality the claim of V. S. White & Co., a firm consisting of John E. Moore and Walter W. White, though a portion of the indebtedness stands in Moore's name alone. They claim under a contract made by correspondence, the provisions of which, so far as they are material, are as follows. The negotiations originated in telephone communication, but they afterwards took the form of correspondence, and on the 28th December, 1903, it was finally agreed that Estey was to sell and Moore to purchase four million superficial feet of spruce logs and battens for delivery at St. John, free of all charges, as early as practical during the rafting and towing season of 1904. These logs were to be marked by what is known in the business as "Moosehorn" M.; they were to be cut in what was known as the Rockaway lands, which were a part of the lands under license from the Crown to Estey, but which were at that time, and ever since have been, in Moore's name, as I shall presently explain. In Estey's letter of December 28, 1903, to Moore, he says: "What I intended to do re delivery of logs, was to just let you have the Rockaway logs and keep Tobique logs for deal for my mill." In 1902, Estey had a number of licenses from the Crown to cut logs on lands on the Tobique river. In order to secure an indebtedness then due to White & Co. and Moore, as well as any future advances which they might make in course of their mutual dealings, these licenses were assigned to Moore. The renewals issued to him in his own name, and they are now held by him as an additional security for the claims of himself and his firm. As between

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them and Estey, Moore is only a mortgagee of the licenses, although the legal title to all lumber cut under them is in him, subject only to the rights of the Crown (C. S. 1903, Chap. 95, ss. 4 & 5). When this contract was made, on December 28, 1903, Estey owed the firm in all $27,361.13, of which $10,764.71 stood in Moore's name. When Estey assigned he owed Moore $25,961.10 and the firm $10,262.77. In addition to these sums, Moore has, since the assignment, been compelled to make certain expenditures which bring the whole claim up to some $40,000. It will be seen that Moore's contract is for the delivery of a specific quantity of spruce logs to be cut on a specific portion of lands under license to himself, and of which, therefore, he would be the legal owner, and they were to be marked with Moore's own mark. Not only had he the legal ownership of the logs as licensee, but the particular logs to which the contract referred were capable of identification immediately that they were cut. In my opinion, Moore is entitled by virtue of his contract to a lien on all the spruce logs cut on the Rockaway lands up to the amount of his contract, if these logs are capable of identification, and if not then to all the logs marked "Moosehorn" M. He is also entitled to look to the licenses as an additional security for his claim.

McKean's claim stands in a different position. It is not on a contract for the delivery of logs, but for the delivery of a quantity of deals which Estey was to manufacture at his own mill. Except for this one fact there is nothing in the contract to prevent Estey from making his deliveries from deals purchased in the market. The lien which the contract gives him is on the manufactured lumber, the deals and battens, which were to be piled in separate piles; and this lien on the deals and battens was to exist both at the place of manufacture and continue during their transit for shipment to the purchaser at St. John. The lien was also to exist on the "logs from which the said deals, etc., are being manufactured, wherever they may lie." None of the deals were ever manufactured, and when the assignment was made no logs had been appropriated or set apart for the purpose of carrying out McKean's contract; the logs of

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the whole season's operations were in the stream or in the booms far away from Estey's mill, and where it was impossible to say any portion of them was being manufactured. The time never arrived when McKean could go and select any one log of the whole of Estey's cut and legally claim a lien on it under this contract. So far as I can discover there was no possible way of identifying it. I should be prepared to go some length in a case like this to hold the property created by money advanced for the purpose, liable for the advances; but it is essentially necessary that, in some way or another, it can be shewn what the precise property is to which the lien attaches, when the lien is to be enforced. Reliance was placed on the action of the creditors at a meeting held previous to the assignment. It was a meeting called by Estey, at which nearly all the creditors, or at all events those who represented nearly all the indebtedness, were present, McKean among the number. It was then unanimously resolved that Estey be requested to assign to four creditors to be selected by the meeting, and that they should complete these contracts, carry on the business and settle the estate in the best interests of the creditors. It was in pursuance of this resolution that Estey made the assignment. At the first meeting of creditors held under the Act on the call of the assignees, that resolution was varied by striking out the words "complete the contracts," and the assignees were authorized to carry on the general business and operate the milling business in the best interests of the estate, and so long as they deemed it expedient. They operated the mill until it was destroyed, manufactured deals and sold them and the logs, and in one way and another have disposed of all the assets. I do not see that all this affects the claim in any way. Estey is not complaining that he was induced to make the assignment because his contracts were to be carried out. The assignees could not carry on the business except by direction of a Judge, and then only for a limited time (see sect. 17, sub.-sect 4, Chap. 141). I think the arrangement that was eventually made, to which McKean was apparently an assenting party, was that a decision should be

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obtained as to the respective rights of these parties, that in the meantime the assets should be realized in the best way in the interests of the creditors, and whatever rights the claimants had in the property could be satisfied out of the money. Mr. McKean will, of course, be entitled to rank as a general creditor, but I think he has no other right.

I need not enter into the question of the *Bills of Sale Act*. So far as Moore is concerned, Estey never owned the logs, the title was always in Moore. There never was any mortgage of them in any way, or any transfer of them, even if the contract could be considered as anything more than an ordinary contract or transaction of sale in the lumbering business, which the evidence shews it to have been.

I think Moore should value his licenses under sect. 19, and that out of the sum represented by them and the proceeds of the lumber got out under his contract, his claim should be paid. If there is any deficiency he is entitled to rank on the general estate. If there is a surplus it goes into the general estate.

With these directions I have no doubt the parties can adjust their claims, but if not, there will be liberty to apply.

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